Auras of Legality -
the Jurisdiction and Governance Signature
of the International Governance of
Official Development Assistance

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Abstract

Official Development Assistance (ODA) or international development aid (defined as the transfer of official financing to promote the development and welfare of developing countries), is a highly influential and politically sensitive area of international relations. Though it is not governed by any international legal agreement, it displays remarkable cohesion across the major Northern donors in its modalities of governance, the coherence in its normative aims and in its institutional reform agenda. In order to understand why, this project focuses on the central, if overlooked, role of the Organisation for Economic Co-operation and Development (OECD) and its Development Assistance Committee (DAC) as the key institutional locus of the international governance of ODA by donors.

This project examines the legal nature of the international governance of ODA, tracing and critically analysing the link between the governance *of* ODA and governance *by* ODA. It demonstrates how the legal form of the international governance of ODA is central to the reach and effectiveness of the legal and institutional reform agenda promoted via ODA at national and international levels, and to contouring the legal and political subjectivities of donors and aid-recipient states in ways that escape formal legal and democratic recognition.

Finding that mainstream legal analytical methods fail to fully capture the legal-juridical quality of the international governance framework of ODA, and the particular role of law therein, I develop a new analytical lens based on the concepts of 'jurisdiction' (as *juris dictio*) and the 'signature.' This lens reveals how ODA creates a distinct jurisdiction with its own internal legal logic, where donor and aid-recipient subjectivities and relations of authority are continually constructed and maintained by international governance instruments and practices developed during colonial and imperial governance eras under the League of Nations and Marshall Plan institutions. I demonstrate how this jurisdictional space is augmented by key legal, policy, bureaucratic and technocratic instruments of governance by the OECD and DAC, through patterns of juridification and reiteration.

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List of Acronyms

ACP	African, Caribbean and Pacific states
A-WG	Agriculture Working Group (of donors, for Tanzania)
ASDP	Agriculture Sector Donor Partner
BWI	Bretton Woods Institutions
CEEC	Committee of European Economic Co-operation
DAC	Development Assistance Committee (OECD)
DAG	Development Assistance Group
DFID	Department for International Development (UK)
DPG	Development Partners Group (of donors, for Tanzania)
ERP	European Recovery Programme (the Marshall Plan)
ESF	World Bank Environmental and Social Framework
EU	European Union
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
GAL	Global Administrative Law
GPEDC	Global Partnership for Effective Development Co-operation
HIPC	Highly-Indebted Poor Countries
ILO	International Labour Organisation
IMF	International Monetary Fund
IPA	International Public Authority
JAST	Joint Assistance Strategy (Tanzania)
JIR	Joint Implementation Review (undertaken by donors)
LCDO	Law of Development Co-operation
LDC	Least developed countries
NDP	National Development Plan (of aid-recipient state)
NPA	National Policy Instrument
NPM	New Public Management
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
OLIC	Other Low-Income Countries
OOF	Other Official Flows (of donor development finance)
OTC	Overseas Territories Committee (of the OEEC)
PCD	Policy Coherence for Development
PFMRP	Public Finance Management Reform Programme (Tanzania)
PFM	Public Financial Management
PMC	Permanent Mandates Commission (League of Nations)
PPG	Pro-poor growth
PR	Peer Review

PRSP	Poverty Reduction Strategy Paper (World Bank)
TOSSD	Total Official Support for Sustainable Development
UNCTAD	United Nations Conference on Trade and Development
UNRAA	United Nations Relief and Rehabilitation Association
USAID	United States Agency for International Development

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"What, then, is the aura? A strange tissue of space and time: the unique appearance of a distance, however near it may be."
Walter Benjamin. [1]

Chapter 1 – Revealing legal and juridical puzzles of the international governance of ODA

1. Introduction

This thesis examines the international governance of Official Development Assistance (ODA or development aid) [2] from a legal perspective. In it, I claim that ODA is a key instrument of neo-liberal, imperial international governance that enables donors to wield significant, if subtle, influence on the legal and institutional reform agendas of aid-recipient states, in pursuit of a highly particular neo-liberal transnational capitalist development project. The legal qualities and features that enable the governance of ODA to play this role in international relations remain under-recognised though, more recently, have been partially addressed by legal scholars. This is not surprising because, as I will show, the legal form of the international

[1] Walter Benjamin, "The Work of art in the Age of Its Technological Reproducibility" [First Version]. Trans. Michael W Jennings. (2010) 39 Green Room 11 at 15.

[2] This study focuses on public funds captured by the term 'Official Development Assistance' defined by the OECD as follows – "Grants or loans to countries and territories on the DAC List of ODA Recipients (developing countries) and to multilateral agencies which are: (a) undertaken by the official sector; (b) with promotion of economic development and welfare as the main objective; (c) at concessional financial terms (if a loan, having a grant element of at least 25 per cent). In addition to financial flows, technical co-operation is included in aid. Grants, loans and credits for military purposes are excluded. Transfer payments to private individuals (e.g. pensions, reparations or insurance payouts) are in general not counted." See http://www.oecd.org/dac/dac-glossary.htm#ODA. The OECD's definition has been included in some donor states' own legislative frameworks on ODA e.g. Canada's Official Development Assistance Accountability Act (2008) S.4. In 2018, the OECD changed its official definition and from its 2019 data onwards, a new ODA information series has begun. The previous definition operated under a "cash-flow basis" methodology where the full face value of a loan was counted as ODA and repayments were progressively subtracted. The new ODA assessment methodology is based on a grant-equivalent methodology. This means that only the "grant portion" or the amount the provider gives away by lending below market rates, counts as ODA. Additionally, loan parameters were set so that from 2018 onwards, donors can henceforth only provide loans on very generous terms to poor countries. As the new grant-equivalent figure is not comparable with historical ODA data, the 2018 figures start a new ODA series. See http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/official-development-assistance.htm. While this change is important for researchers and statisticians that track ODA flows, it does not affect the analysis of the governance role of ODA that I explore in Chapter 10.

governance of ODA cannot be fully captured by orthodox legal analysis that relies on a liberal view of law. In response, I develop and apply an analytical lens based on the concepts of jurisdiction and the signature in order to reveal and critically examine the legal features and qualities of the international governance framework of ODA that enable it to play this role, undetected by the domestic law of aid-recipient states, donors, or international law.

This lens relies on legal terms such as jurisdiction, the legal form, the juridical, as well as terms such as legal logics, subjectivity and agency. It refines and applies these in ways that reveals and examines the complex and hidden relationship between international law and international governance, and the nature of power that is manifest, wielded, legitimised and normalised through this relationship via ODA. By "legal form" I refer to the construction and concentration[3] of legal relations through a combination of legal reasoning,[4] the rationality of law, [5] and the instruments and technologies[6] – legal and juridical – that provide the governance architecture [7]

[3] I borrow the term "concentration" from Niklas Luhmann, David Roberts, "The Medium of Art," (1987) 18-19 Thesis Eleven 101.

[4] By legal reasoning I mean the premises and the processes by which value judgments become legally recognisable to and by law via legal argument. It includes elements such as proof; the process by which relevant factors are identified as such and connections are made between them, and the processes and criteria upon which decisions are ultimately made. See Friedrich V. Kratochwil, *Rules, norms, and decisions On the conditions of practical and legal reasoning in international relations and domestic affairs.* (Cambridge: Cambridge University Press, 1989).

[5] This includes how different legal concepts and doctrines function systematically and relate to each other, the ideas that shape their engagement in a legal context (such as 'weighing and balancing'). For a detailed explanation of rationality in a legal context, see Richard Ball, *The Legitimacy of the European Union through Legal Rationality: Free Movement of Third Country Nationals*, (London: Routledge, 2013), at Chapter 2.

[6] Here I use "technology" in a Foucauldian sense, as a way of drawing attention to the means by which power is manifest and expressed, not in negative or repressive terms, but through a relationship that "molds, adapts, triggers and stimulates individual behaviour, particularly by shaping bodily conduct….'Technology' is thus both a form of power that 'produces' individuals in ways that integrate them into political and economic structures by supervising, subjecting, and normalizing them, and a term that dispels the illusion of the 'the individual as abstract subject, defined by individual rights.'" Michael C Behrent, "Foucault and Technology," (2013) 29 Hist & Tech 54 at 60, 82. I use the term instrument to focus on individual components that contribute to a technology. As I describe in Part III, the international governance of ODA by the OECD consists of distinct legal, policy, bureaucratic and technocratic technologies, which have distinct, shared and overlapping ways of governing, that involve a particular approach to law, and a discernible (if different) legal quality.

[7] Frank Biermann defines architecture as "the interlocking web of widely shared principles, institutions and practices that shape decisions at all levels" in relation to international relations. I adapt this definition to include a

for both. This concept also includes consideration of the ontological and structural effects of that legal form - how social life becomes categorised and translated into objects that become imbued with legal characteristics, such that a legal identity subsequently shapes the opportunities and choices available. [8] In this view, the legal form captures how social life is formed and transformed by law. I use the term legal form to identify how ODA subtly – and cunningly - maintains a sharply differentiated identify and agency for donors and aid-recipient states, in the face of international doctrine and law on sovereign equality that asserts a contrary view.

By "legal logics" I mean the particular configuration that law takes, within a jurisdiction such as a state, or a realm of international relations, that is in support of a particular kind of project. In this thesis, the project under scrutiny is that of development, one pursued via ODA across boundaries of scale and policy realm such as education, health, infrastructure etc. Here, law contains within it a neoliberal configuration or logic based on the centrality of the market and market values. Villmoare and Stillman have described this as the "Janus Face" of law in the neoliberal state. In one of the faces, law helps shape, adapt and create a neoliberal state, with law losing many of its welfare and regulatory responsibilities, and with state law working more intensively on behalf of the market and private property. In the second face, law itself is

specific focus on law, regulation, and actors with legal personality such as states and international organisations that are prominent in international policy-making. Frank Biermann, *Earth System Governance: World Politics in the Anthropocene,* (Cambridge, MA: MIT Press, 2014) at 31.

[8] Robert Fine, "Marxism and the Social Theory of Law," in Reza Banakar & Max Travers, *Law and Social Theory 2nd ed.* (Hart Publishing, 2013), 101 at 102.

transformed with its democratising and contestation potential increasingly restricted, and with law becoming a means to assert increasing state power through policing and surveillance. [9]

The term "juridical," in the context of the international governance of ODA, refers to practices of governance that include the following features. First, there is the presence of an absolute Authority or Executive power – there is an entity who makes determinative decisions – and there is a community that recognises this authority as such. Secondly, there is an expectation of determinative decision-making through methods and practices that are recognisable to that Executive Authority as legitimate (e.g. the availability of appropriate "facts;" written reports (evidence); a mode of reasoning to be applied to particular kind of "fact pattern" etc.). Thirdly, particular subjectivities for states as donors or aid-recipients, [10] are created that are recognisable to or, as we will see, invisible to, the law of that community. These subjectivities imply a certain kind of agency. By agency I mean the relative power of donors and aid-recipient states, and how this is facilitated and constrained by their governance relationship along

[9] Adelaide H. Villmoare & Peter G. Stillman, "The Neoliberal State's Janus Faces of Law," (2014) 65 St in Law, Pol & Soc 31 at 32.

[10] By the subjectivity of a state, I mean its identity as a sovereign state with legal personality. With Aalberts, I take sovereignty to consist of both fact and norm, where sovereign identities are constructed on the basis of a norm of what is considered to be legitimate or appropriate statehood. Aalberts describes three features of this constructed statehood that are relevant to this research. First, that that those that are already "in the club" (of states) get to decide about the membership rules for new members and how applicant candidates are assessed. (I will show how this is especially evident within the League of Nations and within the OECD in Chapters 6 and 8 respectively). Secondly, that sovereign statehood counts as "the normal mode of international identity and participation" in international society. (Here, I interpret this feature to refer to how the international governance of ODA relies hugely on the consent of the aid-recipient state as a sovereign state to participate in the ODA-relationship. The form that this consent takes, of course, and the kind of invasive intervention that ensues as a result of ODA, does not rely on a legal agreement, as this thesis shows). Finally, differentiated identities for states can be created and maintained, even though they may be formally equal (I will show how ODA clearly constructs and maintains differentiated identities for donors and aid-recipient states, in parallel with maintaining an illusion of parity of sovereignty between both. Tanja Aalberts, *Constructing Sovereignty- Between Politics and Law,* (London: Routledge, 2012) at 125-126. For this thesis, I focus on the different kinds of subjectivities that are allocated to donors and aid-recipient states through the international governance of ODA. In particular, I examine the respective agencies that are allocated to each, and the different kinds of authority and decision-making powers that this differentiated subjectivity implies.

several dimensions including in key areas such as economic, political and social policy, through public means such as law and democratic governance, and in temporal (the present and the future) and scalar (sub-national, bilateral, regional and/or international) dimensions. The fact that the donor has an agency that involves more power than, or more power over, and a wider scope for that power, than the agency of an air-recipient state may well be recognised by a formal agreement or contract between the donor and aid-recipient state.

Finally, there is the presence of a risk of coercion "that cannot be fully understood, justified and curtailed by practical reasoning."[11] This feature aims at capturing the unequal power dynamic between donor and aid-recipient state that includes, but encompasses much more than merely the possession of development finance.

My thesis has three underlying aims. Firstly, it aims to understand the role of law within, and legal nature of, the international governance of ODA, in a way that pays attention to how law and politics meet in this sphere. [12] Second, it aims to highlight the necessity of including a dedicated focus on ODA (and development finance) as an under-analysed area of international legal scrutiny, one that is key to the architecture of international economic law and international economic relations. Third, it aims to explore the hidden potential of prominent legal concepts for critical legal analysis for naming and revealing problematic features and dynamics of rule by law in ways that currently remain invisible to mainstream legal analysis. With this aim, I want to explore ways on how law can be used to critique law "from within." [13]

[11] Bas Schotel, "Multiple legalities and international criminal tribunals: juridical versus political legality," Nicholas M. Rajkovic, Tanja E. Aalberts and Thomas Gammeltoft-Hansen, The Power of Legality: Practices of International Law and Their Politics (Cambridge: Cambridge University Press, 2016), 209 at 214.

[12] I am not trying to propose remedies for this situation – my intention is to better understand it in legal terms.

[13] In this, I take a very partial and simplistic approach to immanent critique whereby I seek to use already existing concepts that are 'internal' to law and recognisable to law, and use these to develop an explanatory framework

With these aims, I develop a kind of a meso-level[14] analysis and narrative of the international governance of ODA.

In this thesis, I make the novel argument that the international governance ***of*** Official Development Assistance (ODA) is demonstrably linked to international governance ***by*** ODA through particular features of its legal form. The role of ODA is far more important as an influential and sensitive area of international relations than is represented by the actual financial flows that the concept captures. Through ODA, donors exert almost limitless influence over the domestic legal, institutional and policy arenas of aid-recipient states, one that currently remains legally invisible and, effectively, politically unchecked. The reasons for this lie in *how* it is governed, internationally, and in particular, how it is *legally* governed.

I develop this argument through the following three claims. First, ODA constitutes a universal jurisdiction that allows donors (many of these are states from the Global North or international organisations) to legitimately exercise prescriptive, extra-territorial authority over the legal and institutional reform of aid-recipient states (usually states from the Global South) in pursuit of a distinct project of neo-liberal transnational capitalist development. [15] This jurisdiction accords a differentiated legal and political subjectivity to donors and aid-recipient states, conferring greater rights, authority and agency to the former over the latter.

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that can reveal trajectories, tensions and tendencies within the governance of ODA that have been hidden until now. Geoff Pearson & Michael Salter, "Getting Public Law Back into a Critical Condition: The Rule of Law as a Source for Immanent Critique," (1999) 8 Soc & Legal St 483.

[14] I explain this term in greater detail in Chapter 5 on methodology.

[15] This idea of jurisdiction is contrary to the predominant idea of jurisdiction in international law that presumes against extra-territoriality. Cedric Ryngaert, "The concept of jurisdiction in international law," Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law*, (Edward Elgar online, 2015), 50 at 55.

Secondly, despite the lack of a dedicated international legal agreement on ODA, the jurisdiction of ODA is captured in a coherent and cohesive international governance framework that consists of an overlapping mix of law, policy, technocratic and bureaucratic governance instruments, cognisable to donors and aid-recipient states as intrinsic to the modality of ODA. The role of the international Organisation for Economic Co-operation and Development (OECD), and its Development Assistance Committee (DAC), is central to the evolution, maintenance and exercise of this jurisdiction via these governance instruments. Historical moments, such as the League of Nations' Permanent Mandates system, and the administration of the Marshall Plan, generated new innovations in international governance law, doctrine, instruments and actors that have shaped the contemporary relations between donors and aid-recipient states via ODA. Thirdly, I claim that the legal form of the international governance of ODA can be discerned through its governance *signature*, in which the following four features are key to its legal quality or legal aura. These are its juridical quality; its approach to juridification, its internal legal logics, and its performativity.

This chapter proceeds as follows. The following section gives a brief overview of the role of ODA in international development, and though its role as a source of development finance is important, I focus on its role as an instrument of governance, one that permeates all realms of international development policy and traverses all of the main bodies of international law germane to development, without legal detection. [16] Section three exposes this hidden

[16] In section four of this chapter I will show how the governance of ODA proceeds without any comprehensive scrutiny by legal instruments that might evaluate it against principles of international law articulated in the Charter of the United Nations, such as principles of equal rights and self-determination of peoples, of sovereign equality and independence of all States and non-interference in the domestic affairs of States. See Articles 1 and 2 of the UN Charter. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. These principles are

governance quality in more detail. It provides an overview of the main bureaucratic instruments of governance, and then reveals how these mask their governance role. I use the example of donor practices and approaches of the European Union (EU) and the United Kingdom (UK) in relation to aid given to Tanzania.[17] These examples reveal how the exercise of donor executive authority within the domestic institutions and policy of Tanzania is not a whimsical or once-off occurrence but is inherent within the way that donors as a group govern their ODA. I aim to show how law – at the domestic and international level - is deeply implicated in the current approach to the international governance of ODA. Section four turns to the questions that this thesis seeks to address, and gives an overview of how the thesis addresses them. I conclude this chapter with an overview of the thesis, and with a brief explanation of my use of the term "aura" in the title of this thesis.

2. From ODA funds to ODA modalities – approaching ODA as an instrument of governance

Within the development finance community, ODA is viewed and discussed as an aid *modality,* [18] as a source of development finance, and as an expression of the domestic foreign policy of

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echoed in the Vienna Convention on the Law of Treaties (1969). United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

[17] These examples were selected because the EU's approach to its governance of ODA is an expression of an agreed approach to ODA by its 28 member states. The UK was included because it is one of the larger donors to Tanzania's Public Financial Reform Programme. Tanzania was selected as it is widely considered to have pioneered a model of aid-recipient state donor liaison and co-ordination since the mid-1990s. See Gerry K. Helleiner, Tony Killick, Nguyuru Lipumba, Benno J. Ndulu, & Knud Erik Svendsen, "Development Co-operation Issues between Tanzania and its Aid Donors. Report of the Group of Independent Advisors." June 1995. (Print copy with author). See also OECD DAC, Peer Review – Tanzania, (Paris: OECD, 2003) at 15.

[18] The term aid modality usually refers to the particular instrument through which aid is delivered, such as budget support, project support, sector programme support, basket funds etc. Discussions here have primarily been distinguished according to the technical arrangements that govern the disbursement and management of funds. These include (i) the terms of finance and the type of finance; (ii) the channels through which it is disbursed; (iii) procurement conditions and (iv) the targeting and tracking of donor resources. Sara Bandstein, *What Determines the Choice of Aid Modalities?* (Karlstad, Sweden: SADEV, 2007). Though in normal use, the term modality refers only to the technical administration of ODA, we will in the next section how the EU uses it to convey and implement a particular approach to aid-recipient state governance.

donor states. Thus, when approached as an aid modality, debates on ODA have primarily focused on its effectiveness[19] and its efficiency. [20] As a source of development finance, though amounts of ODA are small in relation to overall finance flows from the Global North to the Global South, [21] ODA continues to be an important source of finance for many developing countries. [22] This is especially so for least-developed countries (LDCs), where ODA represented about 68% (per cent) of total external finance to LDCs in 2014.[23] As an expression of the domestic foreign policy of donors, the intersection of donor domestic self-interest with wider ethical issues, as well as policy pragmatism concerns such as how ODA integrates with other aspects of donor policy, have all attracted scholarly and popular attention. [24] However, though

[19] Prominent in debates on the effectiveness of ODA include its role in promoting economic growth, a key concern – and raison d'etre even - of international development organisations such as the World Bank. See the hefty development economic literature begun with Craig Burnside & David Dollar, "Aid, Policies, and Growth," (2000) 90 Am Ec Rev 847 and the critiques this prompted such as William Easterly, "Can Foreign Aid Buy Growth?" (2003) 17 J Ec Perspectives 23, and his book *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good,* (Oxford University Press, 2006). The methodological challenge of establishing a link between aid and growth is elaborated in Raghuram G. Rajan & Arvind Subramanian, "Aid and Growth: What does the cross-country evidence really show?" National Bureau of Economic Research Working Paper 11513, August 2005.

[20] A Commitment to Development Index (CDI) and Quality of Official Development Assistance (QuODA) were developed in 2003 and 2008 and have been used as proxy indicators of the effectiveness of aid. The latter draws data from 23 donor countries and over 100 aid agencies and measures aid quality using four dimensions of maximising efficiency, fostering institutions, reducing burden and transparency and learning derived from 31 indicators. Homi Kharas and Rita Perakis, Measuring the Quality of Aid: QuODA Second Edition (Brief for the Fourth High-Level Forum on Aid Effectiveness, Busan, South Korea). Centre for Global Development, November 14, 2011. Available at https://www.cgdev.org/publication/measuring-quality-aid-quoda-second-edition-brief-fourth-high-level-forum-aid.

[21] I thank Prof Susan Spronk for bringing this to my attention.

[22] Most African countries still rely heavily on financing from official bilateral and multilateral creditors (which together account for about 60% (per cent) of Africa's long-term external debt stock). However, after the 2008 financial crisis, African countries faced severe constraints as financing from traditional donors on concessional terms declined. In response, they turned to borrowing in both domestic and international markets. The increase in commercial debt and the decrease in concessional debt has meant that sovereign debt became more expensive. Concessional debt as a share of total debt peaked in 2004 at 55.4 per cent then sank to 35.8 per cent in 2016. UN Economic Commission for Africa, Fiscal Policy for Financing Sustainable Development in Africa. Economic Report on Africa (2019) (Addis Ababa, Ethiopia: United Nations ECA, 2019), at 146, 162.

[23] http://www.oecd.org/newsroom/development-aid-drops-in-2018-especially-to-neediest-countries.htm

[24] See for example Stephen Brown, Molly den Hayer & David R Black (eds), *Rethinking Canadian Aid*, (Ottawa: University of Ottawa Press, 2017).

the potential for donor political leverage through ODA has long been recognised (and, arguably, has been the impetus behind such international ODA reporting initiatives such as the International Aid Transparency Initiative, and the Global Partnership for Effective Development Co-operation), [25] its structural and systemic nature has remained hidden. [26]

In my view, part of the reason for this is the powerful role of the discourse of economic humanitarianism that underpins ODA – both ubiquitous and prominent in equal measures across all donors' policy on ODA. This effectively masks the deeper structural and systemic governance dynamics at play. Thus, the fact that the international governance framework for ODA means that, *as a group*, primarily Northern and market-oriented, economically powerful donor states, hold and retain executive authority not only over on what they spend ODA, but also on how aid-recipient states, *as a group*, must change their domestic policy institutional environments in order to receive it, remains largely overlooked. Similarly overlooked is the fact that the international governance framework for ODA facilitates a remarkable similarity in donor policy prescriptions for aid-recipient state reform – one oriented towards the progressive implementation of legal, regulatory and policy alignment along neo-liberal, global market

[25] Both of these initiatives rely on a transparency model to governance that includes the disclosure of information by participating states and other actors, the construction of data from this information, and the compilation of periodic reports according to 'standards' that usually include indicators and other numerical information designed to capture current conditions and undertake comparisons with previous data. No independent review or sanctioning systems are included in these methodologies.

[26] By structural governance dynamics, I mean those that arise from "the relationship and mutual dependencies between business and the state," where the structure of capitalism "creates opportunities for some companies (but not others) vis-à-vis the state, and the ways in which that structure creates leverage for some states (but not others) to play off companies against each other." Pepper D. Culpepper, "Structural power and political science in the post-crisis era," (2015) 17 Bus Polit 391 at 391. In the context of ODA, these structural dynamics include where donor prescriptions for aid-recipient state policy reform or procurement seek to advantage transnational corporations or elites that are domiciled in donor countries. In an era of transnational capitalism, states can be forced to compete for foreign direct investment by the introduction of policy measures that place transnational capital at an advantage over national firms and labour. See Stephen R. Gill & David Law, "Global Hegemony and the Structural Power of Capital," (1989) 33 Int St Qty 475.

integration lines. The international governance framework for ODA elides from view the role of ODA in maintaining and perpetuating an international economic governance architecture[27] that is singular in its pursuit of a neo-liberal model of transnational capitalist development aimed at keeping the economic interests of Northern, market-oriented states and elites at the apex of wealth and privilege. [28] In my view, the creation and maintenance of this governance architecture is a result of a complex reciprocal engagement between law and power, one with strong historical roots as I will demonstrate in Chapter 6 and 7. Here, I define power as the "production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances and fate"; [29] with governance understood "in terms of 'political order', whereby 'political' stands for anything affecting the 'public interest' or 'common good."[30]

3. The governance of ODA - key technologies and instruments of governance

Though ODA primarily consists of grants, concessional loans and ODA-funded non-financial supports like technical assistance and capacity building, it is usually delivered through a narrow range of channels including for distinct projects (project support); an amalgamation of donor funds for single projects (called basket funds); general or sectoral budget support (GBS-SBS) (usually the aid-recipient state's preference), and either via the recipient's national financial

[27] I define international economic governance architecture as the primary international legal instruments and institutions that govern transnational economic activity in areas such as trade, investment, capital flows, sovereign debt etc.
[28] Of course, this model of economic development poses an existential threat to the planet and natural and social life as we know it, being fundamental to causing problems such as biodiversity loss, global plastic waste, carbon dioxide concentration, higher incidence of 'natural' disasters etc.
[29] Michael Barnett & Raymond Duvall, "Power in international politics," (2005) 59 Int Org 39 at 52.
[30] Ibid at 3.

and procurement systems that such instruments are partly aimed at reinforcing, [31] or through other means.[32] A veritable thicket of managerial, bureaucratic and technocratic instruments and processes at each of the donor and aid-recipient state's end are required to support this transfer which, though intended to connect like a jigsaw, frequently overlap and are challenging to navigate. Despite this, several instruments are routine within the governance of aid across diverse donors and aid-recipient states. [33]

The formal high-level instruments of financial agreement between donors and aid-recipient states are largely diplomatic in nature and purpose, ranging from letters of intent to more formal (yet still not formally legal) Memorandums of Understanding. It is impossible to ignore the political leverage that the legal quality of this kind of agreement invites, [34] leverage that is

[31] Though donor ODA financial instruments are, since 2015, becoming increasingly diverse and complex in the drive to support private-sector led transnational investment, to include instruments like first-loss guarantees, insurance products and other blended finance products where public ODA is 'blended' with private capital, as yet these instruments constitute a small, though growing, segment of ODA.

[32] These can include include local governments, local communities, and private entities such as NGOs, and in some instances, private contractors and companies. The ability of donors to autonomously engage with many entry points is a source of continual frustration to aid-recipient states.

[33] The OECD's DAC has produced several guidelines to donors on desired features of their aid programmes, framed as apolitical, technical 'good practice' advice designed "to inspire the aid manager and practitioner to look for ways to improve their operations," and to help donors that are looking 'to grow, strengthen and consolidate their programmes.' OECD, *Better Aid Managing Aid Practices of DAC Member Countries,* (Paris: OECD, 2009) at 3. See also Chapter 11 of this thesis.

[34] This was confirmed in interviews with donors undertaken during a field trip to Tanzania in 2015. Though I verbally asked every donor representative for a copy of their financial agreement or contract with the Government of Tanzania (with sensitive data blacked out), I was not successful in obtaining one. The lack of public availability of MOUs - their confidentiality, in other words - is one of their signature features. Anthony Aust, "Alternatives to Treaty-Making: MOUs as Political Commitments," in Duncan Hollis, *The Oxford Guide to Treaties,* (Oxford: Oxford University Press, 2012), 46. In the EU's case, their agreement is included with the 'Country strategy paper and national indicative programme.' It includes references to relevant treaties applicable to EU policy on ODA. Thus, for example, many African country aid-recipients' agreements include reference to relevant clauses within and annexes to the ACP-EU Cotonou Partnership Agreement. However, it is notable that the legal weight of these references are also qualified by statements that the financial allocations 'are not entitlements and may be revised by the Community following the completion of mid-term and end-of-term reviews, in accordance with Article 5.7 of Annex IV to the ACP-EC Partnership Agreement.' Republic of Uganda – European Community, Country Strategy Paper and National Indicative Programme 2008 -2013 at 2. Available at https://eeas.europa.eu/delegations/uganda/13094/country-strategy-paper-and-national-indicative-programme-2008-2013_en.

enhanced and solidified by a myriad of bureaucratic instruments, in which the role of documents is key.

For donors, these instruments commonly include distinct national strategies on their ODA policy, that usually outline the objectives, levels, priority areas and relevant government and departmental institutional mechanisms that are responsible for the administration of ODA (these strategies are often captured in documents, sometimes hosted electronically on websites, for example). [35] Of legal note is the fact that only a minority of the major Western donors have legislation-backed ODA policies, [36] meaning that these strategies have to be periodically updated, and may not (ever) adequately capture the reality or the nuance of a relationship between a donor and aid-recipient state. Frequently, and depending on the size of the donor, these national policy documents are further elaborated in issue-focused strategies such as on gender, food, the private sector etc.[37]

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[35] An example is the UK's tellingly titled '*UK aid: tackling global challenges in the national interest (2015.)*' It includes detailed plans to address specific policy objectives in relation to the administration of ODA including 'value for money' and 'transparency.' It is notable that under the former objective, it outlines a change in policy direction to move away from funding through general budget support (unearmarked contributions to aid-recipient countries' budgets) to more targeted forms of financing, backed by newly-developed managerial processes of detailed departmental planning to 'ensure that their programme design, quality assurance, approval, contracting and procurement, monitoring, reporting and evaluation processes represent international best practice.' HM Treasury and Department for International Development, *UK Aid: Tackling Global Challenges in the National Interest* (November 2015) at 21. Available at https://www.gov.uk/government/publications/uk-aid-tackling-global-challenges-in-the-national-interest

[36] Examples would be the UK whose *International Development (Official Development Assistance Target) Act* (2015), that legally obliges it to spend 0.7% of Gross National Income (GNI) on ODA, or Canada's Official Development Assistance Accountability Act (2008) that aims to ensure that Canadian ODA meets three criteria set out in section 4.1 of the Act. These are that it contributes to poverty reduction; take into account the perspectives of the poor; and be consistent with international human rights standards. It also obliges two annual reports to be produced, one to parliament and the other relating to statistics and data. See https://www.international.gc.ca/gac-amc/publications/odaaa-lrmado/index.aspx?lang=eng.

[37] The EU, for example, has a Country Strategy Paper and National Indicative Programme for most of its aid-recipient states. These follow a common format including a country 'diagnosis' summarising data on the country's political, economic, social and environmental situation; its poverty reduction strategy and development strategy and an analysis of these; a review of past EU interventions, and an overview of the key areas (e.g. transport, democracy promotion etc.) and modalities (budget support, project support, technical support etc.) planned for future EU intervention, along with an analysis of the wider donor environment and contributions, and other issues

A key document for any donor is its production of a time-bound *Country Strategy Paper* or some such-titled document that captures the donor's analysis of, and approach to, the aid-recipient state's perceived development challenges. This constitutes the summary and signposts of the donor's aid strategy for the aid-recipient state and is a lynchpin of ODA-governance. [38] The contents frequently mimic the approach of the EU's, the latter containing the following elements – an analysis of the aid-recipient state's political, economic, agriculture and food, social (poverty and vulnerability) and environmental situation, along with a reflection on 'country capacities.' The latter includes an assessment of the state's institutions, its civil society and private sector. This document represents an important node of surveillance on the aid-recipient state, an activity that is fundamental to the ODA governance relationship. Additionally, the Paper may include an outline of the donor's aid strategy, sometimes with reference to the interventions of other donors and donor co-ordination. It is clear that these Papers are intended primarily for donor use, and though due acknowledgement is made of the necessity of referencing the aid-recipient state's own policy documents (such as its *National Development Plan*), such reference to and analysis of aid-recipient state originating documents are supplementary to the donor's own analysis. [39]

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such as debt sustainability and financial stability etc. Canada has a Feminist International Assistance Policy centred on 6 action areas including growth, peace and security, that aims at 'the economic, political and social empowerment of women and girls, and (that) makes gender equality a priority.' See https://international.gc.ca/world-monde/issues_development-enjeux_developpement/priorities-priorites/policy-politique.aspx?lang=eng#4.

[38] It is worth noting that these important documents are not easy to access by the public. An exception is the EU's approach, which includes these in the delegation's website, through these are not always in-date.

[39] The EU's template for the analysis of National Development Plans advises that the analysis should "clearly indicate to what extent the existing NDP can be used for programming EU aid or duly justify why it could not be used to that end. It should also indicate possible sectors not reflected in the NDP that should nevertheless be considered for EU support." EEAS, 'Annex 3 – Template for the Analysis of National Development Plans (undated).' On file with author.

For aid-recipient states, however, a larger range and type of institutional mechanisms and bureaucratic instruments are commonly required. These include national country-level development plans (national development plans); sector-wide development plans (focusing on particular sectors such as education, health, transport etc.); issue-focused plans such as a national *Poverty Eradication Action Plan* (which may serve as a *Poverty Reduction Strategy Paper* (PRSP) for World Bank purposes),[40] as well as sub-plans of these (e.g. plans on childhood nutrition and stunting), along with, more rarely, geographic area-based plans. They may also need to produce donor-specific 'country strategy papers' to reflect the political interest and funding allocations of each donor. Many of these plans overlap in terms of timeframes, funding, content, donor engagement, and thus, managing the complexity of aid administration is no easy task for the aid-recipient state. While the administrative and technical burden of complex aid administration by aid-recipient states is well documented in the development studies literature, [41] what is key here, is the centrality of surveillance practices involving particular kinds of data and pro-forma texts to ODA governance, organised to meet donor needs that aid-recipient states are obliged to deliver.

However, important though these documents are in ODA governance, they merely signal a much deeper interventionist governance engagement by donors in the domestic policy realm of

[40] See Celine Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States*, (Hoboken Taylor & Francis online, 2011). Note that the major international development organisations such as the IMF and the World Bank also require their own unique documents such as the IMF's Financial System Stability Assessment, and the World Bank's PRSP. There is significant sharing of data across donors, with the contents of similar reports becoming almost formulaic.

[41] Arne Bigsten & Sven Tengstam, "International Coordination and the Effectiveness of Aid," (2015) 69 World Dev 75; Bertil Odén & Lennart Wohlgemuth, "Where is the Paris agenda heading? Changing relations in Tanzania, Zambia and Mozambique," ECPDM Briefing Note 21, (Maastricht: European Centre for Development Policy Management, 2011).

aid-recipient states. The actual reach of ODA governance extends far beyond those technically necessary for the transfer of finances. This reach is achieved by a range of extensive background donor practices that are framed as an essential and uncontested part of the transfer of ODA. [42] In this thesis, I will demonstrate that these practices, by resort to techniques of bureaucratisation, technicisation, a managerial mode of decision-making and the rationality of neo-liberal transnational development that underpins the model of development being pursued by ODA, mask and appear to neutralise the covert legal and political nature of donor intervention in the domestic policy and institutions of aid-recipient states. I will also show how these governance practices and instruments have a distinct legal and juridical quality. These features are undoubtedly questions of governance, in which law and the legal nature of the international governance of ODA are key.

4. Linking governance *of* ODA to governance *by* ODA: law, legality, the significance of the legal form, and the questions asked by this thesis

Yet, over the post-war lifetime of ODA, scholarly and public debates on the governance of ODA have largely focused on improving its impact and effectiveness.[43] These have themselves been primarily framed as a question of ethics, economics and politics, rather than law and

[42] From a governance perspective, certain practices are key. These include (i) those associated with donor use of Budget Support, and the institutional response in aid-recipient states that this modality prompts; (ii) the particular kind of rationalities and subjectivities engendered via ODA, especially through concepts such as partnership and country ownership, and (iii) the prominence of New Public Management (NPM) governance techniques in which technocratisation and bureaucratisation, and a turn to a more managerial approach to governance, is key. The governance *effects* of these practices are identifiably legal and juridical in several ways. See Appendix 1 for greater detail on each of these practices and their effects, with particular reference to EU and UK donor practices in aid to Tanzania.

[43] Ben Ramalingham, *Aid on the edge of chaos: rethinking international cooperation in a complex world* (Oxford, England: Oxford University Press, 2013); Dambisa Moyo, *Dead aid: why aid is not working and how there is another way for Africa.* (London: Allen Lane, 2009); Roger C. Riddel, *Does Foreign Aid Really Work?* (Oxford, New York: Oxford University Press, 2007) and William Easterley, *The White Man's Burden: why the West's efforts to aid the rest have done so much ill and so little good.* (Penguin Press: New York, 2006).

governance. When governance issues as such emerge, these tend to narrowly focus on issues of the transparency and accountability of aid. [44] Deeper questions about why the international governance of ODA displays a remarkable consistency across myriad Western donors where to date have been overlooked. What also remains invisible is the remarkable symmetry in the content of the law and institutional reform projects proposed by the international development organisations and funded through ODA. It begs the question on whether there exists an intrinsic dualism or dialectic quality to governance[45] and ODA, whether a relationship between the international governance **OF** ODA on the one hand, and the international governance **BY** ODA, on the other exists. Such an approach would seek to describe and examine the nature of this relationship in legal terms, and explore whether the considerable normative, legal and political influence wielded through ODA is facilitated by the particularities of the legal form of its governance. Is there a connection between the legal nature of the international governance of ODA, and role of and for law within the development project being promoted through ODA? Approaching the international governance of ODA from this perspective recognises that, even

[44] Thus debates on aid accountability and transparency have largely centred on two issues (i) the quality of information on aid provided by donors, leading to approaches to transparency by initiatives such as the 'PublishWhatYouFund' and the International Aid Transparency Initiative focusing on strongly on numerical, quantifiable assessments on aid transparency. Thus the International Aid Transparency Index ranks donors, and quantifies the proportion of aid that's 'transparent' according to a formula. While valuable, it offers a very partial approach to transparency in aid, and (ii) issues of corruption and rent-seeking within ODA-funded fields of activity focusing mainly on issues such as whether aid can promote good governance more widely e.g. Nicholas Charron, "Exploring the impact of foreign aid on corruption: has the "anti-corruption' movement been effective?" (2011) 49 Dev Economies 66, and corruption in donor aid or aid spent by national governments e.g. Samuel Brazys, Johan A. Elkink, Gina Kelly, "Bad neighbours? How co-located Chinese and World Bank development projects impact local corruption in Tanzania," (2017) 12 Rev Int Orgs 227; Elizabeth Dávid-Barrett, Mihaly Fazekas, Olli Hellmann, Lili Márk & Ciara McCorley, Controlling Corruption in Development Aid: New Evidence from Contract-Level Data. Budapest: Government Transparency Institute Working Paper 2017:03. Available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103395.

[45] Here, governance is understood "in terms of 'political order', whereby 'political' stands for anything affecting the 'public interest' or 'common good." Stefano Guzzini, 'The Ambivalent 'Diffusion of Power in Global Governance' in Iver B. Neumann, Stefano Neuman & Iver Guzzini, *The Diffusion of Power in Global Governance,* (Palgrave Macmillan, 2012) at 3.

without a dedicated international legal agreement, law and institutions exist and play a strong, if not 'traditional' role in the international governance of ODA. However, to understand law in this way requires a less positivist approach to law, one that recognises the complexity of its form in a transnational context. With this in mind, the concept of law, along with concepts that aim to capture the legal quality of the governance instruments that constitute the international governance framework of ODA (the terms 'legal form' and 'juridical nature')[46] used in my research depart from the historically more dominant paradigm where law was conceived of as a system of prohibitionary commands backed by institutional authority.

I draw from Neil MacCormick's institutional theory of law in order to help capture and articulate key legal qualities in the international governance of ODA. MacCormick approaches law as an institutional normative order. [47] This definition of law moves away from a focus on

[46] In defining and using these terms, I am not aiming at a universal, essentialist definition. I am using these terms specifically in the context of the international governance of ODA. I suggest that the legal form and juridical quality of a governance framework are both highly contingent and reliant upon the context in which they operate. The elements of the legal form and juridical quality defined in this context have been selected as they are entirely necessary for the jurisdiction of international ODA to operate. We will see later in this thesis how combinations of these elements create the jurisdiction of international ODA, one a very distinct ordering effect. Luhmann identifies a connection between the form and the medium, and this is certainly true of the specific legal nature of the international governance of ODA. Niklas Luhmann, David Roberts, "The Medium of Art," (1987) 18-19 Thesis Eleven 101.

[47]"Normative order is a kind of *ideal* order….[it] is ideal in the sense of *the favoured or preferred* idea, not merely the neutral idea…. Normative order is *practical*, both in the sense that it guides praxis, guides what we do, and also therefore practical in the sense of practicable. It is an order that is envisaged as a *practically realizable* state of the world *given things as they are and persons as they are here and now*; *to the extent that it is realized, the world is a better, more satisfactory, world* than if no such guideline were envisaged or followed. 'Norms' are propositions that we formulate with reference to, and as singled-out elements of, normative order. In primary form, they are either exclusionary provisions (negative duties, prohibitions) that rule out certain ways of acting on all occasions on which such action might otherwise be contemplated, or provisions of the converse type (positive duties, obligations) that call for or insist upon certain ways of acting as required of a person despite any contrary temptation, or countervailing reason for action." (Own emphasis). Neil MacCormick, *Questioning Sovereignty*: *Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) at 4 (own emphasis). He explains the 'institutional' as a further 'ordering' of judgments. *Ibid* 7.

sources of law, its institutional[48] or other criteria[49] to concentrate much more on the function that law serves in society and how it does so through the distinctiveness of its own form. In recognition that the international governance framework for ODA contains an uneven and complex role for law, we will see that the relationship between black letter law and non-legal governance instruments are highly interdependent. Thus, the 'legality' or 'legal quality' of the international governance framework of ODA may best be approached as one of relative institutionalisation where the juridical nature of law is approached as an "emergent phenomenon.". [50] This approach recognises a contingent relation between power[51] and law, the diffuse nature of power at the transnational level, [52] and that both power and law operate in fluid ways. I address these aspects in more detail in Chapter 3 on jurisdiction and in Chapter 4 on the signature.

[48] That law has some kind of court or adjudicative body, and enforcement agencies.

[49] See for example Lon Fuller's list of eight "desiderata" of good law, generally described as rules that are (1) general; (2) published or promulgated; (3) ordinarily prospective in their application;(4) clear and not unduly vague; (5) self-consistent, not contradicting one another; (6) capable of being obeyed; (7) relatively stable over time; and (8) applied and enforced by officials in a manner that is congruent with their content as promulgated. Lon Fuller, *The Morality of Law*, (Revised Edition), (Yale University Press, 1969).

[50] Maksymilian Del Mar, "Legality as Relative Institutionalisation: MacCormick's Diffusionism and Transnational Legal Theory," (2014) 5 TLT 177 and 215. Del Mar's reconstruction of MacCormick's theory describes a model of legality that has five stages. The merits of his approach lie not in this but in the features of law that this captures that are particularly relevant for the study of law at the international level. These include recognising (i) the contingency of the relationship between law and power thereby enabling a focus on the links between law and power that is not bound to the form that power may take (e.g. which might lead to the assumption that a treaty has more normative weight than a set of shared principles that is backed by a rigorous peer-review mechanism); (ii) the importance of inchoate and emerging forms of legality that can lead to greater degrees of institutionalisation; and (iii) the existence of the element of decision-making and agency of persons – whether officials, lawyers or ordinary people – that enables some forms of institutionalisation to assume greater legality. Furthermore, Del Mar highlights the potential of this approach to lend to a study of transnational law that enables a focus on the normative and descriptive in tandem; recognises the potential contribution of insights from other disciplines to understanding law and power and recognises the fluidity and more ambiguous nature of concepts that inform this area of research. *Ibid* 215-216.

[51] I define power as the "production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances and fate." Michael Barnett & Raymond Duvall, "Power in international politics," (2005) 59 Int Org 39 at 52.

[52] Del Mar notes that this approach differs to theories that view law as the outcome or product of power. Supra note 50 at 179.

My research investigates ODA as instrument of global governance through which real political, economic and legal change is enacted in ways that are highly dependent on the legal nature of its governance framework. It asks

(i) What is the legal form of the international governance of ODA, and how can the legal quality and juridical nature of the international governance of ODA be identified and characterised?

(ii) How does this legal form mediate power - in particular, in relation to the distinct subjectivities and agency of donors and aid-recipient states?

I argue that the international governance of ODA has a curious legal form that is central to its role as an instrument of governance. At the international level, it weaves a shifting path that *mediates* between a number of bodies of international law (most prominently international economic law and international human rights law), and connects law with strands of development theory and international relations in ways that masks tensions between them. This role serves a number of legal, political and economic purposes. Legally, this mediation role orders and creates coherence between often competing, and overlapping legal orders, across different areas of international and domestic activity, and across different levels of governance. Furthermore, its legal form and the kind of governance it enables remains invisible to the law and democratic accountability institutions of the aid-recipient state. Politically, first, it creates, stabilises and maintains identities and relationships between more powerful and less powerful states. The former are mainly Northern-based states (as 'developed' countries) and the latter are usually located within the Global South (as 'developing countries'). Secondly, it legitimises

the pursuit of what are framed as altruistic and humanitarian relations between North and South, in a way that does not need to reckon with the baggage of colonial and imperial history. Economically, it supports the maintenance and continuation of imperial extractive relations between the Global North and South articulated through a development discourse that focuses on the increasing integration of the developing countries into the global economy.

In focusing on the international dimension of the international governance of ODA, I take one international governance site as the primary locus of the international governance of ODA and this is the primary focus of attention of this research. It is the Organisation for Economic Co-operation and Development (OECD) and, in particular, its Development Assistance Committee (DAC). Briefly, the OECD is an international organisation, founded in 1961 by convention, with its original membership largely consisting of the former post-World War II Western allies, but with Japan joining in 1964. Currently it has 36 member states as members. [53] In Part III, I describe the purpose and the work of the OECD and DAC's approach to development and its governance of ODA in far greater detail. But the choice of the OECD and DAC as a key site of the international governance of ODA might seem at first puzzling as the OECD and DAC are not aid donors. It is not an international organisation with universal membership such as the United Nations; instead it has been frequently popularly described as a "club of the rich."[54] Its legal and policy activities are more frequently associated with the production of policy analysis and proposals relating to economic development, usually from a 'global' and comparative context. When it has sporadically and (in my view) belatedly come under the dedicated attention of

[53] http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm
[54] Buttonwood, 'What is the OECD?' The Economist, July 6th 2017 at https://www.economist.com/the-economist-explains/2017/07/05/what-is-the-oecd

legal scholars, this has focused mainly on its role in developing and promoting international legal instruments in the areas of bribery, hazardous waste, the promotion of foreign investment and corporate conduct in that context, and its convening role.[55] While it has received some small attention from Global Administrative Law scholars,[56] its role in international development, and its governance of ODA in particular, have remained overlooked.

This research is the first to examine the OECD's (and its DAC's) role in the international governance of ODA from a critical legal perspective, one that takes its international legal personality, its international legal, normative and political governance roles seriously, and within this, its use of law and the juridical quality of its other governance technologies. By critical, in this project, I mean an underlying concern with the lack of emancipation of large groups of people in the world today and the structural causes of this; an explanatory framework that acknowledges the significance of the logic of the transnational capitalist system to how relations between groups of people and areas in the world are structured,[57] and the importance of an economic growth model based on this logic to the project of development,[58]

[55] The George Washington International Law Review did a special issue on the OECD in 2011. It focused mainly on the OECD's role in promoting foreign investment and within the G20. ODA and development received no attention. (2011) 43 George Wash Int L Rev 239 – 388. Earlier Anne-Marie Slaughter spoke glowingly of the OECD's convening role in *A New World Order*, (Princeton, NJ: Princeton University Press, 2004) at 49.

[56] Armin von Bogdandy & Matthias Goldmann, "The Exercise of International Public Authority through National Policy Assessment: The OECD's PISA Policy as a Paradigm for a New International Standard Instrument," (2008) 5 Int Org L Rev 241.

[57] I adapt this definition of a critical perspective from critical theory towards one focused on development using Frans J Schuurman, "Critical Development Theory; moving out of the twilight zone," (2009) 5 Third W Q'tly 831 at 835-836.

[58] The idea of development as a project is held by many development theorists and lends to particular narratives on development that can be used to trace the evolution of development theory, especially since the articulation of the Truman Doctrine. See for example Jane L. Parpart & Henry Veltmeyer, 'The Development Project in Theory and Practice: A Review of its Shifting Dynamics.' (2004) 25 CJDS 39. On the nature of the development project, see Philip McMichael, *Development and Social Change: A Global Perspective* (Thousand Oaks: Sage, 2012).

and finally, recognition of the legacy of colonialism and imperialism[59] for the way this world has emerged, and for how the OECD and DAC came to govern today. [60]

Overview of the thesis

This thesis is divided into three parts. Part I establishes the research context for this thesis and consists of five chapters. The following chapter places this thesis within the context of insights from literatures in law. Here, I show how ODA has been placed in very diverse locations within international law and legal theory by legal scholars in the past. In recent years, it has been the focus of dedicated legal scholarly attention from two perspectives. The first focuses on the World Bank, and research here draws from governmentalities literature, and science and technology-informed legal literature on indicators. The second draws from Global Administrative Law perspectives, and here I focus on the work of scholars that draw from this perspective to address the accountability of international organisations such as the OECD. A very important strand in this literature – and indeed the most developed on the governance of ODA to date - comes from the work of Philipp Dann. Dann's work, and that of his co-authors and colleagues, over several pieces, constitutes perhaps the most well-thought-out approach to the international governance of ODA, and in particular, law's role in that field. I examine how

[59] Both colonialism and imperialism involve the subjugation of one people to another. However, colonialism usually involved the transfer of population to a new territory, where the arrivals lived as permanent settlers while maintaining political allegiance to their country of origin. Imperialism, on the other hand, comes from the Latin term *imperium*, meaning to command. Thus, the term imperialism draws attention to the way that one country exercises power over another, whether through settlement, sovereignty, or indirect mechanisms of control. See Edward N. Zalta (ed), "Colonialism" in *The Stanford Encyclopedia of Philosophy*, (2012) at https://plato.stanford.edu/entries/colonialism/.

[60] While Chapters 7 and 8 in Part II explain this in much greater detail, we will see how this history has shaped the contemporary governance approach to the OECD to development, and the DAC to ODA in Part III.

they have conceived of law in the governance of ODA and I highlight areas that remain unexplained and overlooked.

In Chapters 3 and 4, I describe the theoretical lens that I use to analyse the role of law and legal quality of the international governance of ODA. This is anchored in two concepts – one relating to 'jurisdiction' and the other relating to the 'signature.' I approach the international governance of ODA as a jurisdiction[61] in its own right, whose legal form imbues it with an authority, legitimacy and reach captured by its unique governance signature. Key to this jurisdiction is the role of approaches to and functions of particular governance instruments that emerged at the international level at particular times, as a result of efforts to address colonialism, and to implement the Marshall Plan.

Part II focuses on two key historical precedents - the first is the precedent set by the then-new international order with the emergence of the League of Nations and the Permanent Mandates System and Commission. The second is the period during the implementation of the Marshall Plan in Europe that re-drew and solidified relations between colonies and the metropole in very particular ways. Over Chapters 6 and 7, I trace how governance approaches and instruments from the League and, later, the institutions created to implement the Marshall Plan, acted as a segue to the newly-inaugurated OECD and its Development Assistance Committee.

In Part III, I describe the OECD's and DAC's approach to the international governance of ODA in four chapters that address, separately, the role and contribution of law, policy, a technocratic governance technology (that of the concept of ODA), and a bureaucratic governance

[61] In this thesis, I use the term "ODA as jurisdiction" to refer more to the dynamic nature of this creation of a space of authority and rule; I use the term "ODA as a jurisdiction" to refer to the actual governance space. The two terms are closely related, and can be used interchangeably in most instances.

technology (that of Peer Review by the DAC of donors' policies on development co-operation). I describe how each of these, in different ways, elaborates and contributes to the governance signature of ODA. Though I have followed the formal distinction between law and non-law in my analysis of the four main governance instruments of the OECD and DAC that construct their jurisdiction over and through ODA, in the concluding chapter, I depart from this. Here I trace how each of the four elements of the governance signature of ODA, including its juridical nature, its approach to juridification, its legal logics and its performativity, in different ways, contribute to each of the governance technologies of law, policy, technocracy and bureaucracy of the OECD and DAC. In doing so, I aim to trouble the binaries of law/non-law; international/national; public/private that are foundational to orthodox approaches to law. I argue that such an approach – exploring how concepts central to orthodox approaches to law may have hidden critical and analytical qualities – may prove fruitful for critical research that seeks to trace and examine the legal form across time, across law, and across place.

A note on "Auras of legality"

> aura, *n.*
>
> A supposed subtle emanation from and enveloping living persons and things, viewed by mystics as consisting of the essence of the individual, serving as the medium for the operation of mesmeric and similar influences.[62]

In searching for a title for this thesis, I struggled to find a word or a phrase that would capture the coming together of facets, practices, instruments, ideas, histories and locations through law that enable ODA to maintain such an invisible yet powerful hold on donors, on aid-recipient states, and on other important actors such as international organisations, international leaders, financial actors etc. The term "aura" seemed to capture that kind of legal existence.

[62] Oxford English Dictionary online.

Chapter 2 Review of the Literature

1. Introduction

This chapter places my research in the context of relevant legal literature on the international governance of ODA. This literature can be divided into two strands that overlap, to some extent. The first is a primary strand – one that specifically addresses and analyses the governance *of* ODA, or governance *by* ODA in legal terms. This is by far the smaller strand of the two. The second strand is a supplementary one, and this focuses on the legal analysis of activities of governance of, or by, actors that are *donors*, where ODA supports activities aimed at development. In this literature, ODA itself is not the primary focus of research attention, but rather the focus here is a donor's approach to its ODA-funded *activities* and how it conforms to existing international law(s) in relation to governance. The analytical lens prominent in this literature is variously normative and critical and I include reference to it here as it helps to illuminate aspects of governance by ODA relevant to this thesis.

This chapter proceeds as follows. In the following two section, I provide a brief overview and more in-depth analysis of the primary strand of legal literature – where governance of ODA, and governance by ODA is the primary focus - and the secondary literature, respectively. In the final section I reflect on the contributions of both strands to understanding the legal quality of the international governance of ODA and highlight areas that remain overlooked.

2. Legal approaches to the international governance of ODA

ODA is an unusual activity in that it constitutes an element of many areas of international relations that are governed by distinct bodies of international law. Thus, for example, it

emerges in international economic law (in international trade law in particular); [63] in environmental law;[64] and in international human rights law. [65] It is also prominent as an identified activity within international policy frameworks such as on sustainable development,[66] as well as being an important source of funding that underpins the activities, and existence, of many international organisations. [67] As such, consideration of where ODA 'fits' within the international legal terrain - and thus the legal framework most appropriate to its governance -

[63] Thus Section 2 of the most recent WTO *Agreement on Trade Facilitation (TFA)* which addresses Special and Differential Treatment Provisions (SDT) for developing country and least-developed country members (LDC), includes provision for 'assistance and support for capacity building' defined as "technical, financial, or any other mutually agreed form of assistance." Unusually, for an SDT provision in a WTO agreement, it directly links implementation of the TFA by developing country and LDC Members to their capacity, and links this capacity directly to resources available for assistance and support for capacity building, thereby making the provision of 'assistance' key to the implementation of this agreement in developed country and LDC members, legally bolstering the doctrinal concept of SDT in this instance. WTO *Agreement on Trade Facilitation*, 15 July 2014, WT/L/931. Siobhan Airey, "The WTO's Trade Facilitation Agreement – New Beginnings on Multilateralism and S&D?" (2015) 10 Can Int'l Lawyer 27.

[64] The United Nations Framework Convention on Climate Change (UNFCCC) included a number of climate-financing related goals, and has a Standing Committee on Finance that collects, reports and reviews climate finance information communicated by individual Parties in the UNFCCC context. More recently, the Paris Agreement extended this activity, encompassing the reporting of climate finance provided, mobilised and received. It also encompasses the technical review of climate finance provided. The OECD/IEA Climate Change Expert Group (CCXG) is taking a lead in developing expertise on the monitoring frameworks for climate finance. Note that there is thus a strong similarity in the modalities under which the OECD exercises leadership on ODA through its DAC, and that of the CCXG. See for example the work of the CCXG - http://www.oecd.org/env/cc/ccxg.htm.

[65] A review of country reports under the UN's periodic reporting mechanism for the ICESCR, for example, indicates that several countries refer to the content of their ODA policies and financial commitments as evidence of their support for international human rights abroad. See latest Canadian national report submitted under the UN's universal periodic review mechanism where it highlighted its Feminist International Assistance Policy. UN HRC, Canada – National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 3 April 2018, A/HRC/WG.6/30/CAN/1 at 18. Also, latest Irish national report – UN HRC Ireland National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 9 February 2016, A/HRC/WG.6/25/IRL/1 at 22.

[66] In 2015, countries adopted the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals. See https://www.un.org/sustainabledevelopment/development-agenda/. See UN GA Resolution *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

[67] Consider the range of international, international and regional organisations that rely significantly on contributions that are described as ODA in national and international terms e.g. many of the UN agencies; intergovernmental organisations such as the International Conference of the Great Lakes Region, and regional international organisations such as the East African Community organisation.

faces a challenge. ODA is mentioned (if summarily) in legal literature across all those existing legal fields, as well as in proposals for new ones. [68]

However, in the last decade, the activity of international development finance has finally begun to receive recognition in its own right. This "primary" literature consists of two sub-strands. The first approaches ODA as a distinct kind of international activity and seeks to delineate a new field of dedicated legal attention focusing on the governance *of* ODA. This latter body of legal scholarship has been called, variously, the law of development co-operation,[69] the institutional law of development and finance,[70] or the Global Administrative Law (GAL) of development.[71] This strand, though small, is influential and more prolific recently, and within this strand an analytical approach strongly informed by a GAL perspective predominates. The second strand, much smaller, can be described as focusing on governance *by* ODA. More critical and heterodox in approach, this strand is best captured by Celine Tan's monograph that focuses on the World Bank's then-recent implementation of Poverty Reduction Strategy Papers (PRSPs). [72] Drawing explicitly from TWAIL insights,[73] and critical international development studies, Tan's work

[68] See the following section where ODA is included as part of a new field of law called international development law.
[69] Philipp Dann, *The Law of Development Cooperation, A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press, 2013).
[70] Philipp Dann, "Institutional Law and Development Governance: An Introduction," (2019) 12 L & Dev Rev 537.
[71] Philipp Dann, 'The Global Administrative Law of development cooperation,' in Sabino Cassese, (ed) *Research Handbook on Global Administrative Law* (Edward Elgar online, 2016) at 415-416. This is defined as 'the law of institutions that organize the transfer of funds and knowledge for development purposes…and normative questions of their limits and accountability are guiding.' *Ibid.*
[72] Celine Tan, supra note 40.
[73] Third World Approaches to International Law (TWAIL) is a scholarly movement with a strong intellectual and political orientation towards understanding, examining and addressing the relationship between the subjugation of the Third World in and through international law. "TWAIL is driven by three basic, interrelated and purposeful objectives. The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for

approaches PRSPs as modes of disciplinary governance. [74] In the following paragraphs, I will describe, compare and contrast these two strands of primary literature.

Davis, Dann and other thinkers from the GAL legal community, have sought to distinguish ODA from other areas of law such as contracts and global governance more generally, (though recognising it clearly shares conceptual and methodological approaches with these) by focusing on two features. These are the public nature of development finance, and the public nature of the main development actors. In what can be identified as the inauguration of the field from this perspective, Davis proposed a dedicated research agenda on the law of development finance, along four axis - (i) a descriptive direction where the field is 'mapped' and different modes of development finance are elaborated; (ii) the development of conceptual tools to order and analyse the field; (iii) the promotion of accountability of the various organisations, actors and stakeholders, and (iii) the analysis of the consequences of choosing different modalities of development finance, and the significance of choice of different legal terms in the various rules and agreements utilised. [75]. Though Davis identified "financing development" as a field of practice, and did not explicitly exclude consideration of private development finance actors such as philanthropic actors, for-profit actors etc., it is clear that his elaboration of the field at that time mainly focused on ODA-related financing for development.

international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World." Makau Mutua, "What is TWAIL?" (2000) 94 ASIL Proceedings 31, at 32.

[74] Both of these are distinct from 'conditions for financing' which are the terms of the legal agreement between the financier and the aid-recipient state and that relate to periods of repayment loan interest rates; loan charges etc. Ibid 95-96.

[75] Kevin E. Davis, ''Financing Development' as a Field of Practice, Study and Innovation,' (2009) Acta Juridica 168.

This approach was adopted and significantly further developed by Philipp Dann with his monograph on the law of development co-operation (LDCO). His book, focused on the administrative approach of influential public donors such as the World Bank, the EU and Germany to their respective ODA activities, is considered a seminal and authoritative text. It was the first to address the legal nature of the international governance of ODA; the role of and for law within that governance framework; the governance challenges to the political dimension of the governance of ODA and, in particular, the greater decision-making authority and agency that donors have. In doing so, it explicitly recognised the political economy of aid, the prominence of administrative processes and instruments in ODA, and the role that the governance of donors (could) play in mitigating unequal power relations between donors and aid-recipient states. Dann's book was warmly received within legal scholarship, receiving several positive reviews in peer-review law journals, and has been part of recent review essay in a leading international law journal. [76] Aside from being the most prolific author in this field and thus being central to bringing the international governance of ODA to wider legal scrutiny, Dann's research displays a thoughtful awareness of, and a considered approach to, the challenges posed by the international, the legal and the political dimensions to the international governance of ODA, questions that are central to this thesis.

[76] The commentary that follows focuses mainly on his 2013 monograph *supra* note 69. This is based on an English translation of Dann's *Habilitation*, and thus represents an excellent insight into a Continental and more formalist approach to law, and to a GAL approach – influences that Dann openly acknowledges at 22. It is a work of considerable legal research, of over 500 pages in length and focuses on the administrative approach of the World Bank, the EU and Germany to their respective ODA activities. Dann's definition of, and GAL-inspired approach to, LCDO has subsequently been referenced in several articles. For book reviews, see Giedre Jokubauskaite, 'Book Review,' (2014) 25 EJIL 599; Benoit Mayer, 'Book Review' (2016) Indian J Int'l L (online, article unassigned). For review essay see Florian F. Hoffmann, 'Review Essay: Twin Siblings: Fresh perspectives on Law and Development (and *Vice Versa*),' (2017) 30 Leiden J Int'l L 267.

The law of development co-operation (LDCO)

The focus of Dann's research is "the law governing the institutions and processes of development co-operation,"[77] and LCDO, according to Dann, is concerned with the law of ODA transfers, "…regulating the procedures, instruments and criteria by which ODA is awarded".[78] Significantly, he identifies this transfer process as having four stages – the (donor) budget decision to reserve ODA; the multi-year planning for a (recipient) country or sector; the negotiation and agreement of a development intervention (either a project or programme), and the implementation of the intervention.[79]

The development co-operation system faces three structural problems according to Dann. The first relates to the "immense organizational, procedural and terminological complexity" that leads to both a lack of transparency, and effective control by donors and recipients alike. Features of this complexity include first, the simultaneously multiple relations between several donors and recipients;[80] with national and international ODA administrations having "excessively complex organisational structures," who utilise different and constantly changing

[77] Supra note 69 at 7

[78] Ibid 13. In his later 2016 article, Dann expands this definition to include, significantly, knowledge, as follows - 'establishing the structures for the process of transfer by constituting the actors, delineating their powers and setting procedural rules as well as substantive standards for the process.' 'Transfer' in this case, refers to the transfer of funds *and knowledge*. See elsewhere - '…*the law of institutions* that organize the transfer of funds and knowledge for development purposes…and normative questions of their limits and accountability are guiding.' *Ibid.* Italics my own – note here the emphasis on institutions, and the inclusion of knowledge transfer as a recognised activity. Dann (2016), supra note 69.

[79] His study focuses on the latter three phases. Interestingly, this first element – the donor decision to allocate funds to ODA in the first place - receives little attention either by Dann, or in commentary on Dann's work by Hoffmann. This is a pity, as this phase constitutes a key phase in the ODA process that (though clearly political in nature, and thus highly appropriate for scrutiny) remains maddeningly understudied in the legal literature. Its centrality to the governance of the ODA continues to remain overlooked by the GAL thought leaders in the field. This is all the more puzzling as, in the case of state ODA donors, the potential to explore the application of domestic administrative law and regulatory processes to this phase of decision-making, and examine the possible links with regional and international commitments relating to development seems pertinent and obvious.

[80] 'It is never a question of *one* donor and *one* recipient,' (italics in original) Dann, supra note 69 at 131.

terminology,[81] and secondly, a fragmented donor community where multiple donors may operate in one country simultaneously. Dann notes the well-recognised problems that the latter generates, including increased transaction costs of donors; competition amongst donors for better projects and personnel, leading to the neglect of less attractive development issues and regions, and a disproportionate administrative burden on aid-recipient states and organisations.

The second problem relates to the political nature of the development co-operation process itself. It is shaped, as Dann describes it, by power and identity, with donors increasingly exerting their authority through their use of conditionality in recent decades. This, Dann points out, circumscribes recipient state autonomy, with recipient lethargy towards donor conditionality prompting more frequent donor resort to and exhortation of greater recipient 'ownership' of the development process and the consequent rise in use of plans and goal-setting exercises towards that end. The third problem relates to the necessity for donors to have accurate and timely data on development, and the conceptual and practical challenges that this poses. Dann notes the rise in the use of indicators and their role in addressing this knowledge gap and conceptual challenge, and explicitly acknowledges the politics of their use. [82]

Crucially, he notes three functions of law in the context of ODA. Firstly, there is an orienting or guiding one, where the practices of ODA can be better oriented towards its guiding principles ("law is about justice, the formulation of ideals and hence about providing guidance on

[81] Ibid, 131-132. Dann notes that one of the tasks of the book, and of organising the 'soft law' of ODA is to establish a common conceptual and terminological framework.

[82] He discusses several of the well-recognised problems with indicators including the illusion that indicators capture a holistic snapshot of a phenomenon; their illusion of impartiality and neutrality, and the power that the producers of such knowledge wield. Ibid 149-150.

reform"). Second, law can help protect weaker actors from more powerful ones, a role that Dann identifies as "formalisation," by subjecting donors to rules of equality. And finally, law (and legal scholarship) has a transparency function, wherein its public nature helps facilitate understanding, make comparisons, evaluate and critique norms, and in doing so, promote transparency and accountability.[83] In this, he draws strongly from a public law sensibility, highlighting features central to this approach in his treatment of LCDO. These are described as first, that public actors and authorities are held to higher standards of accountability and legitimacy than private ones (including legal standards); secondly, that the exercise of public authority is to be guided by a public interest goal, and thirdly, the need to be accountable to a diverse public.[84] The normative and instrumental purpose of Dann's project for law in development co-operation are clear – "[I]n the long run, why shouldn't foreign aid …grow out of its politicized niche and become an autonomous legal regime that can be used to effectively check political powers?"[85]

Dann's method for developing a LCDO involves three elements – firstly, a contextualisation piece which is primarily oriented towards understanding the wider historical and political context in which ODA transfers takes place; second, a "constitutionalising"[86] piece, where he formulates principles for the field of LCDO, and finally, a comparative approach involving a focus on supranational law and the application of administrative law principles to development

[83] Ibid 30-31.
[84] Ibid 18-19.
[85] Ibid 32.
[86] My term. By this I'm referring to the approach Dann takes to defining and using principles within LCDO.

law.[87] The constitutionalising element is of key interest here, and offers an innovative example of an application of GAL methodologies law in an international terrain. Dann formulates *sectoral*[88] principles for application to donor LCDO, on the basis that principles of public international law are too general. The purpose outlined for these principles is threefold – first, to help systematise LCDO by identifying the functions of LCDO rules, how they relate to each other, and where gaps may exist.[89] Second, to help evaluate whether LDCO rules actually achieve or progress those principles.[90] Finally, principles serve a transparency function, which Dann defines as signalling the tensions and trade-offs between values such as development vis-à-vis human rights, or efficiency over participatory use of funds.

Dann's approach to principles for the field of LCDO is elaborated further with the delineation of two kinds - either structural or legal in nature, though sometimes they can be both. A structural principle captures the leading *ideas* of the legal field to which it applies. It serves a doctrinal function and can help "systematise and order legal materials."[91] In the context of LCDO, structural principles are located in donor law, and identified using a comparative method. [92] Dann claims they have the status of *global* law. [93] Legal principles, while they can have the

[87] Ibid 21-24. The latter involves two elements – a comparison of the regimes of different donors, and the bringing of administrative law principles to bear more closely on an area of domestic policy with international reach.
[88] Ibid at 22. Italics in original.
[89] Dann uses the word 'function' here, but from my reading I think the word 'purpose' might be more appropriate. Ibid 22.
[90] Dann is clear that this function is not about determining whether rules are legal or illegal. But he suggests that this evaluative function may also be useful for comparative reasons in comparing different ODA institutions.. The aim is primarily a 'heuristic' one. Ibid 23
[91] Ibid 222-224.
[92] Ibid 223-224. Dann is aware of the partiality of this source, noting that '[I]t is still emphatically necessary to remain sensitive to the danger of a hegemonically narrowed perspective in this area.' However, this doesn't prompt a reconsideration of the bounded nature of that identified source.
[93] Italics in original. Ibid 224.

qualities of structural principles, also serve other functions including an evaluative one (on the legality of an activity) and as a source of argumentation. Unlike structural principles, their normativity is *legally binding*. As such, Dann identifies the sources of legal principles of LCDO as the three sources of international law listed in Article 38 of the Statute of the International Court of Justice. [94] In cases of conflict, he proposes that legal principles would 'trump' structural principles, but that there is no order of priority between the legal principles themselves. [95] Dann proposes four principles for LCDO, namely – development; collective autonomy and sovereignty, individual autonomy and human rights, and finally, coherence and efficiency that he elaborates as follows.[96] These principles are forensically researched and derived from international law doctrine and principles, and donor law and practice.[97] The principles can act as both an analytical device and normative framework within which to assess the governance of ODA.

[94] These are conventions, customary law, and (notably for this project), 'general principles of law recognized by civilized nations.'
[95] Ibid 511.
[96] Chapter 4 of his book addresses these in more detail. Ibid 218 – 298.
[97] Thus the principle of collective autonomy and ownership is derived from (i) the general principle of sovereignty within international law; (ii) the concept of ownership in the Monterrey Consensus and the Paris Declaration, and (iii) a review of each of the German, World Bank and EU approaches. See Chapter 4 in ibid.

Table 2.1 Principles of the law of development co-operation.

Principle	**Dimensions**	**Structural or legal**
Development	• Donors' duty to co-operate • If ODA is given, a focus on poverty reduction and good governance • Respect for human rights	Structural

Collective autonomy & ownership	• Respect for sovereign equality
	  ○ Duty on donors to implement projects and strategies even if it doesn't fit their own
	  ○ Duty on recipients to plan and implement programmes
	• Recognition of equal autonomy
	• Protection of autonomy of aid-recipient states, but coercion permissible in pursuit of a public service goal
		Legal

Individual autonomy & human rights	• Human rights based assessment • Extraterritorial duties on donors to respect, protect and fulfil (e.g. through Human rights impact assessments)	Legal
Coherence & efficiency	• Cost effectiveness, result orientation & concentration • Alignment with recipients' goals and plans • Donor co-ordination and complementarity	Structural

Source: Dann (2013)

In summary, therefore, Dann draws from a GAL approach to articulate four principles that are (separately or together) either legal (legally binding) or structural (normative) in nature, with both being characterised as 'law,' albeit the latter considered as "global law." The role for law (in the LCDO) is threefold – to orient practices towards more just outcomes; to apply formal rules of equality to protect aid-recipient states from powerful donors, and to facilitate greater transparency, which will help with accountability, as well as other instrumental aims such as comparison, evaluation, learning etc.

Thus, when Dann reflects on two issues which are at the core of his project - the wielding of power (what helps ensure that the 'power-wielder' is accountable to an 'accountability holder'?[98]) and what constitutes an appropriate level of accountability in the context of ODA, he proposes that using the four principles as standards will help direct a move towards greater formalisation of accountability standards towards more effective ends. Dann suggests that his study proposes a legal analysis that addresses key aspects of the complex plural institutional nature of the field of development co-operation. First, it is able to reveal its multi-level nature, consisting of diverse legal forms that operate therein, from formal agreements such as the World Bank's Articles of Agreement, to the EU's treaties and German domestic legislative framework, to the detailed and formalised administrative regulations such as the World Bank's Operational Policies and Bank Procedures. Within this he recognises international soft law such as the UN's Millennium Development Goals declaration and similar instruments in relation to climate change. Secondly, he suggests that some core *doctrinal* "building blocks" can also be discerned using this approach. These are the "complementarity" of development co-operation planning;[99] "risk oversight" in which conditionalities emerge. Notably, Dann defines a conditionality as "[a] rule which makes the disbursement of ODA dependent on a certain condition or which attaches sanctions to non-compliance."[100] He proposes this is similar to the

[98] These are Dann's terms. Ibid 500-501. Note the parallel with human rights terms such as the duty-bearer and rights holder, however a relation to or link with human rights concepts is not identified or developed. He identifies three "constituencies" for accountability – people affected by projects in developing countries; recipient governments and taxpayers in donor countries, for which the existence and nature of standards of conduct and sanctions against misconduct, would help significantly. However, he points out that most of the standards that exist are set by 'power wielders', are not independent and often remain internal to the administration. Where peer review happens, standards there are also set by donors.

[99] By this he means that the "[g]ranting of autonomous decision-making power in *one* phase to *one* actor is combined with the obligation (and thus the complementarity) of following decisions and actors to respect the previous decision." Ibid 508. (Emphasis in original)

[100] Ibid 509.

compliance methods used in welfare administration law. [101] Thirdly, and perhaps most importantly in terms of considering the merits of the conceptual and methodological innovation that he develops from this study vis-à-vis the identification and use of the four principles, he suggests that the principles method offers one response to questions about the role for law in addressing the legitimacy of development co-operation. Asserting that "[L]aw and legal analysis can help classify arguments, examine the normative justifications for various approaches and rationalize the discourse,"[102] he suggests that the four principles serve as a useful instrument of analysis. [103]

And yet, an ambivalence can be detected.

> "The problem of imbalance of influence and interests runs through levels of development cooperation law, national, supranational and global alike. It is rooted in the transnational nature of development co-operation law, in which the most affected party, the people in developing countries, is structurally excluded from holding the donors directly accountable. Global development-aid law… provides a number of alternative devices. But these seem often to miss the political dynamics.'[104]

More recently, Dann has reflected further on the nature and the location of LCDO within wider legal scholarship. [105] On the former, while repeating many of the features elaborated in his monograph, he adds further detail including that the transfer of finance is now matched by the transfer of knowledge; that there is potential for "market-driven, bottom-up or experimentalist approaches" to the delivery of finance, in contrast to the top-down, donor-dominated, multi-

[101] This view is clearly at odds with Tan's definition of a doctrine of conditionality that distinguishes a due diligence purpose from a disciplinary purpose within conditionality. Supra note 46 footnote 6.
[102] Dann, supra note 69 at 511
[103] He claims that this analysis reveals that the law of the World Bank is more open to human rights protection and thus adheres more to the principle of individual autonomy, whereas the EU's development co-operation law 'displays particular respect for the collective autonomy of recipient states.' He finds that the World Bank implements the principle of coherence and efficiency better than the EU and Germany. Ibid 512.
[104] Ibid 504.
[105] Philipp Dann, "Institutional Law and Development Governance: An Introduction," (2019) 12 L & Dev Rev 537.

year planning model that characterises the field, while repeating features identified in his 2013 monograph (the multi-level, heterarchical nature of the transfer of finance, and finally, the asymmetry of the partners involved). [106] On the latter, he places LDCO at the nexus of international institutional law, and "law and development" studies. [107] Most notably with his recent intervention, he perceptively (in my view) acknowledges that the institutional law of development "is already an example and testing ground for research on global legal regulation," because of its multi-level and multi-actor characteristics, and the political and economic policy valence of development itself. [108]

At this point, before moving onto discussing Tan's monograph as an example of a critical piece of primary material on the international governance of ODA, I will analyse Dann's overall contribution to the international governance *of* ODA from a critical perspective informed by the questions posed in this thesis. His is an ambitious project and constitutes a very notable contribution to legal research on the international governance of ODA. It reveals the main legal (both hard and soft law) instruments used by three influential international donors, and by delineating the ODA process into four phases, and identifying and proposing structural and legal principles for LDCO, offers a well-thought out and clearly articulated framework of analysis. However, for the questions that animate my project, Dann's contribution is constrained in two ways. The first lies in the approach to law and to development co-operation

[106] Ibid 540-542.
[107] In my view, law and development scholarship spans a continuum from liberal, normative approaches strongly based on classical economic theories and institutional approaches to law, to more critical analytical scholarship. It appears that Dann's interventions lie perhaps more on the former than the latter, though he refers to several publications that I would locate on the more critical end of the continuum such as David Trubeck & Alvaro Santos, *The New Law and Economic Development* (Cambridge: CUP, 2009) and Anne Orford, *International Law and its Others* (Cambridge: CUP, 2006).
[108] Ibid 599.

that underpins Dann's approach to his project. This is revealed as liberal and formal in its approach. The second focuses on the principles-focused aspect of the methodology he utilises and the extent to which it can address the heuristic, evaluative and normative roles he envisions.

Underpinning Dann's approach is a liberal and largely ahistorical approach to law and to development that are, I suggest, ultimately problematic for the aims of his project. While Dann's monograph includes a critical awareness of the context of LDCO (there are frequent acknowledgements of the political dimensions of the development project), and of the donor-recipient ODA relationship,[109] this does not extend to a consideration of how international law (and the GAL processes which he proposes) may be deeply enmeshed in the facilitation of a development project that is, itself, highly contingent and contested. Though references are made to TWAIL authors and post-colonial legal ideas, the deeper critiques offered by these thinkers on (international) law's co-determinant relationship with colonialism and development remain conspicuously absent in Dann's work. This is perhaps most clearly discerned in his approach to the sources of LCDO – these are primarily the doctrine of international law and donor law. No reference is made to the existence (or not) of relevant law of aid-recipient states, or of other international legal entities (such as regional international organisations with a strong development remit, of which all African states, for example, are members).

[109] Thus, though he references critical development studies and TWAIL scholarship, the deeper, systemic insights revealed by that scholarship remain unaddressed by Dann, and thus leave the politics of his project open for further scrutiny. As Hoffmann puts it, 'While he shows an impressive breath of reading in both 'law and development' and in development studies, and an admirable ability to present these literatures concisely, he tends to go for lowest-common denominator understandings that fudge taking on some of the field's more contested issues.' Hoffmann (2017), supra note 141 at 274.

Similarly, his definition of development is significant. He proposes it as "an ongoing process of taking decisions about public choices to better the lives of those affected by poverty…. [I]t is about public choices and about the power to decide. It is about using and creating freedoms. It is political." As Dann himself acknowledges, this definition is primarily procedural in approach,[110] with a belief that in instances where political imbalances hold sway, these can be mitigated by "fair procedural rights." [111] These, I suggest, display a liberal mindset both in the view of development (its purpose is primarily about the realisation of individual freedom), and in the approach to law in that project (law as a bulwark against power; politics and the state are distinct from the economic realm). This stance orients the subsequent analysis to overlook the significance of history and other structural causes and influences of mal-development. [112] This perspective is further revealed in his choice of terminology. While the term "development co-operation," Dann notes, has no agreed definition, the term emerged in frequent use in Germany in the 1990s "since co-operation better suggested the element of an equal partnership." He rationalises the use of this term in this project because of its egalitarian

[110] Dann (2013), supra note 134 at 25.
[111] Ibid at 18.
[112] This definition echoes Amartya Sen's influential 'Development as Freedom' which has been critiqued for its absence of a consideration of historical, structural and material causes of inequality. As further evidence of this 'history-lite' approach to development, Dann describes the history of development as beginning in the Cold War era – '[I]International development policy is a child of the Cold War.' Ibid 35, and spanning two epochs – 'formative years' (1945-1975) and 'years of transformation' (1975 – present). These contain five periods that correspond to distinct paradigms in development co-operation – 'emergence and improvisation' (1945-1965); breakthrough and contestation (1965 – 1975); 'stagnation and instrumentalisation' (1975-1990); 'expansion and rejection (1990 – 2000), and 'aid effectiveness'/'rise of the rest' (2000-present). This characterisation broadly matches thinking from others in the law and development movement. David Trubek and Alvaro Santos, 'Introduction. The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice,' in David M. Trubek, David M Kennedy, Duncan Kennedy & Alvaro Santos (eds) *The New Law and Economic Development: A Critical Appraisal*, (Leiden: Cambridge University Press, 2006) at 1.

promise as "a co-operation among equal partners."[113] Thus, Dann's approach to the governance of ODA could be described as liberal and utopian in orientation.

One of the most noteworthy achievements of Dann's project is an identification and collection of the instruments most associated with the governance of ODA. Dann takes a conventional formal approach to this task with international agreements; organisational mandates with the status of law; legislation; regulation, and formalised administration instruments as the prime building blocks of this architecture. While this is not unusual, what emerges from this approach is a hierarchy that ascribes normative weight to the formal quality of law, a tautology that does not always match reality, and though replicated in his ascription of structural and legal qualities to the organising principles he selects, the inherent contradiction within this approach is not addressed. Thus, while he recognises the existence of soft law instruments and mechanisms such as international and regional development policy frameworks and international peer review mechanisms, his treatment of them has a number of implications that are troubling for the aims of his project. Their normative role and weight in the field of development co-operation; their relationship to the LDCO framework that he has identified, and their influence on donor policy development and administrative approaches is under-recognised.

[113] Dann (2013) supra note 134 at 25. This is despite Dann's self-awareness of the politics of language and word choice in discussing this topic. He recognises that terms like 'governance', 'ownership' and 'aid effectiveness' can 'conceal more than they reveal and hide the intentions of the instruments behind them'. To address this double-bind, Dann (curiously) seeks to 'preserve a somewhat autonomous language of scholarship', by not taking 'cues from organisations and political declarations, but rather from scholarly practice – and, of course, the law.' Ibid 26. From this I detect, and sympathise with, an internal debate on the positioning of the researcher and the nature of the critical stance. While one can sympathise with this sentiment, perhaps this small decision betrays a scholarly sensibility more attuned to utopia over apology which may explain the orientation of his subsequent analysis. In this section on Dann's work, I use the term 'development co-operation' as Dann uses it.

This is evidenced in his treatment of conditionalities, which within the formal framework outlined above, would rank somewhere mid-way above soft law instruments and organisational policies, but below legislation and international agreements. Conditionalities, and their exercise, are viewed as largely technocratic exercises in legal terms, in spite of Dann's recognition of their impact on the legal principle of collective autonomy. However, for the aid-recipient state, the application by the donor of a combination of normative ideas such as those on good governance, along with conditionalities, whether delivered through results-based financing or project aid[114] may constitute far stronger normative weight and disciplinary effect, than the existence and implementation of a formal law or regulation. [115]

This approach betrays a dual sensibility that has implications for the aims of his project. First, Dann adopts an idea of power in global governance that is largely structural and institutional in nature and overlooks other forms of power that can be more productive in nature. [116] Secondly, the combination of a limited view of power with a liberal view of law, one that largely excludes consideration of the normative weight of soft-law instruments, means that the aim of fostering greater accountability though this method may only ever be partially achieved.

The following second strand of my comment relates to the methodology that Dann utilises to develop the principles based on the GAL method that he applies to the administration of ODA,

[114] Note that ODA can take multiple forms and can often be a combination of these.
[115] Dann states that organisations, and donor and recipient states have formal human rights obligations – they constitute one of his legal principles of LDCO.
[116] Barnett & Duvall describe power in their original article as follows – "Compulsory power exists in the direct control of one actor over *the conditions of existence and/or the actions* of another. Institutional power exists in actors' indirect control over the *conditions of action of socially distant others*. Structural power operates as the *constitutive relations of a direct and specific—hence, mutually constituting—kind*. Productive power works *through diffuse constitutive relation*s to produce *the situated social capacities of actors*." Michael Barnett & Raymond Duvall, "Power in International Politics," (2005) 59 Int Org 39 at 48. Emphasis added.

the activities of development co-operation and the conceptual innovation that his research brings. Currently, administrative law is most well developed at the national or sub-national level, where the institutions of the executive, the legislature and the judiciary, and the checks-and-balances approach of each, are clearly enunciated and taken together. Governance relations, and the rights, duties and obligations of actors and entities in each are relatively clear. At the supra-national level, this scenario is completely different. While the equivalent of a 'legislature' and 'executive' may exist, their mandates and modus operandi can vary widely, and a dedicated 'judiciary' is frequently absent.

This brings us to a reflection on the wider political implications for legal projects that draw from this methodology. As described earlier, the impetus for the GAL project is a strongly democratic one, committed to the equalisation of power relations at the transnational level, greater transparency and accountability and thus perhaps lending greater legitimacy to certain projects pursued through this process. While cautious, and sometimes even skeptical[117] notes can be discerned in this research, the wider political ramifications of the emergence of a body of 'global administrative law, and a body of legal scholarship that is largely unquestioning of the merits of this development, need to be raised.

First, by relying largely on pre-existing legal instruments and mechanisms from which legal devices such as principles are derived, such projects risk continuing or repeating some of the conceptual and institutional orientations and blind spots that have contributed to problems with transparency and accountability in the first place. Secondly, the adoption of an

[117] Carol Harlow, "Global Administrative Law: The Quest for Principles and Values," (2006) 17 EJIL 187.

administrative approach, which largely relies on the development of internal bureaucratic instruments, to resolve or address what are fundamentally political issues, without at the same time, drawing attention to wider reform of the institution and the context in which it operates, risks depoliticising and neutralising the claim assertion process and end up further legitimising the authority of the institution as the source of normativity. Thirdly, the adoption of a largely positivist approach to law, where legal instruments are identified as 'hard' and 'soft' and greater normative and political weight is attributed to the former, overlooks the different normative effects of the combination of instruments operating together and over time. It also fails to recognise the potential of any link between the nature of the political project proposed – in this case, a neoliberal approach to development – and the legal and juridical quality of the governance framework adopted to achieve that goal. This last point is a key focus of my thesis.

Governance through development

If Dann, and his companion GAL authors on the activities of international organisations in development, focus on governance *of* ODA, Celine Tan's monograph focuses on governance *by* ODA. Focused on the analysis of PRSPs by the World Bank[118] and through an analytical lens informed by Foucauldian approaches to discipline and biopower, [119] Tan argues that PRSPs are a new form of discipline of Third World states, representing both a continuation and extension

[118] Announced in 1999, PRSPs were to be the new framework for regulating access to debt relief and concessional financing for low-income countries by the World Bank and the IMF. They replaced Policy Framework Papers as prerequisites for financing from their concessional facilities. Thus, the IMF replaced its Enhanced Structural Adjustment Facility (the fund for its discredited structural adjustment programmes) with the Poverty Reduction and Growth Facility, and the World Bank introduced Poverty Reduction Strategy Credits as new financing instruments.

[119] Tan (2011), supra note 40, 219-220.

of colonial and imperial control, respectively, via the Bretton Woods Institutions (BWI).[120] She views PRSPs as a new social contract, where the terms 'poverty reduction,' 'country ownership,' and 'partnership,' discoursively anchor a new disciplinary framework whereby aid-recipient states seeking concessional financing and debt relief must subject themselves to a targets-led set of reforms. She perceptively conceptualises the application of conditionality by World Bank and IMF as a *doctrine* in order to capture the distinction between the application of conditionality (as due diligence) in order to minimise the risk of debt default or a departure from agreed financing objectives, and the far greater scope and much more intrusive exercise designed to discipline the recipient state via the pursuit of domestic legal, regulatory and policy reforms established by the financier. [121]

Tan's research shines a deep light on the legal content and effects of reforms proposed in PRSPs and in their periodic assessments by Joint Staff Advisory Notes. Though not framed in this way, in my view, her work clearly shows the legal purchase and effects of bureaucratic instruments of governance of the BWIs that masquerade as instruments of development. She carefully reveals how the status and roles of Third World as a collective of states, and as individual states in themselves, are carefully contoured to meet Northern economic and political imperial interests, through the medium of the BWIs. [122] However, though the legal effects of these instruments, and their significance to the creation and maintenance of the wider unequal international political and economic order are clearly elaborated, Tan's analysis

[120] Ibid 36-37. She terms the BWIs as "the ideal institutional framework for the management of such post-colonial economic structures and relationships." At 41.
[121] Ibid 95-96.
[122] Important parts of her research are captured in Celine Tan, "The New Biopower: Poverty Reduction Strategy Papers and the obfuscation of international collective responsibility," (2011) 32 Third W Qtly 1039.

focuses on how BWI PRSPs, as a single influential instrument alone, are key to mediating political power and constructing a particular legal and political subjectivity for aid-recipient states. Though the World Bank is arguably one of the most powerful donors, and thus norm-setters on ODA policy and governance, Tan's rich analysis of the World Bank as a donor relies strongly on the highly detailed institutional instruments, practices and mechanisms that have been developed within that governance space alone.

3. Secondary literature

As I mentioned earlier, I identified a separate body of legal literature, a secondary strand, with three sub-strands that separately, shed light on aspects of the legal quality of the governance framework of ODA – but by proxy. By this I mean that this literature is helpful to revealing aspects of the international governance of/by ODA, though it does not explicitly address ODA per se. The first of these sub-strands develops the concept of international public authority (IPA), and its thinkers, and thought, have informed the Global Administrative Law approach to LDCO that I have analysed earlier. In this strand, concerns about promoting greater transparency and accountability[123] of international organisations, entities and actors involved in deciding and undertaking activities that have clear and demonstrable impacts on the lives and

[123] P.A. Nollkaemper & Deirdre Curtin note that accountability in international law has predominantly been viewed through a state accountability-for-wrongfulness lens and state liability doctrine. Accountability in this governance context, they write, is a much broader concept involving giving account to and holding to account, and with retrospective and prospective dimensions. It addresses not only legal accountability, also includes political accountability and administrative accountability. P.A. Nollkaemper & Deirdre Curtin, "Conceptualising Accountability in International and European Law," (2005) 36 Netherlands Y Int'l Law 3. In the context of relations between states and international organisations with differing levels of power, where their decisions and activities can significantly affect people and communities distant from those sites, it is necessary to be explicit on the extent to which legal, administrative and political accountability mechanisms take account of the cost/benefit *effects* of certain events and processes, as well as considering the mix of different accountability processes that give meaning, in practice, to the term.

freedoms of distant subjects and how to promote more democratic ownership of those entities and their activities has long been a source of legal debate.

International Public Authority

In liberal democracies, it is the role of public law to frame the exercise of public authority in such a way that balances considerations of liberty with others such as efficiency etc.[124] It does this by nominating appropriate institutional settings, fair procedures, substantive standards, judicial review and other forms of accountability. In doing so, it provides legitimacy to public authority to such an extent that a legal framework is now considered an indispensable, if not sufficient, element of legitimate authority. [125] The existence of public law delineating the nature and operation of public authority lends significantly to the transparent exercise of public power, thereby further contributing to its legitimacy. At the international level, this idea of public authority gets more complicated, with a much more varied and complex range of actors and institutions involved in the exercise of governance. These trouble an easy notion of international public law mirroring that of public law at the national level, with the high prevalence of informal, non-binding and non-legal international instruments as policy instruments used in plural governance arenas instead of law. In this context, the concept of international public authority (IPA) has emerged. It captures authority that is exercised on the basis of a formal or informal international act of a public authority, designed to further a goal

[124] "[U]nderstood as a discourse of political right, public law takes shape as a set of rules, principles, canons, maxims, customs, usages, and manners that condition, sustain, and regulate the activity of governing the state. This discourse works to maintain the autonomous world of the public sphere, a sphere that achieves its distinctive position through arrangements that seek to reconcile claims of individual autonomy with the existence of a regime of public authority." Martin Loughlin, *Foundations of Public Law*, (Oxford Scholarship Online, 2010) at 10-11.
[125] Armin von Bogdandy & Matthias Goldman (2008), supra note 125 at 259.

that they define as a public interest, and that are mandated to pursue this. [126] Authority here is understood as the legal capacity to determine others' and to shape their legal or actual freedom. [127] In this definition, the 'publicness' of an exercise of authority, as well as its international character, depends on its *legal* basis, which in the international context, can include binding or non-binding international acts. [128]

How does this concept of international public authority enable law to better frame and analyse these multiple instruments of global governance, of varying legal quality, whose impact operates through many different modes of power? Drawing from a legal method prominent in Germany and Italy in the 18th century, von Bogdandy and Goldmann propose a doctrinal construct of a *standard instrument* as a reference point to identify acts of public authority that have a specific legal quality, as well as to rationalise and standardise the legal regime emanating from these acts. [129] Standard instruments, they propose, do not need to be of a binding legal nature, but this does not mean that they are insignificant for legal practice. Instead, once an act of international public authority has been identified as falling under the definition of a certain standard instrument, the standard instrument functions like a 'prism'

[126] Ibid.
[127] Armin von Bogdandy, Phillipp Dann & Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities,' (2008) 9 German L J 1375 at 1382-1383.
[128] This definition is appropriate in this context as we are focusing on Official Development Assistance and thus 'public' entities in the traditional sense. But see Goldmann for a later and further development of the idea of the 'public' which may be better suited to hybrids of public-private governance. Matthias Goldmann, "A matter of perspective: Global governance and the distinction between public and private authority (and not law)," (2016) 5 Global Constitutionalism 48.
[129] The authors offer a fascinating genealogy of the term and the specific socio-economic and political context that prompted its emergence. In Germany it arose as a response to wider developments that prompted a change in the perception of the relationship between the state and the individual, where rule of law was expanded to include the idea that public authorities had to adhere to a set of fundamental legal principles. The method they use is doctrinal constructivism that links the practice of international institutions with deductive reasoning guided by legal principles and considerations of legitimacy. Armin von Bogdandy & Matthias Goldman (2008), supra note 125 at 269, 280.

that "makes an entire repository of norms applicable to the activity under consideration" visible. [130] Thus, the standard instrument is both descriptive (identifying legal norms that are immediately relevant to its implementation) and normative (identifying legal norms that could or should be relevant). They define a "National Policy Assessment" (NPA) standard instrument as

> [T]he revelation of empirical information with a claim to objectivity by international institutions which concern the policy of another public entity and are coupled with an enforcement mechanism for future domestic policy, in particular iterativity, publicness, country rankings or specific policy recommendations. [131]

Having identified the NPA as a standard instrument, the next step is to define its legal 'regime'. von Bogdandy and Goldmann approach this task using the following assessment criteria - (i) an examination of its mandate and its legal status; (ii) its respect of scientific standards and the representativeness of its expertise; (iii) the (public) accessibility of the assessment data; (iv) a principle of 'national ownership' as an over-arching principle throughout the key steps in the production of the NPA (though they suggest that this is not given primacy over other principles), and (v) institutional autonomy in policy development (freedom from political pressure). From an assessment of the extent to which the standard instrument respects these

[130] Ibid 283.

[131] This definition is based on their assessment of the legal framework of the OECD PISA and criteria that constitute the PISA assessment and reporting process as being exercises of public authority. The criteria include (i) NPAs produce informational documents on the outcomes of public policies and may include explicit recommendations; (ii) the assessment includes a claim to objectivity based on empirical data; (iii) it includes an enforcement mechanism that equips the assessment with communicative power that future domestic policy can only ignore at some cost (this can be through ranking instruments; iterative assessment mechanisms etc.); (iv) it needs to be attributable to an international institution, and (v) the NPA needs to refer to the policy of another public entity. Ibid 287-288.

requirements, they propose that it may be considered legal or illegal under international law.[132]

von Bogdandy and Goldmann's standard instrument construct, and the theory and methodology that underpins it, represents an innovative attempt at capturing the legal quality of a highly influential instrument of public governance. While they recognise a number of normative critiques that can be made of this approach, [133] they overlook the constraints posed by the parameters of the legal lens that they apply. First, though the process of determining the legal quality of an NPA draws on several elements that combine both formal and informal instruments, it would appear that each element of the assessment process is accorded equal weight. [134] This is noteworthy and its implications for the effectiveness and authority of this instrument as a 'weighing scales' of legality remain unaddressed. By according equal weight to both formal and informal sources within the assessment process, the NPA instrument risks undermining its primary objective of contributing to the legitimacy of the NPA itself by equalising the value of legal and non-law sources as determinants of legitimacy.

Secondly, the outcome of that assessment is presented as a binary legal/illegal decision. While this kind of decision may have significant political salience in instruments where the outcome is a weighting or a ranking, in practice, the utility of a binary determination of legality is

[132] That aspect of international law they use as reference is Article 25 (a) of the ICCPR which states 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;'

[133] The extent to which sub-state entities' interests and participation are facilitated and the challenge of capturing a wider ripple effect of pronunciations of an NPA on other determinations of an international legal nature such as, for example, in relation to the production of periodic international human rights reports ibid 294-298.

[134] Thus should 'national ownership' be equated more weight than 'public accessibility of data'?

questionable, given the complex nature and composition of the NPA, and the highly politically and otherwise-invested context in which NPAs are developed, implemented and utilised. Thirdly, the NPA instrument assessment process is narrowly self-referent in its focus. It excludes consideration of whether the NPA as a governance instrument meaningfully contributes to the public welfare objective under which it was developed. Furthermore, and an issue of central importance to this project, while the concept of national ownership signals implicit recognition of the need for all participating or affected states to have their stake in the policy instrument in question recognised, surprisingly the authors do not elaborate on the content of this concept or identify possible features through which this quality of the instrument might be assessed. [135] They uncritically accept the normative rationale behind NPAs, a stance all the more surprising given the partial membership of the OECD, the international organisation under analysis for their case-study.

Epistemological governance – the World Bank

A second sub-strand of the secondary literature has focused on the World Bank and on distinct mechanisms and instruments that have a governance role within that organisation. One part of this literature has focused on the production of knowledge instruments and the development of monitoring exercises influential to World Bank and wider international development policy-making. These are indicators and rankings of states on development-related activities such as "Doing Business" or the "Worldwide Governance Indicators."[136] These have ontological,

[135] It is clear from their discussion of the reasons for including 'national ownership' within the legal 'regime' of an NPA is instrumental – in order for the NPA, its results and methodology not to be questioned. Von Bogdandy & Goldmann (2008) supra note 125 at 291.

[136] See generally, Kevin E. Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Merry (eds), *Governance by Indicators: Global Power Through Quantification and Rankings*, (Oxford: Oxford University Press, 2012);

epistemic and very real legal effects on policy prescriptions by the World Bank,[137] and on states seeking to attract investment, in particular and, as a rich body of legal literature now shows, rely heavily on implicit ideas about law's role in development,[138] and thus on ideas about law in general. [139] This literature offers much insight into how particular knowledge technologies that are central to international development policy making, and decision-making on development policy at national and international levels, contain within them particular ideas about the world, about law, and about the right role of states and markets. Another, separate part of this literature focuses on how mechanisms such as the World Bank's independent Inspections Panel, and organisational practices such as its environmental and social standards for Investment Project Financing, (the Environmental and Social Framework (ESF)) have been examined in relation to their conformity with international human rights law or international organisations' law. Here, in addition to examining the legal nature of the ESF according to the World Bank's own internal law, and international organisations law, recent reflections have focused on the influence of World Bank rules on law in practice beyond that institution, including on the responses of other international financial institutions to their own lending. [140]

Specifically, Tor Krever, "Quantifying Law: legal indicator projects and the reproduction of neoliberal common sense," (2013) 34 Third W Qtly 131. More recently, Dimitri Van Den Meerssche, "International Organizations and the Performativity of Measuring States," (2018) 15 Int Org L Rev 168.

[137] And by other entities such as other international organsiations and donors that use these instruments in their own decision-making.

[138] An influential thought leader in Bank thinking is Douglass North. Douglass C. North, *Institutions, Institutional Change, and Economic Performance*, (New York: Cambridge University Press, 1990). For a critique of North's thinking, see Julio Faundez, "Douglass North's Theory of Institutions: Lessons for Law and Development," (2016) 8 Hague J Int Law 373.

[139] David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press, 2016). Ralf Michaels, "Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law." (2009) 57 A J Comp L 765.

[140] Philipp Dann & Michael Riegner, "The World Bank's Environmental and Social Safeguards and the evolution of global order," (2019) Leiden J of Int Law; Giedre Jokubauskaite, "The World Bank Environmental and Social Framework in a wider realm of public international law," (2019) Leiden J Int Law.

This has signalled a welcome engagement with debates on the evolution of law and legality in global ordering more widely.

ODA as international finance

A third strand of the secondary literature relates to the legal location of ODA as an activity of international finance. I include this as an example of how, even when development finance is recognised as an explicit area of international activity, the focus can be more on the legal personality of the actors involved than of the ODA activity itself. Thus ODA, for Sarkar, would be included in his new "discipline" of international development law, in ways similar to other kinds of financial transfers. He defines the scope of this field as relating to (1) cross-border financing, (2) trade, and (3) technology transfers because "the engine of the global economy is fuelled by the exchange of capital, commodities, and technology." Within this body of law, he includes state actors as well as institutional "players" such as the multilateral banks (the World Bank, the European Bank for Reconstruction and Development etc.) and bilateral aid agencies (such as the UK's Department for International Development (DFID), and the US' Agency for International Development (USAID)), with each having different rights, duties and obligations. Similar to Dann, the proposes that "fundamental" principles such as mutuality, a duty to co-operate, equitable participation in development and transparency would underpin international development law, to be supplemented by contextual, and absolute legal norms, and backed by an institutional framework for enforcing rights. In elaborating a new field of development law, Sarkar's quest is to explore ways that existing law can be augmented through

principles etc. in order to make influential development actors the World Bank, the International Financial Corporation (IFC) etc. more accountable. [141]

4. Conclusion

In this chapter, I reviewed the main strands of legal literature that have addressed law in, and the legal nature of, governance of and by ODA. In my analysis of this literature, I delineated two strands – a primary one that explicitly addressed either the governance of ODA, or governance by ODA from a legal perspective, and a secondary one, that addressed relevant aspects of the governance of development that relate to this, but by proxy. By this I mean that insights in this latter strand offers insights into the international governance of ODA, even though ODA is not the prime focus. As I mentioned in Chapter one, legal scholarship on the governance of ODA has only recently emerged and begun to consolidate. Dann's work in this field is both path-breaking and innovative, and the underlying approach to his research – relying on a liberal view of law, inspired by insights from Global Administrative Law and pursuing a normative agenda – informs the secondary literature as well. These characteristics, however, also serve to limit its critical analytical potential. By contrast, Tan's work on the BWI's PRSP framework holds far more critical purchase for this research. Her research exposes the highly normative project of legal and regulatory reform pursued by a doctrine of conditionality and how the PRSP's disciplinary approach to governance subtly but powerfully contributes to the maintenance of a

[141] Similarly, Quereshi & Ziegler include a chapter on 'International Development Law' in their book on international economic law, thereby identifying international development law as an element of international economic law. They highlight that international development law "suffers from a lack of a proper constitutional and institutional framework in the international sphere," though they recognise that legal analysis of the approach of the World Bank to development financing is well established. See Asif H Qureshi & Andreas R Ziegler, *International Economic Law* (London, Sweet & Maxwell, 2011) at 618-619.

wider international legal and political order whereby the Third World will always remain an object of international law and a subject for intervention. Thus, the full sovereign political and economic equality of Third World states will always remain elusive.

In the secondary strand of literature, a duality in approach of liberal-normative, and more critical-analytical approach can also be discerned. Thus, Von Bogdandy & Goldmann's innovative work in legally developing the concept of International Public Authority, and a National Policy Assessment as a "standard instrument" that warrants legal scrutiny, towards ensuring that the power wielded through this instrument is legally 'named and tamed' is perhaps more reflective of the former approach.

Recent legal attention to the World Bank's knowledge instruments and its ESF have directly engaged with the legal and ordering effects of its internal organisational policies and mechanisms in ways that lean more towards a critical and analytical perspective. Here, the nature of law and legality is viewed with more ambiguity than in the liberal approach, and the way that these governance instruments manifest and wield power becomes more context-specific and nuanced. Thus this literature, in particular on governance through indexes and indicators, reveals both the legal constitutive effects and methodology of these (formally) non-legal instruments. In a similar way, Tann's work on the Bank's PRSPs explicitly draws from a Foucauldian lens in order to reveal how PRSPs wield World Bank power in ways that use law and legal reform as a key governance axis. In each of these instances, what are identified as essentially technocratic instruments, become key sites and modalities for, not only norm diffusion, but in doing so, a wielding of a particular kind of power, through which new regimes

with their own internal orders are created and consolidated, and new realms of social activity are opened up for intervention.

Chapter 3 Governance through a jurisdictional lens

1. Introduction

In Chapter one, I described Official Development Assistance (ODA) as an influential and politically sensitive area of international activity that raises challenging questions on how its international governance framework enables a skewed wielding and mediation of power in favour of donors, along with an unbounded scope for donor intervention into the deepest areas and aspects of domestic policy and institutional governance in aid-recipient states. Key to this power dynamic, I argued, was the operation of a synergy between the legal nature of, and role of law within this international governance framework, and the role for law articulated in the development project widely pursued by donors through ODA. I hypothesised that there is symbiotic relationship between the legal form of the international governance *of* ODA, and the role of law and institutions articulated in the development model to be pursued *by* ODA, (or governance *by* ODA). I described the EU's approach to Budget Support and the UK Department for International Development's (DFID) current intervention in the Tanzanian Public Financial Management Reform Programme Phase V (2017/18 – 2021/22) as an example of this governance dialectic. In Chapter two, I examined contributions from legal scholarship that have analysed the governance of ODA, and activities by the World Bank as a key international donor that are revelatory of governance *by* ODA. The literature on donor governance of development co-operation is based on a strong liberal approach to law, one that is challenged to capture the breadth of the ways that law and legality operate in the international governance of and by ODA. In my view, though a laudable democratic and egalitarian impulse clearly underpins the contributions of Dan, Reigner and Global Administrative Law theorists, their proposals on law

and legal innovation to address and remedy the ways that donors continue to manifest and maintain an unequal power relation over aid-recipient states, may be partial at best. This is because several potent feature of ODA exist that militate against this. These include, first, the influence of colonial modes of governance on contemporary international governance including international law, international organisations and international administration. Secondly, the breadth of the range of governance instruments that are used by donors to govern ODA, from formal law, to institutional mechanisms, to the knowledge instruments and devices that rely on data to make social life cognisable and amenable to international governance remains overlooked. Similarly, thirdly, the temporal dimension to ODA governance – its reliance on time-bound plans, and the recurrence and repetition of governance practices over time – remains invisible. Finally, and crucially, they fail to fully grasp how ODA and its governance construct and maintain a legal world, one that is highly particular to ODA but that sits quite easily alongside, though invisible to, mainstream law. This legal world of ODA is one with a clearly differentiated approach to the sovereignties of donors and aid-recipient states and with a highly partial view of law. By contrast, Tan, Trevor and van der Meerssche have gone beyond "black letter law" in their respective analyses of the range of ODA governance technologies that effect legal change, that construct and promote a particular legal world view, and that work with law in maintaining the unequal power relation the heart of the ODA relationship. However, though the latters' analytical lens have shed new light on the intricacies of this relationship, three important questions remain to be explained.

The first is the incredible transnational reach of ODA regardless of the existence or not, or legal nature of, the governance framework at the domestic level of donor or aid-recipient state.

ODA, and its governance, seamlessly engages a myriad of different public legal entities (including international organisations, regional organisations, and donor and aid-recipient states), across every area of domestic, regional and international policy captured by the term development. In doing so, the reasons for this quality of legal transcendence must be taken seriously. Secondly, in spite of a lack of an international legal agreement, and the diversity of legal regimes that exist across donors and aid-recipient states,[142] there is remarkable similarity and cohesion to the type of governance instruments used. While bureaucratic and technocratic governance technologies predominate, their ability to seamlessly and silently graft onto the *legally*-sanctioned democratic and domestic policy processes of aid-recipient states (and of donors) is remarkable. This ability to effectively and simultaneously engage with legal and non-legal frameworks warrants further attention.

If the former two factors relate to the legal quality of the internal international governance framework of ODA, the third factor focuses on its external recognition by domestic and international law. What is unusual here is the fact that a clearly differentiated legal subjectivity - with donors allocated greater agency and authority (in many cases, executive authority) over that of aid-recipient, a differentiation sanctioned by the current international governance framework of ODA – remains unrecognised and unchallenged by international law. This occurs in spite of the international legal principles of formal sovereign equality of states and non-interference in the domestic affairs of states being legally recognised by multiple international treaties, and operationalised in the decision-making in international organisations such as the

[142] It crosses common law, civil law, Islamic law and other legal regimes. It also crosses different governance levels including international, transnational, regional, national and sub-national.

United Nations.[143] The fact that an international governance framework that promotes such a differentiated and highly unequal subjectivity, and facilitates such an intimate intervention by a donor state in the domestic institutional affairs of the aid-recipient state, begs further investigation. At a minimum, it arguably constitutes a legal anomaly.

This chapter and the one that follows describe a theoretical approach and analytical lens that holds these three legal questions in view - the transnational, juridical and unequal[144] nature of the international governance framework of ODA. It draws insights from legal philosophy and critical legal theory with respect to the concepts of jurisdiction and the signature, with this chapter focusing on the former and the following chapter focusing on the latter. In this chapter, I describe the thinking of several critical thinkers in law and legal studies on the concept of jurisdiction and I examine how this concept has potential to address several aspects of the queries described just above on the international governance framework of ODA. The next chapter draws on philosophical concept of the signature and I use this to elaborate the idea of the *governance signature* of the international governance of ODA. With this concept, I aim to capture the particular legal features of the governance of ODA such as its juridical nature[145] and

[143] See the Preamble to the Vienna Convention of the Law of treaties "….sovereign equality and independence of all States, of non-interference in the domestic affairs of States." United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. See also Articles 1 and 2 of the Charter of the United Nations. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

[144] The ability of the international governance framework of ODA to articulate and enact a differentiated subjectivity for donors and aid-recipient states, one that gives executive authority and greater agency to the former, contra the legal articulation of the

[145] As I mentioned in Chapter one, I mean the term juridical to refer to qualities that we might associate with formal law in terms of form and function, that are attributes of (in this case) governance instruments that are not formal law. These qualities include the presence of an absolute authority; an ability and expectation of determinative decision-making; practices and methods that are recognisable by the authority (and to law) as legitimate (such as a clear mode of reasoning, the production of written reports etc.), and perhaps most importantly, processes that create a status (such as legal and illegal) and subjectivity with an ascribed agency that is also recognisable to law. An example of the latter is how the international governance framework on ODA on relations between donors and aid-recipient states, utilises concepts such as 'country ownership' (for aid-recipient

its approach to juridification, its internal legal logics and its performativity. These features are challenging for mainstream legal analysis to engage with, but in my view, they enable me to identify key features of the legal form of the international governance of ODA, and show how these make the international governance of ODA so responsive, dynamic and so at ease with formal law. I use literatures from both the jurisdictional strand and the governance signature strand to develop an analytical lens that first, approaches ODA as a jurisdiction in its own right and describes the key elements that create and fortify it as a jurisdiction, and secondly, that focus on how it legally acts and is maintained as a jurisdiction through its particular governance signature. Chapter 5 on methodology, I describe in greater detail how I use and apply this lens in my analysis of the international governance of ODA in order to address the research questions posed in this thesis.

2. Thinking with jurisdiction

As a concept, jurisdiction is central to the framing of the legal world. Historically, jurisdiction has mainly been approached from a legal technical and positivist perspective as referring to legal powers.[146] More recently, however, contributions have examined it from more pluralist

states) and development 'partner' (for donors) that draw from ideas on sovereign equality within international law that underpins formal international relations. In practice however, through DAC-produced standards and guidelines, these terms disguise the wielding of a very particular kind of political power, namely decision-making authority without recourse to question or redress by donors over aid-recipient states. In this way, these standards and guidelines are strongly juridical in nature – they contain prescriptions that shape the subjectivities and agency of different actors in ways that rationalise the wielding of power in a particular way. In using the term 'agency' I am largely referring to power – the power to do something, having power over something, and the ability to wield power.

[146] Adjudicative jurisdiction refers to the power to subject people or things to judicial process; prescriptive jurisdiction is the power to regulate the conduct of persons or things, and enforcement jurisdiction is the power to enforce law vis-à-vis persons of things. Anthony J Colangelo, "Jurisdiction, Immunity, Legality, and *Jus Cogens,"* (2013-14) 14 Chicago J Int'l L 53 at 55. Thus jurisdiction is a central question in conflicts of law for example, Mary Keyes & Brooke Adele Marshall, "Jurisdiction Agreements; Exclusive, Optional and Asymmetrical," (2015) 11 J Int Pr Law 345, but is predominantly approached from the technical standpoint of the scope, authority and limits of a body of law, an institution or the territorial boundaries of a state, and how it approaches scenarios from the legal

perspectives that include legal philosophical and historical standpoints.[147] The following sections provide an overview of three strands of contributions on jurisdiction that are particularly insightful when approaching ODA as a jurisdiction. The first examines jurisdiction as a space where the word of law is proclaimed and heard. It draws predominantly on philosophical approaches to jurisdiction that approach it as *the speech of law* and that explore the conditions and the context through which law is proclaimed, articulated and assumes authority and legitimacy. Writers such as Costas Douzinas, Mariana Valverde, Maria Drakopoulou and others have drawn from different interpretations of the etymology of jurisdiction to reveal distinct elements of the content and context of jurisdiction through which law and legal authority emerge. These hold particular relevance for understanding ODA as jurisdiction. [148]

The second strand focuses on how jurisdiction captures the movement of legal authority and legal norms boundaries and borders. This strand emerges from thinking from legal pluralist

perspective captured in that body of law. See the recently re-invigorated work of the work of the Hague Conference on Private International Law "Judgements Project, at https://www.hcch.net/en/projects/legislative-projects/judgments.' As an example of a 'classic' approach to jurisdiction within one body of law, see Lorand Bartels, "Jurisdiction and Applicable Law in the WTO," Society of International Economic Law, Working Paper 2016, No 18. For one that takes a more philosophical approach, but that still works within the formalist approach to international law, see Gregor Noll, "Theorizing Jurisdiction," in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law,* (OUP, 2016), 600. Another approach that acknowledges and seeks to address this disjointed approach to jurisdiction by identifying customary international law norms on the law of jurisdiction, see Cedric Ryngaert, *Jurisdiction in International Law,* (Oxford: Oxford University Press, 2015). While the latter kind of contribution is very valuable to technical and doctrinal issues of jurisdiction, it is not the approach taken to the concept of jurisdiction here.

[147] For a good overview of how the concept of jurisdiction has evolved and been addressed in international law, and the shortcomings therein, see Alex Mills, "Rethinking Jurisdiction in International Law," (2014) 84 Brit Y Int Law 197.

[148] Here I wish to state that in drawing from their etymologically-driven approach to jurisdiction, I am not stating that this is what jurisdiction 'is.' Rather, I have found their approach to be very insightful to considering issues of content and context that define and shape the form of a jurisdiction, and the particular cast to its governance therein. I thank Prof John Harrington of Cardiff University for probing the consequences of etymologically-oriented legal conceptual research.

Paul Schiff Berman, who considers the potential of the concept of jurisdiction to address doctrinal and conceptual challenges posed by globalisation, specifically on how legal authority and norms are applied across borders.[149] His intervention is especially helpful to how thinking with jurisdiction can address challenges to legal analysis from transnational activity. The third strand draws from ideas from Shaunnagh Dorsett and Shaun McVeigh that I use, in conjunction with the previous two strands, to define the main ingredients for the jurisdictional lens I use in in Part II and especially in Part III of this thesis.

3. Jurisdiction as *juris dictio* and the governance of ODA

If we focus on the etymology of the term jurisdiction, several facets of the concept are revealed to be particularly illuminating for understanding the legal quality of the governance of ODA. This includes, first, how a focus on decision-making helps better reveal its politics; secondly, the contingent nature of the relationship between the law-sayer and the law-hearer; thirdly, the significance of context - and history in particular – to legitimising and institutionalising this particular jurisdiction, and finally, the powerful role that the rationalities of the development project, and its articulation of a promise of a better future, play in charging its governance with a particular discoursive force.

The Latin *juris-dictio* links the noun *ius* with the verb *dictio*. Dorsett & McVeigh point out that *Ius* is usually translated as *law* and refers to the adjectival situation of conforming to law (*iustus*). When linked with *dicere* – the saying or speech of law – *ius* becomes performative. In

[149] Berman's contribution arises mainly from his reflections on the regulatory challenges posed by the transnational governance of electronic data and online communication flows. However, his analysis holds relevance for considerations of issues of jurisdiction beyond that area of transnational activity. See his definition of the concept of jurisdiction in international law as normative prescription, adjudication and enforcement. Paul Schiff Berman, "The Globalisation of Jurisdiction,' (2002) 151 U Penn L Rev 311, footnote 28, at 318.

the context of the Roman courts, *ius* and *dicere* are linked to the office of the *iu-lex* – he (sic) who states the law, and thus *juris-dictio* relates to the saying or the speaking of the law.[150] For the Greeks, the word for jurisdiction means the giving of *dike*, of "order and of the law" – jurisdiction as a "gift of law." Yet another source links the word for law *jus* with *justitia*, justice, whereby jurisdiction would be the diction of justice or justice's talk. Thus the etymology of the term jurisdiction captures a relationship between the creation of an order, law and power - the office/person that (gets to) speak law, and those that (get to) hear it; the words that inaugurate law; the words that contain what law is; the giving and the gift of order, underpinned by an idea of justice.[151]

Douzinas asks "[w]hich speech establishes its power to legislate in its act of speaking? Which utterance brings about this formidable result while uttering mere words? How does jurisdiction arise in its original form?" [152] This is the highly significant inaugural moment for law as it is "an act in which the law recognises itself as such, acts out its original right as law reflexively and, in doing so, institutes itself." [153] This is the boundary between law and politics, where the articulation of the singular (the body of the speech giver; the law-creating words and the law-

[150] Shaunnagh Dorsett & Shaun McVeigh, "Questions of Jurisdiction,"' in Shaunnagh Dorsett & Shaun McVeigh (eds), *Jurisprudence of Jurisdiction*, (Abingdon, Oxon: Routeledge-Cavendish, 2007) at 3. Douzinas describes other aspect of the etymology of the term. He writes that in the Roman context, as "law's speech," jurisdiction has two aspects. First, there is the diction that speaks the law (law's inauguration through words) and secondly, law's speech – what the inaugurated law says. Costas Douzinas, "The metaphysics of jurisdiction," in Shaunnagh Dorsett & Shaun McVeigh (eds), *Jurisprudence of Jurisdiction*, (Abingdon, Oxon: Routeledge-Cavendish, 2007) 21.
[151] "The law speaks and the law gives: the law gives its talk and this law-talk is associated with justice." Ibid 23.
[152] Ibid 22-23.
[153] Ibid *23.*

giving speech act) and the universal (the community of hearers; the subjects of the law) is "the linking of the juridical and the political that brings law to existence."[154]

In highlighting the significance of the original decision that precedes the speech, Douzinas states clearly that the decision itself constitutes "an act of law," [155] and views the link between the law-speech and its attachment to a particular community or polity as revelatory and reflective of the political aspect of law. Though Douzinas focuses on "grand law" such as a national constitution as an example of an instrument that demonstrates the link between the decision, the speech of law, and a political community, I extrapolate this relationship as having deep similarities with that of the international governance of ODA. For example, a focus on decision-making within a governance framework helps us identify the identities of the law *sayer'* and *-hearer*, the subjectivities of the decision-maker and decision-taker, and their relationship. As Douzinas points out "The law to speak must be one: only a unique individual can speak law."[156] I will show in the following chapters, how the decision-makers - the law-sayers - are exclusively those of Northern donor states (many are former colonisers), institutionalised via the Organisation for Economic Co-operation and Development (OECD) as an international organisation. I will also show how the executive and unilateral nature of this decision-making is hidden through powerful quasi-legal concepts of "partnership" and "country ownership."

[154] Ibid.
[155] Ibid 23. Douzinas is not the only legal theorist to focus on the significance of and the context for the decision as being a key characteristic of law.
[156] Ibid 25.

While it might seem obvious that the law-sayer has more power and authority than the law-hearer, Douzinas' treatment of this relationship urges a more contextual approach. While he acknowledges the violence at the heart of the inception of every law that disproportionately affects the law-hearer, [157] he focuses on the duality of the choice available to the hearing subject. Such subjects are, at the one time, free of and subject to law (they can ignore or seek to escape the law), but choose to hear the law. Douzinas urges consideration of the factors that influence such a choice. For both the law-sayer and the law-hearer, context is significant to enabling both to play their respective roles. This draws attention to the factors that create the conditions of possibility for the law-sayer to be in a position to, and to be conscious of, speaking law, and for the law-hearer to be open to hearing it. [158] *Hearing* creates the founding condition that invites or commands relationship to and inclusion in a particular kind of ordering, while also creating a particular kind of identity (a reduction (of so many diverse states predominantly in the Global South) to a particular kind of sameness (related to an ascribed status of under-development)) [159] that ultimately leads to legal subjectivity (however inaccurate or partial according to the subject's own self-defined identity), then our attention is drawn to the conditions and the instruments that create that openness to subordination and obedience in the law-hearer in the first place. Such a lens is helpful to locating and grounding the hearing

[157] Here he refers to Walter Benjamin's statement that there is something rotten in law, referring to the violence inflicted by law's inception and is manifest by such legal entities as the modern nation-state, which intrinsic to its very nature, excludes certain people, races and territories. Ibid 27. In the context of ODA, this could be analogised to the situation that whole varieties of states, peoples and regions become constructed as donors and aid-recipient states, involved in a narrowly-defined, if shared project of development.

[158] Does this echo Fuller's insight on the fidelity of legal subjects towards law as a relationship of active engagement with law?

[159] Costas Douzinas, "Violence, Justice, Deconstruction," (2005) 6 German L J 171 at 174.

subject in a material reality that reminds us of the significance of the context that is necessary for law to have authority and to be effective. [160]

On this, Drakopoulou points out that though jurisdiction appears to set apart the legal from the non-legal, [161] signalling a break from or a discontinuity with law's past, [162] she resists this inclination. Instead she draws attention to the proximity of this past to law's inauguration, highlighting that "the conditions of its possibility lie in the *a priori* positing of a time, space and mode of being that existed without this law, so that the axiom of non-law (or corrupt law) founds the new law's jurisdiction." [163] Thus, for law to exist, non-law is entirely necessary. In the context of the particular governance framework of ODA, this insight allows us to draw attention to the artifice of the binary presented as characterising the developed-donor and developing country-aid recipient state relationship, how they are delineated differently through the jurisdiction of ODA, in ways that ignore very real historical, institutional and material connections that connect both symbiotically. [164]

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[160] Note that consideration of the material and structural aspects of this context are frequently absent from legal perspectives on law in an international context, including Global Administrative Law, International Law and International Relations and Transnational Legal Theory.

[161] Drakopolou describes this as "the unfolding of law in pivotal acts of separation, isolation and delineation." Maria Drakopoulou, "Of the founding of law's jurisdiction and the politics of sexual difference. The case of Roman law," in Shaunnagh Dorsett & Shaun McVeigh (eds), *Jurisprudence of Jurisdiction*, (Abingdon, Oxon: Routledge-Cavendish, 2007), 33 at 33-34.

[162] *Ibid,* 54.

[163] *Ibid* 54.

[164] Thus, for example, "good governance" initiatives such as the Extractive Industries Transparency Initiative (EITI), the World Bank's Worldwide Governance Indicators project and the African Union's African Peer-Review Mechanism, operate on the basis of a fiction that the disclosure of state-level information will substantively improve accountability and transparency in domestic governance without addressing the international institutional dimensions that foster conditions of corruption and malgovernance. Examples of an international institutional dimension that has clear relevance for addressing corruption and malgovernance, but that remains beyond the purview of each of these initiatives is that of reform of the rules of the international tax system in order to address the prominence of tax gaps including off-shore tax havens. Siobhan Airey, "Rethinking how taxation might better finance the SDGs," in TNI, *Public Finance for the Future We Want* (forthcoming). Gabriel Zucman estimates that tax

Douzinas also exposes another important feature of the performativity of the law-saying speech act. He notes that though a particular law-sayer may speak (such as a judge or a legislator), they do so in the name of universal *silent partner* – that which legitimises their act of speech and gives authority to what they say. [165] This leads to the curious scenario whereby the law-sayer must offer authority and reasons for their legal claim; they must identify and justify the rationale for the call on the law-hearer. Thus, though there is a co-mingling of the individual (law-sayer) and the universal (the authority for the law) in the instance of the saying of law, there is also a concealing of the authoritative source of that universal. In the context of the international governance of ODA, Douzinas' insight draws our attention to the presence of a number of layered narratives that are operating simultaneously that authorise the role and the speech of the law-sayer. First, at the surface level, there is the immediate context in which the speech-act is performed (which is shared with the law-hearer). The location of these speech acts is frequently at the international political and diplomatic realm, in arenas where Northern donor states have greatest political power. Other sites include the work of international organisations such as the World Bank, the International Monetary Fund (IMF) and the OECD, where aid-recipient states' presence is legally limited to non-existent. [166] But second, there is the dominant narrative on development that legitimises the role of the law-sayer and

havens hide US$7.6 trillion, or 8% of the world's personal financial wealth. Gabriel Zucman (trans. Teresa Lavender Fagan), *The Hidden Wealth of Nations* (Chicago: Chicago University Press, 2015), 35-36.

[165] This can be God, the Kind, the People or law. Douzinas (2007), supra note 150. In the context of ODA, I suggest the 'deity' evoked is the imaginery of development, an idealised future for which sacrifice must be offered. Anne Orford, "Trade, human rights and the economy of sacrifice," in Anne Orford (ed), *International Law and its Others,* (Cambridge: Cambridge University Press, 2006), 156.

[166] In this I refer to the membership and voting arrangements of each of these international organisations that are articulated in their founding treaties, which give developing country aid-recipient states far less political power than their populations or membership numbers reflect.

rationalises the content of the "law" that is spoken. In an ODA context, this derives from several sources, including from historical civilization and development policy narratives, as well as contemporary international policy discourses around security, risk-management and sustainability. Though this need for authorisation from the "silent universal" marks evidence of what Douzinas characterises as an insecurity "that the claim will fail", it is at this point of disjuncture "…the gap between particular and universal or between performance and statement … [that]…both violence and critique launch themselves in law."[167] He notes that "[V]iolence is the closing down or forgetting of the gap…where the 'I' is forced to become part of the 'We,' of a community or a communion where we find our essence through the identification with the spirit, the tradition or the history of the whole."[168] Thus in (donors') pronouncing the "law" on a community of law-hearers (aid-recipient states), many other narratives on development are excluded, [169] or re-framed. [170]

"If jurisdiction tries to conceal its forceful creation of law and fake figuring of oneness, the repressed always returns and reveals the contingency of origins and the fragility of communal construction."[171] Thus, there is a double movement happening here – an affirmation of a

[167] Douzinas (2007), supra note 150 at 27.
[168] Ibid.
[169] Historically, these have been several articulations of ideas associated with 'development' at national, regional and international levels. Within the UN, there have been several, for example the various UN Declarations on Permanent Sovereignty over National Resources; the New International Economic Order, on the Right to Development. At the national level, throughout history, articulations by political rebels and revolutionaries of alternative visions of a national, self-determined future have frequently invoked egalitarian ideas of development e.g. the Proclamation of Irish Independence (1916), and more recently in regional articulations of development through concepts such as *Buen Vivir.* Buen Vivir is an indigenous Andean philosophy that emphasizes community well-being, reciprocity, solidarity, and harmony with Pachamama (Mother Earth). José Manuel Velázquez-Gutiérrez, "Constitucionalismo verde en Ecuador: Derechos de la Madre Tierra y Buen Vivir," (2014) 10 Entramado 220.
[170] Beth Williford, "Buen Vivir as Policy: Challenging Neoliberalism or Consolidating State Power in Ecuador," (2018) 24 J World Sys Res 97.
[171] Douzinas (2007), supra note 150 at 27.

differentiated authority by the law-sayer, while a continual denial of the contingency of its source. This is a dangerous dynamic that must be managed carefully. In relation to the governance of ODA, I assert this quality points to an underlying insecurity within the donor-led development discourse that must be addressed by a constant conceptual renewal of the premise underpinning its authority, [172] one re-articulated and re-asserted through a variety of new and constantly evolving instruments of governance. [173]

Finally, we come to the relationship between jurisdiction and justice. Though Douzinas explicitly refers to jurisdiction as the "diction of justice,"[174] it is not an aspect that he explores further. However, if we accept that jurisdiction is the condition through which the law-sayer and the law-hearer come into life before law, then jurisdiction is imbued with the dynamic between law-as-is and its inherent promise of justice-to-come that critical theorists have identified is a key ingredient of law's force.

[172] The articulation of international development policy promulgated by the various international organisations through the concepts of 'sustainable development' and the Paris Agreement on Climate Change are contemporary examples. Earlier iterations of prominent development rationalities include the 'basic needs' approach followed by the 'human development approach.' A 'Women in Development' (WID) approach (that recognised that women should also be beneficiaries of development processes) dominated development thinking in the 60s and early 70s. This was replaced by the 'Woman and Development' approach in the mid-1970s (which critiqued the Western-oriented and structural biases of WID), followed by the Gender and Development (GAD) strand of thought in the 1980s (focused on gender equality as a goal of development, one to which men have a role in progressing) that remains prominent today, though now it has developed further strands related to particular development issues and sectors e.g. women and trade, women and enterprise, women and the environment etc.

[173] I will examine this dynamic of critique and renewal more thoroughly in Chapter 10. Though beyond the scope of this research project, one can trace this quite clearly in recent decades with the response by the OECD DAC to each of the deliberations from the UN-led International Conferences on Financing for Development (Monterray 2002; Doha 2008 and Addis Ababa 2015) with developments within its own 'Aid Effectiveness Agenda' (now iterated through its 'Global Partnership for Effective Development Co-operation' http://effectivecooperation.org/). The shift in focus from 'aid effectiveness' to 'development effectiveness' is profound, reflecting a shift in focus from donor-recipient aid dynamic to that of the approach by aid-recipient states to 'development co-operation.'

[174] He draws from Ulpian's etymology of *jus* deriving from *justitia* or 'the art of what is good and fair'. *The Digest of Justinian* (trans Charles Henry Munro) (Cambridge University Press: 1904) at 1-2 'On Justice and Law.' Douzinas refers to Ulpian's *jus* as referring to 'justice.'

> "Justice in itself…outside or beyond the law, is not deconstructible…Justice remains , is yet, to come, *á venir*…It will always have it, this *á venir*, and always has...[j]ustice, insofar as it is not only a juridical or political concept, opens up for l'avenir the transformation, the recasting or refounding of law and politics." [175]

In the context of both ODA and its international governance, given the reliance of the former on highly normative conceptual foundations that derive from the fields of human rights, development, sustainability, international relations etc. and the latter's complex mix of different legal, regulatory, programmatic and technical instruments that similarly draw from a variety of fields of expertise and subject matter, the emancipatory promise within both ODA policy discourse and its governance take on a special quality and potency. For development policy discourse this promise of justice is – literally – universal. It applies to every subject (e.g. to humans of every identity and status; to flora, fauna, fish and inanimate objects such as plastic and bridges, to wider ecosystems, and to states, companies, roads, power stations etc.), and every issue (e.g. from peace-building to education to climate mitigation). This promise of justice operates both as a powerful animating dynamic, and as a key rationale through which the jurisdiction of ODA is called forth, and continually renewed with each new animating idea. [176]

[175] Jacque Derrida, 'Force de Loi: Le « Fondement Mystique de L'Autorité' »'Force of Law : The "Mystical Foundation of Authority"' (1989-1990) 11 Cardozo L Rev 920 at 969-70. See also Costas Douzinas, 'The End(s) of Human Rights,' 2002 26 Melbourne UL Rev 445 at 456 when he says "Human rights struggles are symbolic and political; their immediate battleground is the meaning of words, such as 'difference' and 'equality'…but if successful, they have ontological consequences – they radically change the constitution of the legal subject and affect people's lives."

[176] A more recent example is the adoption of the UN's Sustainable Development Goals and that of the role of development finance in pursuit of those goals in particular. Beard's work explores how concepts of desire, sacrifice and the promise of salvation that underpin this promise – concepts that can be traced back to early Christian writings – expressed via a modern discourse of development that enable it to continue to hold such sway in the political and public imagination. See Jennifer L. Beard, *The Political Economy of Desire – International law, development and the nation state* (Abingdon, Oxon: Routledge-Cavendish, 2007) for a fascinating treatment of this point.

So having explored some of the features of jurisdiction deriving from its etymology that are especially helpful for understanding the governance of ODA, let us now turn to how jurisdiction has been used to conceptualise contemporary transnational governance.

4. Jurisdiction as construction of dominion

In his seminal article on globalisation, [177] Berman approaches the assertion of jurisdiction as a "meaning-producing cultural product" – a characteristic shared by all legal acts.[178] He identifies four aspects of jurisdiction that are often overlooked by writings on the jurisdiction of transnational governance issues, including first, how jurisdictional rules reflect and construct *social* conceptions of space, which are not intrinsic to the physical world they operate in; secondly, how jurisdictional rules establish the *dominion* of a community *over* a 'transgressor'; thirdly, how the assertion of jurisdiction symbolically *extends the membership* of a community to subjects beyond its previous incarnation, and finally, how the assertion of jurisdiction can *open a space* through which norms are articulated that may challenge sovereign power.[179]

Berman highlights that jurisdiction never simply emerged "from a utilitarian calculus about the most efficient allocation of governing authority" but instead operates as a device to make sense of social space, thereby reflecting the attitudes and perceptions of community members towards the physical space where they live, but also to how they define the idea of community

[177] Berman's article has been widely cited by international legal scholars writing on diverse areas such as global administrative law, private international law and others, and also from writers in legal theory. Paul Schiff Berman, "The Globalisation of Jurisdiction,' (2002) 151 U Penn L Rev 311.
[178] Ibid 424.
[179] Ibid 423-441.

itself. [180] Thus, jurisdictional rules construct and connect personal identity, community affiliation and physical location in particular ways. [181]

In the context of the governance of ODA, this constitutional aspect of jurisdiction draws attention to the contingency of the identities and locations of actors, and the technologies through which these are constructed. In relation to the international governance of ODA, this understanding helps us focus on how identities such as donor and aid-recipient states, and developed and developing state and regions are created over other identities; how actors and entities are deliberately encompassed, and how the scope (both geographic and sectoral) and reach of its governance are constructed within this framework. Thus, for example, EU ODA funding linked to the implementation of Economic Partnership Agreements (EPAs) [182] by the EU in African, Caribbean and Pacific (ACP) states, is heavily oriented towards legal and regulatory initiatives that promote the creation and integration of particular ACP-based markets into EU- and internationally-oriented liberalised trade and investment regimes, [183] via revised ACP economic regional entities. In many cases, the African regional entities created through these negotiations are at odds with existing African regional entities and the stated demands of leaders of African states and the ACP institution.[184] In this instance, viewing ODA as a

[180] Ibid 427
[181] Ibid 432.
[182] EPAs are EU-ACP regional trade agreements, though framed as ones that co-prioritise development with market liberalisation.
[183] See for example the 'Development Matrix' proposed as an Annex to several EU-EPA agreements during EU-ACP EPA negotiations. In the EU-East And Southern Africa draft EPA, for example, there is a high prominence of legal and regulatory reform initiatives across the infrastructural (energy, transport, telecoms, water etc.) and productive (agriculture, fisheries etc.) sectors
[184] See Para 58 of the Declaration of the 8th Summit of ACP Heads of State and Government of the ACP Group of States, issued on June 1st 2016 in Port Moresby in Papua New Guinea which stated "We are concerned that all ACP States have not been able to conclude Economic Partnership Agreements (EPAs) due to the excessive demands

jurisdiction that is intimately linked to an EU-led economic approach to African regionalisation, helps highlight how powerful – and contingent – the ODA 'jurisdictional' construction of spatial entities is.

This leads to the second aspect of jurisdiction on how jurisdiction relates to the assertion of a community's dominion. Berman highlights how, when the community's moral code is transgressed by an 'other,' jurisdiction is key to how the community identifies the nature of the threat and selects its response. By identifying the threat as an 'internal' one, the community draws from its own jurisdictional rules to symbolically assert its dominion over the 'other,' thereby declaring the community's authority over the transgressor, as well as claiming an over-arching legitimacy for the community's 'order' that will be applied in response. For the international governance framework of ODA, this understanding of jurisdiction draws attention to the existence of a particular neoliberal globalised development 'order' within its policy discourse which claims and asserts dominion over all spaces and life-forms that currently exist. Within this development order, certain orders promoted as legitimate and implemented through ODA clearly predominate. These include formal legal ones on the liberalisation of trade and investment, the management of migration, as well as informal orders such as those relating to "good governance,'[185] international finance flows such as anti-money laundering, [186] systemic risk management etc. Thus the community's 'order' that is being asserted over the 'other'

from the European Union that has weakened regional economic integration processes." http://www.acp.int/content/declaration-8th-summit-acp-heads-state-and-government-acp-group-states

[185] James Thuo Gathii, "Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes between Markets and States," (2000) 45 Vill. L. Rev. 971.

[186] Virginia Haufler, "Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World," (2010) 10 Gl Env Pol 53.

contains its own internal legal logic. Applying a jurisdictional lens to ODA highlights this important feature through which a neoliberal globalised model of development (with its own incipient legal order) is asserted, and promoted as legitimate by donors for implementation in aid-recipient states. [187]

In the third aspect of jurisdiction – and related to the second one immediately above - Berman examines how jurisdiction symbolically *extends community membership* to those brought within its ambit. He traces how jurisdiction can create a narrative where the 'outsider' is not truly an outsider in the sense of being completely separate from the community, but in some way, is located in relation to the community, such that the community feels *entitled* to extend its norms to that outsider.[188] Applying this perspective to ODA draws attention to how ODA acts to create, solidify and expand relations between donors and aid-recipient states, and does so based on largely donor-generated rationales and self-belief. [189]

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[187] Thus, the most recent EU-Africa policy framework – the "Africa – Europe Alliance for Sustainable Investment and Jobs" - has committed the EU to a significant increase in its spending on initiatives to support business and investment climate reforms in Africa to EUR 300-350 million on average per year envisaged under Pillar 3 of the External Investment Plan. Communication from the Commission to the European Parliament, the European Council and the Council, "Communication on a new Africa – Europe Alliance for Sustainable Investment and Jobs: Taking our partnership for investment and jobs to the next level." Brussels, 12.9.2018 COM(2018) 643 final. Note that these 'orders' are not always legal at first glance. Thus, in that Communication, the EU describes how a EUR 16 million programme on modernising trade and investment related regulations and institutions contributed to Côte d'Ivoire's improved ranking in the "Doing business" classification, moving up from 167 in 2010 to 142 in 2016. *Ibid* at 10. This refers to the World Bank's "Doing Business Index" which has been critiqued for its selective approach to law and regulation, one that promotes a very narrow idea of development related to the development of 'efficient' markets, and that is based on a partial, and heavily neoliberal view of law therein. See Tor Krevor, "Quantifying Law: legal indicator projects and the reproduction of neoliberal common sense," (2013) 34 Third W Qtly 131 at 150.

[188] Ibid 435-438.

[189] A cursory comparison of ODA-related policy texts today reveals that numerically and politically, donor-generated texts far outweigh those generated by aid-recipient states. This was not always the case. There have been several moments in history when then about to be- and newly-independent states articulated an alternative vision. See, for example the Bandung Conference of April 18–24th 1955, when delegates from twenty-nine states across Asia and Africa attended a conference in Bandung, Indonesia, to articulate new political, economic and social futures in that context. For an in-depth consideration of the legacy of that moment, see Luis Eslava, Michael

With respect to the fourth aspect, Berman describes how, historically, an assertion of jurisdiction functioned as a space through which norms can be articulated that might function as an alternative for, or be resistant to, sovereign power. [190] This has valence for revealing how ODA, as a distinct governance space, operates as a site where several non-sovereign derived norms are generated and imposed on aid-recipient states. These include norms on what constitutes a 'good' state as a model for aid-recipient states to emulate, and the appropriate domestic laws and institutions that are deemed necessary for participation in an international economic order. As we have seen in Chapter One in relation to the EU's approach to Budget Support and the UK DFID's approach to Tanzanian Public Financial Management Reform Programme Phase V (2017/18 – 2021/22), and we will later see in Chapter Nine, these norms are articulated, refined and adopted in ways that remain hidden from domestic scrutiny, and are generated usually without any meaningful input from aid-recipient states.

With these four aspects, we can see how Berman's approach to jurisdiction as a legal concept helps capture several broader legal and governance questions that arise when considering the governance of ODA and the complex role of law therein. These include first, how the ODA governance framework creates a realm of jurisdiction through its symbolic function of naming and authorising, whether over persons, places or things; secondly, how it creates and extends a particular order (with its own internal legal logic) of one community (donors) onto non-

Fakhri & Vasuki Nesiah (eds), *Bandung, Global History, and International Law : Critical Pasts and Pending Futures*, (Cambridge: Cambridge University Press, 2017).

[190] As example, he describes how, in seventeenth century England, common law courts began to write writs of prohibition so as to prevent rival Court of High Commission, (the supreme ecclesiastic court in England that had been instituted by the Crown in the sixteenth century, could be convened at will by the King, and had enormous power both in civil and ecclesiastical matters) from hearing cases. Ibid 438.

community 'others' (aid-recipient states, and other actors), and thirdly, how the idea of jurisdiction is a site through which particular orders are expanded in reach and deepened in ways that are not determined or easily scrutinised by the domestic sovereign state. I now turn to constructing the analytical lens used in this thesis and for this, I draw from later writings of Dorsett & McVeigh on jurisdiction,[191] supplemented by insights from Valverde.[192]

5. Jurisdiction as an analytic

In a work that addressees the historical, philosophical, legal conceptual and material aspects of jurisdiction, Dorsett & McVeigh approach jurisdiction as "a practice and conduct of law and as a distinct form of critical engagement with law," and explore "[h]ow we come to belong to law, and the quality of that belonging." [193] They identify four elements to a critical approach to jurisdiction that help with this endeavour, namely a focus on (i) authority and authorisation; (ii) representation; (iii) the technologies of jurisdiction, and (iv) how jurisdiction engages with lawful relations. In the following paragraphs, I summarise and rearticulate their insights on each in order to demonstrate how these can reveal aspects of the legal quality of the governance of ODA that are overlooked by traditional legal analysis. I conclude this section with a table summarising the key features of each of these elements most relevant for understanding the international governance of ODA.

With the first element – authority and authorisation – Dorsett & McVeigh highlight that for mainstream legal analysis, authority is frequently linked to the sources of law, with legal

[191] Shaunnagh Dorsett & Shaun McVeigh, *Jurisdiction* (Abington, Oxon: Routeledge-Cavendish, 2012).
[192] Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory," (2008) 18 Soci & Leg St 139.
[193] Dorsett & McVeigh (2012), supra note 191 at 10.

doctrine reducing jurisdiction to the articulation of rules of law. However, as noted above with the etymological analysis of jurisdiction, we now recognise that jurisdiction actually inaugurates law, and thus precedes law, making the language and work of jurisdiction more complex and nuanced than what mainstream legal thought and practice suggests. [194] This helps foreground several questions. First, how does authority come into being? Dorsett & McVeigh note that from a political theory perspective, the issue of authority (which gives reasons for people to submit voluntarily) bears a distinct relationship to both reason and power. Thus a focus on jurisdiction foregrounds the *kinds of reasoning* and foundational premises, along with *the identity of the actor* that uses these, that creates a scenario whereby a community voluntarily submits its will. [195] A jurisdictional lens enables a sharper focus on the language of authority that brings law into being (how jurisdiction authorises law), and also to the distribution of authority within law (what is authorised and who is given authority). Secondly, there is the issue of transmission – how is authority passed from one place to another, and from one era to another? Thirdly, what factors (material, ideological, historical, institutional etc.) in that context bring about a demand for and the emergence of that particular kind of jurisdictional ordering? What are the conditions of possibility that are made manifest in that context?

The second aspect of jurisdiction highlighted by Dorsett & McVeigh relates to the representation of jurisdiction which they articulate as including both the "staging and performance of law… (including) both sets (visual) and actors (dialogue)." They focus on both the "visual form of law" and "that speech which gives distinctive form to law and to its modes

[194] Ibid 11.
[195] Ibid 10-12.

of authorisation," making the point that they view "form and content as being quite closely aligned in the practices of jurisdiction." [196] In the context of the international governance of ODA, this aspect foregrounds the significance of certain terms within ODA discourse (such as country ownership and partnership) that are central to the authorisation of a differentiated agency to both donors and aid-recipient states, and to the articulation of a particular kind of power relationship between both. [197] The governance of ODA is visually represented across a range of instruments including the periodic issuance of topic-focused governance standards by the OECD; the presentation of donor ODA commitments and spending in development finance through data tables by donor, by country, by sector and by project; by graphs on changes to levels of ODA commitments and by the existence of several international databases that hold and analyse development finance data. [198] Though the pragmatic implications of analysing development through data-based information has received greater attention in recent years, [199] the political and governance implications of predominantly perceiving development through datasets remains under-explored. [200]

[196] Ibid 13-14.

[197] Several of these 'anchor terms' exist that create development narratives, construct subjectivities and contour relationships between actors. Other terms include 'mutual accountability,' 'mutual learning,' 'enabling environment,' 'inclusive development, 'policy coherence,' etc. These terms exist in several international development policy frameworks across public and private entities including within the UN system, the OECD's, the World Economic Forum's, the EU's etc.

[198] For OECD data see http://www.oecd.org/dac/financing-sustainable-development/development-finance-data/. For Publish What You Fund – the Aid Transparency Index see - https://www.publishwhatyoufund.org/the-index/2018

[199] See for example, contributions to the Special Issue of the Canadian Journal of Development Studies (2014 V45) on 'Measuring African Development.'

[200] Insights from the field of 'big data aesthetics' that focus on how large complex sets of data change how we think about social life (Morten Søndergaard, 'The Politics of Big Data Aesthetics,' (2015) 31 MedieKultur: J Media & Comm Res 1) would certainly be relevant here.

The third aspect of jurisdiction they explore relates to technologies of jurisdiction, which they define as a "practice, device, technique or organisational strategy…that is designed to, or is capable of, *authorising, changing or altering lawful relations*."[201] An example of a 'practice' within the governance of ODA that has an influence on lawful relations is the production of documents for "analysis, guidance and good practice"[202] on donor ODA policy by several public and private international organisations. These include the World Bank's annual World Development reports; the several and ongoing OECD DAC's donor guidelines and 'standards' along with its data on ODA spending, and initiatives led by private international organisations designed to improve the 'effectiveness' of ODA and financing of development more generally.[203] In Chapter 9, I will examine the content of some of the key OECD DAC standards on development co-operation to identify and analyse the implicit law reform agenda, as well as the legal subjectivities of the aid-recipient states, that are promoted through these. Legal and regulatory reform agendas are not always implicit in these devices of knowledge and influence; the World Bank's "World Development Report 2017" focused specifically on the topic of governance and the law. [204] Indeed, scholars in the law and development field have long

[201] Dorsett & McVeigh (2012), supra note 191 at 14. Emphasis added. Note that one definition of device is "Something devised or contrived for bringing about some end or result; an arrangement, plan, scheme, project, contrivance; an ingenious or clever expedient; often one of an underhand or evil character; a plot, stratagem, trick." A definition of 'technique' is "A particular way of carrying out an experiment, procedure, or task, esp. in a scientific discipline or a craft; a technical or scientific method. Also more generally: a skilful or efficient means of achieving a purpose; a strategy, a knack." Oxford English Dictionary online.

[202] This is listed in the current mandate of the OECD's DAC as one of six core activities. See http://www.oecd.org/dac/thedevelopmentassistancecommitteesmandate.htm.

[203] Examples of the latter – private international organisation-led initiatives that produce influential policy documents on donor policy aimed at donors and public international organisations - include the World Economic Forum's 'Redesigning Development Finance' initiative https://www.weforum.org/projects/redesigning-development-finance and the International Chamber of Commerce's 'Global Business Alliance for 2030' https://www.gbafor2030.org/ .

[204] World Bank/IBRD, *World Development Report 2017 – Governance and the Law,* (Washington DC: WB, 2017).

focused on the embrace by development theory of law as central to the process of development. [205] The point here is that it is undoubtedly a "practice" of influential international entities to prescribe to both donors and aid-recipient states what is deemed to be acceptable practice, and to frame this in normative terms.

An example of a device that is clearly capable of influencing lawful relations within ODA is the use by donors of data, statistics and indexes at national and international levels for assessments on aid-recipient states domestic institutional mechanisms and on institutional reform in aid-recipient states. These are influential for donor funding decisions on ODA. One prominent example that is frequently mentioned by both donors and aid-recipient states in their development finance plans is the World Bank's *Doing Business* project. This is a data-based project that aims to provide "objective measures of business regulations and their enforcement across 190 economies and selected cities at the subnational and regional level," [206] with states described as 'economies' in this technology. [207] Krever highlights how the project includes a *Rigidity of Employment Index* whose scoring system rewards jurisdictions with weak labour protections such as a low minimum wage, relaxed rules for termination, no requirement of advanced notice for redundancy termination or mass dismissals, while penalising jurisdictions that place limits on work time or that mandate paid annual vacation. [208] Not surprisingly, use of this index (along with another index that claimed to measure the payment of tax) has been

[205] See Michael Trebilcock, "Between universalism and relativism: reflections on the evolution of law and development studies," (2016) 66 UTLJ 330 for an overview of a range of instrumental approaches to law's role in development.
[206] See the project's website "About us" at http://www.doingbusiness.org/en/about-us It is also called the 'Ease of Doing Business Index.'
[207] See http://www.doingbusiness.org/en/rankings
[208] Krevor (2013), supra note 187 at 140 – 142.

heavily critiqued for not only being methodologically flawed and thus misleading, but also for the wider international policy influence it has, in particular on emerging economy states, and developing countries. An independent World Bank-appointed panel on the Project highlighted how Georgia's substantial improvement in the *Ease of Doing Business* index in 2007 was, in part, the result of far-reaching labour law reform that was criticised for contravening International Labour Organisation conventions, which the country had ratified. Despite this, Georgia was presented in the World Bank's 2008 Report as a country where workers "have the best protection". The Panel noted that the effects of the employability index may have been particularly strong in countries where it was used by the World Bank to benchmark or monitor loan performance. They refer to a document capturing the loan agreement with Burkina Faso in 2007 that stated that the *Doing Business Rigidity of Employment Index* would be one of the monitoring indicators used to determine whether the objectives of a poverty reduction support credit loan had been achieved. Controversy on that indicator's use led to its suspension in 2009 and, only then, its removal for loan conditionality purposes.[209] However, both donors and aid-recipient states continue to refer to the *Doing Business* scores to signal and signpost regulatory reforms that mirror a business-friendly neoliberal approach to development, [210] even though it continues to be critiqued. [211] Kang argues convincingly that regardless of the World Bank's

[209] Independent Doing Business Report Review Panel, "Independent Panel Review of the Doing Business report," June 2013, (New York, World Bank), 34.
[210] See earlier references on the content of the Tanzanian Public Management Reform Programme. See also references in several OECD documents on development co-operation including
[211] ITUC, "World Bank should scrap ideologically-driven business regulation ratings," (22nd January, 2018) at https://www.ituc-csi.org/world-bank-should-scrap. The World Bank's Chief Economist Paul Romer resigned after coming under fire for saying that Chile's rankings in the 'Doing Business' report may have been deliberately skewed under socialist President Michelle Bachelet. Chile dropped to 55 in 2018, from 34 in 2014, the year Bachelet took office. Romer revealed that the decline resulted from methodological changes, rather than a deterioration of Chile's business environment, and may have been the result of the World Bank staff's political motivations. "World Bank economist Paul Romer quits after Chile comments," Reuters Business News (25th January

signalling of a greater role for labour protection and workers' welfare in development processes, labour flexibility was and continues to be a key condition for many lending programs from the World Bank and the International Monetary Fund. [212]

Dorsett & McVeigh's identification of the influence of "organisational strategies" as key technologies of jurisdiction helps to foreground bureaucratic organisational activities of planning and preparation undertaken by donors both singularly and in cohort. An example of these is an influential international initiative on "aid effectiveness" which began in December 2000 following the UN's Millennium Declaration.[213] Rationalised by legitimate concerns about maximising the efficiency of aid administration and reducing transaction costs to both donors and aid-recipient states of dealing with multiple donors, the OECD's Development Assistance Committee (DAC) formed a task force consisting of DAC members, representatives of multilateral donors and some developing countries that drew up detailed recommendations for the harmonisation of donor procedures. This was approved by the DAC at ministerial level. Endorsed in February 2003 by more than 40 bi-and multilateral donors and 28 developing countries *(*Rome Declaration on Harmonisation), and further institutionalised and dissipated via several High-Level Fora,[214] the initial framework was articulated in highly instrumental

2018) at https://www.reuters.com/article/us-worldbank-economist-romer/world-bank-economist-paul-romer-quits-after-chile-comments-idUSKBN1FD38Y.

[212] Susan L Kang, "Labor and the Bank: Investigating the Politics of the World Bank's Employing Workers Index," (2009) 14 J Workplace Rights 481 at 496.

[213] The UN's Millennium Declaration is a General Assembly Resolution that, in my view, inaugurated a new mode of international development policy-making that was universal in its coverage and breadth. Consisting of eight Chapters and 32 paragraphs, it was endorsed by 189 countries. UN General Assembly, *United Nations Millennium Declaration, Resolution Adopted by the General Assembly*, 18 September 2000, A/RES/55/2.

[214] These were the High Level Fora on Aid Effectiveness in Rome, Paris, Accra and Busan in 2003, 2005, 2008 and 2011 respectively. By 2011, the Busan Partnership Agreement was endorsed by over 100 countries as the blueprint for maximising the impact of aid. That initiative has now evolved into the OECD-supported Global Partnership for

pragmatic terms as a framework of good practices for donor co-operation. [215] It was an international DAC-led initiative, but had deep significance for the creation of a cohesive approach by donors at the aid-recipient state level.

Two features of this approach are significant here. The first is the translation of deeply political problematic donor practices, identified as such by aid-recipient states, into technical-administrative challenges to be overcome by a change in donor administrative practices. Thus, though a survey of aid-recipient states identified 'donor driven priorities and systems' as the most frequently mentioned burden, the proposed response to these political tensions was a range of initiatives for donors that included the simplification and harmonisation of donor procedures, along with greater "alignment with partner systems" and greater donor transparency.[216] The second was the creation of a dedicated initiative on harmonising donor practices, institutionalised through influential Donor Co-ordination or Liaison Groups that operate at aid-recipient state-level. This initiative created a recognised national-level space, framed as one for donor co-ordination but one that was actually focused *on aid-recipient state governance*.[217] Again, the very real political role of this mechanism as a way to intervene

Effective Development Co-operation, involving 161 countries and 56 organisations – see http://effectivecooperation.org/.

[215] Five areas were identified including country analytic work and preparation of projects and programmes; measuring performance in public financial management; reporting and monitoring; financial reporting and auditing, and delegated co-operation i.e. when one donor acts on behalf of another.

[216] Thus survey was a needs assessment of 11 aid-recipient states representing different geographic regions and levels of development. It was undertaken by a DAC Task Force on Donor Practices. Results of this survey fed into the following document. OECD, *DAC Guidelines and Reference Series: Harmonising Donor Practices for Effective Aid Delivery Vol.1*, (Paris: OECD, 2003) at 13.

[217] This is clear from the scope of the financing modalities examined including budget support; sector-wide approaches; capacity development in public financial management and supporting public financial management system reform. OECD, *DAC Guidelines and Reference Series: Harmonising Donor Practices for Effective Aid Delivery Vol.2*, (Paris: OECD, 2006).

directly in aid-recipient state governance is masked by a pragmatic-focused discourse of "principles and common themes." These give the illusion of a deliberate intention to respect aid-recipient states' domestic policy independence. These two features – the DAC's international leadership in creating national-level donor fora and the masking of the politics of donor intervention into the sovereign sphere of aid-recipient state policy-making via a discourse of technocratic pragmatism – are ones that repeatedly emerge in the international governance framework on ODA.

In the context of the governance of ODA, I take Dorsett & McVeigh's "technologies of jurisdiction" as those technologies of governance that are capable of authorising, changing or altering lawful relations through the international governance of ODA. For this thesis, I focus on four distinct but overlapping governance technologies of the OECD, including (i) its legal technologies on development and ODA; (ii) the OECD's dedicated policy frameworks on development, and the DAC's dedicated policies on donor governance of ODA; (iii) the technocratic technologies that are predominantly expertise and numbers-based instruments such as expert reports, statistics, indexes and indicators, and (iv) the bureaucratic-institutional technologies of the OECD and DAC on ODA that have an explicit deliberative-convening function.[218]

All of these technologies, with their particular instruments, techniques and devices are key to articulating the normative framework that underpins both ODA and development as a

[218] In practice, however, these technologies frequently undertake executive decision-making functions that affect the role and activities of aid-recipient states, as we will see in Chapter 11 on the DAC's Peer Reviews of donor development co-operation policies.

governance project. Across all four, I highlight the important juridical work that concepts do, in their role and capacity of making life cognisable and intelligible for rule by ODA governance instruments, including law.[219] With each of these technologies, I explore the most relevant aspects of their mandate, their reach, and their way of operating that enables the authorising, changing or altering of lawful relations in the international governance of ODA.

The final aspect of Dorsett & McVeigh's jurisdictional lens relates to how jurisdiction creates a "belonging to law," how it establishes the extent of lawful relations. [220] In this thesis, I interpret this to refer to underlying legal logics that structure both the project of development and more especially, the legal and political subjectivities of donors and aid-recipient states and their relationship to be pursued via ODA. There are three elements of relevance here. First – and especially for donors and aid-recipient states – where and what kinds of law, and at what governance level is the law that specifically governs both donor and aid-recipient activities of ODA? Secondly, what kinds of subjectivities and relations are created and authorised between donors and aid-recipient states, and what is their legally-backed political quality? Thirdly, what kinds of law (e.g. international economic law, international human rights law, regional law, domestic law; contract law; business law etc.) figure prominently in the development and governance policy discourse that underpins and lies within the governance framework of ODA,

[219] The crucial work of concepts is recognised by Derrida, who notes that "[E]very concept …. belongs to a systematic chain and constitutes in itself a system of predicates. There is no concept that is metaphysical in itself. There is a labor – metaphysical or not – performed on conceptual systems." Jacques Derrida, *Limited Inc,* (Evanston IL: Northwestern University Press, 1988) at 21. In this context, I suggest this insight helps highlight the important 'heavy lifting' work of concepts in a transnational governance context such as with ODA.
[220] They define lawful as referring to the idea of 'belonging to law'. Dorsett & McVeigh (2012) supra note 191 at 16.

and what ones are left out?[221] And finally, how are potential tensions and conflicts between these laws resolved?

Though Dorsett & McVeigh identify the above four elements as key aspects of a jurisdictional lens, they also include an explicit historical focus in their conception of jurisdiction. This is because jurisdictional thought, knowledge and practices are strongly shaped by the history of legal institutions and legal thought. [222] This historical awareness is certainly relevant for understanding the particular legal form of the contemporary governance of ODA, and for understanding that its current governance signature has precedents created in particular moments in time and locations. [223] This point is echoed by Valverde, who highlights how jurisdictional assemblages have a strong path dependence. [224]

But there is another aspect to the temporal nature of the governance of ODA – its selective focus. The discourse of ODA and its governance share a strong, future-focused orientation, with its gaze turned away from deeper historical contributors to the current development status and problems of developing countries. [225] This affects the legal form of ODA and its governance in identifiable ways. For example while some data is gathered on select areas of human rights

[221] Note that it also relates to the authority/authorisation aspect of jurisdiction discussed earlier in this section. Thus, one would ask, what kinds of law are additionally authorised by their inclusion in the governance framework of ODA? What kinds of law and legalities are left out?
[222] Dorsett & McVeigh (2012), supra note 191, at 25-27.
[223] In Part II of this thesis, I identify and explore particular historical periods, locations and institutions that contribute important precedential elements to the governance of ODA.
[224] Mariana Valverde (2009), supra note 192 at 144.
[225] For example, though contemporary ODA discourse has clear precedents in the discourse of colonial governance, the lingering detrimental economic effects of colonisation on former colony states are never acknowledged. Similarly, and perhaps more significantly from a development perspective, the human and institutional effects of several hundred years of slavery also remain invisible. For an excellent analysis of the economic and institutional impacts of slavery on Africa see Nathan Nunn, "The Long-term Effects of Africa's Slave Trades," (2008) 123 Qty J Ec 139.

adherence by aid-recipient states as part of the commonly-accepted governance framework of ODA, no data is gathered that links donor ODA contributions to their former colonial history or the historical benefit they have received from slavery.

Valverde's focus is not only on history however, but includes geography. Her earlier work addresses the relationship between scale and jurisdiction within frameworks of governance, drawing attention to the significant difference in the rationalities and technologies of governance at different scalar sites. [226] In the context of the governance of ODA, a number of scalar-related governance issues emerge, with internal and external dimensions. First, and most obviously, the legal form of the governance framework of ODA (for donors and aid-recipient states) can vary at the national, regional and international levels, with differences in the kind and role of legal and other governance instruments at each level. Secondly, scale and space play an important imaginary role in the discourse of ODA and development policy in several ways that explicitly underpins governance measures introduced and supported via ODA. For example, a featureless, ahistorical and future-focused *global* animates ideas about development, even though in practice, it is highly selective about what has permission, and what is desired to move through that space. Thus the movement of capital, goods and services through the creation and operation of markets is an explicit goal of both ODA and development policy, though the movement of people is much more circumscribed, being predominantly framed in terms of access to labour markets via carefully managed migration and security

[226] She traces the particular rationalities, technologies and temporalities of police power in the US and France as an example. The temporalities she refers to are different to the ones noted just earlier. In the context of governance by police, crimes already committed (the past) are allocated to detective work; crime prevention work (the future) is often undertaken through a separate function. Valverde (2008), supra note 192 at 147.

measures. Thirdly, and in relation to the governance *of* ODA, scalar levels hold different governance meanings for donors and aid-recipient states. While both share an interest in various international policy frameworks such as those addressing climate change or sustainable development, the level of the sovereign nation – the *national* – is a key scalar entity at which needs assessments, plans, evaluations and periodic monitoring reports are generated. Finally, and in relation to governance *by/via* ODA, the sub-national (articulated through discourses on decentralisation) and the regional (articulated through discourses on regional entities such as customs unions, trade agreements, regional international organisations etc.) emerge as key. Thus, with this in mind, it is necessary to include a focus on the spatio-temporal as a key dimension of the jurisdiction of ODA[227]

6. A jurisdictional analytical lens for the international governance of ODA

From the thinking on jurisdiction just reviewed, I focus on four elements that I deem key to the characterisation and operation of how the international governance of ODA operates as a jurisdiction in its own right. I use these elements to develop a lens with which to identify and analyse ODA as a jurisdiction. Each of these elements has clearly identifiable aspects that, taken together, demarcate the international governance of ODA as a particular kind of jurisdiction that inaugurates a particular kind of order. This has a distinct approach to law, the subjectivities and legal relations between donors and aid-recipient states, and legal orders. Taken separately

[227] In including this as an additional element, I wish to make clear that my treatment of this element is 'light'. Several socio-legal researchers have written extensively on the relationship between law and time, and law and space and some, such as Valverde, have sought to theorise and analyse law using both concepts together. Unfortunately, though such approaches are certainly relevant for the subject of this study, attempting to do so is beyond the scope of this research project at this stage. See Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance,* (Abingdon & New York: Routledge, 2014).

and together, they have distinct legal, political and other effects on donors and aid-recipient states. These elements focus on (i) authority and authorisation within the governance of ODA; (ii) the governance technologies that are most prevalent, and in particular, the way they work together; (iii) the implicit approach to time and temporality, and to space (territory and geography) held within the governance framework of ODA, and (iv) representation – how the jurisdiction of ODA is represented.

The first element attends to matters of authority and authorisation within the international governance of ODA and lends to questions on who or what is given authority in that framework? Who/what are predominantly ascribed the roles of decision-maker or prime authority over what is considered development; the 'right' purpose and role of ODA; the 'right' approach of donors and aid-recipient states to the use of ODA etc.? A particular focus of this element is where a differentiated authority is prescribed and implied for donors and aid-recipient states, and how this may contour the legal subjectivities of both in ways that differ from those recognised in international and domestic law. Related to this is how the international governance of ODA contains and promotes its own internal legal logic - a particular vision or model of law(s), the relations between different kinds of laws at different levels, and how donors and aid-recipient states are supposed to engage with law more generally. Here I focus on the kinds of laws that the technologies of the governance of ODA foregrounds; those that it excludes, and the way it prescribes a very particular approach to aid-recipient states to their engagement with international law and domestic law in particular. Another relevant element here is consideration of the particular material, political, economic and other factors that help legitimise and naturalise this relationship of authority between

donors and aid-recipient states. As we will see below, and in Chapters 6 and 7 in particular, I propose that history, and the history of colonisation in particular, holds strong relevance for both the content and the form of the contemporary international governance of ODA. However, other factors are also relevant here. These include the influence of international responses to societal challenges like conflict, terrorism and security; issues relating to climate change, poverty and corruption etc.[228]

The second element focuses on the identification of the various governance technologies that form the architecture of the international governance of ODA. These include the prominent legal (and regulatory), and official policy technologies on ODA, and development (and law's role in development), as well as the bureaucratic (the institutional mechanisms and the governance practices prominent within these) that have a direct executive (decision-making), deliberative or convening function within the international governance of ODA. It also includes a focus on the role of technocratic instruments of governance. These are the knowledge-based

[228] It is important here to distinguish between the phenomena themselves, and the domestic and international responses to them. ODA is frequently used to finance donor responses to these transnational issues, and these responses are frequently tailored to meet donor interests in these issues. One such example is the heavily-critiqued military response (called 'Operation Sophia') of the European Union to stem the passage of thousands of asylum-seekers and migrants to Europe by disrupting people-smuggling networks that enable them to cross the Mediterranean. In this operation, the EU provides support to the Libyan Coast Guard to enable it to intercept migrants and asylum seekers at sea after which they are returned to Libya to arbitrary detention, where they face inhuman and degrading conditions and the risk of torture, sexual violence, extortion, and forced labour. Human Rights Watch, *No Escape from Hell - EU Policies Contribute to Abuse of Migrants in Libya*, (New York: HRW, 2019) available at https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya. As part of this operation, the EU provides training and support to the Libyan Coast Guard, an entity that has been deeply implicated in criminal involvement with human smuggling. Zach Campbell, "Europe's deadly migration strategy - Officials knew EU military operation made Mediterranean crossing more dangerous," Politico 2/28/19, available at https://www.politico.eu/article/europe-deadly-migration-strategy-leaked-documents/.
Though funding for the EU's support to the Libyan Coast Guard falls within the broader framework of EU-Libya cooperation on capacity building and stabilisation, under its Common Security and Defence Policy (CSDP) funded EUNAVFOR Med Operation Sophia, this initiative is nested within other initiatives that draw directly from ODA such as the EU's Emergency Trust for Africa and its bilateral assistance to the African Union. See European External Action Service, 'EU-Libya Relations,' Brussels 9/12/2018 available at https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations.

governance instruments that can play a variety of roles in the governance of ODA. Examples include guidelines to donors on their ODA policy; donor and aid-recipient state country action plans, as well as particular devices such as reporting templates, periodic reporting on ODA etc. Within these, benchmarks, indexes, indicators and statistics figure prominently in the classification and categorisation activities that are essential to the international governance of ODA. For each of these technologies, explored in greater depth in Chapters 8-11, I focus on the type of technology under scrutiny, its mandate, reach and how it works, both on its own, and when woven with others, and how it wields power.

The third element focuses on issues relating to time/temporality and to space/geography. Recent years have seen a flourishing of socio-legal research on law's relationship with time, revealing the exclusionary effects of the historical location of development as a driver of social progress with its implicit view of time as elapsing in linear mode. In this view, the past is separate from the present and thus violences and exclusions committed in the past remain in that temporal realm, with no claim on present or future attention. This form of linearity can be violently excluding of those who do not or cannot fit within the historico-developmental project. [229] While this line of thought on law's relationship to time is certainly relevant to the international governance of ODA – after all, part of the seduction of the development project is its promise of a better future – in this project, my approach to time, while critical, has two features. First, it focuses on highlighting how a *longue durée* approach to the evolution of the governance of ODA[230] reveals the significance of colonial rule, and international legal and

[229] Máiréad Enright, "'No, I won't go back' National time, trauma and legacies of symphysiotomy in Ireland," in Sian Beynon-Jones & Emily Grabham (eds) *Law and Time,* (London: Routledge, 2018), 43.
[230] Most analyses of ODA frame its origins as beginning after World War II.

governance responses to two moments in history. These are the League of Nations Mandate System, and the post-War reconstruction of Europe through efforts undertaken via the Marshall Plan. Second, it moves away from a linear, event-focused view of history, to examine how temporal *patterns* are significant to the contemporary international governance of ODA. By this I mean how patterns of recurrence, repetition, an implicit model of time, and a future-focused orientation of development shape how ODA is implemented and governed. Thus, by recurrence, I mean the periodic occurrences of economic crisis that cause, for example, a re-think of the development model itself,[231] and usually result in a re-worked approach to ODA by donors (See Part III for examples across several of the OECD's governance technologies). By repetition, I mean the centrality of periodic governance practices and instruments, such as the OECD Peer Review of donors' ODA policy (I deal with this more explicitly in Chapter10), and the requirements on aid-recipient states to produce periodic annual and five-year plans for donors, as examples. The latter are an example of an implicit model of time, one that underpins the model of development prevalent in ODA, but we also see these implicit models of time in wider international development policies such as the UN's Agenda 2030. [232] And finally, there is the deeply powerful evocation of a development future that *is-to-come*, one that is always beyond reach. Arguably, this promise of development is the underlying rationale for the whole development project and edifice.

[231] William H Sewell, JR, "The temporalities of capitalism," (2008) 6 Soc-Ec Rev 517.
[232] This is shorthand for the UN's Sustainable Development Goals, that are meant to be achieved by 2030.

In relation to space/geography, while the law and geography movement's well-established commitment to exploring the co-production of law with space and place[233] inflects this element, here I focus more on the select approach to place inherent in the development discourse elaborated through the instruments of governance of ODA. Thus, though entities such as cities, regions, states, regional entities and others all have varying legal identities in different bodies of law, and they, along with people, have highly characteristic tangible and material features and identities that clearly differentiate them from others, yet the governance framework of ODA adopts an almost universalistic approach – a focus on aid-recipient states whose differences must be flattened and erased. Thus, the landscape that the governance of ODA creates and rules over is featureless and borderless, denuded of people and the characteristics that makes an abode a home over an asset; a city a vibrant node of diverse and throbbing social life, over an investor-friendly location, and a state a nation with a complex past and unique vision for itself, over a regime with an attractive regulatory environment.

The final aspect that I identify as key to the creation and operation of ODA as jurisdiction is how it represents itself. While representation implies an act or a performance - and indeed the international governance of ODA is enacted and performed at multiple sites across the globe - here I focus more on important tangible entities such as the key texts (legal and non-legal) that outline, instruct and authorise the development project pursued through ODA and more importantly, the way ODA should be governed, and the locations and events that act as sites of governance of ODA.

[233] See for example contributions in Irus Braverman, Nicholas Blomley, David Delaney & Alexandre Kedar (eds), *The expanding spaces of law: a timely legal geography,* (Stanford: Stanford Law Books, 2014).

While this analytical lens may appear over-broad and complex at first glance, what is important to keep in mind is the singular purpose of the jurisdiction of ODA. I propose that this is to draw into and to deepen engagement with what is outside of, or only tangentially in relation to ODA, *in order to establish a relationship of governance*. I will demonstrate this ravenous, expansive logic of ODA in each of the chapters of Part II and III, by reference to each of the elements of the governance signature of ODA that the governance technology analytical framework aims at mapping the jurisdiction of ODA, and identifying the elements and the instruments by which this jurisdiction is created and governed. This *systematic bringing under the governance reach of* ODA - the creation of an environment intelligible to ODA and governable through its technologies - is enabled by its *juridical and legal* qualities. Thus, methodologically, in applying this analytical lens to the international governance of ODA by the OECD, and its DAC in particular, the focus is on those aspects of each of the jurisdictional elements or vectors that systematically, deliberately, create intelligibility to ODA and become ever more amenable to governance by and through ODA, over time. I examine this juridical and legal quality through its signature, and it is to this I now turn in the next chapter.

A summary table of the main elements of the jurisdictional elements used to construct the analytical lens for this thesis is available in the appendix 1.

7. Conclusion

This chapter and the one that follows describe a theoretical approach and analytical lens that holds three under-addressed legal questions - the transnational, juridical and unequal[234] nature

[234] The ability of the international governance framework of ODA to articulate and enact a differentiated subjectivity for donors and aid-recipient states, one that gives executive authority and greater agency to the former, contra the legal articulation of the

of the international governance framework of ODA – in view. In this chapter, I described one of the two elements of this approach - how the concept of jurisdiction as understood by critical legal theorists offers a useful way of revealing the legal and juridical form of the international governance of ODA (an area not governed by an international legal agreement) and a basis for exploring the relationship between how ODA is governed internationally, and governance through ODA. I propose that this can be done by approaching ODA as a jurisdiction in its own right, consisting of four key aspects - authority and authorisation; its governance technologies; an approach to time and space/territory, and its representation. These four elements, when applied to the OECD's and DAC's role in the international governance of ODA, help reveal the essential elements and dynamics of rule through which its internal order is constructed and implemented, and the important aspects of the context that enable this jurisdiction to assume form, authority and legitimacy.

However, though this jurisdictional lens captures the key elements that enable the international governance of ODA to constitute a cohesive jurisdiction in its own right, it does not fully explain how these elements work together, and become institutionalised in ways that enable it to stay resolutely and simultaneously connected to its local and international context. Though it helps explain how a particular relationship of power and authority between donor and aid-recipient state becomes formalised, it does not sufficiently explain the legal and juridical quality of this jurisdiction. This legal-juridical quality is key to how the jurisdiction of ODA operates so cohesively, and engages so seamlessly, and invisibly, with domestic and international law. To address this, I use the concept of the signature as the second part of the analytical lens for this thesis. In chapter four that follows, I describe my approach to the

signature as both metaphor and method, and in chapter five, I outline how I combined both of these strands to critically analyse the jurisdiction of ODA created by the OECD and the DAC through their international governance of ODA.

Chapter 4 The *Signature* of governance

1 Introduction

In the previous chapter I described how the concept of jurisdiction holds deep analytical possibilities for a critical analysis of the international governance of ODA, a realm of international relations whose governance proves challenging to explore with more mainstream tools of legal analysis. From the literature review in Chapter Two, I highlighted how the transnational, juridical and cohesive nature of the international governance of ODA are, as yet, only partially addressed by the existing legal literatures on the governance of development co-operation. In response, I develop an analytical lens based two pillars. The first pillar is the concept of jurisdiction, consisting of four aspects - authority and authorisation; governance technologies of law, policy, technocratic and bureaucratic instruments; an approach to time/temporality and space/territory, and its representation. The second pillar, based on the concept of the signature, helps expose and explore the legal and juridical form of the international governance of ODA, in spite of the absence of a formal international legal agreement on this area of international relations.

In this research, I claim that the international governance framework of ODA has a particular governance *signature*. I use the concept of the signature as both a metaphor and a method to identify and explain how the elements of the jurisdiction of ODA constitutionalise and institutionalise a rule or order that has a distinct *legal-juridical* quality. In the following sections I describe my approach to the concept of the signature in this thesis. I begin with a short overview of how the signature offers an insightful metaphor for a legal-juridical analysis of

governance. I then explain how I use the signature as method, drawing ideas from Agamben and Derrida. I show how this method enables a tracing of four features that I deem important to the constitutionalising and institutionalising roles of the international governance of ODA. These are its juridical quality, its approach to juridification, the presence of a distinct internal legal logic and finally, its performativity. In the following chapter on methodology, I describe how I blend and apply insights from the jurisdictional and the signature into an analytical lens to apply to the international governance of ODA.

2. The signature as metaphor

There are many features to *signature* that resonate with an analysis of international governance, and that prove to be particularly insightful when analysing the international governance of ODA. Signatures have a unique ability to hold and communicate varieties of *excess*,[235] far beyond their singular material existence as an inked trace on a document in which it lies. It also has the ability to *alter*, in a fundamental way, the nature of objects and subjects. For example, consider the difference between viewing a print of a painting of a vase of yellow flowers as a poster and the original sunflower series of paintings by Van Gogh. [236] The artist's verified authentic signature is key to a vastly different performance, and experience, of viewing. In the latter case, when encountering the original painting, the subjectivities of the viewer, the painting and the viewing experience are vastly different to the former. This ability of a signature

[235] Here I refer to Derrida's writings on law that explain law as having the qualities of Force and a promise of Justice, and philosophy as having authority, but spoken in the name of Truth. "The moment of truth and justice must remain a necessary moment of otherness – an excess that prevents law and philosophy from becoming reducible to pure force or authority." Maria Dos Santos Lee, "The Law of Law" (1998) 4 L Text Cult 153 at 170. In my view, signatures carry this quality of excess, a quality that enable them to carry an excess of meaning, of authority, of value, of authenticity etc. far beyond their physical quality as a piece of personal written text.
[236] https://www.vangoghmuseum.nl/en/collection/s0031V1962?v=1.

– whether an actual written signature, or whether of 'signature' features such as the brushstrokes of a painting – to communicate 'excess;' to catalyse a reaction of considerable consequence, and fundamentally change the nature of the object, is reflective of power, whether legal, symbolic or social in nature.

Signatures are highly individual and unique - for example, each person's signature constitutes a distinctive mix of identifiable features that may be identified through forensic analysis.[237] Yet signatures, by their very nature, can *connect* very diverse actors, periods in time and contexts such as the list of signatories on a political declaration or legal agreement, or the list of signatures of group of work colleagues in a card congratulating one on a success or an important life event. Uniquely as a technology, a signature is taken as evidence of a signator's *presence* at a significant event, connecting the signator with other people and institutions, perhaps across great distances and through time.

Keeping the multifarious significances of the signature in mind, in the following paragraphs, I explain the significance of the choice and use of this term in the context of the project's theoretical approach. In claiming that the governance framework for ODA has a unique governance signature, I wish to make the following four proposals, each with a distinct relevance for law and the legal quality of that governance framework. First, the configuration of jurisdictional elements and governance technologies that constitute the governance framework of ODA, and how they operate, demonstrates a highly particular approach to juridification. This approach to juridification is key to the reach and influence of the governance framework, and

[237] Michael Allen, Foundations of Forensic Document Analysis: Theory and Practice, (John Wiley & Sons Ltd, 2016), 63-87.

partly explains its cohesion and coherence in the absence of an international legal agreement. As I will show in Part III, the dynamic and flexible nature of the approach to juridification is a key feature of the governance signature of ODA. Though my focus is on the approach by the OECD and DAC to the international governance of ODA, depending on the governance site, level or actor, the governance signature of ODA may differ in detail and in "charge," and the governance traction of its different elements may vary. [238]

Secondly, the international governance framework of ODA has the powerful ability to both communicate and implement an internal legal ordering that is highly selective in its content. It thus has its own *internal legal logic* with two features. The first is that this legal logic is modelled on a neoliberal globalised approach to capitalist development. This order recognises and excludes certain laws, and creates hierarchies and relations between laws and legal actors in line with this model. Secondly, this internal legal logic can elide the legal and institutional oversight of aid-recipient states. In this way, the internal legal logic of ODA may be invisible to, though perhaps in tension with law(s) in its external legal environment. By the external legal environment, I mean the legal environment in which the governance of ODA is nested,

[238] The concept of the signature acknowledges this variability, without, for example, leaning towards the binaries of 'hard' and 'soft' law and with their implicit association of formal law with juridical governance possibilities only.

including national laws and policies (particularly of aid-recipient states),[239] regional [240] and international laws.

Thirdly, this governance signature of the governance framework for ODA has a particular juridical quality that traverses its national, regional and international levels of governance. As explained in the first chapter, I understand the term juridical as having the following features - conveying the presence of a recognised authority that holds ultimate executive decision-making power, and a community that recognises this authority as such; as being reliant on determinative decision-making through practices and methods that are recognisable to the executive authority and perceived to be legitimate; that the executive authority, the decision-making practices and methods together create subjectivities and agency that are recognisable to law, and may be backed by formal legal agreements and institutions whether immediate (such as a contract between parties) or more distant (such being authorised by an international organisation). This kind of juridical quality can alter and shift legal subjectivities and legal relations. However, much like the ability of signatures to carry authority across time and place, I propose that the concept of the signature, when applied to the governance of ODA, also helps

[239] For example, under Article 43 of the Constitution of the Federal Democratic Republic of Ethiopia, it is provided that "Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development." The Transitional Constitution of the Republic of South Sudan (2011) contains constitutional rights relating to the public provision of aspects of education (Art 29), and primary health care (Art 31), as well as elaborating a detailed set of "Fundamental Objectives and Guiding Principles" that define (amongst other areas of national policy) that the principal objective of the economic development strategy as the eradication of poverty; a guarantee of the equitable distribution of wealth; redressing imbalances of income, and achieving a decent standard of life for the people of South Sudan. (Part III, Article 37).

[240] For example, in the African human rights system, the African Charter on Human and Peoples' Rights (ACHPR), a legally binding regional human rights treaty, recognizes the right to development as an enforceable human rights entitlement and has developed jurisprudence clarifying states' procedural obligations necessary to fulfil this right. See *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v. Kenya*, Comm. No. 276/2003 (Endorois case) Para.283, available at http://www.achpr.org/communications/decision/276.03/.

to convey ties to and links with juridical forms of authority and governance from the past, more especially those from the colonial era.

Finally, the governance signature of ODA relies on governance technologies where performance, repetition and recurrence are key to their authority. Each of the governance technologies that are central to the contemporary governance of ODA – law, policy frameworks, technocratic and bureaucratic instruments of governance – involve governance practices with an inherent temporality that is central to how they work.

In the following sections, I draw from ideas about the concept of the signature that reveal how it assists in revealing the legal form of the international governance of ODA, and in particular, the ways that its features of juridical quality, the legal logic, the approach to juridification and the quality of performativity, together constitutionalise and institutionalise a coherent and cohesive international governance framework, in the absence of an international legal agreement.

3. The signature as method

Giorgio Agamben approached the signature as a method that can explain how inert words become living sentences that carry meaning. [241] In this view, the signature has primacy over the sign. While the signature has no content in and of itself, the sign cannot exist in the absence of the signature. He views the signature as an active operator that works in two inter-connected ways. First, it captures the determinative elements of the context through which signs assume

[241] Georgio Agamben, *The Signature of All Things – On Method* (translated by Luca D'Isanto with Kevin Attell), (New York: Zone Books, 1999). In this book, he explores three methodological problems – the paradigm, the signature and the origin – in relation to Foucault's work.

their meaning. The signature, in Agamben's view, is "the decisive operator of all knowledge, that which makes the world, mute and without reason in itself, intelligible." Signatures work to orient signs in particular ways in particular contexts – "the sign signifies because it carries a signature that necessarily predetermines its interpretation and distributes its use and efficacy according to rules, practices and precepts that it is our task to recognise."[242] By drawing attention to the constitutive role and effect of signatures, Agamben highlights the significance of contextual "rules, practices and precepts" and their effects on signatures, and the significance of their links and relations to other phenomenon. Signatures are thus highly context-specific and *attached*. This feature raises awareness of the importance of the wider political-economic context in which the international governance of ODA takes place, and the structural elements (the "rules, practices, and precepts") that shape this context. For ODA we can translate this literally into a consideration of how the "rules" of the international legal architecture that shape the global economy; the "practices" of international decision-making and international relations in which donors and aid-recipient states engage, and the "precepts" of prevailing neoliberal policy doctrine on international development.

Second, signatures have the unique ability to *slide* the sign towards other contexts and phenomena, and in doing so, alter its meaning and function as a result.[243] In particular, the signature "does not merely express a semiotic relation between a *signans* and *signatum*; rather it is what … *displaces and moves it to another domain, thus positioning it in a new network of pragmatic and hermeneutic relations*,'[244] and in the process, creating a fluidity in relation to

[242] Ibid 64
[243] Ibid 78
[244] Ibid at 41- 40. Emphasis added.

roles, identity and meaning. [245] Here, in relation to the governance of ODA, this draws attention to how concepts such as development, ownership, partnership, accountability and other anchor concepts within that governance framework, come to be articulated in select ways that maintain a highly unequal relationship between donors and aid-recipient states. It also points out the *means* of this shift – and how the pragmatic-focused orientation of the international governance of ODA (tracking finance) rationalises and conceals a highly hermeneutic and meaning-creating function (a deep intervention in the aid-recipient state's domestic legal and institutional processes).

Separately, Derrida uses the idea of the "juridic signature" to explore the relationship between writing and presence (by this he means literal presence and time). "By definition, a written signature implies the actual or empirical nonpresence of the signer. But…the signature also marks and retains his (sic) having-been present in a past *now* or present [*maintenant*] which will remain a future *now* or present [*maintenant*], thus in a general maintenant, in the transcendental form of presentness [*maintenance*]." [246] Here, the meaning-making power of signatures comes from its dual ability to both be detached from the source (the signator and the signature-event) and to remain connected to it by its "[r]epeatable, iterable, imitable form."[247] It is a quality that retains a particular relationship to time (and in the context of the governance of ODA, to colonial history), and to performance as repetition. For this research, this understanding of the signature echoes the presence and central role of the authority, an

[245] Ibid 37.
[246] Jacques Derrida, *Limited Inc.,* (Northwest University Press, 1998), trans. Samuel Weber, 20. Italics in original.
[247] Ibid.

entity essential to the creation of a jurisdiction with its own order, as we saw in the previous chapter.

Agamben's and Derrida's insights are helpful to reveal the legal-juridical qualities of the governance signature of the international governance of ODA in three ways. First, the concept of the governance signature helps identify and trace the particular aspects and elements of the jurisdiction of ODA that come together to construct the subjectivities and agency of donors and aid-recipient states in ways that are both selective of, and can deviate from (the 'sliding' effect), identities and agency recognised in formal law. This is also true of how a selective internal legal logic is constructed within the jurisdiction of ODA. The 'signature' offers a method that exposes both the contingency and (from a critical perspective), the stakes of this process on the actors involved and affected. Secondly, by its recognition of the significance of both the source of the signature, and the reliance on repetitive and imitative performance, the signature points towards understanding how, and from whom, this particular governance signature came about, including the often mundane practices and performances through which the jurisdiction of ODA becomes institutionalised and consolidated, and then legitimised over time. Thirdly, the signature highlights the centrality of time and temporality to the jurisdiction of ODA. Though time is identified as a key aspect of the jurisdiction (and has been explored in more depth in the previous chapter), here I wish to draw attention to the rhythmic, almost pulsating nature of many of the bureaucratic governance technologies on international ODA, a hidden contributor to their significance and influence. Here I refer to the predominance of strictly calendared performances of governance. Thus, international development policy frameworks are

frequently framed and implemented in time-related sequences. [248] Donors' ODA policies undergo periodic peer review by the OECD's DAC every 5-6 years. [249] Aid-recipient states develop many time-bound plans and strategies at the country and sectoral level, all of which must be reported upon periodically, and evaluated at the end of the plan's timeframe. [250]But I also wish to include how a signature implicitly conveys a connection to times past, to history. For the international governance of ODA, this is helpful to recognising the connection that the contemporary governance of ODA has with international governance technologies that were inaugurated during the colonial era.

4.The governance signature of ODA

In the following sections, I outline four features that trace the governance signature of (the governance of) ODA, and expose its legal-juridical qualities in particular. These are its approach to juridification; its internal legal logic, its juridical nature, and its performativity. In each I describe how these features work and how they lend particular legal potency to the jurisdiction of ODA created by its international governance framework.

4.1 Its approach to juridification

Juridification, in this context, relates to the process by which the international governance of ODA becomes more formalised, standardised and – in some instances - legalised, over time. This process is key to understanding the traction and power that the jurisdiction of ODA wields

[248] See for example the Millennium Development Goals from 2000-2015, and the UN's Sustainable Development Goals, which will be in existence until 2030. The Global Partnership for Effective Development Co-operation gathers data biennially. See http://effectivecooperation.org/monitoring-country-progress/what-is-global-partnership-monitoring/.

[249] https://www.slideshare.net/OECDdev/oecd-dac-peer-reviews-what-they-are-how-to-engage-and-how-to-use-them.

[250] See Appendix 1 for examples in relation to Tanzania as an aid-recipient state.

over donors but more particularly, aid-recipient states. As Blichner & Molander note, "juridification is an ambiguous concept with regard to both its descriptive and normative content" [251] but "takes place within a legal order or *a legal order in the making*, be it at a national international or supranational level." [252] While intuitively, one might guess that juridification may thicken or increase over time, Blichner & Molander posit that a reversal of this process is also possible. [253] Their approach delineates five dimensions. [254] While drawing largely from the original content of these five dimensions, I have adapted them to better fit my analysis of the particular approach to juridification within the governance framework of ODA. In the following paragraphs, I describe each dimension and how it helps to further elaborate the legal quality of the governance of ODA.

The first dimension is based on the premise that "norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system."[255] This dimension is called "constitutive juridification" or the constitutive dimension. It draws attention to the phenomenon of 'constitutionalisation' whereby rules that that elaborate obligation, delegation and precision are developed. In the context of the international governance of ODA, this helps focus on the increasing institutionalisation of the governance of ODA, through law, regulation, institutional practices and other governance instruments that order the social life of

[251] Lars Chr. Blichner and Anders Molander, "Mapping Juridification," (2008) 14 ELJ 36, at 36-37.
[252] Ibid 38. Own emphasis. Its actors include governments, legislatures, the judiciary, legal experts, corporations, institutions, NGOs and others.
[253] Indeed, though Blichner & Molander describe the dynamics of this process as twofold – juridification/dejuridification – I suggest that this view may implicitly suggest a normative dimension – that juridification is a positive development in the evolution of a legal order. This is not a view that I take in this research. I think it is helpful to recognise that these processes may take place simultaneously within a legal order, with each process having different political and material outcomes.
[254] Ibid 38.
[255] Ibid 39.

ODA, and bring this life within the jurisdiction of the governance of ODA. However, this is a particular *kind* of constitutionalisation. [256] As we will see in Part III, the OECD's Development Assistance Committee, is a key and highly influential centre for the constitutionalisation of the governance of ODA through its focus on donor governance of ODA; the direction of this through the production of standards and guidelines on donor implementation of ODA, and the evaluation of donor progress with their implementation through a dedicated peer review process; the development purpose of ODA; information and data on ODA that, over time, creates a distinct identity for it as an instrument of international economic relations, and the production of data, statistics and other knowledge products.

The second dimension addresses how activities become subjected to legal regulation or more detailed regulation, called "expansion and differentiation." Blichner & Molander differentiate between both terms, with each having both horizontal and vertical dimensions. With "differentiation," one law can divide into two or more laws (horizontal differentiation); or a law becomes increasingly specific in order to differentiate an increasingly diverse number of cases (vertical differentiation). With "expansion," law can extend to areas of activity not previously regulated (horizontal), or higher level rules can be increasingly applied to lower orders (vertical). Blichner & Molander note that one of the outcomes of this kind of expansion and

[256] Peters notes that "[T]he core issue of constitutionalism is the relationship between governmental power and human liberty and flourishing. From a constitutionalist perspective, governmental arrangements are strictly instrumental, and must be so designed as to safeguard and promote as much as possible the well-being of natural persons not only as atomized individuals but also in their group relationships." See Anne Peters, "Are we Moving towards Constitutionalization of the World Community?" in Antonio Cassese (ed), *Realizing Utopia. The Future of International Law*, (OUP 2012) at 118, 119. In the constitutionalist approach to juridification within the international governance of ODA, I take a critical view, one that explores the gap between the normative rationale for the development of increasing numbers of governance instruments with greater breadth and depth, and their instrumental use.

differentiation is that more discretionary power comes to be vested in legal and administrative systems. [257]

In relation to the juridification of the governance of ODA, expansion and differentiation are key strategies that underpin how, over time, more and more of the life of peoples and states in the Global South is drawn into the realm of consideration for development, and thus under the jurisdiction of ODA through a variety of technologies and instruments that frame, conceptualise, measure and describe how each strand is to be included in this project. Part III of this thesis traces how, through the work of the OECD and its Development Assistance Committee (DAC), this process has accelerated and intensified in depth and reach in recent decades, leading to an increasingly de-localised, centralised and universalised mode of governance via the DAC's guidance on donor governance of ODA.

The third dimension in Blichner & Molander's approach to juridification addresses a trend whereby societal conflicts are increasingly solved by reference to law - the "conflicts" dimension. They distinguish three main modes of conflict solving – judicial, legal and lay. [258] For the jurisdiction of ODA, the conflicts dimension is somewhat different. In this context, the conflicts dimension relates to how, given the broad reach and depth of ODA, tensions and conflicts within the ODA-funded development project between different kinds and levels of legal and political regimes and subjects are addressed. We know that ODA is a highly politically sensitive area of international relations, and that it traverses and combines activities from

[257] Blichner & Molander (2008), supra note 251 at 42.
[258] Judicial conflict solving involves the judiciary and thus engages a highly sophisticated form of legal reasoning and the apparatus of legal institutions. Legal conflict solving involves the use of legal reasoning outside the judiciary with lay conflict solving involving less stringent or no formal legal reasoning, though still retaining a reference to law. Ibid 44.

different legal and political regimes as well as engaging a myriad of public and private actors. I suggest that, unlike Blichner & Molander's approach, or that adopted by private international law, [259] tensions and conflicts between different legal and political orders and subjects are addressed quite differently in the governance approach to ODA. In Part III in particular, we will see how the jurisdiction of ODA deliberately creates and contours relations between different legal regimes at different levels (e.g. at national, regional and international levels), with different areas (e.g. trade, investment, human rights etc.), and with different actors in highly specific ways. The jurisdiction of ODA assumes and takes upon itself a distinct ordering function via the creation and consolidation of an overall schema that defines authority, allocates responsibility and guides the actions of both public and private actors, at multiple levels. Prominent within this is the deliberate and selective recognition of particular laws and regimes for promotion and support, such that conflicts and harmonies between different regimes, levels and actors, are re-contoured in particular ways. I term the outcome of this conflicts process the internal "legal logic" of the international governance of ODA.

The fourth dimension focuses on the increase in "judicial power" within juridification. Blichner & Molander note that there are two sources of this power – law's indeterminacy and/or lack of transparency. Thus the higher the level of indeterminacy in relation to the rules and regulations of a specific order, the greater the discretionary power that the legal system, its decision-makers and experts within and outside that system, wield. Transparency generates a similar

[259] For a brief summary of the approach to conflicts in private international law, including the doctrine of comity, see Alex Mills, "Connecting Public and Private International Law," in Veronica Ruiz Abou-Nigm, Kasey McCall-Smith & Duncan French (eds), *Linkages and Boundaries in Private and Public International Law,* (Oxford: Hart Publishing, 2018), at 16-17.

outcome – the greater the lack of transparency in a legal system, the more it favours the more able participants. [260]

In the context of the governance of ODA, this indeterminacy aspect of juridification draws our attention to the broad interpretive possibilities that lie within key principles, concepts and ideas that underpin the governance of ODA as iterated by the major international development finance organisations, and in particular how, over time, these are directed towards a particular meaning and interpretation. We will see in Part III how concepts within the discourse of development such as 'inclusive growth,' along with other ODA-governance specific concepts such as 'country ownership,' 'partnership' and 'capacity development' are articulated in highly particular ways that shape both the subjectivities and policy options of donors and aid-recipient states. What the transparency aspect of this dimension draws our attention to is the purpose and the partial nature of the efforts and instruments of governance that aim at greater transparency. It lends towards greater scrutiny of the kinds of information generated; its underlying purpose; the decisions generated from this information and who the decision-makers (and –takers) are, and the extent to which information on the decision-making processes is publicly available in ways that are meaningful to all actors. In Chapters 8-11 on each of the OECD and DAC's governance technologies of law, policy frameworks, bureaucratic and we will see how both the particular approach to the indeterminacy of key concepts within the international governance of ODA, and selective approach to information generation creates a scenario where donors assume executive authority over issues of policy and practice in ways

[260] "When transparency decreases, it increases the power of those that master the difficulties relative to those that do not." Blichner & Molander (2008), supra note 251 at 45.

that facilitate and veil their interventions in aid-recipient states, and render their roles almost completely unaccountable to the peoples, communities and states upon which that intervention is made.

The final dimension of juridification is "legal framing." Blichner & Molander identify this as the "most elusive" dimension, and describe it as "the increased tendency to understand self and others, and the relationship between self and others, in light of a common legal order" to the extent that the legal culture in question "extends beyond or even replaces other background cultures." [261] In the context of the international governance of ODA, I suggest that this dimension has two main features. First, there is the rise to prominence of references to law and legal subjectivity (to rights, duties and obligations under law) and, in particular, to certain kinds of international law held as universally applicable (and thus perhaps regional international law will be less prominent) as ways through which development, and modes of development to be supported by ODA, are articulated. This is evident in the evolution of the discourse of development from needs-based, to rights-based development from the 1970s to the early 2000s, and in the increasing recognition of the role of law and institutions as key to effective development in policy responses advocated by the international development organisations. [262] Second, there is the privileging of the governance and development policy discourses within the

[261] Ibid 47.

[262] See for example several of the World Bank's World Development Reports such as *World Development Report 2017 Governance and the Law*, available at http://www.worldbank.org/en/publication/wdr2017 and *World Development Report 2002: Building Institutions for Markets,* available at https://openknowledge.worldbank.org/handle/10986/5984. Note that this 'turn to law' adopts a highly conservative, instrumental and technical approach to law and legality, one which views the role of human rights in development from a predominantly bureaucratic and technicised perspective. See for example, Siobhan McInerney-Lankford & Hans-Otto Sano, *Human Rights Indicators in Development: An Introduction*, (World Bank, 2010). Available at https://www.openknowledge.worldbank.org/handle/10986/2529

international governance of ODA as promulgated by the OECD's DAC and the donor community, over and above other relevant governance frameworks such as domestic and regional legal and policy frameworks.[263] Though legal instruments exist that hold clear relevance to the development project pursued by ODA across several policy realms and governance levels, and that could provide normative guidance on donor governance of ODA at an individual and collective level, instead, economic law remains centre-stage as the anchor legal-normative order. [264]

Blichner & Molander make two important propositions on how the model of juridification that they elaborate operates. The first is that the different dimensions of juridification are not necessarily linked, and second, that relations between the different dimensions of juridification may be linked "in any which way, positively or negatively." This implies that close attention to context, including empirical research, is necessary to identify and substantiate the nature of links between the different dimensions, and the effects of these. They suggest that relationships between the five different dimensions is dynamic and complex, not singular and cause-effect. [265] These propositions are helpful to understanding the processes of juridification within the governance framework on ODA also. The governance framework of ODA has

[263] For example, Dann's law of development co-operation derives solely from DAC-member donor law only (the World Bank is an observer in the DAC).
[264]. Another area of law of clear legal and normative relevance to the governance of ODA, and a vibrant area of contemporary legal innovation at several levels, relates to conceptualising the relationship between the earth and law, and where more recently, rights have been accorded to 'Mother Earth' and nature in various jurisdictions. For example Ordinance 2013-01 'Mora County Community Water Rights and Local Self-Government Ordinance' of Mora County, New Mexico (USA) establishes 'rights of ecosystems;' Chapter Two of the Ecuadorian Constitution elaborates several aspects of 'Rights of the good way of living (buen vivir)' and in recent years, New Zealand has seen several highly innovative legal rulings when the Te Urewera national park, the Whanganui River and Mount Taranaki have all been conferred with the status of legal personality. On the latter, see Phoebe Smith, 'Mount Taranaki: will the New Zealand peak's 'living person' status bring respect?' The Guardian 5th June, 2018.
[265] Blichner & Molander, supra note 251 at 49

continued to evolve and grow in scope, reach, detail and sophistication over several decades, with juridification processes demonstrating a similar level of dynamism and change.

I now turn to the other three dimensions of the governance signature of (the international governance of) ODA– its juridical quality, its legal logic and its performativity.

4.2 Its juridical quality

If "assumed by law to exist" is one of the definitions of the term juridical,[266] a consideration of the elements necessary for law's assumption of existence would include the presence of norms, institutions and decisions. As we have seen in the case of the UK's Department for International Development (DFID) and the Tanzanian Public Financial Management Reform Programme (PFMRP) in Appendix 1, the governance framework of ODA foregrounds a particular set of norms on what constitutes a desirable approach to development, and to donor and aid-recipient state roles, subjectivity and agency in the ODA relationship in service of that end. These are articulated and institutionalised through a particular set of governance instruments, processes and practices, that work alongside, but remain ignored by, the law of aid-recipient states, all underpinned by a particular kind of decision-making mainly taken by donors, (though with the illusion of partnership with aid-recipient states). The executive nature of the decision-making within this governance framework, in particular, inexorably lends towards a Schmittian understanding of the juridical quality of the international governance of ODA. [267] As I will show in Chapters 8-11, there is strong donor decision-oriented approach to the norms and

[266] Oxford English Dictionary (Oxford University Press, 2003) online version.
[267] Captured by the (in)famous phrase "Sovereign is he who decides on the exception." Carl Schmitt, *Political Theology Four Chapters on the Concept of Sovereignty* Translated and with an Introduction by George Schwab With a new Foreword by Tracy B. Strong, (Chicago: University of Chicago Press, 2005), at 5.

governance instruments and practices that constitute the international governance framework on ODA. In Appendix 1, I showed how the governance of ODA at the national level permits, facilitates, and conceals possibilities for unlimited donor intervention in aid-recipient state domestic affairs, in ways that are not visible to the domestic legal and regulatory instruments of the aid-recipient state. Thus, a sophisticated donor-aid recipient state governance mechanism works alongside and is heavily engaged with key areas of national policy-making such as national budgeting processes and public financial management, without connecting to democratic institutions of accountability. The governance of ODA facilitates legal and institutional reform in very particular ways that promote a select approach to what constitutes rule of law, and the appropriate role of the state and markets. The political aspects of this kind of engagement are disguised in technocratic and bureaucratic terminology and processes. This is one way that the legal logics inherent in ODA (governance *by* ODA) are deeply connected to the juridical quality of its governance framework (governance *of* ODA).

4.3. Its internal legal logic

I define the legal logic of the international governance framework of ODA as referring to first, the kind of law,[268] and second, the kinds of laws[269] that are recognised, privileged or excluded by the policy discourse of the kind of development project pursued via ODA. On both, in Appendix 1, I showed that the particular kind of law reform agenda pursued by DFID vis-à-vis the Tanzanian state was that of a more foreign investor-friendly business climate within

[268] Here we can use binaries to help define the kind of law e.g. public/private; national/international; hard/soft etc.
[269] For example, whether they promote market interests or public interest; whether they are aimed at democratic participation, or exclusion etc.

Tanzania (despite the recent laws passed the Tanzanian National Assembly that aimed at enabling greater state control of, and benefit from, recently-discovered natural resources of great interest to transnational resource extraction companies). Equally, it was about the pursuit of a strongly liberal approach to law, one that emphasised and promoted the formal equality of individuals, over laws that address collective social issues. Taken together, this approach could be characterised as one of "neoliberal legality," [270] In Chapters 8-11, we will examine more closely the particular kind of laws that each of the governance technologies of the OECD's and DAC's international governance framework on ODA promotes.

4.4 Its performativity

Earlier I mentioned how this research reveals how the governance signature of ODA relies on governance technologies where performance, repetition and recurrence are key to their authority. In Chapters 6 onwards, I will show how the main governance technologies that are central to the contemporary governance of ODA – law, policy frameworks, technocratic and bureaucratic instruments of governance – involve behaviours and practices whose various kinds of temporality is central to how they work. There are two kinds of temporality at play here. The first relates to repetition and reiteration, practices that lead to a sedimentation and consolidation of authority and identity over time. Butler's concept of performativity is helpful

[270] Defined as connections between neoliberal thought and practice or the "demands neoliberalism might make of law and lawyers and how legal norms, institutions, and practices might express or call into question neoliberal principles." Fleur Johns, "On Failing Forward: Neoliberal Legality in the Mekong River Basin," (2015) 48 Cornell Int L J 348 at 348. Of relevance to the governance of ODA here is her perceptive insight that "[W]hen development projects fail to realize their transformative promises, this failure has not tended to impede later projects from proceeding on more or less unchanged policy premises." Ibid. The term 'neoliberal legality' has been used increasingly of late, for example by David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism, (2014)* 77 Law & Contemp Probs 1 at 1, and Honor Brabazon (ed), *Neoliberal Legality: Understanding the role of law in the neoliberal project,* (Abingdon, Oxon: Routledge, 2017).

here as it draws attention not only to the utterance that brings forth a reality or a subjectivity, but to the variety of processes that produce ontological and political effects from that utterance. In particular, she highlights the significance of the conditions that enable those effects to be realised. [271] She highlights the significance of the codification and ritualization of an uttered discourse and draws attention to how its governance effects depend on its continual re-establishment, time and time again through processes of reiteration and sedimentation. This is a phenomenon that she describes as a paradox in that it is both regenerative and accumulative. [272] In my view, this concept of performativity captures a dynamic that is essential to the authority, legitimacy, adaptability and stability of the governance of ODA. This feature contributes much to how the international governance of ODA remains so connected, and so influential to shaping the legal and political subjectivities of donors and aid-recipient states. The second aspect of temporality related to performativity is of a much longer duration. This is where, as I will show in Chapters 6 and 7, new approaches to international governance, involving new expressions of authority through law, development rationalities and technologies of governance, in eras of colonial rule, and post-World War II reconstruction, were retained and adapted over decades, through new international legal entities. Once created, these international governance instruments were never shed, but retained their ability to create,

[271] Though Butler's notion of performativity is most closely associated with her views on gender, it is also bound up with politics and legality. She builds the concept of performativity from John Austin's analysis of utterances as having three parts – locution, illocution, and perlocution. Illocution refers to speech acts that have effects derived from the saying of something (e.g. marriage, or the delivery of a legal judgment). Illocution brings something into being by the mere saying of the utterance. Perlocution, on the other hand, is when effects follow from an utterance only when certain other kinds of conditions are in pace. Perlocution thus draws attention to the conditions that help bring about those effects. Judith Butler, "Performative Agency," (2010) 3 J Cult Economy 147 at 147-148. Also Stephen Young, "Judith Butler: Performativity," Website Critical Legal Thinking, 14th November 2016, available at http://criticallegalthinking.com/2016/11/14/judith-butlers-performativity/.

[272] Butler (2010) ibid at 139.

shape, and adapt legal subjectivities, relations and concepts. I include this aspect of temporality within the element of performativity as a key feature of the governance signature of ODA, because as we have seen earlier, signatures connect presence through time. In this way, the signature helps show how instruments of international governance created for purposes and in contexts in a different era, can retain a presence and an influence in contemporary international governance. (See Appendix 2 for a summary of the features of the governance signature).

5. Conclusion

Insights from Agamben and Derrida on the concept of the signature highlight several elements that are useful in a critical legal analysis that seeks to first, understand how the international governance of ODA comes to operate so coherently and cohesively in the absence of an international legal agreement, and secondly, how it engages with law, and adopts law-like attributes in this process. In exploring the concept of the signature as metaphor, these elements include its capacity to hold and communicate excess, in which law and legal dynamics are key; its ability to alter or change the identity of the subject or object, or the meaning attributed to both; its ability to connect across time and space, and importantly for this project, its ability to make such governance mechanisms cognisable to law, and to act as law. The application of the four-part analytical lens of the signature helps to reveal, and give a basis to further explore, these hidden legal qualities. The lens of the governance signature thus helps overcome limitations of existing legal scholarship on the governance of ODA that focuses on donor law only (such as that led by Dann and colleagues analysing development co-operation and international public authority using respectively, donor law only as the main legal field, and

administrative law as their analytical and normative lens). It also helps deepen insight from critical legal scholarship on governance by ODA and international governance through ODA-related instruments, by revealing identifiably legal and juridical features of the international governance framework of ODA. Crucially for both, in my view, it makes explicit the link between governance and temporality, both as an essential non-legal feature of contemporary governance, but also its connection to governance instruments developed to manage colonial and imperial relations (see Tan, Trevor etc. in Chapter 2).

In short, the governance signature helps explain the influence of, but also the particular contours of power, authority and legitimacy that are specifically activated and enabled by the jurisdiction of ODA. In the following chapter, I describe how I blend and apply insights from a jurisdictional lens (from Chapter 3), and the signature into an analytical lens to apply to the international governance of ODA.

Chapter 5 Methodology for this research

1. Introduction

In this chapter, I describe the methodological approach used to collect and analyse the data gathered for this research. The data gathering exercise consisted of four strands, (i) a literature review of scholarly and, to a lesser extent, grey literature on the core subject areas of this research topic; (ii) a doctrinal analysis of relevant legislation and rules; (iii) a policy discourse analysis of relevant official policy, programmatic and institutional materials from the Organisation for Economic Co-operation and Development (OECD) and its Development Assistance Committee (DAC), and to a lesser extent, the main international development organisations such as the World Bank, and from more influential donors such as the United Kingdom (UK) , the European Union (EU); from information from donor consortia in Tanzania and other aid-recipient states with public information on mechanisms such as donor co-ordination groups etc; (iv) empirical research involving visits to and interviews with officials from donors and aid-recipient states involved in the planning and administration of ODA at the international, regional and national level. This chapter proceeds with a description of the approach taken to gathering and generating data from each of those four strands. It then specifically addresses how the analytical lens based on the concepts of jurisdiction and the governance signature was applied to data derived from these activities. Within the latter, I pay specific attention to historical approach taken to research materials used for this research, which I include in two chapters in Part II of this thesis.

2. Literatures consulted and bibliographic choices

As this research explores the international governance of ODA, the literature review used to inform each of the research activities above primarily focused on the study of law's role in the governance of ODA and in development, but also included relevant materials from the fields of international development studies; political science and international relations; critical international political economy, legal philosophy and some history. Scholarly literature was sourced using the university's library's generic, legal and social science catalogues; Google scholar; SSRN and generic Google searches. Searches were undertaken using search terms in the fields of international law and legal studies, international development studies; critical international political economy, history and political science (international relations), social theory and legal philosophy. Other sources of scholarly literature were from academic research centres that produce online research reports,[273] from academic listservs on areas such as critical political economy, European law and development studies; from table of content alerts from selected journals, and from call-outs to people in my academic networks. I benefitted enormously from the expert and diligent guidance and support from librarians in the law library and social science libraries at the University of Ottawa, and from the guidance and support of librarians at the European University Institute in Florence, Italy, especially in relation to EU and OECD materials.

For institutional literature (UN, OECD, EU institutions, the East African Community and some of the relevant statutory organisations in various states such as Tanzania), specialised

[273] These are located mainly in Europe, for example the Centre for the Law of European External Relations at the Asser Institute in The Hague and the Leuven Centre for Global Governance Studies.

organisational electronic search engines were used, and at times, requests were sent directly to the organisation. I also subscribed to relevant email lists of various relevant institutional mechanisms such as the European Parliament Weekly Digest, and email updates from the European Commission's Directorate Generals of Trade and Development Co-operation, which helped keep me abreast of relevant research and developments at an EU level. Grey literature was sourced from bibliographies; from research-focused NGOs;[274] from independent online newsletters, [275] and from NGOs located in Europe and elsewhere. Institutional and grey literature was especially difficult to obtain from the East African Community and statutory departments and institutions in Tanzania. Though librarians at the copyright library at the University of Dar es Salaam were enormously helpful, it was simply not possible to obtain official documentation from the several relevant government departments within the 6-week research visit I had in Tanzania and Ethiopia. Doing so would have required several visits to each institution to obtain the necessary permissions to access and review documents, arrange official photocopying and later pick-up of the relevant documents. I hired an experienced doctoral researcher from the Faculty of Social Science at the University of Dar es Salaam for a period of two weeks whose function was to obtain physical copies of a list of relevant official documentation that I had identified from my own research. Her efforts were only partially successful. Thus I would like to highlight the partial documentary archive available to me upon which I have relied for insights into the EAC and Tanzanian governance framework on ODA.

[274] Examples include the European Centre for Development Policy Management; South Centre; International Centre for Trade and Sustainable Development.
[275] Such as EU Observer https://euobserver.com/static/about; EURACTIV - http://www.euractiv.com/about-euractiv/abouteuractiv/

3. Doctrinal analysis in this research

Often summarised as the method that lawyers use to undertake a legal analysis of law and legal cases, doctrinal analysis has been described as "a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation."[276] In this instance, 'critical' is associated more with a deconstructive method. Research on methodologies of doctrinal analysis termed as such, has largely focused on legal processes at the domestic level and, at the international level, within bodies of law with a well-established dispute settlement process such as a court. At the international level, doctrinal analysis has predominantly focused on the interpretation of 'hard' international legal materials such as treaties, decisions in international courts and tribunals etc. For treaties, the 'rules' of interpretation have been summarised in Articles 31-33 in the Vienna Convention on the Law of Treaties. [277] However, belief in their objectivity and that application of these rules will lead to a 'correct' interpretation, has been challenged by Kammerhofer and others. [278] In a recent article, Kammerhofer has pointed out the dual aspects to interpretation – the interpreter's

[276] Terry Hutchinson, "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law," (2015) 3 Erasmus L Rev 130 at 131. Hutchinson elaborates on the nature of the conceptual analysis critique as being "based on an understanding of the rules of precedent between the court jurisdictions, the rules of statutory interpretation, the tacit discipline knowledge such as the difference between civil and criminal jurisdictions, and various tests of liability, along with the acknowledged reasoning methods, borrowed from philosophy and logic, such as induction and deduction." Another, similar, definition of doctrinal analysis is offered by Posner - "[I]involving) the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis." Richard Posner, "The Present Situation in Legal Scholarship," University of Chicago Law School Chicago Unbound 1980 (90) Yale L J 1113 at same.

[277] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

[278] Jörg Kammerhofer, "Taking the Rules of Interpretation Seriously, but not Literally? A Theoretical Reconstruction of Orthodox Dogma," (2017) 86 Nordic J Int Law 125. See also Mark E Villiger, "The Rules on Interpretation; Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission," in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: OUP, 2011) 105.

understanding of the meaning of a rule, and the interpreter's justification on why the legal system should recognise a particular meaning as authoritative. [279] While this acknowledgement perhaps parallels well-known and rehearsed debates on the indeterminacy of law, I include it here to draw attention to the contingency of the interpretation of rules that serve to guide the interpretation of particular bodies of legal rules, and to draw attention to the fact that even where these rules exist, they do not necessarily explain decisions that arise in relation to the subsequent interpretation of legal clauses. In analysing some aspects of international law in the following chapters, I have approached doctrinal analysis cognisant of those rules of interpretation, but aware that their applicability is partial and, in practice, may be minimal. The latter is likely to be especially true where the international agreement does not have formal dispute settlement mechanism such as a court, and where treaty interpretation remains very much an act of legality with juridical and political elements. This is frequently the case with law in the context of international organisations – both in relation to the interpretation of their founding treaties, and of laws and regulation that mandate and rationalise interventions into particular areas of activity, and in a certain direction. This issue emerged rather early in the research when seeking to understand the legal basis for the broad mandate conferred by the OECD's founding convention upon itself, and how this mandate, and that of its DAC have been interpreted to rationalise and legitimise a very particular direction in relation to its pursuit of a development project, and in relation to engagement with non-members. [280]

[279] Kammerhofer quotes Dirk Pulkowski here. *Ibid* at 4.

[280] While this research does not focus on the law of international organisations per se, this aspect of the law of international organisations – the 'internal' interpretation of its own legal mandate – remains under-addressed in the literature in this area. See for example the contributions within Jacob Katz Cogan, Ian Hurd & Ian Johnstone (eds)*, The Oxford Handbook of International Organizations,* (Oxford University Press, 2016). Though the

In addition, for the purposes of this research project, the approach outlined in the VCLT raises three considerations – first, it is silent on the interpretation of governance instruments that are not treaties, such as rules and 'soft law' instruments, even though, over time, these may be incorporated into the internal rules of international organisations and even into international law. [281] The consequences of including international 'soft law' instruments as material for law-focused doctrinal analysis has only begun to be explored by legal researchers. [282] Secondly, it raises the question as to the kind of doctrinal analysis that may be appropriate for soft-law instruments that recognises their dual juridical and political qualities. Are only the recognised approaches to legal interpretation that include modes of legal reasoning etc. appropriate? Or could some other methods that draw from, for example, formal policy discourse analysis, be helpful? The latter question is posed in response to the conceptual idea implicit within mainstream doctrinal analysis, that formal legal analytical technique is the route to the discovery of 'truth' in law. However, for the purposes of this project, I differentiate 'doctrinal' analysis of hard and of soft law instruments, and in relation to the latter, suggest that the analysis and interpretation of soft law instruments may benefit from insights from certain elements of policy discourse analysis, and in the latter case, critical discourse analysis and

International Court of Justice referred to 'a certain autonomy' conferred by the founding treaty of the international organisation onto itself, the parameters of that autonomy remain unclear. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, at 75.

[281] See for example the prominence of references within the OECD to the UN's Sustainable Development Goals. See also the incorporation of the Aid Effectiveness Agenda and the UN Millennium Development Goals into the EU-ACP Cotonou Partnership Agreement (2000-2020), an international legal agreement, and the largest North-South international treaty currently in existence.

[282] See for example debates within Global Administrative Law on the concept of international public authority as one attempt to address the legal nature of aspects of these instruments in legal terms that can then enable their scrutiny in legal terms.

institutional discourse analysis (described below). For the list of legal instruments used in this research, see the List of Legal Instruments at the start of this thesis.

4. Policy discourse analysis and the contribution of non-legal documents as research data for legal analysis

Discourse analysis has been the subject of intense attention from social science and humanities scholars over the last several decades with varying definitions and several approaches proposed and recognised. [283] For the purposes of this research, I offer a preliminary definition of discourse as "a particular way of talking about and understanding the world (or an aspect of the world)"[284] with the focus less on a linguistic analysis of the contents of a statement(s) and more on how discourse consists of a group of related statements, that "cohere in some way to produce both *meanings* and *effects* the real world."[285] In this approach, my method of discourse analysis draws from three propositions – first, that discourses are systems of signification that construct social realities; secondly, that discourses are productive or

[283] This section drew from earlier research undertaken on particular aspects of discourses analysis such as Critical Discourse Analysis (CDA) and Institutional Discourse Analysis (IDA). Institutional Discourse is a rich field of discourse analysis research that focuses on how institutions, their members and other stakeholders, are constructed and reconstructed in discursive practices. It views institutions as sites of struggle where groups compete to shape a reality in ways that serve their interests. Institutional Discourse analysis is informed by other perspectives such as critical discourse analysis, feminist perspectives etc., and terms such as Gramsci's 'hegemony' and Foucault's focus on institutions as sites of disciplinary power would be prominent. Institutional Discourse analysis can focus on language issued through spoken, written or behavioural media. For this research, the primary focus is on written texts, but see section on 'Empirical Research' for insights gained informally from visiting the various governance sites. See Andrea Mayr, 'Institutional Discourse' in Deborah Tannen, Heidi E. Hamilton, and Deborah Schiffrin (eds), *The Handbook of Discourse Analysis,* (John Wiley & Sons, 2015), 755. CDA is a multidisciplinary lens that examines the relations between discourse, power, dominance, social inequality and the position of the discourse analyst in these relations. It can draw specifically from lenses such as feminist and anti-racism. See Teun A. Van Dijk, 'Principles of critical discourse analysis,' (1993) 4 Discourse & Soc 249 at 249.

[284] Marianne Jørgensen & Louise J. Phillips, 'Field of Discourse Analysis' in Marianne Jørgensen & Louise J. Phillips, *Discourse Analysis as Theory and Method,* (Sage Publications online, 2011) 1 at 2.

[285] Jean Carabine, 'Unmarried Motherhood 1830 – 1990: A Genealogical Analysis,' in Margaret Wetherall, Stephanie Taylor & Simon J Yates, *Discourse as Data, A Guide for Analysis* (Milton Keynes: Open University Press, 2001) 267 at 268. Emphasis added.

reproductive of things defined by the discourse, and thirdly, that in order to maintain their 'truth', discourses need to constantly articulate and re-articulate their knowledges and identities (in order to fix their 'regime of truth') and thus they are contingent. [286] Thus, in the context of this research, the policy and other documents selected that relate to ODA are analysed not as only *reflecting* a perspective on ODA, models of development, the relationship between donor and aid-recipient states and the wider international order, but also as *constitutive* – they construct a particular version of these and establish what the 'truth' about ODA is at particular moments in time. Milliken points out that in the context of the analysis of international relations, for "discourses as signification," two approaches to stand out – first that attention is paid to the relationships between things within a sign system, and in particular how one object is distinguished from another. This leads to the second feature, that discourses are expected to be structured mainly as binary oppositions, where one part of the binary is more privileged than the other. Thus, in the discourse of ODA, we will see a number of binaries clearly in evidence including developed/developing; donor/aid-recipient; state/private sector; developing country state/'people' (usually in need of development or in poverty).[287]

This constitutive power of discourse within a policy context has a number of important effects - it can exclude or invalidate other potential truths, and it is key to shaping the subjectivities of

[286] Jennifer Milliken, "The Study of Discourse in International Relations: A Critique of Research and Methods," (1999) 5 EJIL 225 at 229-230.

[287] Even when these identities can be masked by terms such as 'development partner.' To reveal such identities and tactics of obfuscation, and the power dynamic contained within, discourse analysts sometimes substitute one of the binary terms for the other. In this instance, I sometimes substituted the term 'aid-recipient state' and 'donor' for the term 'development partner' in order to reveal the hidden roles and power dynamics ascribed. Not all identities and objects are in easily identifiable binary relationships. Drakopoulou's method of discourse analysis introduces a third concept – that of sex – in order to reveal the hidden foundational role of sex and gender in the construction of a legal relationship that is invisible to the written text. While this would be a fascinating exercise to undertake in order to reveal the hidden sexed nature of the donor-recipient ODA relationship, it is beyond the parameters of this research project at this time, unfortunately.

people and other actors. The productive role of discourses is evidenced in how discourses identify and imbue certain subjects with the authority to speak and to act, denying others this role; how discourses define the knowledge practices that are considered legitimate and thus legitimise certain interventions; how they identify the places and spaces that are the objects of the discourse and specify how they should be ordered, and finally, how they create and endorse a certain approach or worldview which makes 'common sense.'[288]

But how do policy discourses and their analysis relate to the analytical lens identified in Chapters 3 (on jurisdiction) and 4 (on the signature)? In this project, I link the particular approach taken to a discourse analysis of ODA which highlights its constitutive and productive dimension, with the *governmentality practices* that construct knowledge for the purposes of (i) self-government and (ii) surveillance developed to monitor, regulate and thus discipline the behaviour of donor and aid-recipient states through particular *technologies*. Such technologies include reports and knowledge instruments of various kinds, allied to the institutional mechanisms and processes that make up the practices of government which, as Burchell points out, constitutes Foucault's idea of governance as a 'contact point' where techniques of domination - or power - and *techniques of the self* 'interact', where "technologies of domination of individuals over one another have recourse to processes by which the individual acts upon himself and, conversely, . . . where techniques of the self are integrated into structures of coercion." [289] In this way, discourses are linked to jurisdiction through

[288] Milliken notes that this is key to the legitimising role of discourses. 'Throughout, discourses are understood to work to define and to enable, and also to silence to exclude, for example, by limiting and restricting authorities and experts to some groups, but not others, endorsing a certain common sense, but making other modes of categorizing and judging meaningless, impracticable, inadequate or otherwise disqualified.' Milliken (1999: 229).
[289] Graham Burchell, "Liberal government and techniques of the self," (1993) 22 Econ and Soc, 267 at 268.

technologies of governance. Two key features of this relationship are how discourses (materialised through knowledge and manifest in data) are instrumentalised in decision-making processes, and how these technologies are linked to formal law (this is explored in each of the chapters that follow).

As to the approach to undertaking the discourse analysis in practice, it consisted of the following steps (i) the identification of the relevant objects (this included instruments of governance including law, regulation, international public policy frameworks on what constitutes appropriate policy on donor policy on development co-operation, and on ODA-funded development for example, as well as normative instruments such as guidelines and standards on ODA governance targeted at donors or aid-recipient states); particular categories (such as ODA, and concepts such as development partner, country ownership etc, and themes of study (a focus on authority and decision-making on the governance of ODA; the model of development being proposed; the prescribed role for ODA in pursuit of this model and the ideas about law's and the state's role in development etc.); (ii) the identification of (a) the relationship between these objects and categories, and (b) the relationship between discourses and how these are naturalised, and (iii) a tracing of how this 'common sense' framework of ODA was institutionalised and operationalised through governance practices.

A key challenge was the identification of relevant documents that could be identified as the main instruments of the international policy discourse on ODA and its governance. At each of the governance levels, my decision-making process was informed by a reflection from the literature review; the identification of the relevant policy governance instruments for ODA, and from interviews with key personnel. While many documents relevant to the governance of ODA

were identified (for example, the EU's ODA policy traverses several areas of its international relations; the World Economic Forum has a whole cohort of research on how it thinks ODA should be used by OECD DAC-member donors), these had to be narrowed for purposes of efficiency and relevance. Decisions on the choice of documents at each level on the basis of relevance were made by assessment of how the document illuminated the approach to ODA at that level, and how authoritative and legitimate it was perceived to be by the relevant stakeholders.

As Jorgensen & Phillips state, the validity of a discourse analysis depends on the choice and combination of criteria that hinge on the researcher's approach to scientific knowledge in the first place. With such a wide potential leeway and responsibility on the researcher, how is she to know when the analysis is sufficiently extensive and rigorous to be deemed valid? They suggest the following 'rules of thumb' –

- That the analysis should be *solid* – based on a range of different textual features rather than just one feature.
- That the analysis should be *comprehensive* – that the questions posed to the text should be answered fully, and that textual features that conflict for this should be noted and accounted for, and
- That the analysis should be presented in a *transparent* way, by documenting the interpretations made and including clear references to sources.

Such an approach, they suggest, should enable both the researcher and the reader to undertake an immanent critique of the project itself in order to evaluate its internal consistency. [290]

5. The empirical research undertaken for this thesis

The final strand of the research method used for this research project was empirical research where I undertook semi-structured interviews with bureaucrats involved in the governance of ODA and with key informants (who were representatives of NGOS and academics), familiar with issues of ODA governance at the international, regional and national levels. Given the exploratory and inductive nature of this research, the inclusion of interviews with people closely connected to, and involved in, the international governance of ODA, was considered key to understanding how the international governance of ODA worked in practice, vis-à-vis the links between and roles of different governance instruments, but also the world view of those involved. The purpose of this strand of research was to understand the international governance of ODA as a coherent system, and how the different aspects of its governance at each level, worked together.

Interviews were sought with officials and key informants at the EU level, the EAC level and at the ODA-recipient level in Tanzania. Relevant officials and key informants were identified

[290]Jørgensen & Phillips (2001), supra note 284, 173-174. Of course, this approach lends towards the idea that some universal standard of knowledge assessment is available to researchers, which is based on a shared idea of validity criteria. Clearly, this is not the case. However, given the principles of the critical approach taken to this research elaborated earlier, such an assessment is possible in terms of whether the knowledge generated is sufficiently valid from a critical perspective. I should add the caveat that I make no claims that the knowledge contained in this thesis, pursued through the framework just outlined, consists of THE critical analysis of the governance of ODA. Rather, I suggest that it potentially offers one critical perspective on this question, that is reasonably coherent in terms of its analysis of the governance of ODA.

through advance online research on each of the institutions; [291] and queries to institutions and organisations at each governance level. I commenced with an excel spreadsheet that identified my first option list of potential interviewees, and after initial contact (sometimes repeatedly) with these to explore whether they were indeed the right people to talk with and whether they would consider meeting me for either a formal interview, or informal discussion, refined this list to more relevant sources. Given the politically sensitive nature of ODA, I quickly offered all potential interviewees the option of being interviewed as a formal or informal participant. All participants were assured of confidentiality and that no identifying information would be released in my thesis or subsequent research based on my doctoral research. The main difference between data from a formal and informal source was that the formal source had consented for me to include anonymised quotes in my thesis, if relevant.

Ethics permission was sought from the University of Ottawa and this involved an extensive application and two meetings with the Ethics Office personnel. While separate permission was not necessary for interviews with EU officials, I sought and received ethics clearance from the relevant authorities in Tanzania also. (See the Appendix for the certificate of ethics clearance for this research).

Research at the EU level involved eight interviews with representatives from DGs Trade, Development Co-operation and the European External Action Service, along with two

[291] This involved checking public statements; official documents and records; institutional organograms; queries to information/press officers and other sources. An example of the latter was reviews of attendance lists at international meetings – this was one way of identifying for potential interview, relevant people who are not sufficiently 'high level' to be identified in official documentation, but who have considerable institutional authority. I also used personal contacts within the Irish diplomatic services in Ottawa and Dublin who were very helpful in introducing me to colleagues in Brussels, Paris and Dar es Salaam.

interviews with European NGOs focused on EU policy on international development and one interview with a member of the African Caribbean Pacific Secretariat. This research was undertaken in May 2015.

For the field research in East Africa, this involved three areas of activity. The first was attendance at the Third International Financing for Development Conference in Addis Ababa in July 13th – 16th, 2015, in order to attend the public parts of the conference and relevant side events as an observer. While there I also attended the Civil Society Forum held beforehand (July 11th – 12th, 2015). This was not originally included as part of my field research, but as it preceded the planned dates of my field research in Dar es Salaam, I sought and obtained official clearance to attend. At this conference, I attended the NGO pre-session activities; several of the side events that examined various aspects of the international financing of development in the context of the then-forthcoming UN Sustainable Development Goals Framework; and introduced myself to the NGO participants of both the Canadian and the Irish official delegations. Through their generosity and interest, I was able to informally observe several of the preparatory meetings where representatives of international NGOs prepared their negotiations strategies. I also registered with the Irish embassy in Addis, and thus was invited to attend some events supported by the Irish government designed to develop strategies on international financing for development. These events gave me access to debates by international policy makers that was an enormous help to understanding the stakes of the international governance of ODA from several perspectives.

The second area of activity was meeting with officials from the East Africa Community institution that were engaged in donor liaison. The third area of activity was meeting with

officials from various government departments and national institutions of the Republic of Tanzania involved with donor liaison, and also meeting with representatives of international donors involved with aid programmes in Tanzania. The reason for selecting Tanzania as a site of research is that Tanzania's donor liaison and management mechanisms are considered state-of-the-art and were developed in the early 1990s, thereby setting a precedent as a model approach to donor-recipient liaison and co-ordination that was later followed by many donors and aid-recipient states. Thus, the Tanzanian approach offers insights into the international governance of ODA that goes far beyond its national relevance.

This research also draws from twenty-eight semi-structured interviews I conducted in Tanzania, in July and August 2015. I interviewed eleven current officials from bilateral aid agencies and embassies (one meeting had four officials present); three from international development organisations; six from several Tanzanian government ministries dealing with donor financing at the national level, and five from the Eastern Africa Community located in Arusha, Tanzania. I interviewed five academics based at the University of Dar-es-salaam that that undertaken research consultancy on various aspects of Tanzanian development policies and its implementation. I also interviewed two people from two civil society organisations – one was a research institute and the other was an international NGO. Interviews were mainly conducted on a one-to-one basis, however in two instances with bilateral donors, between 2 to 4 people participated in the semi-structured 'interview' and thus, in the latter case, the 'interview' became more of a facilitated discussion. In several cases, interviewees introduced me to their colleagues and in three instances we proceeded to have lunch or tea together with issues from the interview being further discussed within the larger group. In these instances, as soon as

possible afterwards, I noted down any additional relevant points raised during these informal discussions.

Reflections on the field research

Initially, I had planned that this research project would draw far more from the empirical research undertaken, and that references to the content of interviews would be included in the text of the thesis. However, reviewing the overall process and the content of the interviews on completion revealed three important things. First, interviews with European Union officials in Brussels pretty much repeated official perspectives on the planning and implementation of EU ODA policy, and explicitly and implicitly followed the official policy discourse of the OECD's Aid Effectiveness Agenda. Secondly, interviews with officials within the EAC institution and Tanzanian state who deal with ODA revealed somewhat different and contrasting perspectives. In general, commentary and references to planning, reports and monitoring frameworks, and decision-making practices, as well as ODA-institutional management mechanisms such as the Tanzanian Donors Partners Group, [292] lent strongly to the view that concepts such as country ownership and partnership were, in practice, largely donor-determined and –oriented. [293] Furthermore, there were references to several examples of donor-initiated activities that flew directly contrary to both the Aid Effectiveness Agenda principles, and DAC recommendations on tied aid.[294] Thus, there was a significant discrepancy between donor-held views and those of

[292] See the website of the group for more information http://www.tzdpg.or.tz/dpg-website/dpg-tanzania.html.
[293] In my view, this was especially the case with the EAC which is significantly reliant on non-EAC sources of funding for much of its activities.
[294] One example given in an informal interview was how an OECD DAC-member donor offered a substantial aid package on rail infrastructure, if the state would subsequently purchase further goods and services on rail at market rates. Another example is how a group of northern donors funded the creation of a private company to deal with administrative trade bottlenecks for firms within the EAC customs union. One of their activities is to run certain customs posts on borders where bottlenecks have been identified. The 'taking over' of an important public

aid-recipient states on the values and principles underpinning the ODA relationship, and the processes and practices that made this relationship manifest. [295] Thirdly, I detected a distinct unease and discomfort with some Tanzanian and some EAC officials in critically discussing donor ODA practices and approaches. Assurances of confidentiality appeared to do little to ease this until I formally finished the interview. At that point, information and insights would usually flow more freely, and informants would appear to be more comfortable. This was in stark contrast to the approach of a group of Tanzanian public officials who are closely involved with donors in their official capacity and have received additional remuneration for these responsibilities, [296] or engaged in professional consultancy to donors in a private capacity.[297] Thus the perspectives of aid-recipient public officials on ODA practices revealed a much more complex political economy of donor-aid recipient relations than I had anticipated. In order to avoid individualising, and/or extrapolating in error, from such a small research sample, I

service by a private, wholly internationally-funded company, without recourse (as I understood it) to prevailing public procurement processes, is in stark contrast to the official ODA policy discourse on 'capacity-building.' This 'informal' tying of aid has subsequently been recognised as problematic at UN and in other forums. For example, DAC procurement statistics illustrate that 'informal tying' remains a major challenge. In 2016, 51% of the value of bilateral ODA contracts reported to the DAC flowed to firms in donor's own countries. See United Nations, Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2019, (*United Nations: New York, 2019) at 94.

[295] A very simple and visible manifestation of the predominantly donor-oriented focus of ODA governance instruments is that key ODA planning documents such as the various Tanzanian 'country strategy documents' appear to be prepared in English from the outset, and not Swahili, the official national language.

[296] The payment of allowances and per diems to staff in order to offer an incentive to engage in 'capacity development' activities has emerged within development finance literature as an issue of questionable efficiency in public spending, as well as questionable effectiveness in progressing public policy goals. It was also raised with me in interviews by several donor representatives in Tanzania, as well as one representative of the Tanzanian state. See Guy Blaise Nkamleu & Bernadette Dia Kamgnia, 'Uses and Abuses of Per-diems in Africa: A Political Economy of Travel Allowances,' African Development Bank Working Paper Series No. 196 – February, 2014.

[297] Thus one academic was nominated by the Ministry to represent the Ministry of Justice on a donor-Tanzanian task force on law reform. The task force produced its report and the Ministry struck a donor-Tanzanian state committee to implement the recommendations of the task-force. The academic was approached by a donor to be their representative on the task-force and acquiesced. He received a significant consultancy fee for this role. Questions of a possible conflict of interest did not arise, in his view.

decided to change the role of interview data from being a prominent source of research data for the thesis, to being a source of intelligence and information to me as a researcher in my efforts to adequately frame the research questions and analyse the data.

Secondly, unlike a research approach that is based on hypothesis-testing,[298] this research project proceeded in a planned fashion in relation to the pragmatic research activities, but the theoretical framework outlined earlier emerged after the field-work was completed, and after several months' reflection had passed. The jurisdictional-signature theoretical and analytical lens evolved slowly as a way to capture, explore and understand the governance of ODA, and its legal qualities in particular, following insights and intuitions fed by reading more widely in legal theory, critical theory and legal philosophy than I had initially undertaken. In doing so, other previous theoretical perspectives including TWAIL[299] and law and geography were left behind, and a much deeper reflection on the 'critical' approach was undertaken. I wish to stress that though the 'place' of the empirical research undertaken for this project, in relation to the writing of the thesis, changed somewhat, its influence on the insights from this project are perhaps far more profound than are immediately visible on these pages. Intuitions, insights and knowledge gleaned from that experience prompted a much deeper engagement with the theoretical aspect of this project and led to developing the jurisdiction-juridification-signature approach. In a similar way, it led the research to more explicitly address the influence of history

[298] See Dan Jerker B Svantesson, "The Hypocritical Hype about 'Hypothesis' – Why legal research needs to shed this relic," (2014) 39 Alt L J 259 for a discussion on the merits and demerits of hypothesis-testing in legal research.
[299] Third World Approaches to International Law.

and colonialism, a direction that was not anticipated at the outset. (For more on the approach to history, see following section).

This research approach also has several limitations. For the field research, due to resource constraints, I was only able to engage with three of the four research sites examined (I did not visit the OECD), and thus to the extent that the visits and interviews added extra detail to my understanding of the systemic nature of the governance of ODA, this method of data gathering was absent for the OECD. However, the OECD's institutional website is extensive, and its information staff have been helpful in responding to emailed enquiries. For those sites that I was able to visit, I would not claim that the interviews undertaken can be taken to represent 'the view' of the institutions in question. [300] This would have demanded a different research approach such as a case-study which was not possible or desirable.

6. **The analytical lens development for this research based on the concepts of jurisdiction and the signature**

In Chapters 3 and 4, I described the two pillars of the analytical lens developed for this project based on the concepts of jurisdiction and the signature. In the former, I identified four key elements – the governance technologies of ODA (including legal, policy frameworks, bureaucratic and technocratic); the nature of authority and authorisation created within that; the approach to time/temporality and to space/geography, and the symbols or events or locations that represent the project of ODA - that construct and maintain ODA as (a) jurisdiction in its own right. By approaching ODA thus, I claim that each of these elements, even if in a

[300] This is because different locations within an institution can offer different perspectives on a discourse.

different way, create the architecture of the jurisdiction of ODA and provide the basis for its unique legal form. They also contribute to the coherence, cohesion and effectiveness of the international governance of ODA as jurisdiction, one that operates as such without an international legal agreement.

One of these elements relates to time, and in particular, to history and to the past. Thinking about this element - how to understand the relationship between the past and international law today, and the links with forms of international governance in the past, has been the subject of some debate in international legal theory in more recent years, with one point of contention focused on the merits and the stakes of analysing this relationship in conventional chronological terms, over a contextual approach which some have termed "anachronistic."[301] In the former, the narrative of the evolution of international law is one that has cast off its colonial history and European heritage, and emerged as an instrument for the promotion and protection of universal liberal values of peace, freedom, democracy and human dignity. In the latter, however, this position is viewed as fundamentally untenable, with the contemporary multilateral system - based as it is, primarily on international legal instruments that have evolved over centuries - viewed as inherently containing continuities with the legal orders that previously underpinned and rationalised both colonial and imperial orders. Anne Orford's work in particular has addressed both the stakes and the methodology that underpins both approaches. Over several interventions, she defends TWAIL's historical approach (and Anghie's

[301] Anne Orford, "International Law and the Limits of History," in Wouter Werner, Marieke de Hoon, Alexis Galan, *The Law of International Lawyers – Reading Martii Koskenniemi,'* (Cambridge: Cambridge University Press, 2017) 297 at 301-304.

work in particular)[302] as historically anachronistic,[303] highlighting how, for lawyers and legal scholars, their attention to the ability of law to capture and transmit meaning through time via legal concepts, doctrines, principles and practices opens up the legal terrain for deeper critical investigation, thereby revealing the "rhetorical and ideological force" of international law that produces "authoritarian or exploitative effects."[304] In doing so, she extrapolates from and relates debates on historical 'method' from within the discipline of history to methods in international legal research.

In the sections below, I draw inspiration from Orford's ideas, which have informed my analytical approach to the historical context from which key strands of the development and governance rationales, and the approach to governing ODA and development has emerged. My intention is to better reveal the contingency of the ideas underpinning this governance rationale, the fragility of their truth claims, while highlighting the logic of their manifestation in instruments and practices that, taken together, prove key to their longevity and efficacy nowadays. But this task proves additionally difficult to undertake with historical works, whose form and content have changed across time. How to go about this task? My approach goes beyond discourse analysis 'in context.' Rather, it can be described as "anachronic,"[305] which, at its essence, seeks to describe how ideas and instruments derived from different eras (that are, on the surface

[302] See George Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' (2008) J Hist Int L 181, who accuses Robert A. Williams and Antony Anghie of constructing 'false continuities' and 'over-schematization' (at 207).
[303] Anachronism being the "worst of all sins, the sin that cannot be forgiven" by historians. Lucien Febvre in Jacques Rancière, "The Concept of Anachronism and the Historian's Truth," (English Translation), (2015) 3 InPrint 21.
[304] Orford, supra note 301 at 305-306.
[305] Orford's examination of the accusation of anachronism by conventional historical scholars led me to explore the etymology and use of the term to describe different approaches to historical research.

level, perhaps incompatible and incongruous), maintain a connection that have an inherent and powerful influence that, when deployed, have regime-ordering consequences. The anachronic … does not constitute an 'alternative' to historical models, it is neither un-historical (as the anachronistic), nor a-historical, nor does it simply transcend timelines, but it is a *historiographical instrument designed to activate the agential potential of ideas, events, actions*.[306] This approach, I suggest, may serve as a "technology of reading in the past [that can] allow us to follow the transformation of discourses over time,"[307] in a way that focuses on where languages or texts persist, migrate from one historical situation to another, and are redeployed in a situation other than where they originated or were deployed previously.[308] Unlike other methods of analysing the history of intellectual ideas and political thought,[309] my intention is not to uncover and faithfully reconstruct these ideas in a historically 'accurate' way by, for example, focusing on deeply grounding their origin and use in a localised context, or indeed by extracting an ideational 'essence' and tracing its lingering scent across those three eras, in a way that severs its links with its use in practice.

[306] In her examination of the relationship between art and history, Eva Kernbauer highlights how artworks can displace chronology (and chronological time), resulting on configurations that repeat, regress, distend, duplicate, fold and bend, which enables artworks "to keep incompatible models of temporality in suspension." This quality, she notes, is not 'anachronistic' – it does not place the event or idea or instrument in an incorrect position in the chronological course of time. Instead, it disturbs the division of time into a 'before' and 'after,' connecting – and uniting, in some instances - more than one temporality. Eva Kernbauer, "Anachronic concepts, art historical containers and historiographical practices in contemporary art," (2017) 16 J Art Historiography 1 at 9-10. Italics my own.

[307] Peter De Bolla, "Review: Disfiguring History," (1986) 16 Diacretics 48 at 56.

[308] J.A. Pocock, Foundations and Moments,' in Annabel S. Brett, James Tully & Holly Hamilton-Bleakley, *Rethinking the foundations of modern political thought,* (Cambridge UK: Cambridge University Press, 2006), 37. Pocock calls this approach "diachronic," and contrasts it with the "synchronic" approach of writers such as Quentin Skinner who, he claims, focus on the detailed reconstruction of language situations as they exist at any given time. *Ibid.* 45.

[309] Such as geneology.

Instead, it is a dialectical approach that seeks to focus on two things. First, how particular ideas associated with the 'ideal' in the civilizational-development narrative, expressed in concepts and articulated through instruments of knowledge, were utilised to rationalise and progress projects in service of that purpose. Secondly, how these ideas became concretised through legal, technocratic, bureaucratic and administrative techniques that were initially created and authorised by metropolitan, colonising states in the colonial era, but were later adapted and continued by then newly-emerging international organisations during particular times of heightened innovation in international institutionalisation (here I focus on the post-World War I and post-World War II eras). [310]

For that element of the jurisdiction of ODA that addresses time, here I focus on history, and I select two historical moments that I propose are key to understanding the current legal form of its international governance. During these moments, new laws, institutions, concepts of development and governance, instruments of rule, and actors with new legal subjectivities emerged, that effectively created a new international governance space, one that resonates strongly with the contemporary international governance framework of ODA. The first moment is that of the emergence of the League of Nations and its Permanent Mandates System (PMS). As a partial response to deep domestic and international antagonism to the continuation of colonial rule, a new way of addressing colonial relations through the invention of a new legal

[310] I think this dialectical approach is most suited to examining the origins and evolution of a contemporary form of institutionalised international relations that cannot easily be traced through other political science methods such as process tracing. Here, I disagree with David Waldner who claims this method is suited to macro-level explanations in a historical context. See David Waldner, 'What makes process tracing good?
Causal mechanisms, causal inference, and the completeness standard in comparative politics.' In Andrew Bennett & Jeffrey T. Checkel (eds), *Process Tracing - From Metaphor to Analytic Tool,* (Cambridge University Press, 2014), 126.

international mechanism and new governance technologies emerged. I examine this development in much greater detail in Chapter 6, but here I want to draw attention to innovations in international governance such as the creation of a new international community through law, but one with a differentiated approach to authority and decision-making; bureaucratic governance mechanisms such as the Permanent Mandates Committee, a dedicated Secretariat, and a Rapporteur System; new technocratic governance instruments such as the collection of statistics and data in order to establish facts about both governance and development through the development and use of a survey; the gathering of information from 'experts;' the periodic reporting by Mandatory states on their implementation of trusteeship responsibilities to particular territories, as well as new doctrines of international development based on the concept of Trusteeship and Open Door.

The second moment relates to the development of a new international institutional mechanism via the Marshall Plan efforts to reconstruct Europe after World War II. In Chapter 6, I focus on the role and governance approach of the US' Economic Co-operation Administration (ECA) and the Economic Co-operation Act (1948); on the European side, I focus on the Committee for European Economic Co-operation (CEEC). The former latter's Working Party (comprised of members with overseas responsibilities – Belgium, France, the Netherlands, Portugal and the United Kingdom) sought to draw the colonies of European victors of World War II into service for the project of European post-war reconstruction, through technocratic modes and instruments of governance. This later became the Overseas Territory Committee that, later again, became the Development Assistance Committee of the OECD.

My intention with this trajectory of two historical moments, is (in an anachronistic way) to identify the distinct elements across the institutions and instruments of governance of each of these entities, in order to reveal continuities in colonial modes of governance. Thus, I devote two chapters to a description and analysis of the historical context that, in my view, was and remains a strong constitutive element of the jurisdiction of ODA. The allocation of two chapters and one part of this thesis to these moments in history is evidence of the importance that I attach to the influence and continuing relevance of colonial history to the contemporary governance of ODA. In doing so, this research aims at shedding light on an aspect of the governance of ODA that has been overlooked by legal scholars. I claim that an understanding of the legal form of the governance institutions in both of these moments in history are revelatory of, and help contextualise the kind of authority/authorisation and the legal-juridical quality of the modes of governance that prevail in the contemporary international governance of ODA.

This analysis then leads to the second part of the analytical lens focuses on the governance signature. In Chapter four, I identified four key elements to the governance signature of ODA – its juridical nature, its approach to juridification, its internal legal logic, and its performative character – that I deem key to identifying and explaining the legal and juridical quality of the international governance of ODA. These elements do not rely on the binaries of hard/soft law; international/national etc.; the categorisations of legal families (human rights, trade and investment, environmental) and levels of governance (international, regional, national, local etc.). Yet they keep the public aspect of the governance wrought by ODA and enable an analysis of the relationship between the legal form of the international governance of ODA, and its wielding of power – one of the two questions that animate this research.

I trace the manifestation of each of these elements in each of the four main governance technologies of the OECD and DAC – their law (in Chapter 8); the principal policy frameworks on development that clearly articulate their respective organisational positions (in Chapter 9); a technocratic governance technology (the official definition of ODA) (in Chapter 10), and a bureaucratic governance technology (Peer Review of donors' policies on development co-operation) (in Chapter 11). In the concluding chapter, I show how each of these legal-juridical elements of the signature engage and connect across the different governance technologies in order to show how they create, construct, reinforce, shape, direct legal subjectivities and authority in such a way as to constitutionalise and institutionalise a distinct jurisdiction and legal order. This jurisdiction and legal order operates without the necessity of an international legal agreement. It operates alongside law and mediates potential tensions between laws. This jurisdiction currently remains largely invisible to the domestic law and democratic institutions of aid-recipient states, and yet is key to the operation of so many areas of domestic and international policy governed by law.

It is important to note that my tracing and exploration of such connections between these elements of the signature of ODA, across the jurisdiction of ODA, is only one of several potential tracings that can be made. I caution that revealing the governance signature of the jurisdiction of ODA is not one derived from a mechanical application of the elements of its signature to its technologies of governance. The strong resonance between the performativity of the governance signature, and the element of time and temporality from the jurisdictional lens shows that the relationship between both is far more dynamic, complex and overlapping than the above description of my use of the jurisdictional-signature lens perhaps conveys. But I

do not wish to either fetishise this methodology or make it unnecessarily complex or strange, either. Rather, I wish to show that, in my view, this method shows potential to engage in critical legal analysis of a highly influential and problematic international governance space, (to which some legal scholars have responded by calling for more law). While the following chapters are partly an exercise in demonstrating the potential of this method, if deemed adequate to addressing the research questions underpinning this thesis, the chapters are also a gentle call to think anew about how law has within it as yet under-explored qualities and features to engage in analytical and/or normative research.

7. Limitations of this project

I wish to draw attention to an important limitation of this research project that derives from its archive and methodology. The former derives from data that both quantitatively (in terms of the major source of data), and qualitatively (in terms of the worldview that is represented) are drawn from and anchored in a Northern and Western legal, though critical, standpoint. In brief, the literatures examined are almost overwhelmingly donor and international organisation-focused, derived from scholarly literatures produced in the North by publishers focused on academia in the Northern hemisphere. This was most tangibly and acutely presented to me while working in the library of the University of Dar es Salaam, trying to source scholarly and grey literature from Tanzania and East Africa on donor-Tanzania relations. Though the University library there is a copyright library, to the great sadness of the librarian that that I was engaged with there, there are major gaps in the material that was available. This is clearly not just one problem with one library, but reflective of a deeper, structural dearth of research resources available in many major higher-level institutions in the Global South more generally.

The latter derives from the methodology used, that arguably, exhibits a meta/meso-narrative approach to its subject that can quite validly be critiqued for replicating erasures and silences that it seeks to reveal. By this I mean that I am deeply conscious that the Northern-centric orientation and epistemological frames of the literatures drawn from here, and the short period of time that I had to undertake the necessary research in Tanzania, offer just a partial take on this narrative. There is so much more to be said and to be written on the jurisdiction and the signature of the international governance of ODA from the perspective of a critical legal scholar located in Tanzania and East Africa. Other critical legal perspectives from feminist, other historical, geographical etc. standpoints, using other methodologies such as a more strongly socio-legal or ethnographic methods, would certainly lend greater depth to this analysis. A combination of both would certainly bring a fresh perspective to aid-recipient state inertia to donor conditionality, and the repeated efforts of donors to foster greater aid-recipient state ownership of ODA and development. In acknowledging these limitations, I wish to draw attention both to the resource constraints under which this research was undertaken, but also to draw attention to the constraints of the worldview from which most of this literature, and myself as researcher, operates.

7. Conclusion

This chapter has described in detail the methods used to gather data for this project, the sources of information and data used, and the evolution and changes to the methodology over the duration of the project in light of developments in relation to the field research in particular. It also explained the ways in which the concepts of jurisdiction and the signature are used to trace and examine the legal form and juridical nature of the international governance

of ODA, and how this legal form mediates power, in particular in relation to the distinct subjectivities and agency of donors and aid-recipient states. This chapter concludes Part I of the thesis. In Part II, consisting of Chapters 6 on the League of Nations Permanent Mandates System, and Chapter 7 on the post-World War II reconstruction of Europe, I take a strongly anachronic historical approach to trace the institutional lineage to the contemporary international governance of ODA by the OECD and its DAC.

Chapter 6 Precedents I: Mission-focused internationalised governance – the approach of the League of Nations' Permanent Mandates Commission

1. Introduction

In Chapter 3, I outlined how a jurisdictional lens consisting of four aspects that examined the range of governance technologies, what these authorised, how these relate to time and to space, and the artifacts that represent the jurisdiction of Official Development assistance (ODA), helps foreground the key elements that constitute a distinct jurisdiction of ODA in which law and the juridical quality of its governance technologies is key. In Chapter 4, I proposed an analytical lens consisting of four elements that would capture the governance signature of ODA. These elements - its juridical nature, its distinct approach to juridification, its internal legal logic and performativity – help reveal and analyse how the jurisdiction of ODA becomes constitutionalised and institutionalised over time.

As I've described in Chapter 5, I claim that history makes an important contribution to the contemporary legal form of the international governance of ODA. In this and the following chapter, I foreground the 'time' element of the jurisdictional lens. In particular, I focus on two historical moments that I propose are key to understanding the legal form of the contemporary international governance framework of ODA. In each of these moments, new approaches to the governance of colonies and territories by their imperial powers were instigated that prove foundational and constitutive, in different ways, to the contemporary international governance framework of ODA. The first of these is the Mandate System of the League of Nations, that revolutionised the governance of international relations through the creation of a new international governance realm consisting of a new international organisation, new

international law(s), new legal relations and actors, and new legally-backed instruments of international governance of a bureaucratic, technocratic and scientific nature, all in service of re-formulating relations between (mainly) colonial powers and their colonies. Antony Anghie has written definitively on the significance of the League's Mandate System as a site both of the emergence of a new pragmatic approach to international law, and as the origin of the contemporary discipline of development. Together, these enabled a reformulation of the international legal governance of relations between Western powers and their colonies that effectively institutionalised a "dynamic of difference" that had long animated international law and relations along racial lines and civilisational narratives in the colonial era. [311] In doing so, Angie traces how the League's particular legal formulation helped maintain and enable a "ruling rationality" [312] dominated by Western powers and economic interests, later articulated and perpetuated via the international legal instruments of the United Nations system.[313]

In this research, and with this chapter, I build on, and depart from, Anghie's work. I focus on aspects of the Mandate System that provided new and innovative precedents in international

[311] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law,* (Cambridge: Cambridge University Press, 2004), 117. See esp. Chapter 3 in that work. See also Antony Anghie, "Colonialism and the birth of international institutions: Sovereignty, Economy, and the Mandate System of the League of Nations," (2002) 34 J Int'l L & Pol 513. It is not necessary to revisit here the main arguments and evidence of his contribution with which I agree.

[312] Though these instruments were utilised by the newly sovereign states of the Third World to assert a holistic sovereignty that acknowledged and protected both political and economic sovereignty, what resulted was a rationale for and means of "an ever-expanding sphere of intervention in the Third World." Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality,* (Cambridge: Cambridge University Press, 2011) at 3.

[313] Pahuja gives three examples of how international law's promise of universality was articulated within the UN through a very particularised lens based on the concept of development and its privileging of economic growth, that ultimately resulted in a blunting to the point of erasure, of the emancipatory potential of Third World demands. These examples are the channelling of decolonisation into the formation of the developmental nation state; the transformation of the claim to Permanent Sovereignty over Natural Resources into the protection of foreign investors, and the transformation of the asserted rule of *international* law into the internationalisation of the *rule of law* as a development strategy. Ibid 2-4 (italics in original).

governance that are, I claim, foundational to the contemporary governance of ODA. In the following chapter, I focus on the instruments and processes through which the Marshall Plan was administered. I argue that this arena is another very important international historical institutional precursor to the contemporary governance of ODA, where the Western powers jointly further developed and consolidated the instruments of governance developed earlier under the Mandate System to further an international political and economic project of Western-European post-war economic revival and robustness, based on development in which aid was the key lever.

At first glance, both of these projects appear quite dissimilar. For example, several differences clearly exist in the detail of their purpose; in how they addressed the nature of the sovereignty of nations through international legal and administrative means; in the conception of and the role for development therein; in the implementation and the range of governance instruments (including law) developed and applied, and in outcomes in terms of (dis)parity of sovereignty of former colonisers and colonies and territories. However, in this chapter on the Mandate System, and in the following one on the administration of the Marshall Plan, I propose and hope to demonstrate that there is indeed a striking underlying resonance between both moments across these three vectors, and that these moments provide crucial historical context for understanding the legal form of the contemporary international governance of ODA. In making this claim, my research contributes further detail to the now-considerable body of critical legal research on the evolution of international law and institutions in the twentieth century from a Third World and historical perspective in two ways. First, it re-states the significance of the Mandate System, but links this with the under-studied role of the Committee

of European Economic Co-operation (CEEC) established to facilitate the implementation of the Marshall Plan, and the latter's role in establishing a legal and governance precedent for the Organisation for Economic Co-operation and Development (OECD). Both the CEEC and the early OECD were key sites where new approaches to international law and governance were developed that legally and institutionally articulated and consolidated evolving relations between former imperial powers and their colonies and territories in the process of becoming sovereign states within the international community. Second, it provides greater detail on how the governance instruments, processes and practices in both created an ongoing "fusion" between international law and international administration. [314] I focus on the links between law, the generation of principles, the collection of data and the governance mechanisms, practices and processes that ultimately created a highly juridical approach to governance via international administration across both sites. Within both moments, one can identify a continuity in the internal legal logic of both arenas, dominated by the political and economic interests of the former colonial powers that maintained their role as an identifiable executive authority through these institutions at a time when membership of international society was expanding and undergoing much change as a result of the gradual emergence of newly-independent states.

For mainstream legal scholarship on development co-operation, this historical analysis marks a departure, and a new legal terrain for engagement which though referenced, has remained underexplored.[315] For critical legal scholarship on governance by the international development

[314] This is a term used by Anghie, however he does not elaborate in further detail what this means. Angie (2004), supra note 311 at 574.
[315] Dann (2013), supra note 69 at 18.

organisations such as the World Bank, it similarly introduces governance by the OECD as a field worthy of dedicated legal attention. [316]

In this chapter on the Mandate System, I will first briefly outline the historical context that prompted the formation of the League of Nations and the tensions that the League institution was designed to address. I then examine the novel international legal frameworks of the League, the Mandate System and Mandate Agreements, along with the new legal concepts and doctrines of Trusteeship and Open Door.[317] These, respectively, articulated new legal actors and relations between them, whilst creating a somewhat stable international legal framework for a community of Western imperial powers (including the non-League member of the United States) to pursue their international economic interests without resort to armed conflict or annexation. Of key relevance to the contemporary governance of ODA here is the creation, through international law, of a Janus-faced idea of an international community, with one set of states ("advanced nations")[318] being given the power to intervene in another set ("colonies and territories…inhabited by peoples not yet able to stand by themselves under the strenuous

[316] The World Bank, and the Bretton Woods organisations have dominated attention from legal scholars interested in the international governance of development. It (along with the UN) has similarly predominated in attention by legal scholars on international organisations. See for example, JE Alvarez, *The Impact of International Organizations on International Law* (Brill/Nijhoff online 2016); Jan Klabbers (ed), *International Organisations,* (London: Routledge online, 2016).

[317] Open Door was a significant part of colonial economic policy and meant the absence of discrimination against foreign nationals of another country in a colony. Gerig noted that it had evolved from a "a simple tariff and trade problem to a highly complicated and involved problem of investments, concessions and consortiums to which the application of the principle of equal economic opportunity becomes, in the modern world, a more serious and difficult matter." However, it proved highly significant to peaceful inter-colonial relations. Benjamin Gerig, *The Open Door and Mandates System – A Study of Economic Equality before and since the establishment of the Mandates System,* (London: Allen & Unwin, 1930) at 16. "One of the greatest possible steps toward world peace would be a treaty signed by the ten leading colonial powers, not only in their own colonies, but in the independent countries of the world, such as China, Turkey, Mexico, Siam, Liberia, Abyssinia, Persia, and Afghanistan, and placing the supervision of such an agreement in the hands of some impartial international tribunal." R. L. Buell (1925) in Gerig Ibid at 16.

[318] See clause 2 of Article 22 of the League Covenant, and discussion in section 3.

conditions of the modern world").[319] Second, I focus on the then-new approach to international administration developed by the Permanent Mandates Commission (PMC), and the instruments, processes and practices it created to fulfil the obligations established by the League and Mandates covenants. I argue that the design of these instruments, with their heavy reliance on methods of data collection for the purposes of generating 'facts', from which 'standards' were created to be applied to Mandatories' governance through a periodic reporting mechanism, created a strongly juridical approach to international administration that supported decision-making by what was in effect, an international legal institution dominated by the colonial Great Powers. I aim to shine light on the juridical character of this aspect of the PMC's governance that is masked by the more bureaucratic and neutral term of administration.[320] We will see how features of this international administration process characterise the later approach by the OECD's Development Assistance Committee to its own work on the governance of ODA today.

[319] Article 22, clause 1.

[320] In this, it drew heavily from, and reflected an innate deference to colonial Mandatory governance approaches and policies already in place, whose administrative character differed from that used within the administrative processes of the metropole. Anghie's frames how the PMC undertook its role as one that created an "alliance" between law and administration (he uses the terms "fused" and "combining" when referring to the engagement between both). Anghie (2004) supra note 311 at 152. I think these words risk overlooking the deferent and the juridical quality of the 'administrative' practices developed by the PMC. Also, they were developed in the context of supervising coloniser implementation of long-held colonial policies and governance practices, in an era when both the colonial state and colonial policy of the U.K., for example, demonstrated increasing ambition, breadth and sophistication. For example, the U.K. embarked on a massive expansion of the civil administration in the post-Great War years in order to pursue aims of the maintenance of security, the extraction of revenue and to secure land use. This was facilitated by the development of an increasingly scientific approach to the exploitation of African resources through such bodies as the Colonial Agricultural Service, and the management of Africans, where concerns about health, labour, education and alcohol were managed by new laws, policies and institutions such as the Rhodesia Native Labour Unit, as well as initiatives backed by government support such as the work of the various missionary societies and entities such as the United West African Medical Staff. Casper Andersen & Andrew Cohen, *The Government and Administration of Africa 1880–1939,* (Abingdon, Oxon: Routledge, 2016) Vols 1 and 5. I think placing the PMC's administrative practices in that context, helps reveal how those practices largely sanctioned the expansion of British colonialism, though they have had some effect in tempering its worst excesses.

2. The emergence of the Mandates System of the League of Nations – context and driving ideas

Until the Treaty of Versailles, territories of defeated states in a war were conceded to victors by way of a peace treaty and, in the case of overseas or colonial possessions, "[t]hese simply passed from vanquished to vanquisher as one might hand over a gift." [321] However, signed on June 28th 1919, Article 118 of the Treaty of Versailles[322] vested the right to allocate mandates (the non-European territories yielded by Germany and Turkey as a result of their defeat in World War I) in the Principal (and Associated) Powers. This new direction in international affairs emerged as a result of a vigorous push against their annexation by several of the Allied powers from both US and domestic UK publics, augmented by political support for the abolition of colonial monopolies. It was further bolstered by US umbrage at the contents of several secret treaties, and US' keen interest in the maintenance of an Open Door for trade and investment, [323] which came as a shock to the victorious Allied powers. [324]

[321] Malcolm Shaw, "The League of Nations Mandate System and the Palestine Mandate: What does it say about international law and what does it say about Palestine?" (2016) 49 Israel L Rev Review 287 at 293.
[322] Versailles Peace Treaty (entered into force 10 January 1920) (1919) 13 AJIL Supplement 151, 385.
[323] Quincy Wright, *Mandates Under the League of Nations*, (Chicago: University of Chicago Press, 1930 online) at 29. At the time, U.S. President Wilson held that World War 1 was a consequence of European militarisation, uncontrolled state power, secret treaties and autocratic empires that suppressed national minorities. Jörn Leonhard, "1917-1920 and the Global Revolution of Rising Expectations," in Stefan Rinke & Michael Wildt (eds), *Revolutions and Counter-revolutions : 1917 and its Aftermath from a Global Perspective*, (Frankfurt : Campus Verlag, 2017) at 32.
[324] "The French wanted Togoland and Cameroon and an end to German rights in Morocco (leaving France the latter's sole protector). The Italians had their eyes on, among other things, parts of Somalia. In the British empire, South Africa wanted German Southwest Africa, Australia wanted New Guinea and some nearby islands, and New Zealand wanted German Samoa. The British hoped to annex German East Africa to fill in the missing link between their colonies to the north and south. They had also made a secret deal with the French to divide up the Ottoman empire. The Japanese too had their secret deals with the Chinese to take over German rights and concessions, and with the British to keep the German islands north of the equator." Margaret McMillan, *Paris 1919: Six Months that Changed the World,* (Toronto: Random House, 2002) at 141.

A proposal on the mandates system published by General Smuts on the eve of the Paris Peace Conference (it began in January 1919), built on earlier interventions from several sources.[325] Thus, the League of Nations Mandates System emerged as a novel form of international governance within the League, with the League itself a new international governance institution. The League consisted of a Council that acted as the Executive authority for the League (consisting of permanent representatives of the Powers,[326] with four non-permanent members of the League selected by the Assembly)[327]; an Assembly (of Members, consisting of 27 entities including the British Empire (of Canada, Australia, South Africa, New Zealand and India) and 13 other states that were invited to accede); a permanent Secretariat for the League, and a Permanent Court of International Justice. Thus, this new international organisation inaugurated legislative (Council and Assembly), executive (Council), administrative (Secretariat) and adjudicative (Court) governance functions at an international level.

However, the balance of power between the Council and Assembly was distinctly lop-sided, and structurally favoured the engagement of the Great Powers through their membership of the

[325] This included a statement by U.S. President Wilson on September 27th, 2019 that a "[C]ommon family of the League of Nations" would be necessary to render "impartial justice" based on "equal rights" of peoples concerned with the post-World War 1 aftermath. These views were further elaborated at an informal conference of British and American experts on international affairs at London in November 1918 and the subsequent release of views from that meeting in the Round Table journal. That article included references to tutelage, trustee, mandatory as well as the prohibition of forced labour, traffic in liquor, education for self-government, open door (freedom of traders) and a prohibition on militarisation of native peoples. (Author unknown) "Windows of Freedom," (1918) 9 Round Table 1 at 25-26. Wilson reference earlier at pgs 42-43.
in December 1918

[326] These included the US, the British Empire, France, Italy, and Japan, with Germany later becoming the sixth permanent member.

[327] However '[A]ny fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations…' Article 1.2 of the Covenant. League of Nations, *Covenant of the League of Nations*, 28 April 1919.
Available at http://avalon.law.yale.edu/20th_century/leagcov.asp#art10.

Council. The differentiated membership and authority allocated to the Council over the Assembly helped the Powers to retain their former elevated authority and status in international affairs. While the Assembly could "deal with any matter within the sphere of action of the League or affecting the peace of the world," [328] the Council clearly held executive authority in key areas of organisational and policy competence such as the selection of additional Members to be Council members; [329] the development of plans for the reduction of armaments; the preservation of peace; [330] determination of an appropriate response to aggression[331] and to disputes between League Members; [332] and – of most relevance to the subject of this research – the receipt of reports from the proposed Permanent Mandates Commission, and annual reports from Mandatory states on the implementation of their Mandate obligations. [333] Further lending to this unevenness of authority between the Council and Assembly, were the internal working methods that the Council gradually adopted, in spite of a legal commitment to openness and transparency. [334]

[328] Article 3.2.
[329] Article 4.2. This was also the competence of the Council – Article 4. 4.
[330] Article 8. 2.
[331] Article 10.
[332] Articles 12, 13 and 15.
[333] Article 22.7 and 22.9.
[334] Zimmern provides a fascinating account of the Russian-doll-like quality to the meetings as follows, "Before the Council meets in public it meets in private. These so-called 'private sessions' are private only in name. Their proceedings are published in due course in the Official Journal and those present include a miscellaneous assemblage of delegates, experts and Secretariat officials. No difficulty is experienced by journalists in obtaining an account not necessarily an official or objective account of what has taken place. Behind the 'private meeting' lies the 'secret meeting'. When this is of an official character it takes place in the Secretary-General's room, with only the Secretary-General, the Director of the Political Section, the Council members and a very few of their closest advisers resent. But there are, of course, many other kinds of secret meetings, particularly between the representatives of the Great Powers on the Council. But behind these meetings during the Council sessions there are the steps involved in the drawing-up of the reports." This ever-more opaque quality in terms of transparency of working methods is mirrored in the work of the Council members vis-à-vis the Assembly meetings and various Committees. Alfred Zimmern, *The League of Nations and the Rule of Law 1918 – 1985,* (London: Macmillan And Co., Limited, 1936), at 454-457.

The emergence of the League was a response to a complex mix of factors and forces that geographically spanned the globe. These included efforts by the victorious imperial powers to both expand and consolidate peoples and territories under their influence, as well as to resist attempts at greater political and economic autonomy by the colonies themselves, and address challenges from domestic political opinion, both popular and elite, from assimilationist and autonomist perspectives vis-à-vis how best to respond to 'the colonial question.' [335] Backed by international law, the creation of the League and its Mandate System was, for that time, a necessarily novel institution and approach,[336] designed to address the deep challenges posed by that question, as well as those arising from an era of undoubted political and economic uncertainty, along with several areas of sensitivity in international affairs after World War I. [337]

Three seminal ideas drove the founding of the League and its particular institutional contours, and I suggest that each of these has enduring relevance for understanding the later governance

[335] Histories of the League and analysis of the appropriateness and effectiveness of its approach offer a rich body of analysis, and are still mined for contemporary relevance. For an excellent analysis of the political context and emergence of the League from a Global South perspective see Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (Minneapolis: University of Minnesota Press, 1996). For a less critical one, in which the appeal of the League still holds resonance and even relevance for contemporary international issues (in this case in relation to Indigenous Rights) see Rudolph C. Ryser, "International Trusteeships, the Unfinished Responsibility," (2013) 12 Fourth W J 99.

[336] David Hunter Miller, "The Origin of the Mandates System," (1928) 6 For Affairs 277 at 277

[337] Sensitivities included how best to respond to a rise in nationalist and self-determinationist impulses in Europe (e.g. the break-up of the Austro-Hungarian empire, and the Balkans); the Middle East (affecting British relations there, in particular); Africa (visibly expressed in the anti-colonial and anti-racism agenda of the Pan African Congress meetings begun in 1900); the ripple effect of the Bolshevik Revolution, and anti-racism movements within the United States, linked to de-colonial ones through relationships formed by, for example, Allied soldiers that fought in World War 1. The war had also resulted in severe economic pressure on both victor and defeated states in different areas. On the one hand, those who possessed colonies effectively had monopoly access to and control of raw materials and use of labour within those colonies. US business interests in particular, keenly felt the competitive disadvantage of not having access to the resources of the African colonies. On the other, maintaining a continued military and security presence to maintain control of these and deal with internal conflict was proving costly to cash-strapped, over-extended former colonisers. For example, in discussions in 1919 within the 'Council of Ten,' UK Prime Minister Lloyd George clearly approached the desirability of British assumption of former German East Africa as a Mandate largely through the cost of maintaining British troops there. Hunter Miller, Ibid 277 at 278-279.

of ODA. These are first, a particular view of the 'international' as a neutral, unsullied space to address and govern the often tense relations between the Great Powers (the external dimension), and between colonisers and their colonies (the internal dimension). A second idea was the necessity to legally formalise an international Open Door policy in order to address the importance for the Great Powers of ensuring between them, free and equal trade with and access to available resources within colonial territories, while aiming at minimising economic protectionist policies more generally. The third idea was that of the Trust which evolved into and became institutionalised as Trusteeship. This became a foundational legitimising principle as well as a distinct mode of governance of the Mandates System, affecting the governance approach of the Permanent Mandates Commission, and the Mandatories. Each of these played a part in enabling a partial transition from a clearly untenable colonial system to one that was perceived to be more politically palatable and economically advantageous, as well as being more manageable and implementable, for the former Great Powers. In the following paragraphs, I briefly describe each of the three ideas, and their role in facilitating and guiding that transition.

The idea of international, at the time of the League, had three important features. The first was a differentiated approach to sovereignty, articulated through the concept of a 'trust' or 'trusteeship' that itself drew heavily from the already existing civilizational narrative (underpinned by racist beliefs) that prominently underpinned colonial policy in the Victorian era. [338] This differentiated approach to peoples and territories outside of Europe as being

[338] Though it is recognised that there were significant differences in how Britain and France approached colonial development interventions, one can still find remarkable resonances between their respective approaches vis- a-vis this civilisational narrative. Research on French colonial expansion under the Third Republic has illustrated how

uncivilised was reflected in the approaches of many legal thinkers at the time including Oppenheim and Westlake [339] and was applied to legal understandings of statehood and the wider international order. Thus, Scottish legal theorist James Lorimer distinguished between civilised, barbarous and savage communities to each of which differentiated rights and duties are assigned through a differentiated 'doctrine of recognition'. This differentiated approach to recognition was considered by Lorimer to be one of the three core doctrines central to the law of nations.[340] For Lorimer, this doctrine ultimately implied that "[T]he right of undeveloped races, like the right of undeveloped individuals, is a right not to recognition as what they are not, but to guardianship – that is, to guidance – in becoming that of which they are capable, in realising their special ideas."[341] Lorimer's ideas and approach to classifying states and peoples

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French republican ideas of civilisation - France as the bearer of liberty, democracy, solidarity and progress to the rest of humanity – strongly influenced French policy-making in its colonies. See for example, Raymond F Betts, *Assimilation and Association in French Colonial Theory 1890 – 1914* (Columbia University Press: New York 1961); H Ouidare Idowu, 'Assimilation in 19th century Senegal,' 1969 Cahiers d'Etudes Africanes 194; Alice Conklin, *A Mission to Civilise: The Republican Ideas of Empire in France and West Africa 1895 – 1930* (Stanford University Press: Stanford, California, 1997). On UK colonial policy, see Stephen Constantine, *The Making of British Colonial Development Policy 1914 – 1949* (London: Franck Cass, 1984). An earlier iteration of British policy reflected in a statement by the British Secretary of State for the Colonies from 1895 to 1903, Joseph Chamberlain, rationalised strong intervention in the colonies on the basis of a range of reasons ranging from economic self-interest, the status of Britain in international relations, with both underpinned by an acute awareness of moral obligation arising from racial superiority. "In carrying out his work of civilisation we are fulfilling what I believe to be our national mission, and we are finding scope for the exercise of those faculties and qualities which have made of us a great governing race. ….[I] do say that in almost every instance in which the rule of the Queen has been established and the great *Pax Britannica* has been enforced, there has come with it greater security to life and property, and a material improvement in the condition of the bulk of the population. ….[G]reat is the task, great is the responsibility, but great is the honour; and I am convinced that the conscience and the spirit of the country will rise to the height of its obligations, and that we shall have the strength to fulfil the mission which our history and our national character have imposed upon us." Joseph Chamberlain. Speech at the Royal Colonial Institute Dinner, 31 March 1897 in Allan Bullock & F. W. Deakin, *The British Political Tradition Book Six The Concept of Empire Burke to Attlee 1774 – 1947. Edited by George Bennett.* (London: Adam & Charles Black, 1962) at 318.

[339] John Westlake, who famously contrasted states with good breeding in *Collected Papers* (1894) and L. Oppenheim, who distinguished between the family of nations and states outside the family in *International Law* (1905–1906). Ideas from both are discussed in Anghie (2004), supra note 311 at 40-45.

[340] James Lorimer, *The institutes of the law of nations a treatise of the jural relations of separate political communities*, Volume 1 (Edinburgh & London: W. Blackwood and Sons, 1883) at 102-103.

[341] Ibid 157.

to be recognised and ordered thus through international law, is almost perfectly reproduced in the Mandates System of categorising colonies into A, B and C mandates.

The second feature of the idea of the international was that it became viewed as a space that could address and potentially overcome the exploitative excesses of the colonial system that had, by then, come into popular consciousness and been challenged in the polity and civic space of both the coloniser and abroad. Within the colonial powers, anti-colonial sentiment was becoming increasingly prominent in debates within the trade union movement, civil and religious entities, parliament and wider public opinion through the press, while members of the African diaspora, for example, met and trenchantly opposed new forms of foreign control on the former German colonies via the Pan-African Congress.[342] Independence movements were gaining in strength in the Middle East, and had already achieved visible success within former Tsarist Russia. Perceptions of the powers "turning of exploration into exploitation and civilisation into depopulation,"[343] were compounded by Russian revelation of the conclusion of secret treaties in 1914[344] which augmented anti-war perspectives that held that capitalists were largely behind the War for self-gain. [345] Thus, the international space became viewed as a new and promising site of governance where the excesses of the colonial regime could be reined in

[342] Siba N'Zatioula Grovogui (1999), supra note 335 at 112.
[343] Rayford W. Logan, "The Operation of the Mandate System in Africa," (1928) 13 Journal of Negro History 423 at 425.
[344] These assured France, Japan, Britain, Russia, Belgium, Denmark, along with their allies of Serbia, Bulgaria and Greece of additional territories after the expected defeat of the Austrian-German empire.
[345] Siba N'Zatioula Grovogui (1999), supra note 335 at 112. Thus transparency in future international relations was a key demand of President Wilson in his post-War dealings. "It will be our wish and purpose that the processes of peace, when they are begun, shall be absolutely open and that they shall involve and permit henceforth no secret understandings of any kind. The day of conquest and aggrandizement is gone by; so is also the day of secret covenants entered into in the interest of particular governments and likely at some unlooked-for moment to upset the peace of the world." Woodrow Wilson, President Woodrow Wilson's Fourteen Points, 8th January 1918, available at http://avalon.law.yale.edu/20th_century/wilson14.asp

and checked; where a new more benign (if paternalistic) relationship of trust/guardianship could be developed and institutionalised between former colonisers and the colonised, all to be underpinned by principles that fostered greater public accountability through practices of transparency.

A third feature of the international was its inherent idea of the appropriate order of relations between its participant entities, now consisting of "advanced nations," sovereign states, and newly recognised entities - states with a 'latent' sovereignty [346]. How were these three to relate to each other through this new international law? Revealingly, the relationship was not to depart from the inherited inequitable power relations between the metropole and the colony that still existed and continued. Instead, a very particular kind of international community became constitutionalised in which one set of states (the "advanced nations") were given wide powers to intervene in another set of becoming-states (the Mandate territories). These powers were legitimised by the wider multilateral formal membership of the League by non-Power states, and further, were rationalised by a civilisational-humanitarian narrative.

This approach to intervention via an idea of the international was not a new departure for that time, though its legalisation via the founding of the League was new. Kroll notes that in the nineteenth century, the rationale for international intervention was based on the legal principle of the international community of states, [347] and could be justified on a range of political,

[346] Anghie (2004), supra note 311 at 147. Questions regarding sovereignty, in what it was vested, the nature of the sovereignty of the League, the Mandatories, the Mandate territories, its expression through the League's covenant and the Mandates covenants etc. prompted much debate amongst jurists at the time.
[347] Stefan Kroll, "The legal justification of international intervention. Theories of community and admissibility," in Fabian Klose (ed), *The Emergence of Humanitarian Intervention. Ideas and Practice from the Nineteenth Century to the Present,* (Cambridge: Cambridge University Press, 2015), 73 at 73-79.

economic and humanitarian grounds. [348] He draws from German legal theorist Robert Von Mohl's work that elaborated two main pillars of international law – the sovereignty of states and the international community, with the international community as the legal frame for the protection of the common interests of states.[349] In this thinking, solidarity – and thus intervention - is intrinsic to sovereignty. What is needed to legitimise international intervention is the *form* in which it is carried out. If undertaken *through collective action*, it becomes legitimate. [350]

Through the formation of this new institution at the international level – the League of Nations – the concept of the international community, and the basis of international intervention became legalised through the wonderfully-crafted legal innovation of the Mandate System,

[348] Prior to the foundation of the League, European powers had undertaken several shared military interventions in Eastern Europe including in Greece (1827–8); in Lebanon (1860–1); in Crete (1866–8 and in 1896–1900); and in the Ottoman provinces of Macedonia (from 1903 to 1908). The European powers also collectively decided not to intervene on behalf of the Bulgarians (1876) and of the Ottoman Armenians (during the massacres of the 1890s, of the early 1900s, and of 1911). Davide Rodogno, 'Humanitarian Intervention in the Nineteenth Century,' in Alex J. Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect,* (Oxford Handbooks Online, 2016), at 25. European powers usually reached a collective agreement guaranteeing the 'disinterested' nature of the intervention. He quotes David Bass who noted the significance of 'disinterest' to the success of these ventures. "The great powers had to convince each other that their purported mercy mission was not just a foil for imperial expansion. So the intervening states had to impose limitations on themselves. There were a number of established techniques of self restraint: delineating [the] sphere of justifiable intervention for each of the great powers, delegating to regional powers, putting time limits on humanitarian interventions, restricting the size of the military force, foreswearing diplomatic and commercial advantages from a humanitarian mission, and, above all, multilateralism. All of these devises helped make humanitarian intervention safer." Ibid. However, collective interventions had also taken place at times of natural disaster.

[349] Ibid. 77.

[350] Recall that the protection of minorities was high on the League's agenda also. Though it is beyond the remit of this thesis, a tracing of possible links between the rationale for intervention articulated via the League covenant as one precursor to the contemporary doctrine of "responsibility to protect" remain a potentially fruitful avenue for further study. Anne Orford's work in this area focuses on the UN's approach, but there is strong resonance between the questions she poses on how 'protection' links with authority, responsibility and who can rightly claim to speak and act in the name of the 'international community' and those explored in this thesis vis-à-vis both the League and the OECD. Anne Orford, *International Authority and the Responsibilty to Protect,* (Cambridge: Cambridge University Press, 2011).

where powers and authority on intervention were vested *back to the Mandatory*, through an international legal agreement. Though the PMC and League Council required reports from the Mandatories (to be explored in further detail in section 4), what is important here is the negligible shift in *real* authority that the creation of a new international institution and mode of governance brought about. Instead, we arguably see the creation of a legalised fiction of a changed executive relationship between the coloniser and the colonised. This was brought about through international legal instruments that created a legal community with differentiated sovereignties and powers of intervention, while the creation of new modes of international governance through supervision of reports from the Mandatories masked the continuities in colonial relations and governance practices that largely continued undisturbed. [351]

The second animating idea of the character and formation of the League is that captured in the Open Door policy. Colonial policy was based on the premise that the colonies were tributaries to the metropole, supplying its raw materials, purchasing its manufactures as well as supplying labour power and relieving population pressure in the home territory. Right up until the 18th century, the principles of monopoly and exclusion to preserve metropolitan access to these resources and opportunities drove colonial policy, [352] a source of long-standing international

[351] In this, I depart from analysis of others such as Bernard Knoll, who highlights of prime significance, the international legal innovation of introducing new legal obligations of reporting by the Mandatories on their activities – "an obligation of *binding legal character* towards the international community," Bernard Knoll, *The Legal Status of Territories Subject to Administration by International Organisations,* (Cambridge: Cambridge University Press, 2008) at 61 (emphasis in original). In my view, while the invention of this new legal obligation is significant, the fact that it effectively masked and legitimised, *through legal means*, a deeper *continuity in an unequal international order* is of greater import.

[352] See Quincy Wright (1930), supra note 323, Chapter 1 'Origin of an Idea.'

tension and conflict. [353] As none of the more industrialised states were completely satisfied with the markets and raw materials supplied by its own colonies, this situation began to change somewhat, resulting in a gradual movement towards greater internationalisation (defined as wider access to the colonies by entities other than the sovereign coloniser).

A landmark in this approach occurred during the 1885 Berlin Conference, at which the US and European powers signed the first multilateral treaty that conferred rights of free trade and navigation for all colonial powers in the Congo Basin in Central Africa.[354] The need for unfettered access to raw materials available in Africa was further sharpened by First World War efforts and Allied need for access to cotton, rubber, tin, leather and jute. [355] Though not wishing necessarily for the US to become a Mandatory, the US' President Wilson was an insistent advocate on the Open Door policy in relation to all the Mandate territories, in order to provide US business interests with unfettered access to African resources and markets.[356] Also rationalised as in the economic interests of the native populations, the prime concern amongst the former Great Powers was equality of access to trade and investment, a policy objective

[353] "Competitive land-grabbing and commercial rivalry in overseas trade have for centuries been a most dangerous source of international conflict. It may therefore fairly be argued that anything that tends toward the administration of colonial areas in the general interests of mankind, as opposed to the special interests of particular Powers, favours the ideal of the League and makes for peace. This is incontrovertibly true." W.E. Rappard, 'The Practical Working of the Mandates System, Address given on June 16th, 1925,' (1925) 4 J Brit Inst Int'l Aff 205 at 217.
[354] Wright (1930), supra note 323 at 8-11.
[355] Anghie (2004), supra note 311 at 142-143.
[356] One of the premises of his 14-point Peace Proposal was "III. The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance." Woodrow Wilson (1918), supra note 345.

enshrined in existing colonial policy,[357] barriers to which could be the basis of international intervention in law. [358]

The third foundational idea underpinning the formation of the League was that of Trusteeship. Precedent already existed for the concept of mandate in U.S. national law.[359] Knoll's research traces the application and transposition of the concept of trust held in Roman law and in English common law to the institutionalisation of the Mandate System. There is an inherent tension in this idea of a trust, between the rights of a trustee to 'assets,' but that legally must be devoted to a certain function, thereby differing from rights exercised in ownership. He quotes from Judge McNair's comparison of the Mandate System with the English common law trust where power can be transferred to a trustee for the benefit of a "minor or a lunatic" who

[357] Gerig notes that the principle of equal economic opportunity was widespread within colonial trade policy, becoming particularly prominent in German, Dutch, British colonial policy after the 1880s, and was enshrined in the General Act of Berlin of 1885 as the first multilateral Open Door treaty, applied to that part of Central Africa known as the Conventional Basin of the Congo. Gerig (1930), supra note 317 at 31.

[358] Stowell notes that states had the right to use force in order to ensure international co-operation for the purpose of facilitating international commerce. "This was the principle which justified the United States and the other powers in forcing their way into Japan and in compelling her to negotiate and sign treaties providing for commercial relations." Ellery C. Stowell, *Intervention in International Law,* (Washington DC: John Byrne & Co, 1920) at 287, fn 26. This treaty was an unequal treaty. US Commodore Perry arrived in July 1853 at Uraga Harbour near Edo (modern Tokyo) in four coal-powered steam ships with the mission to open up the country under the threat of military action. A Treaty of Peace Amity was signed in March 1854 in Kanagawa with a second 'Harris Treaty' - a Treaty of Amity and Commerce between the United States and Japan - signed in 1858. Its main provisions included the opening of five trading ports at Edo (Tokyo), Kobe, Nagasaki, Niigata and Yokohama; extraterritorial rights for Westerners, meaning that the Japanese law could not be applied to foreigners in Japan; the opening of markets in Tokyo and Osaka; exchange of domestic and foreign currencies; lack of Japanese tariff autonomy and a unilateral MFN clause. Toshihiro Atsumi and Daniel M. Bernhofen, *The effects of the unequal treaties on normative, economic and institutional changes in 19th century Japan*, University of Nottingham Research Paper Series, Research Paper 2011/19, 1 at 3-6.

[359] For example, Logan points out that in the US, the idea of guardianship by the US "over the Indians and that its government of them 'should be in its nature parental – absolute, kind, and mild' was already on the Statute books with the passing of the 1887 Dawes Severalty Act. Logan (1928), supra note 343 at 426. The existence of domestic precedence was also recognised in *Advisory Opinion on the International Status of South-West Africa, ICJ Reports 1950, p.128* at 132*.* However, 'The object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law. The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object-a sacred trust of civilization. It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law.' *Ibid.*

are *incapable of managing their own affairs*, and where supervisory authority is vested in a court. [360] However, in his separate opinion, McNair also refers to the concept of trusteeship reflecting "the vesting of property in trustees, and its management by them in order that *the public or some class of the public may derive benefit or that some public purpose may be served*."[361] I suggest that it is the combination of both factors – the presence of a determination of incapability of managing one's own affairs, along with an idea of a public purpose or public benefit – are integral to the idea of Trust that underpinned the Mandates System, that subsequently was legally elaborated in the League's Covenant and Mandate Agreements. [362] The *moral* element to this idea of trust was key to its potency manifested in a newly institutionalised international legal concept, as it further strengthened the idea of executive authority already inherent in the international community concept at whose apex lay the victorious Allied Powers.

In the sections that follow, I examine in greater detail the institutionalisation of these three ideas through innovative legal and administrative mechanisms. Both of these elements – the legal and the administrative – are significant for the precedent they set for constitutionalising and legitimising a further turn in relations between the colonial Northern and 'emergent' Southern ones. In my view, these precedents continue in the legal and administrative relations between Northern and Southern states through the contemporary international governance of ODA.

[360] Knoll *supra* note AA, at 59-60. Emphasis added.
[361] Separate Opinion by Sir Arnold McNair, *supra* note XX, at 149. Italics my own.
[362] I deal with the legalisation of these ideas in both instruments in the following section.

3. The League of Nations Mandate System – relevant legal instruments

In this section, I consider the relevant articles and clauses of both the League Covenant and the (separate) Mandate Agreements that address the changed relationship with former colonies through the Mandates System in order to highlight specific features of the role of, and for, law in both. I highlight key terms and phrases in Articles from both, and analyse their doctrinal meaning and their wider significance.[363] My intention is to demonstrate how the Covenant and Mandate Agreements legalised and legitimised a new international order through a significant measure of international legal innovation that yet retained many of the essential characteristics of internal colonial rule. Recall in the earlier section the examination of three animating ideas that underpinned the foundation and evolution of the League. First, there was the international, with its potential as a neutral governance plane somewhat inured from existing critiques of colonial governance; its concept of an international community with three legal statal personalities, in which the difference between "advanced nations" and colonies and territories justified the former's intervention in the latter on moral grounds, with its legal linking of sovereignty (and membership of the international community) to an unspecified level of development, and finally, the formation of an international organisation that, though appearing to have a well-thought out internal governance architecture, in fact retained pre-existing hierarchies in international relations and colonialism. Second, there was the idea of Trusteeship, based on a strong moral and paternalistic rationale, but that reinforced an executive idea of Mandatory authority, and finally, there was the Open Door policy, a joint

[363] Italicised phrases and terms are my own and serve to highlight key phrases for attention.

commitment between the Powers to facilitate equal access to Mandate territories by League Members for the purposes of economic exploitation (as well as evangelisation). These ideas were legally crystallised in select articles of the League's Covenant and Mandate Agreements.

The League's approach to the colonies is primarily captured in Article 22, (and to a lesser extent, Article 23). Article 22 of the League's Covenant states

1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and *which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world*, there *should* be applied *the principle* that *the well-being and development of such peoples form a sacred trust of civilisation* and that *securities* for the performance of this trust should be embodied in this Covenant.
2. The best method of giving practical effect to this principle is that *the tutelage of such peoples should be entrusted to advanced nations* who by reason of *their resources, their experience or their geographical position* can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them *as Mandatories on behalf of the League*.
3. The character of the mandate *must differ* according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.
7. In every case of mandate, the Mandatory shall render to the Council *an annual report in reference to* the territory committed to its charge.
8. The *degree* of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be *explicitly defined* in each case by the *Council*.

As clause 3 outlined, three distinct groups of colonies and territories based upon the deemed level of development each population had achieved at that time, were created. Class A mandates were those formerly of the Ottoman Empire that "have reached a state of development where their existence as independent nations [could] be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time

as they are able to stand alone."[364] Class B mandates included "Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also *secure equal opportunities for the trade and commerce of other Members of the League*."[365] And finally, "There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered *under the laws of the Mandatory as integral portions of its territory*, subject to the safeguards above mentioned in the interests of the indigenous population."[366]

[364] Article 22.4. The clause further stated that 'The wishes of these communities must be a principal consideration in the selection of the Mandatory.' Thus Palestine and Mesopotamia became the mandates of the British Empire, later Great Britain.
[365] Article 22.5. Own emphasis. 'B' Mandates included Belgium Ruanda-Urundi (under the Mandatory of Belgium),Tanganyika (under the British Empire); Kamerun was split into British Cameroons (under the British Empire) and French Cameroun (under France); Togoland was split into British Togoland and French Togoland.
[366] Article 22.6. Own emphasis. The Class C mandates were the former German possessions, and included former German New Guinea which became the Territory of New Guinea (under Australia/British Empire); Nauru, formerly part of German New Guinea (Australia; the British Empire and New Zealand); former German Samoa (under New Zealand/British Empire); Nanyo and the South Pacific Mandate (Japan), and finally South West Africa (under the Union of South Africa/British Empire).

Article 22, clause 1 of the League's Covenant provided the legal basis for the conferring of a Mandatory on selected Powers by the League.[367] Clause 8 of that Article provided for the necessary and subsequent legal agreement outlining the "degree of authority, control, or administration to be exercised" by the Mandatory, (the Mandatory, of course, having 'accepted' the Mandate). These agreements became known as Mandate Agreements and depending on the class of the mandate, shared a number of clauses in common. For our purposes, those detailing the governance of the Class B and C mandates in particular are most relevant, as these colonies and territories were categorised as having much less potential for self-government than the Class A mandates. The Mandate Agreements were key to the creation and articulation of legal subjectivities and relations along three identifiable binaries, including the Mandatory/Territory; between the former colonial Powers and a newly emerging decolonial 'international,' and between "natives" or "inhabitants" of the Territories and the nationals of the Powers.

[367] However, decisions on the former territories and colonies of the defeated German and Ottoman empires to be address by the Mandate System had already been made by the Commission on the League of Nations, established under the Supreme Council at the earlier Paris Peace Conference in January 1919. The Commission consisted of the British Empire, France, Japan, the US and Italy. By May that year, there was agreement on the types of mandates ("A" for nations, such as those in the Middle East, which were nearly ready to run their own affairs; "B" where the mandatory power would run them; and "C" for territories that were contiguous or close to the mandatory power, which would administer the territory as part of its own, subject only to certain restrictions, such as on the sale of alcohol and firearms. "C" mandates, in other words, conveniently
covered Southwest Africa and the islands Australia and New Zealand wanted), and who would get what. Britain and France had already agreed on a preliminary division of German colonies during the war and in the immediate aftermath. Japan got its islands north of the equator. New Zealand and Australia also got their islands. The British took the mandate for Nauru. Britain and France had agreed in secret on a preliminary division of the German colonies in Africa during the war. France got most of Togoland and the Cameroons, Britain a small strip of each next to its colonies of the Gold Coast and Nigeria, and almost the whole of German East Africa. The Portuguese kept their colonies intact and gained a minuscule piece of land for Mozambique. Belgium took two provinces next to the Congo's borders, the mandates for Rwanda and Burundi. McMillan supra note XXXX at 149-151.

The Mandate Agreements themselves followed a certain format. Their preambles outlined the legal basis whereby the Mandate came about, thereby ensuring through careful legal referencing, that their legal pedigree was without question. The British Mandate for East Africa is a good example. First, there was reference to Article 119 of the Treaty of Versailles where "Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her overseas possessions, including therein German East Africa." This was followed by reference to the legal basis through which the East African *territory* to be mandated was identified and agreed,[368] and the relevant clauses of the League's Covenant that authorised the conferring of the mandate on "His Britannic Majesty" along the terms detailed later in the Agreement. Second, there was the *acceptance* of the mandate of the identified territory by the Mandatory state, according to the terms listed, and finally, that the League's Council (as opposed to the Members of the League via its Assembly) had the authority to define the "degree of authority, control or administration" of the Mandate. In this way, at the outset, a powerful and seamless legal narrative addressing the legal history, the territorial reach, and institutionalising a new international order was created. Article 1 of the British Mandate Agreement describes a detailed geography and topographical map of the territory under the Mandate, [369] and the process for confirming the boundaries of this Territory.

[368] The Treaty of June 11th, 1981 between Britain and Portugal in which the River Rovuma is recognised as forming the northern boundary of the Portugese East African "possessions." British Mandate for East Africa, (1923) 17 AJIL Supplement: Official Documents, 153-157

[369] This description is anchored by many detailed references to natural features of the landscape such as rivers (the Mavumba Msilala, Kagera, Lugesera); lakes (Tanganyka, Mohazi, Kivisa) and various 'watersheds'; and further refined by references to directions ('south-south-west', 'south-east'); distances in kilometers; particular topographical features ('the point of', 'the north shore of', the 'southern shore of', 'the line of this lake' etc.), backed up by agreed co-ordinates from identified maps. The vivid, almost romantic, descriptions of the Mandate's territorial reach and features (it includes a reference to a railway, and several to 'frontiers'), is in stark relief to the complete absence of any reference to the peoples living there. This view is further compounded by later

The Articles that follow address a number of areas including, first, the obligations of the Mandatory to, and rights of two legally differently articulated categories of people. These are "natives" or "inhabitants"[370] under the care of the Mandatory, and "all nationals of States Members of the League of Nations" as well as nationals of the Mandatory. Mandatory obligations to the former include "to promote to the utmost the material and moral well-being and the social progress of its inhabitants;"[371] a strong focus on their labour power vis-à-vis the "eventual" emancipation of slaves, and the "eventual" elimination of domestic and other forms of slavery; [372] a qualified prohibition on forced labour; [373] and more intensive supervision of their labour power overall. [374] These obligations aside, there is an extraordinary range and breadth of powers and reach created for the select "advanced nations" eligible to become Mandatories for exercise through their "tutelage" initiatives.

Mandatory obligations to the latter include securing equality of rights to nationals of the States Members of the League, with rights of the Mandatory's own nationals, within the Territory. These rights include property rights,[375] as well as freedom of transit and navigation, and complete economic, commercial and industrial equality, including to the granting of

references to terms such as 'peace, order and good government of the territory,' thereby lending further to a terra nullius-inflected approach to the peoples there.

[370] These more passive terms differ in their association to rights from that of 'nationals'.

[371] Article 3.

[372] '[A]s speedy …. As social conditions will allow.' Article 5 (1).

[373] '[E]xcept for essential public works and services, and then only in return for adequate remuneration.' Article 5 (3).

[374] '[P]rotect the natives from abuse and measures of fraud and force by the careful supervision of labour contracts and the recruiting of labour.' Article 5 (4).

[375] Article 6, however, places a restriction on transfers of land. It specifies that "[I]n the framing of laws relating to the holding or transfer of land, the Mandatory shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests of the native population." It also prohibits the transfer of land between non-natives, without the prior consent of "the public authorities" and "no real rights over native land in favour of non-natives may be created except with the same consent."

concessions for accessing natural resources; and for missionaries - rights to property, freedom to practice religion as well as travel and residence. [376] Thus, the Mandate Agreement – an international legal agreement – creates two sets of human legal subjectivities, one for native inhabitants, and the other for League Member State nationals, each with different legal, political, economic and social entitlements.

The Mandate Agreement also deepened the Covenant's articulation of the international through a combination of legal innovations (the creation of the League, Mandate, Mandatory and Mandate Territory, as well as the articulation in law of the Open Door policy and rights to proselytise) while continuing to recognise continuities in legal agreements from colonial times.[377] It solidified the League Covenant's creation of a distinct international economic and Christian 'jurisdiction' that now existed, one shared across the Powers' territorial boundaries and with almost boundless reach deep into the social and natural life of peoples in the former colonies and territories. This jurisdiction is articulated as one devoid of domestic 'native' political interest and unfettered by barriers to international trade; movement of people[378] and religious (Christian) ideas, but with a clear hierarchy of interests and rights between Powers and Territories, and for 'inhabitants' of the Territories and "nationals" of the Powers.[379] Thus the primary beneficiaries of this artificial jurisdiction are business interests and nationals from the Powers, (including proselytisers). A key achievement of the Mandate Agreement is the creation

[376] Articles 7 and 8.
[377] See Article 9.
[378] The people from the Powers that expressly enjoy this freedom of movement include professionals and tradespersons that wish to practice; those who own or wish to own property in the Territory, and missionaries and those involved in missionary-related activity. Articles 7 and 8.
[379] Note that France had already conferred citizenship (if conditional) on the Senegalese "originaires," with a right to elect a representative in its Chamber of Deputies.

of a new international governance space where the identity of the Powers as colonial and imperial entities has been erased, replaced by that of altruistic "advanced nations." Despite this characterisation, their authority over and relationship with the Mandate territories and people therein remained largely unchanged and comparable to the non-mandatory territories over which they still held colonial power.

Not only are the Mandatory's powers and agency as described in the Agreement far greater than that of the Territory, but the latter's subjectivity is legally constructed as lacking agency, [380] with nothing explicit in the Mandate Agreement, or the institutions or mechanisms created therein, to enable a change to this. As Logan wrote at the time on the classification of African states under the Mandates System, "[I]t is evident, then, that Africa is never expected to "grow up." Neither the Class B nor the Class C Mandates have any provisions in the Covenant looking to their becoming of age."[381] Indeed, the only 'test' for termination of the mandate is an ill-defined principle of "the development of the people." Thus, the Covenant both introduced a new (if vague) measurement of political, economic and social progress linked to statehood, and formalised it in law. Though perversely, it implied that the international identity and authority

[380] In the Agreement, the Mandatory Power's subjectivity as an executive authority is constructed by the extensive use of a wide range of action verbs such as 'shall be responsible for'; 'shall have full powers of (legislation and administration)'; 'shall not establish'; 'shall prohibit…provide…suppress…protect…exercise… secure…ensure,'; 'shall take into consideration'; 'will promulgate;' 'shall be free to organise'; 'shall have the right to'; 'shall apply to the territory'; 'shall be authorised to constitute the territory'; 'shall make' etc. By contrast, the subjectivity of the Territory is constructed as lacking, inert, a recipient and entity unto which things are done, through phrases such as '[T]he territory over which a mandate is conferred,'; 'Concessions…of the territory shall be granted by the Mandatory,'; '[t]he right of the Mandatory….in the interest of the territory under mandate,'; '[T]he Mandatory shall *ensure in* the territory… shall *apply to* the territory….shall be *authorised to* constitute the territory into a customs, fiscal and administrative union….shall be *free to* enter the territory and to travel and reside therein…" (own emphasis). The heterosexist and gendered dimension to the language describing the relationship between the Mandatory and the people in the territories deserves further analysis.

[381] Logan (1928), supra note 343, at 431.

of the Mandatory state as 'advanced' was reliant on the identity of the Mandate territory as "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world," it institutionalised a permanent differentiated relationship of "advanced' nations" and "lesser" entities through international law, whose permanent status of lack rationalised a permanent right of intervention by the Mandatories, legitimised by the wider international community, where the Mandatory assumes almost unfettered real power of authority.

However, though the legal instruments of the Covenant and Mandate Agreements articulated a distinct legal governance architecture between the international community as constitutionalised by the League, its Mandatories and territories, these took substance through the development of new international instruments and practices of international governance by the PMC, to which I now turn. Three instruments became key to the PMC's role – the establishment of "facts," the development of "standards," and practices of supervision through periodic reporting and an early form of peer review. In the section that follows, I reflect on the juridical nature of each of these instruments, and how these facilitated

4. Decolonial imperial governance– the role of facts, standards and supervision

One of the innovations of the League's Mandate System was the evolution of an approach to an adequate international supervision of the League's Mandatories governance of the mandated territories. The League's Permanent Mandates Commission was central to this endeavour, and in the paragraphs below I reflect on how the supervisory approach that evolved was both deeply pragmatic and utilitarian, but yet identifiably juridical in nature. My aim here is to shed light on the role of law and other governance instruments in the PMC's supervisory approach,

that together created a particular governance signature that defy easy descriptions of it being a 'fusion' or a 'combination' of legal and administrative instruments and functions.[382] For this section, I rely heavily on contemporary literature on the PMC's work of the time, and principally that of Wright, whose careful description and analysis of the League's work lends to the kind of scrutiny that I seek here. [383] Key to this analysis is recognition of the newly-created role of the PMC, with potential to diminish the political, economic and administrative powers of the colonial Mandatory powers. [384] How would the PMC ensure that the Mandatories would "undertake to secure just treatment of the native inhabitants of territories under their control"[385]? Where would it stand in relation to already existing tensions between the Mandatories' responsibilities "for the peace, order and good government of the territory" and its responsibilities to "promote to the utmost the material and moral well-being and social progress of its inhabitants"[386]? In the following paragraphs I briefly describe the mandate and supervision role of the PMC and analyse the approach that it developed in response to that mandate.

[382] See Anghie's description earlier. Commentary at the time from Wright, in my view, lends more towards the recognition of the juridical nature of the Commission's work, relying less on a distinction between law and administration. "The Council and Commission each perform functions of both a juridical and administrative character." Wright, supra note 323 at 193.
[383] Others' contemporary descriptions, though informative, are from particular positions. For example see account by W.E. Rappard, a Swiss lawyer and professor who served as a member of the PMC, and a Director of the Mandate's Section for 18 years. W.E. Rappard (1925) supra note 353.
[384] Here, I re-interpret Hibbeln's point of the PMC playing a potential 'guardian' role "over imperialism itself." Paul Hibbeln, *"A Sacred Trust of Civilisation:" The B Mandates under Britain, France and the League of Nations Permanent Mandates Commission, 1919 – 1939,* Unpublished doctoral dissertation, (Ohio State University, 2002) at 51.
[385] Article 23 (c) of the Covenant.
[386] Article 3 of the British Mandate for East Africa.

The role and responsibilities of the PMC were elaborated in Article 22.9 of the League's Covenant. [387] Formally constituted in February 1921 and headquartered in Geneva, the League's Council had already earlier determined the membership, organization, and procedure of the PMC in December 1920. Wright refers to a statement by the British Hon. Ormsby-Gore MP, (then Under-Secretary of the Colonies and later to become a member of the Commission) that captured well the delicate political balancing act that its new members must embark on.

> "[I]t is not a complicated machine, nor is it an obtrusive and meddlesome organization. Neither is it a court of appeal for complaints of minor importance….It is equally requisite that the Mandates Commission shall not degenerate into a bureaucracy….it must avoid the danger of becoming a closed circle…All peoples, whether in Mandated Territories or not, may perhaps come to seek from it needed advice and counsel; and the reports which it publishes should not be merely perfunctory records, but must be fertile in suggestion for the future as well as data regarding past and present conditions."[388]

The PMC had initially nine, and later 10, members - four were from the Mandatory powers,[389] and one was from the International Labour Organisation (ILO). Though there was a majority of non-mandatory states on the Commission, there was only one non-colonial power member, Sweden, from which the sole woman member was drawn. [390] The independence and

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[387] "A permanent Commission shall be constituted to *receive and examine the annual reports of the Mandatories* and *to advise the Council on all matters relating to the observance of the mandates*." (Own emphasis).

[388] Britain, France, Spain, Portugal, the Netherlands, Sweden, Italy, Belgium, and Japan. Wright notes that Bourgeois of France proposed that representatives of the Mandatory powers were needed on the Commission to insure "uniformity in the jurisprudence which would be created by the decisions of the commission," otherwise its "moral authority" would be endangered by perceptions of being out of touch with the mandatories. Ibid. 139.

[389] John P. Grant & J. Craig Barker (eds) *Encyclopaedic Dictionary of International Law (*Oxford University Press, 2009) online edition. Many were retired colonial administrators such as Lord Fredrick Lugard, former governor of Nigeria. Anique H.M. van Ginneken, *Historical Dictionary of the League of Nations*, (Scarecrow Press, 2006) online edition. Entry 'Mandates System.'

[390] Hibbeln notes that the Council never seriously considered the requests of other non-colonial countries for membership. Hibbeln (2002), supra note 384 at 56. This was not for want of enquiry. Logan noted that over several of its annual meetings, the Pan-African Congress advocated for the appointment of a Negro to the Commission. "M.Bellegarde has told (Logan) that he was promised the first vacancy that occurred on the Commission. It is sincerely to be regretted that in spite of vacancies and even additions such an appointment has not been made." Logan (1928), supra note 343 at 476-477. (Louis Dantès Bellegarde was the Haitian representative to the League of Nations and was heavily involved in the Pan-African movement, in contesting US imperialism in Latin America and control over Haiti at the time, as well as within the League. Patrick D. Bellegarde-Smith, "Dantes Bellegarde and

impartiality, as well as the expertise and diplomacy of the appointees was repeatedly held to be central to its authority. [391] To establish a perception of impartiality, PMC members were not State appointees, but were instead nominated by the Council. [392] Explicit recognition of the need for commissioners to have expertise and knowledge in colonial governance was stressed. [393] At its first meeting, the Commission determined its own Rules of Procedure, later approved by the Council. The PMC met twice a year for three weeks at a time, in private, at which it would review reports from the Mandatories according to a predetermined schedule. It also arranged for extraordinary meetings if necessary.

Pan-Africanism," (1981) 42 Phylon 233). Furthermore, though the constitution of the PMC stipulated that the members were to be selected for their personal merits and competence, and were not to represent their governments or hold any governmental position, the League took no steps to enforce these guidelines. Pederson noted that over the duration of the PMC, there were many instances of Commission members defending the interests of their states, and many others in which they upheld the 'interest' of the European empires as a whole. Susan Pedersen, *The Guardians of the Empire,* (Oxford Scholarship online, 2015), 401.

[391] According to Ormsby-Gore, "The commission must be so constituted that it can constantly bear in mind three points of view: international interests…national interests [and] native interests….Each area has its particular problems; for example, the native legal systems prevailing in tropical Africa are entirely unlike those which obtain in the ex-Ottoman territories…The task of the mandate commission is not an easy one, but it can and must be done. Much naturally depends on the personnel of the commission itself and those members of the secretariat of the League who are associated with it." In Wright (1930), supra note 323, at 137 – 138.

[392] Ibid Anique H.M. van Ginneken. However Pedersen notes that "It is important to realize, however, that that 'independence' was a public stance. It did not prevent members from instinctively defending imperial styles to which they had devoted their lives or from consulting privately with their governments before the sessions. Virtually all members from great or mandatory powers did so; what varied was the flagrancy of that collaboration." Pedersen (2015), supra note 390 at 65.

[393] Certainly, the membership of the first Commission included many people with expertise in colonial and international affairs. The original membership was Anna Bugge-Wicksell (Sweden), was a lawyer. William Ormsby-Gore (Britain), was an MP and member of the LONU. Jean BP. Beau (France), was the former Governor-General of French Indochina and a former ambassador. The Marquis Theodoli (Italy), had been undersecretary of state for the Italian Colonial Ministry. Alfredo Freire d'Andrade (Portugual), was the former governor of Mozambique and Minister of Foreign Affairs. Ramon Pina (Spain), was undersecretary of state for Foreign Affairs. Pierre Orts (Belgium), was former secretary-general of the Ministry of Foreign Affairs. Daniel F.W. Van Rees, (Netherlands), was the former vice-president of the Dutch East Indies Council. Kunio Yanaghita (Japan), was formerly secretary-general to the House of Peers. Harold Grimshaw was from the International Labor Organization (ILO). William Rappard was the original head of the League of Nations Section on Mandates, the branch of the secretariat assigned to the mandates, which was composed of four clerks. With the exception of Valentine Dannevig, who replaced Bugge-Wicksell in 1928 (she was a high school principal) the later members of the PMC were also colonial experts. Hibbeln (2002), supra note 384 at 56, fn110.

The PMC's (and the League more generally) procedural strategy consisted of the acquisition of information (the determination of 'facts'), the establishment of standards, and subsequent monitoring to ensure observation of the mandates. Though the League had five methods of obtaining information,[394] the PMC largely relied on the annual reports of Mandatories and oral hearings their representatives. To initially add legitimacy, and later authority, the Commission – with endorsement of the Council – insisted that reports from the Mandatory's government be addressed to the Council. [395] To aid the PMC, brief questionnaires were devised for each of the mandate categories, on which Mandatories were requested to follow in relation to the contents of their reports. Initial versions for the B and C mandates followed the guarantees enunciated within the League's Covenant and Mandate Agreements and deemed relevant to the spirit of the Agreements. The topics included slavery; labour; arms and munitions; liquor; freedom of conscience; military clauses; economic equality; education; public health; land tenure; the moral, social and material welfare of the natives; public finance and demographic statistics. [396] The PMC also encouraged the use of maps and legislative texts by Mandatories as part of their reports, as well as their adherence to a regular reporting schedule.

The political sensitivity of the PMC's act of seeking information cannot be underestimated. Logan records how, in 1926, during a discussion within the Council about a new questionnaire that the PMC wished to submit to the Mandatories, Sir Austen Chamberlain declared "almost

[394] These were (i) the written reports of Mandatories; (ii) the oral hearing of their representatives; (iii) written petitions; (iv) reports of special committees and commissions, and (v) from miscellaneous materials gathered by the Secretariat. Wright at 159.
[395] Wright (1930), supra note 323 at 160 – this was not always the case, leaving the Commission sometimes dealing with reports by local administrators that their government were unaware of.
[396] Taina Tuori, *From League of Nations Mandate to Decolonisation: A History of the Language of Rights in International Law,"* unpublished doctoral dissertation, (Faculty of Law, University of Helsinki, 2016) at 77, 87.

violently" that he could not permit the Commission "to expand its authority to a point where government would not be vested in the mandatory powers but in the Commission itself," – a position supported by the French, Japanese and Belgian members of the Council.[397] In addition to annual reports from the Mandatories, the Commission had also requested special reports on emergency situations. [398] Over time, the Commission compiled statistical tables of the mandated areas in order to track progress on the various issues reported on by the Mandatories. [399]

As the reporting process evolved and was implemented, inevitably the Commissioners required further information from the Mandatories of both a specific and general nature. [400] The Mandatories' reports, according to the PMC's rules of procedure, needed to be examined "in the presence of the duly authorised representative." This rule was interpreted to mean that while the Mandatory would have one accredited representative, it could send experts in addition to the accredited representative. [401] While the PMC appeared to appreciate access to first-hand accounts of the situation in the territories, Wright noted that the oral questioning process also gave the Mandatory government the opportunity to "sell their policy to the Commission."[402] To make the reporting and analysis process more effective, the PMC instituted a specialised *rapporteur* system, whereby each subject was allocated a rapporteur who, on the basis of the contents of the annual reports and written memoranda from other members,

[397] Logan (1928), supra note 343 at 433-434.
[398] Wright notes two in relation to the Bondelzwart insurrection in Southwest Africa in 1923, and the insurrection in Syria in 1925-26. Wright (1930), supra note 323, at 164.
[399] Ibid 165.
[400] Ibid 186.
[401] Ibid 165-166. He notes that officials that had attended these sessions included high commissioners of the mandated territories from Iraq, Palestine, Syria, Ruanda-Urundi and French Togoland.
[402] Ibid 167.

would prepare memoranda on the subject under discussion at the meeting with the Mandatory government. Eventually, this evolved into a rapporteur for all subjects on the questionnaire backed by a *dossier* method, with the latter being sent out by the Secretariat in advance.

It is important to note, however, that the oversight by the PMC did not end with their production of their report and observations, and its forwarding to the Council. Crucially, the Commission's report was sent to the mandatory powers for comment before being delivered to the Council. Pedersen notes that the Council process on receipt of the Commission's report consisted of a representative of one of the non-mandatory powers on the Council summarising the report, thanking the Commission, and moving a resolution incorporating any recommendations the Council saw fit to propose. This, she notes, was usually a highly orchestrated process, with the Mandates Section (secretariat) "vetting (and sometimes writing) the 'rapporteur's text, and the mandatory powers themselves negotiating over any recommendations."

Tensions between the Commission and the Mandatory, and the Commission and the Council, over the authority and ability of the Commission to undertake its supervisory role, emerged not infrequently, with its working methods attracting controversy. An earlier example given was the proposal to introduce a more detailed questionnaire. However, a particularly telling example arose where, in order to ascertain the situation following the Bondelzwart insurrection after receiving unsatisfactory reports and oral discussions with representatives from South-West Africa, the Commission requested that "some of the natives…appear before the

Commission."[403] The Council rejected this request, arguing that "the distance and the expense of travel were too great, that such a proceeding by undermining the prestige of the Mandatory would incite revolt, and that the municipal law of many of the mandatories did not recognize the right of oral petition…..the Commission did not press its suggestion, and the Council ruled that there was no occasion to modify the usual procedure."[404] In response to another Commission request to visit Palestine, Sir Frederick Lugard warned that "No mandatory power would accept such a procedure. Its prestige would inevitably suffer, for the commission or sub-committee would be in the position of a court of enquiry in which the mandatory power was the defendant."[405] It was not surprising then, that the Commission's response to Mandatories' reports ranged from commendation, to requests for further information, criticism, and recommendations. [406]

But the PMC was not completely insulated from outside intervention. The third source of information for the PMC was its petitions system, a rather surprising development that was not anticipated nor provided for in the League's Covenant or Mandate Agreements. Though precedent for a petitions system already existed within the British colonial system,[407] with the establishment of the League and its role, it was perhaps not surprising that the League was contacted by a wide range of individuals from within and outside of the Territories in response to the wider variety of political tensions that existed across the League's mandates. [408] Contact

[403] Logan (1928), supra note 343 at 441.
[404] Ibid 441-442.
[405] Wright (1930), supra 323 at 180.
[406] Ibid 200-203.
[407] Any resident in a British colony had a right to petition the Privy Council, which in 1833 had established a Judicial Committee to hear petitions.
[408] Pedersen describes how the transfer of Southern Cameroon and most of Togo to the French in exchange for recognition of claims elsewhere proved very unpopular with the Liverpool-based Association of West African

was not just in written form – direct lobbying of League officials also took place. [409] This prompted the British League representative to work with the British Colonial Office to draft a petition process, in which, unsurprisingly, the role of the Mandate government's colonial administration was key.[410]

Ultimately, though a broad definition of a petition was adopted, the procedure for acceptance and response agreed upon was a limited one. Though petitions from inhabitants of a mandated area could be accepted, this could be done only if submitted through the Mandatory, whom itself was requested to append a comment on the petition before forwarding it to the Commission. Petitions from other sources were sent to the PMC Chair who decided if they were of 'sufficient importance' to receive the attention of the Commission. To be receivable a petition could not be anonymous; question the terms of the mandate itself; repeat an issue already dealt with by another petition; use violent or indecent language, or request an intervention into matters that were justiciable in law in the mandates itself. [411] On receiving a petition, the contents were discussed at a closed meeting of the PMC with the accredited representative of the mandatory concerned, after which a PMC Chairperson-nominated rapporteur would write a report which was then forwarded to the Council. By 1928, the petition process was routine enough for the Mandate Section to keep a Register of Petitions, with the Commission submitting some 325 separate reports (many addressing multiple

Merchants, with local British officials and with English– and German-speaking elites who had worked for British or German firms before and during World War 1. Similarly, protests against the British and French dispensation in the Middle East were also 'flooding' the League's Geneva office. Pedersen (2015), supra note 390 at 79-80.

[409] Ibid. Thus, the Syro-Palastinian Congress, a pan-Arab nationalist movement, met with the Director of the Mandate Department of the League, William Rappard, over several meetings (when neither the Council nor Sir Eric Drummond, Secretary-General of the League of Nations, would do so). Ibid 80-81.

[410] The British proposal was adopted with just minor modifications. Wright (1930), supra note 323 at 169.

[411] Wright (1930) ibid 170-172; Pedersen (2015), supra note 390 at 84-85.

petitions) to the Council between 1925 and 1939, and with estimates that over 3000 appeals, charges or communications of some kind being received by the Secretariat. [412]

Pedersman's analysis of the petitioning system is revealing on its significance and meaning both to Mandatories, Territories and an emerging international order that was at once both de-colonial yet imperial. In over three-quarters of the petitions, the PMC recommended that no action be taken; with complaints being upheld by the Council in only 10% of cases. [413] She notes that the PMC studiously viewed the petitions as sources of information only – not documents of a juridical nature as, within the mandate of the PMC, the petitions system was not a judicial one. Instead, this system was a mere conduit of information for the Council. Thus, the petitioner had no real rights – their status was that of mere informant. She also notes that most of the petitions were going to fail anyway as the majority challenged the premises of the League itself. "When Syrian, Palestinian, Cameroonian, and Western Samoan petitioners insisted, as they were wont to do, that they could in fact stand alone, the Commission ruled those claims outside their competence….Petitions could claim protections due them under mandate; they could not slough off protection altogether."[414] However, as she acknowledges, this limitation of its role does not fully capture its wider, systemic importance. At a minimum, the petitions system became an identifiable, if problematic, node through which protest and pressure to challenge colonial governance could be mobilised and channelled. The

[412] Pedersen (2015), ibid 86-87.
[413] Ibid 91. I assume the latter figure relates to 10% of the quarter of those cases where the PMC recommended that some action be taken.
[414] Ibid 92. Disparaging comments from the Commission and Council members on the racial identity of the petitioners was used to undermine and dismiss the authority of the petition itself, thereby revealing how the process of receiving and addressing petitions further institutionalised an Orientalist mentality.

Commission's and Council's recognition of and engagement with informed public opinion was a major driver towards the efforts at some semblance of transparency vis-à-vis its oversight of the Mandates. Though the motivation behind these efforts was to court positive public opinion of course, the petitions system was strategically utilised by some petitioners to draw greater publicity to their cause, build international and publicity networks and lend greater credibility and legitimacy to the justness of their grievance.[415]

It is not surprising then that the PMC tread a careful line between critique and complicity in its supervisory approach, one that strongly centred on avoiding Mandatory perceptions of its role as judicial. On this point, from his analysis of the PMC's reports, Wright proposes that the Commission's efforts were mainly directed at four objects – maintaining the League's authority and preventing the Mandatory from acquiring sovereignty; ensuring that the Mandatory make no direct profit from the territory; the treatment of native peoples, and the economic development of the territories. [416] However, this overlooks the juridical quality of its approach to standard-setting, and the implications of its continual deference to Mandatory authority in the governance of the territories. In the following paragraphs I explore each of these in turn.

Wright notes three distinct procedures for establishing standards with which to further articulate and assess fulfillment of the provisions within the Covenant and Mandate Agreements. These were (a) the "growth of a jurisprudence from decisions on particular questions; (b) the agreement on principles for its own use by the Commission, and (c) the

[415] Ibid 94. "[T]he fact that the Commission usually rejected (the petition) rarely damaged either the petitioner's credibility or the movement's popularity – indeed, petitioners eagerly publicized such rejections in the sure knowledge that abuse only enhanced their standing."
[416] Wright (1930), supra note 323 at 214-215.

passage of formal resolutions by the Council." [417] Earlier, I have listed particular methods and steps to the PMC's work, including the work of a specialist subject-focused rapporteur in preparing a report with draft recommendations to the Commission; the phased deliberations of the Commission on the contents of Mandatory reports, as well as on cross-cutting issues that arise, and the formal steps taken by the Council to discuss the Commission's recommendations, the contents of the report, and to pass resolutions therein. In contemporary times, these methods are now recognised as generating jurisprudence within a number of international legal bodies within the UN and regional human rights systems, at the time, no such mechanisms existed. However, Wright certainly recognises their juridical quality by standards of that time, describing the jurisprudential procedure as "quasi-judicial," the principles as "technical," and the passage of Council resolutions as "quasi-legislative."[418]

However, besides their juridical quality, there are three other features of the Mandates System that prove significant to our analysis of the later international governance of ODA. The first is the creation of an international standard-setting mechanism vis-à-vis what constitutes both the appropriate development of territories and peoples in the Global South, and the appropriate role of Western Powers in that project, through a legally-created international organisation that claims universality for its doctrine, though it has a restricted membership. Here there are striking parallels between the League and the much later structure, role and procedures of the OECD and its Development Assistance Committee.

[417] Ibid 219.
[418] Ibid 220.

The second is the internal legal logic of development and the kind of governance necessary to achieve it that was institutionalised and promoted via the Mandates System, of which three features stand out. The first is the highly pragmatic and utilitarian approach taken to the supervision of the Mandatories governance. Thus, though slavery and forced or compulsory labour were to be prohibited, Tuori noted that PMC discussions on slavery revealed that the maintenance of order through not rapidly changing the status of individual slaves was "often considered more important," a dubious rationale compounded by the lack of any clear timelines for achieving universal prohibition. "Change and improvement was looked at from the perspective of generations. As the mandatories and the PMC were not actively advancing the independence of the mandates, they believed they had ample time to enable a change that would take place over generations." [419] Second, the Mandates System created, for the first time, a mechanism through which a comparative study of sovereign colonial administrations could be undertaken, one with the intention of making it more efficient, governable and humane. A new space had opened up in which colonial rule could legitimately be augmented,[420] one separate from domestic colonial and other international spaces where it was coming under sustained critique and opposition. Third, the approach to the implementation of Open Door, and the ability of the Mandatory to constitute the territory into a customs, fiscal or administrative union with neighbouring territories, meant that Mandatories assumed

[419] Tuori (2016), supra note 396 at 89.

[420] Rappard noted that "An excellent opportunity for extending the mandates principle to other territories was missed when Jubaland was ceded to Italy. This cession was made in execution of Article 13 of the Treaty of London of May 9th, 1915, which provided that "In the event of France and Great Britain increasing their colonial territories in Africa at the expense of Germany, those two Powers agree in principle that Italy may claim some equitable compensation, particularly as regards the settlement in her favour of the questions relative to the frontiers of the Italian colonies of Eritrea, Somaliland and Libya and the neighbouring colonies belonging to France and Great Britain."" Rappard (1925), supra note 353 at 223.

considerable economic advantage over non-Mandatory League Members. Of direct relevance here is an arguable precursor to tied aid, where the PMC considered the status of an attachment of a requirement by a Mandatory regarding loans to B-mandated territories that purchases from the proceeds be made from its territory. Though the Commission found that, ordinarily, such requirements would be prohibited, for loans for public works, such prohibitions would not apply. [421]

The third feature of the governance approach by the Mandates System of relevance to the international governance of ODA is the significant role given to the acquisition of information, and the use of data to create a context in which legal concepts could be enumerated, determinations could be made, and progress could be monitored. Here we are witnessing the emergence of an international, legally backed normative order where quasi-judicial decisions, standards, legal concepts and governance practices are developed and amended based on information and data, not law. Furthermore, the Mandate System has now become both a hub for the generation of knowledge, standards and guidelines on comparative colonial administration, a means by which these are disseminated, and their implementation monitored. These functions, and features, are highly similar to those of the later OECD and its DAC.

5. Conclusion

In this first of two chapters focusing on the historical evolution of the contemporary international governance framework on ODA, I have focused on the profound international

[421] Wright (1930), supra note 323 at 479.

legal innovations heralded by the Mandates System and its governance of Mandatories' administration of the League Mandates. I show how a new jurisdiction is constituted and becomes institutionalised through governance technologies that contain within them features that exist in the contemporary international governance framework for ODA. Thus, the founding convention for the League and PMC, as well as the Mandates Agreements, establish unlimited jurisdiction by "advanced nations" (no longer colonial powers) over the affairs of former colonies and territories, sanctioned by a newly constituted international community. It created novel legal concepts of *Trust* and *Trusteeship* to characterise the relations between new statal entities with different sovereignties in which the "advanced nations" were given almost limitless powers over colonies and territories and the peoples within them. However, a new doctrine of imperial development was also inaugurated articulated through the concept of Open Door. This doctrine privileged the promotion of trade and commerce and the economic interests of League Members in the Mandatories, over those of non-members. Of great significance to this research is the creation of the Mandates System, along with the instruments of governance of the PMC, as a new international legal governance realm. This was a new jurisdiction in which law, and new technocratic and bureaucratic governance technologies were developed and refined in order to effectively, and diplomatically, govern a new international realm where colonial and decolonial governance practices co-existed. The gathering of information through surveys in order to generate data to establish "facts;" the instigation of a rapporteur system, and the creation of a record of the analysis of Mandatory governance that could be returned to and compared with over time, will prove to be an enduring and highly

relevant governance approach for the legal form of the contemporary international governance of ODA.

In the following chapter, I turn to a later historical moment – the administration of the Marshall Plan – that added another important element. While the Mandates System created several features of the contemporary international governance framework of ODA, the Marshall Plan created an essential one. This is the co-ordinated approach to economic planning by the European states and the creation of an economic partnership between the US, European states and, especially, European colonial powers to pursue a particular model for the economic development of Europe in which the role of the colonies and territories was key.

Chapter 7 – Precedents II: From Marshall Plan to Overseas Territories Committee to Development Assistance Group – continuities and evolutions in new institutions of international governance of aid

1. Introduction

In the previous chapter, I examined how the creation of the League of Nations and the work of its Permanent Mandates Commission (PMC) created a new international governance space that institutionalised new international relations with newly constructed sovereign identities, rationalities and governance technologies and instruments. In sketching an institutional history of the international governance of Official Development Assistance (ODA), I proposed that the League's Covenant, and its implementation through the Permanent Mandates Commission, enabled the victorious colonial Powers to attain a differentiated and elevated subjectivity within an early 'international community,' and institutionalise a transnational imperial model of development based on the economic and political interests of the victorious Western Powers. This model required unfettered access to the economic resources (its lands and its people) of the colonies and territories of the vanquished Powers.

In this chapter, I turn to a second moment in the history of the international governance of ODA that contains both strong continuities with the precedent established by the law, policies and practices of the League and the PMC, and links with the contemporary international governance framework on ODA. Specifically, I focus on legal and institutional developments in the post-World War II period that preceded the establishment of the OECD and its Development Assistance Committee. These largely relate to aspects of the administration of the Marshall Plan and its immediate aftermath, and include the law and institutions established by

the US to govern the implementation of the Marshall Plan,[422] and their international counterparts. These are the Economic Co-operation Act of 1948,[423] and the Economic Co-operation Administration (ECA).[424] On the European side, it includes the institutional structure and the work of the Committee on European Economic Co-operation (CEEC) representing 16 European countries. This was later replaced by the Organisation for European Economic Co-operation (OEEC) of several European states, of which those that had colonies formed an Overseas Territories Committee (OTC). The OTC later evolved into the OECD's Development Assistance Committee.

We will see how these laws (national and international) and implementing institutions inaugurated an international governance space with several features that resonate strongly with the contemporary international governance framework of ODA. First, these facilitated the pursuit of a distinct project of development, based on ideas about economic theory that prevailed within the US at the time. These held that economic productivity was key to economic growth and, within a post-War European context, such growth was dependent on achieving economies of scale through ever-greater economic integration of European states, in ways that mirrored the US' own economic history. The pursuit of economic growth in this way, it was held, would reduce political tensions between states and promote peace. Thus, according to

[422] Officially known as the European Recovery Program (ERP), and announced by then-US Secretary of State under President Truman, George Marshall in a speech on June 5, 1947 at Harvard University, the Marshall Plan was intended to rebuild the national economies and political stability of Western Europe, primarily. It emerged from a variety of US and victorious European Allies' concerns, including the prevention of the spread of communism in that region.

[423] This was also known as the 'Foreign Assistance Act' of 1948. Economic Cooperation Act (US) of 1948, PUB. L. No.472, 80th Cong., 2nd Sess. (Ap.3, 1948).

[424] This was the American agency established to administer the European Recovery Programme (ERP), as the Marshall Plan was officially called.

President Truman, "The United States has taken the lead in world-wide efforts to promote industrial and agricultural reconstruction and a revival of world commerce, for we know that enduring peace must be based upon increased production and an expanding flow of goods and materials among nations for the benefit of all." [425]

Milward posits that US thinking on the reconstruction of Europe was premised on customs union theory. [426] This held that if all restrictions on the movement of factors of production were removed from a particular area, this would maximize the efficiency with which those factors were used and thus maximize output, income and wealth over the same area, to the point where the benefits to each part would be greater than if that part had remained outside the union. Over time, according to this theory, discrepancies in wealth and income between the different parts of the union would diminish as each part became able to maximize its own particular comparative advantage. Any economic sacrifice involved in the process of economic integration would quickly be overcome by the gains made from economic efficiency. This economic lens was highly selective. Other economic matters - such as how this project might lead to a reduction in economic inequality – were perceived to be irrelevant. Additionally, the framing of this project as predominantly economic, technical and pragmatic in nature enabled the very real politics of this project to remain hidden from view.[427]

[425] US President Harry Truman, Special Message to the Congress on the Marshall Plan, December 19th, 1947.
[426] Alan S. Milward, *The Reconstruction of Western Europe 1945-1951*, (Routledge e-book, 2012), 58.
[427] "Increasing the productivity of Europe labour and capital to the levels which the United States had attained in the Second World War could be presented as not merely economically desirable, in the sense that by increasing Europe's exports it would diminish the dollar gap, but also as politically neutral. It was of course no such thing, for it involved trying to impose a set of particular human and economic values on the societies in question." Ibid 123.

Second, and relatedly, the creation of an international governance space was integral to this economic project. In this view, the 'international' came to be seen as the only appropriate forum where decisions could feasibly be made to re-work the domestic economies and institutions of participating EU states to an unprecedented extent for that time. [428] Such a space would overcome challenges that would undoubtedly arise from European states' concerns about intrusions on their national sovereignty and their status in the international community, as well as their need to protect and promote national self-interest. This governance space had to be amenable to the influence of the US (as the primary donor), and thus be a forum that would remain separate from other newly-minted international organisations such as the United Nations and its Economic Commission for Europe, where such influence could be diluted. [429]

Third, the Marshall Plan project developed an approach to US-led donor international governance of aid with several features that characterise donor governance of ODA today. These include the unprecedented broad scope of aid-recipient domestic policy and institutions

[428] As we will see in the following sections, the areas for domestic attention included not only changes to the major productive areas of states' economies such as food, energy, transport, production, labour etc. but also included matters relating to fiscal policy such as money supply, monetary stability and currency exchange; the management of budget deficits; taxation policy; labour and migration policy; the reduction of barriers to trade, the promotion of foreign investment, and the protection of foreign owned assets, as well as addressing areas of states foreign policy including support for the draft charter of the International Trade Organisation, and reduction of trade with Eastern Europe and Russia. See the contents of the CEEC's first report to the US addressed in the next section, Committee of European Economic Cooperation, Vol. I: General Report; Vol. II: Technical Reports. (Washington: U.S. Government Printing Office, I947), and commentary in the several official US reports that subsequently analysed that initial report. These include 'National Resources and Foreign Aid' (report of J. A. Krug, October 9th, 1947), (Washington: U.S. Government Printing Office, I947) and 'European Recovery and American Aid: Report by the President's Committee on Foreign Aid,' November 7th, I947, (Washington: U.S. Government Printing Office, 1947), (Known as the Harriman Report).

[429] The decade following the end of World War II witnessed the inauguration of several international organisations including the United Nations, the International Bank for Reconstruction and Development, the International Authority for Ruhr, the Food and Agriculture Organisation and others. It thus was a highly innovative era when international law and international organisations were created to address challenges within international relations at the time. The Marshall Plan institutions are distinctive for not coming under the UN's ambit, though this was proposed by several European and Scandanavian states at the time. Milward (2012), supra note 426 at 68.

that came under attention for US donor-proposed reform; the thick range of governance instruments utilised to implement the Plan and administer aid, including a particular kind and blend of law, institutions, bureaucratic and technical governance technologies. This was anchored in a dedicated diplomatic policy discourse that though it explicitly emphasised partnership and co-operation, as well as formal respect for European states' sovereignty, it also masked a highly bifurcated approach to decision-making: the US retained legally backed executive authority in practice. Thus, the US' approach to the administration of the Marshall Plan, with its object being Europe as a whole, and sovereign European states recognised as constituting the international community, offered an experimental precedent that was to become both precedent to, and prescient of, the later international governance of ODA by Western donors over aid given to sovereign states in the Global South. [430]

In the following section, I trace the background to the Marshall Plan and examine how the then-newly created laws and institutions at national and US-European international levels demonstrate and elaborate on these themes in more detail. This is followed by an overview of the international institutional steps that have led to emergence of the predominant node of the contemporary international governance of ODA – the OECD and its Development Assistance Committee. Taken together, I claim that the respective approaches outlined in the preceding chapter on the League and Permanent Mandates Commission, and on the implementation of the Marshall Plan in this chapter, provide the international legal, doctrinal, and governance

[430] "The prospective situation arising out of the operation of the European-aid program provides an almost ideal test case for the application of various aspects of economic analysis and policy." Bert F Hoselitz, "Four Reports on Economic Aid to Europe," (1948) 56 J Pol Econ 103 at 114. Indeed the experimental nature of the macro policy prescriptions delivered by the US to individual European states and the region as a whole is a feature of the donor-recipient relationship that continues to this day.

precedents that were later elaborated on more fully within the OECD's DAC. In exploring this Marshall Plan-focused historical element to the contemporary international governance of ODA, my intention is not to examine the detail, success or the merits of the Marshall Plan, but to focus on those elements of its governance that help elucidate the particular legal form of the contemporary international governance of ODA. [431]

2. Background to the Marshall Plan – rationales for and the discourse of development

In March 1947, President Harry S. Trumann announced to the Congress that the United States must be willing to "help free peoples to maintain their free institutions and their national integrity against aggressive movements that seek to impose upon them totalitarian regimes…." as these regimes "undermine the foundations of international peace and hence the security of the United States." [432] Media reports, along with diplomatic correspondence at the time, had alerted the American public and decision-makers to threats to the domestic stability of France,

[431] From my review of the literature on the Marshall Plan relevant to this topic, the Plan is most frequently analysed and understood through two lenses. The first views the Plan as key to a period of European economic and political 'rescue' and portrays it as an ultimately beneficent process that catalysed the formation of the European Coal and Steel Community (the precursor to the modern European Union) through the later enunciation of the Schumann Declaration and Plan. The second lens recognises the Plan's role in the creation of NATO as the logical expression of Western solidarity in defence that mirrored the economic solidarity promoted by the Plan, a development that solidified the division of Europe into East and West. The approach taken in this research departs from both of these, and instead examines this time of extraordinary international institutional innovation as signalling some continuities with (even with significant departures from) earlier international institutional innovations on decolonial governance.

[432] Aside from repeated appeals to national self-interest and international liberal ideals in the speech ("The free peoples of the world look to us for support in maintaining their freedoms. If we falter in our leadership, we may endanger the peace of the world – and we shall surely endanger the welfare of our own Nation"), Truman also addressed the administration of any aid given to Greece as follows, "it is important to note that the Greek Government has asked for our aid in utilizing effectively the financial and other assistance we may give to Greece, and in improving its public administration. It is of the utmost importance that we supervise the use of any funds made available to Greece, in such a manner that each dollar spent will count toward making Greece self-supporting, and will help to build an economy in which a healthy democracy can flourish." President Truman's address to Congress, Recommending Assistance to Greece and Turkey, March 12th 1947. Available at http://www.trumanlibrary.org/whistlestop/study_collections/doctrine/large/documents/index.php?pagenumber=1&documentdate=1947-03-12&documentid=5-9

Italy and Greece from labour unrest, Communist party activism and general disquiet caused by rising food and fuel shortages after a period of post-war economic resurgence. How had this situation arisen?

Part of the reason can be found in the tensions in the post-war governance of Germany agreed at the conclusion of the Potsdam Conference over several weeks at the end of July 1945 in which the victorious allies – Britain, France, the Soviet Union and the US – agreed to govern occupied Germany as one economic unit, though it was to be divided politically into four zones. This arrangement was intended to ensure that German industrial resources would be harnessed for German and wider European economic recovery, while its political administration would remain permanently constrained to ensure it would never pose a threat to its European neighbours again, but be sufficient to ensure that reparations would be paid to the allies. In practice, this approach underestimated French and Soviet designs on German economic and industrial resources and demands for reparations.[433] While several international institutions had been established, such as the International Monetary Fund and the International Bank for Reconstruction and Development, the 'problem' of how to reconstruct Germany in line with the Potsdam agreement was something not within the remit of these institutions.

The US, along with Britain, was already committed to making the bi-zone self-supporting within three years. And though the US had given Europe $10 billion from July 1945 to June 1947, including a loan of $3.75 billion to the UK, $2.7 billion to the United Nations Relief and Rehabilitation Association (UNRAA) and the US Government Aid and Relief in Occupied Areas

[433] Samuel Lubell, "The Untold Tragedy of Potsdam." Saturday Evening Post. 12/8/1945, Vol. 218 Issue 23, p14-51.

programme (GARIOA) and $1.9 billion for the purchase of army surplus, clearly it was not enough.[434] Visits from Marshall, as Secretary of State, and Will Clayton as Undersecretary of State to Europe solidified the opinions of both, and particularly so of Clayton, that Europe was at risk of eminent economic collapse and political instability.

> "Without further prompt and substantial aid from the United States, economic, social and political disintegration will overwhelm Europe. Aside from the awful implications which this would have for the future peace and security of the world, the immediate effects on our domestic economy would be disastrous; markets for our surplus production gone, unemployment, depression, a heavily unbalanced budget on the background of a mountainous war debt. … It will be necessary for the President and the Secretary of State to make a strong spiritual appeal to the American people to sacrifice a little themselves, to draw in their own belts just a little in order to save Europe from starvation and chaos (*not* from the Russians) and, at the same time, to preserve for ourselves and our children the glorious heritage of a free America."[435]

While Clayton's memo clearly described the benefits of what would later be termed 'tied aid', [436] describing a trade barrier-free economic model for Europe that the aid should be put towards, along with the need for a three-year plan upon which to base US aid, [437] none of this was apparent in the later historic speech given by Secretary Marshall, in Harvard on June 5th 1947 in which the Marshall Plan was publicly announced.

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[434] Alec Cairncross, *Economic Ideas and Government Policy: Contributions to Contemporary History*, (London: Routeledge, 1996) at 105.

[435] Memorandum by the Under Secretary for Economic Affairs (Clayton), May 27th, 1947 reproduced in Meredith Hindley, *How the Marshall Plan Came About.* (Marshall Foundation, 1998) at 22-23. Available at http://marshallfoundation.org/library/documents/marshall-plan-came/. The economic opportunities that US investment would bring for the US economy were also clearly described by Clayton in this memo.

[436] "Europe must have from us, as a grant, 6 or 7 billion dollars' worth of goods a year for three years…..Our grant could take the form principally of coal, food, cotton, tobacco, shipping services and similar things, all now produced in the United States in surplus, except in cotton. The probabilities are that cotton will be surplus in another one or two years." Ibid, 52.

[437] "This three-year grant to Europe should be based on a European plan which the principal European nations, headed by the UK, France and Italy, should work out. Such a plan should be based on a European economic federation on the order of the Belgium-Netherlands-Luxembourg Customs Union. Europe cannot recover from this war and again become independent if her economy continues to be divided into many small watertight compartments as it is today." Clayton, Ibid 24.

Marshall's speech was a carefully crafted message to prepare and persuade the American public of the value of continuing to give aid beyond what was originally anticipated by its leaders. Four features are particularly noteworthy in relation to the narrative it created on aid, the rationalisation proffered for such expenditure and the role for the US, along with a summary of the key features of its likely mode of implementation. First, there was the careful framing of European difficulties in simplistic economic terms only, with no mention of the internal political discord amongst European countries, or between the Allies (in particular, between the US and Britain on the one hand and the Soviet Union on the other) in relation to decisions on agreeing the post-war governance of the defeated Axis powers. Secondly, a civilisation narrative was created, but not in relation to US freedom in comparison with other political regimes as reflected in the content of Clayton's earlier memo. Instead civilisation was now equated with a global capitalist mode of economic production based on a division of labour and the extraction of profit. Both of these features can be seen in selected excerpts from the earlier part of the speech below.

> "The breakdown of the business structure of Europe during the war was complete…..There is a phase of this matter which is both interesting and serious. The farmer has always produced foodstuffs to exchange with the city dweller for the other necessities of life. This division of labour is the basis of modern civilisation. At the present time it is threatened with breakdown. The town and city industries are not producing adequate goods to exchange with the food-producing farmer. Raw materials and fuel are in short supply. Machinery is lacking or worn out. The farmer or the peasant cannot find the goods for sale which he desires to purchase. …. Thus a very serious situation is rapidly developing which bodes no good for the world. The modern system of the division of labour upon which the exchange of products is based is in danger of breaking down. …The remedy lies in breaking the vicious circle and restoring the confidence of the European people in the economic future of their own countries and of Europe as a whole." [438]

[438] George C. Marshall, Remarks by the Secretary of State at Harvard University on June 5th 1947. Available at http://marshallfoundation.org/library/wp-content/uploads/sites/16/2014/06/Marshall_Plan_Speech_Complete.pdf.

Thirdly, the US' role in intervening in European affairs was presented by Marshall as both 'logical' and arising from a 'responsibility' given to it from 'history', and as entirely necessary in order to

> "[A]ssist in the return of normal economic health in the world, without which there can be no political stability and no assured peace. Our policy is directed not against any country or doctrine but against hunger, poverty, desperation and chaos. Its purpose should be the revival of a working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist … With foresight, and a willingness on the part of our people to face up to the vast responsibility which history has clearly placed upon our country, the difficulties I have outlined can and will be overcome."[439]

This belief in the altruism of US economic humanitarianism as motive for its intervention found expression in US foreign policy at the Potsdam Conference in which a nascent principle of 'trusteeship' could be identified. [440] The latent political nature of US intervention is barely hinted at, in favour of a stand against 'hunger, poverty etc.' A new boundary-less Europe is presented in an entirely uncomplicated, singular way. [441] There is no allusion to the possibility that further US intervention in an already volatile and difficult relationship between the former

[439] There are revealing parallels in this rationalisation of US intervention as an almost sacred 'responsibility', echoing French and British resort to the same term in their versions of the civilisation narrative that underpinned their approaches to colonisation. Robert Aldrich, 'Imperial *mise en valeur* and *mise en scène*: Recent works on French colonialism' (2002) 45 Hist J 917 at 922; Gary Wilder, *The French Imperial Nation-State,* (Chicago: University of Chicago Press, 2005); Leonard S. Woolf, "*Empire and Commerce in Africa*" in Allan Bullock & F. W. Deakin, *The British Political Tradition Book Six The Concept of Empire Burke to Attlee 1774 – 1947.* Edited by George Bennett. (London: Adam & Charles Black, 1962), 384-385. T.C. 'The Economic Development of the British Colonial Empire' (1943) 20 Bull Int News 139, Joseph M. Hodge and Gerard Hödl, 'Introduction' in Joseph M. Hodge, Gerard Hödl, and Martina Kopf, *Developing Africa: Concepts and practices in twentieth-century colonialism*, (Manchester: Manchester University Press, 2014) at 23.

[440] At the Potsdam Conference, this 'principle of trusteeship' was evident in ideas underpinning official US relations with non-Western 'others' which supplemented the Roosevelt Four Freedoms doctrine. "It is the policy of our government and our people to do all that we can, consistent with preserving our way of life, to afford others the abundance of life, which *an intelligent administration of the world* should provide" (own emphasis). Memorandum on Foreign Policy, Memorandum No. 221 by the Chairman of the President's War Relief Control Board (Davies), Washington, July 3, 1945. Foreign Relations of the United States: Diplomatic Papers, The Conference of Berlin (The Potsdam Conference), 1945, Volume I. Available at https://history.state.gov/historicaldocuments/frus1945Berlinv01/d221 This memorandum was part of the background papers sent with the US delegation to the Potsdam Conference.

[441] Marshall speaks of "help(ing to) start the European *world* on its way to recovery." Note the ambiguity of whether or not occupied Germany is considered part of this 'world'. Marshall (1947), supra note 503.

allies might exacerbate the deep tensions between the former Western allies and the USSR, or might affect relations between the former allies and now-occupied Germany. Instead, US intervention is presented as a friendly support of the wishes of the majority of European countries.

> "It would be neither fitting nor efficacious for this Government to undertake to draw up unilaterally a program designed to place Europe on its feet economically. This is the business of the Europeans….The role of this country should consist of friendly aid in the drafting of a European program and of later support of such a program so far as it may be practical for us to do so. The programme should be a joint one, agreed to by a number, if not all European nations."[442]

Agency and leadership are ascribed to the Europeans, though what that may mean for the nature of decision-making within and between the Europeans and the US is left unclarified. Clearly, however, the US is presented as not being the prime decision-maker, but acting in partnership with European nations who jointly agree to this programme. The US' facilitative leadership role is further implied by Marshall's invitation to other countries to become involved in this effort. "Any government that is willing to assist in the task of recovery will find full co-operation, I am sure, on the part of the United States Government."[443] This parity-of-partnership approach, however, was not a view shared by Clayton who wrote in his memo of a few days earlier, "Canada, Argentina, Brazil, Australia, New Zealand, Union of South Africa could all help with their surplus food and raw materials, but we must avoid getting into another UNRAA. *The United States must run this show*." [444] Thus, in reality, the US would retain decision-making authority.

[442] Ibid.
[443] Ibid .
[444] Clayton (1947), supra note 499 at 23. Italics added.

Fourthly and finally, it is notable that this exercise of US intervention is also presented as a politically neutral, technical operation, with its deeply political nature masked. Similarly, the intervention was framed in pragmatic terms, one that demanded a longer-term engagement but one that would tackle root-causes and not just symptoms of economic crisis. In an incredibly persuasive way, all of these were integrated as key features of the proposed intervention.

> "Such assistance, I am convinced, must not be on a piece-meal basis as various crises develop. Any assistance that this Government may render in the future should provide a cure rather than a mere palliative. …. An essential part of any successful action on the part of the United States is an understanding on the part of the people of America of the character of the problem and the remedies to be applied. Political passion and prejudice should have no part." [445]

With the public rationale for the Marshall Plan outlined, let us now turn to an examination of how it was developed and implemented in the initial period.

3. The legal and institutional elements of the Marshall Plan – US ideas, institutions and strategy

In the following paragraphs, I outline the main instruments of governance utilised in the preparation and subsequent implementation of the plan within the US and the participating European ERP states. My intention here is to illustrate the unique contribution that each instrument made to constructing and institutionalising a distinct, separate and shared jurisdiction under the ERP. This jurisdiction impacted strongly on the existing legal and political subjectivities of the US and participating ERP states, and created new legal and political entities rationalised through implementation of a new US-conceived transatlantic and international economic theory. What is important here is to understand the jigsaw-like approach and

[445] Marshall (1947), supra note 503.

cumulative effects of the instruments within the US and Europe that, by the end of the Marshall Plan, resulted in a clearly solidified approach to the international governance of aid. By then it had a distinct juridical quality and governance signature, whose elements characterise the international governance of ODA today.

I begin with the aftermath of the Truman speech that resulted in the formation of a Committee on European Economic Co-operation (CEEC) across 16 European states, tracing how the latter's bureaucratic and technocratic approach to its work helped mask, and even erase, the political and legal aspects of its planning project both within the participating European states, and between the US and the European Committee. The passing of the US Economic Co-operation Act of 1948 (the 'Act'), swiftly followed by the inauguration of a new agency, the Economic Co-operation Administration (ECA or 'the Agency') established to administer the ERP, together created new - and some highly innovative – transnational governance instruments. Thus the Act, though national, clearly had extraterritorial authority, and created new legal concepts and identities. The Agency, though a public body, drew mainly from the private sector in its leadership and employees, and in a context of a broad mandate coupled with minimal public oversight, deliberately blurred the boundary between public and private in order to pursue its economic and political objectives. [446] On the European side, the CEEC was replaced by a long-desired international European organisation - the Organisation for European Economic Co-operation (OEEC) – though formal US monitoring of ERP spending within each European state was retained and legalised through a bilateral treaty.

[446] Michael J. Hogan, "American Marshall Planners and the Search for a European Neocapitalism," (1985) 90 Am Hist Rev 44 at 55-56.

After Marshall's June 5th 1947 speech, the Foreign Ministers of the UK, France and the USSR met in Paris at the end of June. The British and French Foreign Ministers were keen to take up the US proposal, in spite of its details being unclear, but the Soviet Foreign Minister was completely opposed to the central premises of Marshall's proposed plan of economic integration based on a shared capitalist approach to development. Faced with a détente, the USSR announced that it would not participate in the plan. [447] This paved the way for French and British to arrange a meeting of sixteen European states that did wish to participate in a US-funded European recovery programme on the 12th July [448] and within four days a Committee on European Economic Co-operation (CEEC) was created along with technical committees covering food and agriculture, fuel and power, iron and steel, and transport, followed shortly after by committees on timber and manpower and later again, a committee on balance of payments and a committee of financial experts to examine the means of removing financial obstacles to intra-European trade. [449] Through questionnaires sent to each of the sixteen states, data was gathered on areas such as the particular areas of difficulty faced by each country; the situation re. agriculture, power, transport, industries such as iron, steel and cement production; housing; plans for the 1947-1950 period; import requirements, balance of payments and reserves as well as suggested "measures for general co-operation." [450]

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[447] Michael Hitchcock, "The Marshall Plan and the creation of the West," in Melvyn P Leffier, Odd Arne Westad, *The Cambridge History of the Cold War*, (Cambridge Histories online, 2010), 154 at 157.

[448] The participants were the US-UK bizone of Germany, the UK, Turkey, Switzerland, Sweden, Portugal, Norway, the Netherlands, Luxembourg, Italy, Iceland, Greece, France, Denmark, Belgium and Austria. Germany was represented by the occupying powers. Cairncross (1996), supra note 460 at 108.

[449] Committee on European Economic Co-operation, Vol 1 General Report September 21st 1947, Paris, US Department of State at 10.

[450] Archives historiques des Communautés européennes, Florence, Villa Il Poggiolo. Dépôts, DEP. Organisation de coopération et de dévelopement économiques, OECD. Committee for European Economic Co-operation, CEEC. CEEC 03. Available at

Cairncross has outlined the deep tensions during the conference that existed between the participants over issues of representation, purpose, context and content. [451] For example, the Scandinavians were concerned about their neutrality and insisted that the conference not bypass the United Nations processes. The French were bitterly opposed to the targets that the US and UK presented for the bi-zone area for steel, coal and coke as they viewed these as a fundamental threat to the success of their own economic development plans. The Belgians wanted Germany to recover as quickly as possible in order to recover pre-war markets for their goods.[452] Perhaps most important however, was a largely shared European resistance to the US longer-term goal of a single European market with, in the interim, the creation of a common European organisation to co-ordinate and co-operate in administering aid with whatever American organization would be given the same task. [453]

The pursuit of a common European programme of aid implementation was deeply affronting to British diplomats who feared a reduction of the status of the UK to that of "just another European country," one that would further complicate its relations with the Commonwealth and British Empire. [454] The French were also resistant to the idea of European integration given unresolved issues with the future governance of Germany, and together they agreed in advance two negotiating principles with the Americans for the then-forthcoming US-European conference in Paris in July. First, they agreed that the detailed work of any such conference

http://www.cvce.eu/en/obj/french_proposal_concerning_the_establishment_of_a_questionnaire_paris_15_july_1947-en-391ea26e-4d94-44df-bc41-bf995fbf53c0.html.

[451] Cairncross (1996), supra note 460 at 108.

[452] Ibid.

[453] Milward (2012) supra note 426 at 61

[454] Ibid 63.

would be done by issue-focused *technical* committees whose functions would be limited to estimating Europe's dollar deficit and identifying possible areas of economic co-operation, which would then be limited and non-committal. Second, these technical committees of civil servants (not political leaders) would be supervised by a much smaller Executive Committee of no more than five countries (to include the major European powers, including Britain and France) that would draw up the specific proposals to be presented to the conference and liaise with the Americans. This Committee, later to formally become the Executive Committee of the CEEC, was designed as the main instrument for Anglo-French domination of the proceedings. In these ways – through technical and bureaucratic means - the British and French aimed to limit and control potentially damaging political implications of American plans for European economic and institutional integration.

They only partially succeeded. By August, it was known that the Americans were planning aid for a period of four to five years, and an advance draft report prepared by the Committee and seen in advance by the Americans proved deeply disappointing to the latter for numerous reasons. Three were central for the Americans. These were the lack of detail on practical steps for the further integration of the European economies; on a common mechanism to allocate and recover resources spent through the Plan, and most importantly, the lack of any mention of a continuing European organisation after the Paris conference. Under-Secretary of the State Department Robert Lovett rejected the draft, and it was then that the public US approach of 'friendly aid' to Europe was side-lined for more direct intervention. Milward noted that strong political pressure was brought on the Executive Committee and the wider CEEC by the Americans at the end of August and early September such that Lovett and the State

Department held that "The CEEC report to Congress would have to be shaped by the Americans as much as or more than by the European countries." [455]

Eventually, compromise was reached with the use of words and terms that blurred the political gap between both through, again, technical and bureaucratic means. Thus, the eventual report formally signed on September 22nd by the Committee, committed the European states to the achievement of production targets in order to receive aid; [456] a commitment to make their currencies convertible post-stabilisation according to International Monetary Fund (IMF) rules; [457] the creation of a Study Group with a timetable to assess the Customs Union proposal, [458] the progressive removal of barriers to intra-European trade "in accordance with the principles of the draft Charter for an International Trade Organisation,"[459] and the issuance of "open quotas or open general licenses for certain goods" in order to facilitate imports; [460] and though the Report was firm that work of the CEEC was now over with the delivery of an agreed Report to the Americans, it included a commitment to continue the existence of the CEEC's Committee of Co-operation "at the request of the Chairman, after mutual consultation."[461]

The role that the gathering and interpretation of economic and social science data played in soothing the political tensions cannot be underestimated. If, as alleged, war has historically

[455] Ibid 83.
[456] Paragraph 96 of the report. Targets included the increase of coal output to 584 million tons (about 30% over 1947 levels); expansion of electricity by nearly 70,000Kwh (40% above 1947 levels); expansion of inland transport facilities "to carry a 25 per cent greater load in 1951 than in 1938," etc. Para 35 and 36 of the CEEC report.
[457] Para 77.
[458] Para 96. Several references to sub-European customs unions initiatives were also mentioned such as that by Belgium, Luxembourg and the Netherlands (who signed a Customs Convention in 1944), and Denmark, Iceland, Norway and Sweden who had begun plans to enhance trade that August.
[459] Para 32 (v) and (vi)
[460] Para 86.
[461] Para 111

been a crucial a factor in the development of statistics, [462] certainly the post-war preparation for the Marshall Plan further raised the profile and policy significance of statistics and expanded its political role significantly. The proliferation of data and the liberal use of statistics and numbers throughout the document presented in tabular form, in comparative formats, in timelines, as percentages, weights, projected targets and so on, fulfilled two important political functions. It prepared a basis for framing, negotiating and deciding on political issues, and it masked the politics and legal challenges of the eventual decisions. [463]

Tellingly, there is almost a complete absence of any reference to consideration of matters of law and regulation [464] of either a domestic or international nature. Though the term policy in the Committee's final report is used relatively frequently throughout the document, this is largely in the context of what could better be described as an approach to an area of policy rather than a formalised policy per se. Whether a deliberate omission or not, it certainly lends to the perception that the Marshall Plan and the European Recovery Programme (ERP) was, and could be, undertaken in an a-legal, a-sovereign space, lacking any formal international legal oversight. [465]

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[462] "Economists and statisticians played a vital role in government during the war…. Gene Martin Lyons, *The Uneasy Partnership Social Science and the Federal Government in the Twentieth Century* (Russell Sage Foundation: New York, 1969) at 87.

[463] A metaphor for the 'translation' of politics into numbers can be found in the last two pages of the Appendices to Volume 1 of the Committee's report. This is a set of tables for the conversation of measurements between miles and kilometres; acres to hectares; square miles to square kilometres; avoirdupois pounds (lbs) to kilograms to short tons, long tons and metric tons. Committee report supra note 450 at 137-138.

[464] A search of Volume 1 of the Committee Report using the terms 'law', 'legal', 'regulation' revealed no matches. A search with the term 'rule' matched discussions on the rules of the Committee, and animal husbandry 'rules' only.

[465] Reading through the document made me wonder if any international lawyers were attending the conference and were part of the diplomatic civil service supporting the representations from each participating state. From the summary research I have done, it appears that certainly economists and statisticians were present. This also leads to questions about the processes of international aid policy making, and the likely predominance of economistic expertise over legal expertise that may well still prevail today.

With the receipt of the signed report, hailed as "one of the great economic texts of our generation", [466] US political mulling over the details of the Marshall Plan began in earnest. [467] Eventually, in April 1948, these deliberations culminated in the passing by US Congress of the Economic Cooperation Act of 1948 (the 'Act'), a departure from earlier aid legislation in that the ERP had a rehabilitation purpose (as opposed to emergency relief); was targeted at a region, and to be administered regionally and nationally, and was aimed at a particular neoliberal view of economic development.[468]

One feature of the Act stands out from a governance of ODA perspective. This is the specific mix of vague and specific terms and clauses applied, respectively, to the US and European actors, that both enable and constrain their varying rights and responsibilities under the Act. This is important as, as noted earlier, though a US domestic piece of legislation, it clearly was viewed and interpreted as having extraterritorial effect. Thus, the Act inaugurates a Plan whose aims explicitly refer to sensitive areas of regional and domestic policy of European states; [469] created an Economic Cooperation Administration (ECA), with corporate personality,[470] and an

[466] By 'The Economist' quoted in John H. Williams, "Europe After 1952 – The Long Term Recovery Problem," (1948-49) 27 For Aff 426 at 427.

[467] See Hoselitz (1948), supra note 430 earlier and the several official reports that were produced, as well as numerous expert and public opinion pieces in the popular press.

[468] See Rupert who, commenting on Robert Cox's thesis that the post war era saw the emergence of a hegemonic order centred on the US, constructed on a new form of state/society complex called the "neoliberal state," writes "This transformation of the welfare-nationalist state into the internationalist, growth-oriented neoliberal state was in large measure made possible by the United States' active reconstruction of the advanced capitalist states along liberal democratic lines. The Marshall Plan extended beyond influencing state policies right into the conscious shaping of the balance among social forces within states and the emerging configuration of historic blocs." Mark Edward Rupert, "Producing Hegemony: State/Society Relations and the Politics of Productivity in the United States," (1990) 34 Int Studies Qly 427 at 434.

[469] Section 102 (a) refers to "[A] strong production effort, the expansion of foreign trade, the creation and maintenance of internal financial stability, and the development of economic cooperation, including all possible steps to establish and maintain equitable rates of exchange and to bring about the progressive elimination of trade barriers" as well as the creation of "a joint organisation to exert sustained common efforts."

[470] S 104 (d).

international presence through dedicated ECA missions abroad;[471] under the leadership of an Administrator, with wide executive powers[472], that reported only to the President. By contrast, the Act is quite specific on the obligations of European participating states including requirements for their adherence to policies on several areas of domestic policy including industrial and agricultural production, financial and monetary measures, trade, transfer of materials to the US, and their administration and payment of financial resources under the Plan. [473] The Act is also notable for its selective approach to the legal powers and obligations of the different actors. Thus, it accords wide administrative flexibility to the ECA and its Administrator,[474] while insisting that participating states must sign a bilateral agreement with the US, to which detailed conditions regarding their use of aid will be attached, [475] as well as other conditions such as that they must become a member of the Organisation for European Economic Co-operation.[476]

This administrative flexibility is crucial to the US as donor. Hogan articulates US' approach to the implementation of the Plan as "neocapitalist,"[477] one that required a new kind of

[471] S 109.

[472] These include - S 105 (a) (1) review and appraise the requirements of participating countries for assistance under the terms of this title; (2) formulate programs of United States assistance under this title, including approval of specific projects which have been submitted to him by the participating countries; (3) provide for the efficient execution of any such programs as may be placed in operation; and (4) terminate provision of assistance or take other remedial action as provided in section 118 of this title.

[473] S 115.

[474] S 118 addresses the basis for termination of assistance by the Administrator which includes termination on the grounds that "because of changed conditions, assistance is no longer consistent with the national interest of the United States."

[475] S. 115. These conditions include the promotion of industrial and agricultural production; addressing measures to enhance the country's monetary system; co-operate to expand trade; make "efficient and practical use of its resources" including "taking measures to locate and identify and put into appropriate use assets located within the United States belonging to its citizens"; arranging the deposit of a local currency equivalent amount of commodities provided via US grant aid, and the submission of quarterly reports to the US.

[476] S 103 (a). The OEEC was established at Paris on April 16th, 1948 by the signatories to the earlier Paris report.

[477] It sought to recast Europe in the image of the US model of an integrated economic system, characterised by new patterns of collaboration and interpenetration between private groups and government authorities, one

administration that could direct expert input from industry as needed, without political interference. The Act provided for a new such kind of administrative structure for the ECA through its Public Advisory Board (to which representatives of organised business, labour and agriculture were invited), along with private advisory committees on specific problems including the Oil Price Committee; Advisory Committee on Fiscal and Monetary Problems, Advisory Committee on Overseas Development (which had an investment panel), and another Advisory Committee on Reparations. Membership of these Committees, Hogan notes, was dominated by prominent figures from the world of business and finance. [478] Business leaders also headed most of the ECA's overseas missions, with many already having extensive experience of governance service in their former professional lives. [479] The ECA initiated a particular kind of capacity-building activity – the establishment of American investment groups to co-operate with similar, government-recognised groups in Belgium, Britain and France, in order to identify potential development projects for American investors,[480] as well as its launch and financial support of a technical assistance programme at the end of 1948 that disseminated American technical and scientific information; conducted training programmes for European engineers and plant managers, and held management seminars for European executives on American business and productivity practices. [481] This helped create an ideas-led base for a new

aimed at liberalising trade and making currencies convertible; at forging national and transnational networks of private cooperation and public-private power sharing, and at building central institutions of co-ordination and control. In this model, both group conflict and market forces can be tempered by institutional mechanisms of regulation and control via co-operating committees and other voluntary frameworks where both public and private leaders share responsibility for economic policy and management. Hogan (1985), supra note 446 at 44-45.

[478] Ibid 57.

[479] Ibid 58.

[480] Ibid 61.

[481] Ibid 62.

European economic community founded on the principles of American neo-capitalism. Thus the novel approach adopted by the ECA – one that pursued public policy objectives through an independent administrative institution and strategy that bore the hallmarks of the corporate form and pursued strongly capitalist corporate economic objectives – was one whose legacy far outlived the life-time of the Agency itself. Though the strategy itself was novel, what is also key here, is how its authority and legitimacy derive from its founding mandate as articulated by the Act.

4. The European administration of the European Recovery Programme and its aftermath – new institutions and old approaches in tandem

I now turn to two important features of the European administration of the ERP. The first is the particular facet of European administration that addressed the role and governance of its colonies and territories within the European reconstruction project funded by the ERP. As with the US approach, this revolved around a combination of international legal, bureaucratic and technical instruments, in which each made a unique contribution to a cohesive, if novel, governance approach. The second is how this approach transitioned and later became integrated into the OECD via its Development Assistance Committee (DAC), thereby creating clear continuities with modified colonial administration practices under the ERP, and with US-donor led ERP administration practices also.

The Organisation for European Economic Co-operation (OEEC), was established in 1948 by international convention to administer aid provided by Canada and the U.S. for the reconstruction of Europe under the Marshall Plan's European Recovery Programme (ERP) (1948-1951). Note that Article 2 of the OEEC's convention stated that the development of

production under the ERP included the mobilisation of resources of the overseas territories of the signatories. [482] To this end, the OEEC initially established a Working Party comprised of members with overseas responsibilities – Belgium, France, the Netherlands, Portugal and the United Kingdom (UK). After contributing to the initial report of the ERP, the Working Party became the Overseas Territories Committee (OTC), empowered to carry out surveys relating to the economic and social development of the overseas territories, though their activities expanded far beyond the technical nature of its mandate.[483] The OTC produced several studies, [484] in which the colonies' development were discussed mainly in light of the needs of the metropole. This was not surprising as, under the ERP, the development potential of the overseas territories was primarily framed both as a source of dollar earnings to be realised through the export of raw materials to the US, and as a future market for European exports – in short, as one element of a plan for European reconstruction, not as an instrument of the autonomous development of the colonies.[485]

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[482] "The Contracting Parties will, both individually and collectively, promote with vigour the development of production, through efficient use of the resources at their command, whether in their metropolitan or overseas territories, in such manner as may best assist accomplishment of the joint recovery programme." Convention for European Economic Co-operation, 16th April 1948. Available at http://www.cvce.eu/obj/convention_for_european_economic_cooperation_paris_16_april_1948-en-769de8b7-fe5a-452c-b418-09b068bd748d.html

[483] Rick Shreurs, 'A Marshall Plan for Africa? The Overseas Territories Committee and the Origins of European Co-operation in Africa,' in Richard T. Griffiths (ed), *Explorations in OEEC History,* (Paris: OECD, 1997) 87.

[484] On investment (1951), energy (1953), processing industries (1958), tax incentives for foreign private capital investments (1958), and on economic growth (1961).

[485] Shreuers estimates that about 6% of the total distributions under the Marshall Plan were channelled to the overseas territories of the European beneficiaries between 1948 and 1952, with over $500 million of Marshall Plan aid being channelled into national colonial development schemes of the European colonial powers during that period. *Ibid* 88. See Matthias Schmelzer, "A Club of the Rich to Help the Poor? The OECD, "Development", and the Hegemony of Donor Countries," in Sönke Kunkel; Corinna R. Unger; Marc Frey, international Organizations and Development, 1945-100-, (Palgrave Macmillan, 2015), 171 at 174, who estimates that 8% of Marshall Plan funds were channelled to the overseas territories.

In addition, though ERP aid was contributed to overseas territories, this was tied to national colonial development planning, thereby ensuring that any subsequent international (colonial power-led) technical co-operation aimed at the development of Africa would be predominantly determined by European powers. Shreurs notes that both the ERP and the OEEC enabled the colonial powers to establish and deepen roots in their dependent territories and stabilise economic relations between them in a particular configuration, one that lasted long after the financial resources of the ERP finished. [486] From a governance of ODA perspective however, it means that the OEEC's approach to development aid emerged directly from, and was grafted onto, the colonial governance apparatus (as indeed did that of many of the national European administrations). [487]

By the mid-1950s, the OEEC's two main tasks – European reconstruction through aid from the Marshall Plan, and the liberalisation of intra-European payments – had been achieved, [488] though plans for deeper European integration and trade liberalisation were mired in difficulty. The OEEC was facing a radically altered context to that of the immediate post-war era of its conception. Factors included the US entering a period of challenging economic circumstances and, as a result, arguing for a more equitable transatlantic sharing of the costs of economic

[486] It is indeed ironic that subsequent calls in later decades for "a Marshall Plan for Africa" (or elsewhere) fail to record its significance in binding newly-emerging independent states into problematic economic and political relations with their former colonial masters under the original Marshall Plan itself. For example, in January 2017, the German Federal Ministry for Economic Cooperation and Development unveiled its new Africa policy framework "Marshall Plan with Africa". George Kibala Bauer, 'Germany's Marshall Plan for Africa,' March 15, 2017, *Africa is a country* available at http://africasacountry.com/2017/03/germanys-marshall-plan-for-africa/.
[487] Schmelzer (2015), supra note 550 at 174.
[488] Between 1948 and 1956, intra-OEEC trade rose by 272 percent and was a key factor propelling European recovery. This is attributed to two OEEC-inspired initiatives, the European Payments Union (EPU) and the Code of Liberalization of Trade, both ratified in 1950. Richard Woodward, *The Organisation for Economic Co-operation and Development* (Oxon: Routledge, 2009) at 15.

adjustment with a now more economically wealthy Western Europe. At the same time, Cold War relations between East and West were intensifying, while conflicts over the nature of European integration were proving impossible to resolve through the auspices of the OEEC. [489] Acrimonious Anglo-French frictions culminated in the dissolution of the OEEC Council's December 1958 meeting and the Council never met again.

Formal progress on a fresh transatlantic partnership began in December 1959 with a summit meeting in Paris of the leaders of France, West Germany, the United Kingdom and the United States. Ohlin notes that a communique issued that month by the chiefs of state of the US, the UK, the Federal Republic of Germany and France, stated that economic progress was such that it was now possible "for the industrial countries of the West to co-operate in 1) *policies to promote the development of less developed countries*; and 2) the co-ordination of their own policies for trade, growth, and stability."[490] Many histories of the OECD record the transition from the demise of the OEEC to the formation of the OECD as a process that was facilitated through a 'Group of Four on Economic Organisation' formed to recommend a pathway forward that mediated between the OEEC's and nascent EEC's interests. Their recommendations - on a

[489] 1958 saw six OEEC members (Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands) establish the European Economic Community (EEC), a common market with a common external tariff. This move alarmed the United Kingdom in particular who had been promoting an OEEC free trade area. This proposal was axed by the United States (who felt it would discriminate against its exports and erode its balance of payments position) and France (who thought it would weaken fledgling EEC solidarity). Ibid 16-18.

[490]Goran Ohlin, 'The Organisation for Economic Co-operation and Development,' (1968) 22 Int'l Org 231 at 231-232. Italics my own. What is interesting to note here is the parity given to both objectives – the development of Western Europe and that of developing countries. Clearly, both were viewed symbiotically. Also relevant were developments in the wider international context – in 1960, Western states lost their majority in the UN and significantly as an international organisation, it became a key site of international efforts to speed up the process of decolonisation. In that same year, the UN General Assembly passed a resolution on the unconditional granting of independence to former colonial territories. See UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514(XV). This was followed by, in 1962, the establishment of a Special Committee on Decolonization to monitor implementation of the declaration and to make recommendations on its application.

remodelled economic organisation created with a wider geographic scope and including Canada and the US as members - were confirmed at a Conference on the Reconstitution of the OEEC in May 1960, and on 14th December 1960, the OECD Convention was signed by a total of 20 states (the OEEC members numbering 18 since Spain's accession in 1958) plus Canada and the United States. [491] [492]

However, often overlooked is a telling detail that, during a Paris meeting for the reorganisation of the OEEC in January 1960, the then-American Under-Secretary of State Douglas Dillon proposed at the Special Economic Committee, an increase in the flow of development capital to developing countries to be implemented by a specially-created institution. In response, a new Development Assistance Group (DAG) was formed, with Belgium, Canada, France, West Germany, Italy, Portugal, the UK and the US being its original charter members, and with Japan and the Netherlands joining in July and September 1960 at its first and second meetings, respectively. [493]

The DAG held several meetings in the Spring and Summer of 1960, taking a number of important policy decisions that were prescient of its future work. At its second meeting in July 1960, for example, it adopted a resolution on the improvement of information on financial assistance to developing countries. At its third meeting in October, it focused on the area of pre-investment technical assistance and engaged externally with various international

[491] A supplementary protocol allowed the European Commission to participate in the OECD's work. The convention became operative on 30 September 1961. See http://www.oecd.org/about/oecd-convention.htm.
[492] Führer tellingly notes that the '[I]nclusion of "development" in the name of the Organisation underlines the new dimension of international co-operation.' Helmut Führer, *The Story of Official Development Assistance – A History of the Development Assistance Committee and the Development Co-operation Directorate in Dates, Names and Figures,* (Paris: OECD, 1996), at 8.
[493] Shreurs (1997), supra note 548 at 94 and *ibid* footnote 16, page 96.

organisations to reach agreement about the kinds of data to be provided by DAG members about the flow of funds to developing countries. At its fourth meeting in March 1961, it adopted a Resolution on the "Common Aid Effort" which included a recommendation to members that they – "…make it their common objective to secure an expansion of the aggregate volume of resources made available to the less-developed countries and to improve their effectiveness' and which included commitments to undertake regular shared periodic reviews of the nature, amounts and modalities of those contributions along with a study on the principles governments might most equitably determine their respective contributions."[494]

At its fifth and final meeting in July 1961, it reviewed incentives for private investment in developing countries, and asked the World Bank to prepare a study on possible multilateral investment guarantee systems. [495] In this way, both its methods and its purpose demonstrate a clear continuity with that of the OEEC's OTC. Indeed, the similarly and overlap between their work can be surmised by the OEEC's publishing of the first comprehensive survey the flow of financial resources to developing countries, followed by regular annual reports until 1964. [496]

While the preparations for the birth of the OECD were continuing (it came into operation in September 1961), over that period the DAG created for itself a distinct identity and status within - and relationship with - the OECD-to-be, in ways that differentiated it from other OECD committees. At its second meeting in July 1960, it created a new name and a separate mandate for itself within the OECD as the Development Assistance Committee. Members of the early

[494] Führer (1996) supra note 519 at 11. As Schmelzer notes, this implied that the aims and motives of donors were, at a minimum, somewhat held in common and thus were compatible. Schmelzer (2015), supra note 550 at 178.
[495] Führer (1996), *supra* note 4 at 8-9. During this time, secretariat services were provided to the DAG by the OEEC.
[496] The initial report was called *The Flow of Financial Resources to countries in the Course of Economic Development, 1956-1959.* Führer (1996), supra note 510 at 9.

DAC were not necessarily members of the OECD, and were limited to donors only.[497] The DAC also contained a rule that the Committee was to have a permanent Chairman, supplied by the US,[498] thereby making the position both semi-independent of the OECD and thus more autonomous,[499] and further forging a closer bond between US and Western European foreign interests.

Schmelzer notes that the formation of the DAG and the DAC were highly controversial at the time, and were contested both within and outside of the OECD. Internally, the poorer OECD members of Southern Europe criticised the exclusion of aid recipients, while neutral members such as Sweden and Switzerland continued to be sceptical about the association of aid with Cold War politics.[500] Externally, developing countries favoured the creation by the UN of an international organisation dedicated to development, which would be democratically controlled by all UN member states. [501] These efforts were deeply contested at domestic, regional and international levels by colonial rulers and Western power allies in order to maintain their political and economic hegemony and preserve international relations between North and South. Thus, in response to the Expanded Programme for Technical Assistance initiated by the UN in 1950, the colonial powers established the Commission for Technical Co-

[497] Today, it is one of the three OECD committees with restricted membership, thereby excluding some OECD member countries.
[498] This was the case until 1999, thereby structuring a strong US influence into the work of the DAC.
[499] It is the only committee with a full-time chair who is not under the administrative supervision of the secretary general.
[500] Again, this history is frequently excluded by authoritative accounts of the history of the OECD. For example, Woodward claims that 'The switch from the OEEC to OECD went largely unremarked.' Woodward (2009), supra note 553 at 18.
[501] Arne Ruckert, 'Making Neo-Gramscian Sense of the Development Assistance Committee: Towards an Inclusive Neoliberal World Development Order,' in Rianne Mahon & Stephen McBride, *The OECD in Transnational Governance* (Vancouver: UBC Press, 2008), 96 at 100, quoting Jean-Phillipe Therrien, 'Debating foreign aid: Right versus Left,' (2002) 23 Third W Q'ty 449.

operation in Africa South of the Sahara (CCTA) in order to keep interference in colonial affairs from the UN (and also the US) to a minimum. [502] Western-led joint policy initiatives included the establishment of the Commonwealth's 'Colombo Plan' (Council for Technical Co-operation in South and South-East Asia) in 1950, which saw founding members – India, Pakistan and Ceylon as regional members and Australia, Canada, New Zealand and the United Kingdom as donor countries (the US joined the Plan in 1951 and Japan joined in 1954).

This was undoubtedly a context of rapid international and domestic institutional developments on international relations where tensions between Western neoliberal internationalism and Communism were openly displayed, and moves towards decolonisation and full participation in the international community via sovereign independence were contested. In this context, the establishment of the DAG can be seen as an exclusive Western and donor-led forum through which influential, exclusively donor-led ideas and initiatives on the nature of development for developing countries, as well as the purpose, modalities and implementation of development aid, and the role of aid in creating and maintaining a wider international political and economic order, came to be articulated, and with strategies for their implementation worked out.

[502] Shreuers (1997), supra note 510 at 93. The CCTA was preceded by the establishment of the Scientific Council for Africa South of the Sahara (CSA). Both of these developments should be seen as part of European powers joint efforts to seriously co-ordinate the exchange of technical and scientific information on Africa. Gruhen notes that critics of the CCTA/CSA claimed that this new means for international co-operation in Africa was a ploy by the colonial powers to keep the UN out, and reduce publicity for African problems. The colonial powers were opposed to the establishment of an International Labour Organisation regional office for Africa and to the establishment of the UN Economic Commission for Africa. Isebill V. Gruhn, "The Commission for Technical Co-operation in Africa, 1950-65," (1971) 4 J Mod Af St 459 at 461.

5. Conclusion

In this chapter, I aimed to tell a story of an important precedent to the contemporary international governance of ODA that focused on the second of two historical moments – the implementation of the Marshall Plan by the US and participating European states, and the transition from the international institutional arrangements developed for that purpose into a key governance space within the contemporary OECD, its Development Assistance Committee.

Unlike the preceding chapter that focused on an earlier moment namely the law and governance practices of the League of Nations and the Permanent Mandates Commission in which Mandatory governance of former colonies and territories were of central concern, the governance of the implementation of the Marshall Plan produced novel law, institutions, instruments and approaches to address the particular objectives and challenges faced by the US. This included the creation of a unique national body, the ECA, with extraterritorial jurisdiction in its governance of aid to European states (and by extension, their colonies), that later became incorporated into the repertoire utilised by the OECD's Development Assistance Committee, and Western donors per se.

Both moments have many features in common including first, the creation of a forum and international institution for Western powers only, focused on the development of donor international development policy and co-ordination designed to meet donor economic and political needs.[503] Secondly, the dedication of institutional attention and mechanisms aimed at

[503] Though the Marshall Plan was funded mainly by the US, recall that some of its funding was spent on the 'overseas territories' of European colonial powers. Thus, the OEEC created an opportunity for European colonial powers to engage together as donors who, at the same time, were also colonial powers.

the development of underdeveloped countries,[504] created new rationales and bases for authority to legitimise almost boundary-less intervention in the 'underdeveloped' space, whether former colonial territory, or recovering ERP-participating European state. Related to this, is a clearly experimental approach to 'development,' if variously articulated. Thirdly, this intervention was heavily reliant on the creation of a new, unsullied international governance space through which flaws in existing international relations perceived to derive from the petty pursuit of national self-interest could be remedied. Instead, principles of co-operation and partnership would prevail. This governance space involved a policy discourse that, at the one time, elevated the pursuit of a particular mode of neoliberal transnational development based on an unfettered flow of capital, to be pursued and facilitated through new international institutions and co-ordination, while refashioning the role and authority of the state to be primarily in service of this end. In this policy discourse, pursuit of unfettered economic growth through enhanced productivity is viewed as apolitical, humanitarian and altruistic, and would ultimately help preserve peaceful international relations. Fourthly, a particular kind of law and institutions (international and national) are key to this new mode of international and inter-national relations, one whose clauses, concepts and terms offer a broad mandate, but retain limited democratic and public oversight for aid-recipient states. Fifthly, new bureaucratic and technocratic instruments are key to the implementation of these programmes. On the former, which includes technical committees, the use of surveys, the preparation of reports for donors, we can note that though state participation is facilitated in these mechanisms (thereby

[504] On this, the OEEC's attention was initially focused on the development of southern European countries – Italy, Greece, Turkey and Spain – who, significantly, were differentiated from developing countries in the Global South by their classification as 'areas in the process of development'. Schmelzer (2015), supra note 550 at 175.

legitimising them as inclusive), executive authority is ultimately wielded by the US as donor. On the latter, we can see the emergence of a distinct approach to numbers, data and statistics as key to development of 'facts' from which decisions can be made, along with the comparative method, as techniques that mask the political stakes of defining what 'good' development policy looks like. Underlying both is a strongly pragmatic approach to governance. With the League and PMC it was the maintenance of order and the facilitation of trade; with the Marshall Plan, it was the economic recovery of a region as a partial bulwark against US fears of Communist political expansion. Similarly, we see the emergence of knowledge and expertise, backed by 'credible' technologies such as rapporteurs, study groups, technical assistance etc. as key to framing and generating the 'right' kind of policies and practices to promote economic development. [505]

This narrative is necessarily partial and I do not wish to suggest that there was a seamless institutional transition from the work of the League's Permanent Mandates Commission to that of the OECD's DAC. Deliberately left out of this narrative is any analysis of the success or effectiveness of these new forms of governance, or indeed how the frequent and varied attempts by actors and entities in the Global South to challenge these governance attempts, to create their own independent governance spaces, may have prompted or influenced these Western-led initiatives. (Indeed, it has been said that international initiatives such the Asian-African Conference at Bandung, Indonesia (1955), lauded by Indonesian President Sukarno as

[505] Particularly noteworthy of the OECD's Mediterranean Regional Project aimed at improving the education policy, resources and provision in those countries, was the methodology it adopted which contain elements that are integral to such large-scale regional development exercises today. See Raymond Lyons, 'The OECD Mediterranean Regional Project,' (1964/1965) 8 Am Economist 11, 13-15.

"the first intercontinental Conference of coloured peoples in the history of mankind" (it wasn't), prompted a Western response to be described as "a thrilling story of Western paranoia, conspiracy, sabotage and ultimate frustration." [506] This dynamic is evident in even a partial summary of important developments in the fifteen years following the conclusion of the Marshall Plan). Instead, my aim is to articulate how history, and colonial and post-World War II history in particular, is an important contributor to the international jurisdiction constituted through the governance of ODA today. With this in mind, it is to the contemporary international governance of ODA through the OECD and its Development Assistance Committee, we will now turn.

[506] Amitav Acharya, 'Studying the Bandung conference from a Global IR perspective,' (2016) 70 Australian J Int'l Aff, 342 at 347.

Part III – The OECD and Development Assistance Committee

Chapter 8 Law and the international governance of ODA: the OECD's jurisdiction on development - the DAC's jurisdiction on ODA

1. Introduction

The following four chapters constitute Part III of this thesis. These focus on the OECD and its Development Assistance Committee (DAC) as highly influential and understudied sites of the contemporary international governance of ODA. It is here that the most powerful and influential donors of ODA, and international actors in international development finance policy convene and make rules for governing ODA and the kind of development it should support. In this chapter I focus on the most relevant law of the OECD and DAC to the governance of ODA, and in Chapters 9, 10 and 11, I focus on, respectively, the OECD and DAC's official policies on development and ODA; a key technocratic governance technology of the official definition of ODA, and a key bureaucratic governance technology of the DAC's Peer Review[507] of the development policies of its Member states (focusing on development finance). [508] In each of these chapters, I continue my analysis of the governance of/by ODA as a jurisdiction. My aim within and between the chapters in this Part III is two-fold. First, it is to reveal and examine how

[507] This is now a fairly widespread instrument of multilateral surveillance governance used by several international treaty-backed organisations, including the the United Nations Environment Program (UNEP), the UN Conference on Trade and Development (UNCTAD), the UN Economic Commission for Europe, the World Trade Organization (WTO), and the United Nations' (UPR). One of its key identifying features is its focus on bringing about policy change in country whose policies and institutions are being analysed. For the OECD, the promotion of policy change for the pursuit of economic growth, economic expansion (including of trade), and financial stability is constitutionalised in Articles 1 and 2 of the OECD's founding convention. See later this chapter for more details.

[508] Note this is not a survey of all the legal, policy, bureaucratic and technocratic instruments available within the OECD and DAC. Rather, I select those that I deem to be most relevant and significant to constituting ODA as a distinct jurisdiction, and those most essential to analysing the governance signature of ODA. Thus, for example, I have left out of my analysis commentary on important OECD institutional mechanisms such as its Development Co-operation Directorate and Development Centre. This is on the grounds that these are mechanisms that produce valuable and influential technocratic information that *aid* DAC decision-making and the deployment of OECD/DAC authority and are means by which cognitive governance is enabled and facilitated, rather than having agency in their own right.

each of the governance technologies contributes to creating the jurisdiction of ODA and within this, the particular kind of authority and authorisation that is institutionalised within that governance technology. Secondly, I want to reveal and examine the most important elements of the governance signature of ODA within that governance technology – that is, its juridical nature, its approach to juridification, its internal legal logics and performativity. In the concluding chapter, I aim to show how the connections between these elements, across of each of the governance technologies of ODA, constitute a unique and powerful governance signature on ODA that maintains its authority and legitimacy as a jurisdiction, but with a unique legal quality.

In this chapter, I begin Part III of this thesis by critically analysing three key legal instruments of the OECD and DAC that inaugurate and delineate its mandate on economic development of the "world economy", that create its identity as an international organisation and its authority as an international governing body on ODA and development, and that instruct its Members on their own approach to ODA.

2. The OECD's founding treaty and mandate, and the mandate of the Development Assistance Committee

The OECD's founding treaty is significant for understanding the international governance of development and ODA, and the role of the OECD therein, for three reasons. First - and unusually for an international organisation at the time of its foundation - the OECD was not established with a law-making function as a priority area of work. Instead, its founding treaty mandates it to promote policies designed;

(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

(b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

(c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.[509]

Thus, its primary purpose was, and remains focused on, transnational economic policy-making, one that has become more overtly neoliberal in focus in recent decades as we will see in the following Chapter. There are several noteworthy features of this mandate. First, though there is a clear Northern-centric framing of its purpose, this is universalised through the intrinsic linking of the "highest" and "sound" economic growth rationale of OECD Members to that of "non-member countries" and the "world economy." Secondly, the scope of its mandate remains exceptionally broad, bounded only by the parameters of considerations of "appropriate means"[510] on "the development of the world economy." Thus, its attention and activities can legitimately - according to its mandate - encompass a very broad range of domestic and international policy areas, of its Members and non-members. Thirdly – and significantly for understanding the nature of its international executive authority - these objectives are not aimed at its Members only, but also extend to states that are not members of the OECD, as elaborated in Article 2.

[509] Convention on the Organisation for Economic Co-operation and Development, Paris 14th December 1960, Article 1, available at http://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm

[510] Article 2 (e) "contribute to the economic development of both Member and *non-member countries* in the *process of economic development by appropriate means* and, in particular, by the flow of capital to those countries, having regard to the importance to their economies of receiving technical assistance and of securing expanding export markets." Italics added

On the latter, a further three features stand out – the explicit inclusion of OECD non-member developing countries within the formal mandate of the OECD; [511] the broad range of developing country (non-OECD member) policy areas to be opened up for OECD attention, and the scope of OECD actions permissible in its relations with non-OECD member developing countries which is simultaneously both unrestricted ("by appropriate means"), yet targeted ("receiving technical assistance and…securing expanding export markets"). Thus, the OECD's mandate legally authorises it to engage in the policy priorities and activities of non-OECD member countries, without their formal consent, and without any restriction in terms of the scope of permissible intervention.

Of particular note here is the echo of an earlier development rationale articulated in the League's founding Convention, [512] and in its Mandate Agreements. This is the developed/underdeveloped binary, which repeats the earlier differentiated spatial representation created during a colonial era that, at the time of the founding of the OECD, existed contemporaneously via many of its founding Members. Yet at the same time, it also opens the possibility and a promise of a negation the differences between "developed" states and "those in the process of economic development," by making the economic development of OECD Members the standard by which global development is to be understood and progressed. With this approach, the OECD actively produces "non-members" as both an object and a subject of unrestrained OECD (and its Members') intervention. This intervention is rationalised

[511] Recall that at the time of its founding, this organisation included no state from the Global South as a member.
[512] See Article 22.1 …"colonies and territories…which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world"

by an idea of development focused on the creation and achievement of a "world economy," economic growth, financial stability and the expansion of world trade.

Thus, the OECD's founding treaty constitutionalises and legalises a particular international political and economic order based on a Northern/Western worldview. It creates a truly global mandate for the OECD, while authorising the use of an unrestricted range of peaceful yet imperial techniques and strategies to create and maintain this order - foregrounding certain instruments more specifically[513] - in service of this order, without the consent of the majority of (then) states to whom this order would be applied.

Turning now to the DAC, when it was founded, its mandate authorised it to simply "consult" on the methods, the levels and the flow of long-term funds for "countries and areas in the process of economic development," as well as to make "periodic reports" and "recommendations" to the OECD Council and its own DAC members.[514] That mandate remained unchanged for several decades, but has undergone several extensive revisions in more recent years. [515] The DAC's

[513] Recall those identified in Article 2 - the flow of capital to those countries, the receipt of technical assistance (towards) the securing of expanding export markets.
[514] Helmut Fuhrer, *The Story of Official Development Assistance,* (Paris: OECD, 1994) at 10.
[515] The original DAC mandate was created by Ministerial Resolution of 23rd July 1960. OECD, *DAC in Dates - The History of OECD's Development Assistance Committee*, (Paris: OECD, 2006) at 8. The DAC has revised its mandate twice in recent years. In 2008, the DAC approved Terms of Reference for a strongly strategy-focused 'Reflection Exercise' that was tasked to "[T]ake stock of the changing global landscape and assess the role of development financing and co-operation in poverty reduction for the next 10-15 years; spell out the DAC's comparative advantage and value added in poverty reduction, including in promoting policy coherence for development, by adapting to new realities, demands and opportunities; and make recommendations on the role, structure, and operating modes of the DAC… and strengthening DAC's interface with other directorates and committees within the OECD, relevant international organisations (World Bank, United Nations, etc.), non-DAC donors, new actors and partner countries." OECD, 'Development Assistance Committee Reflection Exercise. Investing in Development: A Common Cause in a Changing World,' (Paris: OECD, 2009) at Annex 1. In 2016, it tasked a High Level Panel chaired by former UN High Commissioner for Human Rights, Mary Robinson to issue proposals and recommendations on its 'contribution to global development efforts and its relevance and impact within the international development architecture…the enhancement of the inclusiveness and representativeness of the committee,…and the strategic implications for the working methods and structure of the committee.' OECD, 'A

most recent version of that mandate has expanded the scope and working methods of the DAC in several directions, each with jurisdictional implications. [516] On the former, the objective of the DAC is now "to promote development co-operation *and other relevant policies* so as to contribute to the implementation of the *2030 Agenda for Sustainable Development* including sustained, inclusive and sustainable economic growth, poverty eradication, improvement of living standards in developing countries, and *to a future* in which no country will depend on aid." Note the expansion of the scope of the mandate in three key ways. First, the raison d'etre of the initial DAC – the monitoring and analysis of the flow of funds from DAC Member states for the purposes of economic development of developing countries – has expanded significantly. It now includes engagement with non-development finance-dependent policies ("other relevant policies"), while simultaneously acquiring universal jurisdiction, extending its purview to *all* developing countries, and all countries more generally.

Secondly, the DAC has strategically and instrumentally linked its vision of development with the then recently-articulated universal development policy framework iterated via the United Nations – Agenda 2030 or the UN's Sustainable Development Goals (SDGs). By placing the UN's SDG framework as central to the DAC's objectives, the DAC draws what might be termed parasitic legitimacy from this universally-derived policy framework. Inclusion of a reference to the UN SDGs lends additional political and institutional legitimacy to the expansion in the DAC's

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New DAC in a Changing World: Setting a Path for the Future. Report of the High Level Panel (HLP),' (Paris: OECD, 2017) at 14.

[516] The mandate identified as such for the DAC DCD/DAC(2010)34/FINAL and is available on its website in http://www.oecd.org/dac/thedevelopmentassistancecommitteesmandate.htm. However, a more recent 'mandate' is attached as an Annex to the DAC High Level Communiqué: 31 October 2017. OECD DAC, 'A New DAC: Innovations for the 2030 Agenda. DAC High Level Communiqué: 31 October 2017." Available at http://www.oecd.org/dac/dachighlevelmeeting2017.htm. Italics added.

policy scope and serves to double lock it in place. Thirdly, the DAC has now created an enduring mandate for itself ("to a future"), one that can be revised periodically. [517] Note that this universal mandate is wholly internally generated – no permission from or consultation with other international organisations, or non-OECD DAC members is required.

The expanded mandate is further exemplified in how DAC frames and describes its working methods as including to

> "a) monitor, assess, report, and promote the provision of *resources* that support sustainable development by *collecting and analysing data* and information on *ODA and other official and private flows*, in a transparent way;
>
> b) *review* development co-operation policies and practices, particularly in relation to national and internationally agreed objectives and targets, *uphold international norms and standards,* protect the integrity of ODA, and promote transparency and mutual learning;
>
> c) provide *analysis, guidance and good practice* to assist the *members of the DAC* and *the expanded donor community* to enhance innovation, impact, development effectiveness and results in development co-operation, particularly regarding pro-poor sustainable growth and poverty eradication;
>
> d) analyse and *help shape the global development architecture* with a view to maximise sustainable development results, to support the implementation of the 2030 Agenda for Sustainable Development and stimulate mobilisation of resources according to the Addis Ababa Action Agenda on financing for development;
>
> e) promote the importance of global public goods and *policy coherence* for sustainable development."[518]

Several changes reflective of a more assertive DAC can be discerned here. First, whereas the DAC's earliest mandate framed its role in facilitative, horizontal epistemological terms, the

[517] "The mandate of the Development Assistance Committee shall remain in force until 31 December 2022." This periodization of the DAC's new mandate was also evident in its recent mandate, which though due to end in 2015, was extended by one year, thereby providing continuity of mandate coverage until the release of the current one. This is also an example of a temporal feature of the DAC's mandate as a governance instrument.
[518] Supra note 581. Italics added. Curiously however, the DAC does not include its powers of issuing 'Recommendations' in the working methods listed.

current mandate is much more assertive and hierarchical in its epistemological politics. The DAC is now framed as the ontological anchor on both development finance *and* development policy, as well as being an epistemological leader on expertise and good practice in ODA (or "development co-operation," the now-preferred term). Secondly, it frames itself as *the* recognised regulator of international norms and standards in international development co-operation policy, and in doing so excludes from consideration other existing governance spaces such as the UN's various forums on financing for development.[519] Thirdly – and related to this – its jurisdiction now extends to private financial flows (and thereby, to the activities of private entities), and to the "expanded donor community" of non-DAC Member donors. With this, the DAC creates for itself a mandate to work with the now-significantly expanded number of donor states and actors, [520] including the expanding arena of global private philanthropy. [521] This mandate is solidified by internal (intra-OECD) and external institutional arrangements, the latter extending to interactions with actors including "non-Member and partner countries, as well as international organisations, private sector organisations, foundations, and civil society representatives." Fourthly, it adopts an identity as a key actor within and shaper of the "global development architecture," thereby inserting itself into international, transnational and global policy-making and –forums in development. Finally, by reiterating its ties to and support of the

[519] These include the UN's Economic and Social Council (ECOSOC) Development Co-operation Forum, its International Financing for Development Initiative based on international conferences in Monterrey, Mexico in 2002; in Doha, Qatar in 2008; and in Addis Ababa, Ethiopia in 2015, as well as other relevant forums such as the UN Committee of Experts on International Cooperation in Tax Matters.

[520] Supra note 581 (inc in states as donors).

[521] Note that the UN's 2030 Agenda emphasises the roles of both private philanthropy and the private sector in advancing the Sustainable Development Goals (SDGs). Philanthropic funding amounted to about USD 19.5 billion in 2013-15, or USD 6.5 billion per year on average, with the Bill and Melinda Gates Foundation giving USD 11.6 billion 2013-15. Julie Benn, Cécile Sangaré & Tomáš Hos, 'Private Foundations' Giving for Development in 2013-2015: Ongoing efforts to better reflect private philanthropic giving in OECD-DAC statistics on development finance,' OECD Development Co-operation Working Papers, (Paris: OECD, 2017) at 5-6.

UN SDGs, and the public realm at international levels, it further legitimises these moves within its revised mandate by reference to non-OECD, universal policy frameworks.

It is also important to note here that the DAC carefully anchors this revised mandate in several of the OECD's legal instruments including its founding Convention, the Rules of Procedure of the Organisation, the DAC's historical founding mandate, as well as more recent Council and DAC decisions. [522] In doing so, it cloaks what is, in reality, a self-authored mandate to undertake an unlimited form of intervention in developing countries, via a veneer of legitimacy offered through formal legal institutional means. The DAC's resort to a carefully worded mandate to articulate, authorise and legitimise what is a significant departure from its original founding mandate demonstrates the importance of this legal technology, and its legal nature, to the continuing evolution of its jurisdiction on ODA. It also hints at a strategy of partnering references to OECD institutional mechanisms with that of universal instruments to avoid critiques of how representative it is.

Thus, across both mandates – of the OECD and the DAC – we see a number of common and mutually reinforcing features that contribute to the governance signature of ODA. First, there is the creation of the OECD and the DAC as an international governance space with distinct kinds of authority (and subjectivity) and authorisation. Two stand out – that of the OECD's authority and subjectivity as an international organisation for surveillance, diagnosis and intervention within Member and non-member domestic institutions and policies, and within the "world economy" more generally, and a differentiated subjectivity between Members and non-

[522] Supra note 581.

members, as well as a third entity ("the world economy"). The identity of all of these is articulated as having a development lack, thereby providing a rationale for OECD and the DAC to intervene in an unlimited range of domestic and international affairs of Members and non-members alike, and in international economic affairs more broadly. Secondly, it is a space where executive authority on whether to intervene, and the nature of the intervention, is retained by OECD and the DAC. No legal obligation to obtain formal consent by non-member states for those interventions is necessary. Thirdly, both mandates of the OECD and DAC authorise intervention via a wide range of unspecified "appropriate means" and technocratic, non-legal methods, such as the collection and analysis of data; the delivery of guidance to donors, and provision of technical assistance. This gives the OECD and DAC considerable leeway in the range of instruments they can deploy. The technocratic nature of these makes the transparency of this kind of intervention potentially more obtuse, a feature echoed in technocratic and bureaucratic instruments as we will see in Chapters 10 and 11. Finally, the development project to be pursued is a very particular one, focused primarily on the pursuit of economic growth, employment and a rising standard of living in Member states, their economic expansion and the expansion of world trade, with the economic welfare of non-member states a lesser formal objective. The legal articulation of this kind of development project provides the legal mandate for the purpose of ODA to be focused on the pursuit of these goals of the expansion of a growth-oriented, transnational capitalist markets-based model of development.

Having reviewed the mandates of the OECD and DAC, and revealed how these contribute to the creation of ODA as jurisdiction, and traced how this kind of legal instrument contains within it elements of the governance signature of ODA, I now turn to examine in more detail the legally-

enshrined member accession process of the OECD. Here we will see elements of the governance signature such as juridification and performativity in particular evidence.

3. The privileges of OECD and DAC membership

My aim with this section is to trace and demonstrate how the OECD's and DAC's formal, legally-backed approach to their membership processes constitutes a legalised, deliberate approach to the creation and contouring of the subjectivities of OECD applicant Members, and non-Members alike, in ways that serve the maintenance and enhancement of the OECD's and DAC's influence and relevance in global politics. Rather than membership being a process where a state joins into the activities of the OECD, the application process itself is the beginning of an exercise in invasive, almost limitless, engagement by the OECD into the domestic affairs of the applicant member state that will continue as long as its membership does. This engagement begins with an almost surgical-like diagnostic process on the applicant member state that quickly evolves into a remedial therapeutic one, that continues via regular surveillance. Later in this section, I show how the OECD's membership accession process is one of continual intervention, whose outcome extends far beyond the Member into the wider international order, with the OECD as its apex. I begin with an analysis of the OECD's membership process, and then turn to that of the DAC's.

OECD membership

When the OECD was founded in 1961, it had 20 member countries, with four new members subsequently joining intermittently (in 1964, 1969, 1971, and 1973). By 1973, when New Zealand joined, the sense that the OECD was a club of like-minded Western developed nations

clearly pervaded. [523] Membership remained stable until the early 1990s when, between 1994 and 2000, a further six countries joined. By 2004, 16 countries had expressed interest in OECD membership, with the majority being transition or emerging economies and thus markedly different in history and identity to the original OECD founding members. At the same time, the 1990s was a period when the role and the legitimacy of the OECD itself came under fire. Internally, there was a perception that the OECD had lost influence within its membership as a practical means to bring about institutional and policy change. [524] Until then, the OECD had dealt with requests for membership in a largely demand-driven, ad hoc manner. But the combination of external demand, and what was essentially an internal identity crisis, led to a decision in 2002 to develop a strategic approach to membership engagement that would maintain and enhance the OECD's competence and global influence, enabling it to continue its ambition to be "a pathfinder of globalisation."[525] The resulting report on OECD membership rationalised and outlined a much more strategic approach to member and global relations. For an organisation that holds much of its meetings in private, this report (*the Noboru Report*) offers a fascinating glimpse of an internal conversation on the purpose, role and modus operandi of the OECD at a key moment in its own history. [526]

[523] A later 2004 OECD report on OECD membership ('the Noboru Report') described that stage of its membership as being "comprised of all democratic societies and significant players of the global market economy at that time." Ambassador Seiichiro Noboru, *A Strategy for Enlargement and Outreach - Report by the Chair of the Heads of Delegation Working Group on the Enlargement Strategy and Outreach*, (Paris: OECD, 2004) at 7.

[524] This decline in influence was described as prompting 'a sense of crisis' within the OECD. See the Noboru Report, *ibid*.

[525] *Ibid.* 9. This phrase was included in the terms of reference for a special group established by the OECD Council to examine and develop a strategic approach to membership and global relations. Council Resolution on OECD Reform [C(2003)91/FINAL].

[526] It is much more revelatory of the rationale behind the OECD's approach to member and non-member relations, than its follow-up report issued more recently. This latter report is titled 'Report of the Chair of the Working Group on the Future Size and Membership of the Organisation to Council. Framework for the Consideration of

Briefly, the report highlights the centrality of its working methods of peer learning/influencing and rule-making, delivered through its decentralised Committee structure, to the legitimacy and authority of its work, and of its own position within the wider global institutional architecture within and outside of its formal membership. Three things stand out in the OECD's analysis of the centrality of its working methods – first, there is a clear connection made by the OECD between its processes of peer learning and of rule-making, revealing its ambivalence to the boundaries between 'soft' and 'hard' law-making processes as choice of modes of governance. [527] Secondly, the OECD recognises the scope of its mandate; its interdisciplinary approach, and the ripple effect of its cognitive and normative work within and beyond its membership, as key to its conferred institutionalised normative role in a crowded global governance landscape. [528] Thirdly, these working methods (peer learning, influencing and rule-making) were perceived by the OECD to be central to the maintenance and continuation of a favourable global economic and political landscape that continued to meet Member economic interests. [529]

Prospective Members. Meeting of the OECD Council at Ministerial Level, Paris 7-8th June 2017.' It emerged in response to the OECD's 50th Anniversary Vision Statement, Meeting of the OECD Council at Ministerial Level Paris, 25-26 May 2011, C/MIN (2011)6,

[527] "A key comparative advantage of the Organisation is that rule making in OECD Committees is often rooted in peer learning: if there is a strong convergence of views among Members, the detailed descriptions of policy practice are registered in an agreed decision or recommendation. This lowers considerably the transaction costs of multilateral rule making among sovereign states." The Noboru Report, supra note 588 at 12, para 11.

[528] "OECD Committees are also initiators of global change. The rules, norms and standards produced by the membership have a demonstration effect on many non-members. These instruments also have an effect on the agendas of other international organisations and contribute to the shaping of the international economic order….OECD countries are the main initiators of change in the international economic order and they use OECD know-how for influencing the agenda setting of international organisations with quasi-universal membership such as the WTO, the World Bank and the IMF….OECD partnerships with other international organisations also offer opportunities to pursue this aim." The Noboru Report, supra note 588 at 12-13, para 12 and 16.

[529] "..[t]he Organisation needs the participation of significant players in its peer learning/influencing process not so much because members can learn "wise" policies from them but because the economic growth and environmental

While demands for, and proposals to expand the OECD's membership were acknowledged as posing a risk of a more splintered approach to norm- and rule-development (thus risking making its Committee working methods more cumbersome and less effective), the Noboru Report held that there could be a significant potential advantage of creating a larger community of 'like-minded' players, through the convergence of values arising from the peer-learning process. The Report proposed an ingenious way of capitalising on interest in expanded OECD membership, in order to strengthen the competence and global influence of the OECD, while minimising the risk of dilution of it purpose and influence. Based on the rule in the OECD Convention governing membership,[530] it proposed a pre- accession screening process that would target and accept only selected countries for invitation to membership, based on a detailed, seemingly apolitical technical screening process. This screening process focused on consideration of four factors – the "like mindedness" of the potential Member country; whether they are a "significant player;" "mutual benefit" and finally, "global consideration." Though the political nature of the OECD's Member selection process and plans for enlargement was explicitly acknowledged, the report outlined "strategic guidelines" consisting of criteria and yardsticks that were to technicise and thus seemingly neutralise this highly political process. [531]

conditions of present Members depend to a certain extent on their capacity to influence the domestic policies of other significant players." The Noboru Report, supra note 588 at 13, para 15.

[530] Article 16 of the OECD Convention stipulates that "The Council may decide to *invite* any Government prepared to assume the obligations of membership to accede to this Convention". Thus, accession by a country to the OECD is not automatic, but is based on a decision of the OECD Council. This rule authorises the OECD to be proactive and selective about its membership. Italics added.

[531] The fallacy of this exercise is revealed in the detail of what each of the elements or criteria are meant to address. Thus, 'like-mindedness' is explained as "those countries who broadly share values ("more-like-us")." However, in order to reject any semblance of selection on the basis of 'cultural affinity', 'like-mindedness' was defined through 'fundamental yardsticks' of 'market based economy' and 'democratic principles' to which other yardsticks of economic performance; good governance and rule of law; human rights; active participation in other relevant international and regional organisations; *provision of development assistance initiatives*; and observance

Having thus undertaken an initial clarification of the OECD's membership process, the OECD later established a mechanism in 2006 to identify countries for potential accession and in 2007 established a strategy for enhanced engagement with five Key Partners – Brazil, China, India, Indonesia and South Africa – with a view to possible membership, as well as with selected countries and regions of "strategic interest, with priority given to South East Asia."[532] The status of Key Partner involves distinct advantages to the OECD and the country designated as such, enabling the Partner to engage fully with the OECD, though as a non-voting member. [533]

Further formalised in early 2017, the member application and accession process demonstrates the OECD's sophisticated approach to both its internal and external governance, enabling it to target and create the 'ideal' Member through a lengthy and involved accession process with ideological, normative and legal dimensions. The accession process involves two stages, of which the first, pre-accession stage is key. In this stage, a prospective member must demonstrate first, a "State of Readiness," ascertained by an analysis of key characteristics

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of what was identified as the 'OECD acquis' were added. (Note the prominence of development assistance as a yardstick – italics added). Notably, 'like-mindedness' serves to retain the present qualities of the OECD. 'Significant player' designates a country whose membership of the OECD should be capable of "significantly contributing to the competence and the global influence of the Organisation….[and] strengthening OECD's relevance in the future [and] enhancing the capacity of the Organisation to implement its mandate through enlargement and outreach." The assessment of 'mutual benefit' was to include a country's willingness and capacity to contribute to the OECD's peer learning/influencing process'; its rule-making process as well as its impact on the economic development of OECD Members and the OECD's global character. Finally, 'global consideration' is intended to complement the 'mutual benefit' criterion, reflecting the OECD's intention to be a global, but not universal, organisation. The Noboru Report, supra note 588 at 16-18, paras 8-17.

[532] This strategic approach to engagement with selected states, regions and international organisation remains central to the OECD's plans for the expansion of its influence. The OECD's 50th anniversary 'Vision Statement' in 2011 includes a commitment to enhance the OECD's regional activities, 'including through partnerships with other international and regional organisations, such as regional development banks. We are committed to continue supporting and strengthening our policy dialogue with Southeast Asia, Latin America, Southeast Europe, Eurasia and sub-Saharan Africa, as well as the Middle East and North Africa.' *Supra* note 49 at 3.

[533] All OECD Committees are expected to engage with these countries and can invite them as Invitee or Participant without prior Council approval. See OECD website - https://www.oecd.org/globalrelations/partnershipsinoecdbodies/.

detailed in a '*Framework for the Consideration of Prospective Members*'; secondly, respect for the OECD's values (in order to demonstrate "like-mindedness"), and thirdly, high-level political commitment to the OECD's Membership Obligations where the OECD accession process is used to drive the members "*overall* domestic reform agenda."[534] On the basis of information derived from the application of this Framework to the prospective Member, the OECD Secretary-General provides the Council with information which it uses to decide whether or not to open accession discussions, or to engage with the prospective Member using other methods.

Though the OECD's own organisational narratives include reference both to market economies and democratic values as its twin pillars, the *Framework's* analysis of a prospective Member focuses clearly on the former, assessing a potential member over five elements including (i) economic and public governance; [535] ability, capacity and engagement, [536] and reach and impact; [537] (ii) its commitment to OECD values and membership obligations; (iii) its institutional framework; [538] (iv) key economic indicators, and finally (v) relations with the OECD [539] which includes an assessment of its adherence, or progress towards adherence, to OECD-initiated legal instruments. The nature of a prospective member's legal system, and in particular, its

[534] OECD (2017) *supra* note 49 at 5, para. 22. Note the significance in influence that the OECD expects the accession process to deliver in the prospective Member's domestic policy process. Italics my own.
[535] This element includes the following characteristics – a rules-based open market economy; tax transparency and international co-operation; a stable and transparent financial system, and access to information. OECD (2017) supra note 49 at 7.
[536] This refers to a Member's ability to engage fully with the OECD's committees and to provide resources for the accession process. OECD (2017) *supra* note 49 at 7.
[537] This refers to its regional or global role in the economy.
[538] This element includes an analysis of the Member's government type; administrative divisions; legal system; executive branch; legislative branch; judicial branch; central bank and competition authority. OECD (2017) *supra* note 49 at 9.
[539] This also includes its participation in OECD bodies and its participation in other OECD instruments such as country programme reviews and regional programmes (see global relations strategy).

resonance with OECD approaches to rule of law are key to this assessment process. The Framework is explicit and detailed in what is required of a prospective member in terms of adherence to selected OECD legal instruments and standards. For example, to demonstrate adherence to the OECD's *Declaration on International Investment and Multinational Enterprises and related instruments*, a prospective Member is required to adhere to thirteen other OECD Acts, including four legally binding decisions and nine recommendations. [540] Demonstration of adherence to the OECD *Codes of Liberalisation of Capital Movements and Current Invisible Operations*, intended to open up a country's markets to investors from OECD countries, frequently require significant changes to a country's legislation in order to minimise restrictions to the movements of capital and liberalise trade in services. [541] What this *Framework* demonstrates is first, the simultaneous layering or the combining of different technologies of governance (ideological, discursive and disciplinary) to create an OECD Member country as a

[540] The thirteen legal acts are - 1. Decision of the Council on International Investment Incentives and Disincentives [C(84)92]; 2. Recommendation of the Council on Member Country Measures Concerning National Treatment of Foreign Controlled Enterprises in OECD Member Countries and Based on Considerations of Public Order and Essential Security Interest [C(86)55(FINAL)]; 3. Recommendation of the Council concerning Member Country Exceptions to National Treatment and National Treatment related Measures concerning Investment by Established Foreign-Controlled Enterprises [C(87)76(FINAL)]; 4. Recommendation of the Council on Member Country Exceptions to National Treatment and National Treatment related Measures concerning the Services Sector [C(88)41(FINAL)]; 5. Recommendation of the Council on Member Country Exceptions to National Treatment and National Treatment related Measures in the Category of Official Aids and Subsidies [C(88)131(FINAL)]; 6. Recommendation of the Council on Member Country Exceptions to National Treatment and Related Measures concerning Access to Local Bank Credit and the Capital Market [C(89)76(FINAL)]; 7. Decision of the Council on Conflicting Requirements being imposed on Multinational Enterprises [C(91)73]; 8. Decision of the Council on the Third Revised Decision of the Council concerning National Treatment [C(91)47/FINAL as amended]; and 9. Decision of the Council on the OECD Guidelines for Multinational Enterprises [C(2000)96/FINAL as amended]; 10. Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security [C(2009)63]; 11. Recommendation of the Council on the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas [C/MIN(2011)12/FINAL as amended]; 12. Recommendation of the Council on the OECD-FAO Guidance For Responsible Agricultural Supply Chains [C(2016)83]; 13. Recommendation of the Council on the Due Diligence Guidance For Meaningful Stakeholder Engagement in the Extractive Sector [C(2016)100]. OECD (2017) *supra* note 49 at 11-12.

[541] The OECD acknowledges that these changes sometimes concern politically sensitive sectors such as the acquisition of land or the opening up of the telecommunications sector. OECD (2017) *supra* note 49 at 15.

preliminary part of the accession process; secondly, the centrality of law and legal and regulatory change in order to produce the 'right' or OECD-compatible Member state subjectivity, and thirdly, the original legal source within - and thus legal sanctioning by - the OECD's Convention of what is a very invasive accession process for a prospective member.

The application of the *Framework* however, is just one, though key, part of the two-stage application process. The second stage involves a consideration of a broader range of legal, political and cultural[542] elements, including policies that are beyond the current scope of the OECD's remit, as described in its "acquis." [543] Thus, accession also includes a thorough review of the position of applicant countries towards other major international agreements. [544] The inclusion of this OECD review of applicant countries' compliance with selected international obligations as part of the accession process demonstrates another two key features of the OECD's authority wielded through its membership accession process. First, it performatively enacts an expanded, almost unlimited role of formal investigation and assessment for the OECD, of an applicant countries' domestic and international policies, one mandated by a formalised acquis.[545] Secondly, it both enacts, and privileges reliance on, a powerful mode of

[542] By 'cultural' I refer to the 'likemindedness' criteria, described in the acquis as follows – 'A degree of convergence (some would say likemindedness) with policies carried out by existing OECD members in a number of key areas could then also be considered as part of the acquis in a broader sense.' The acquis is detailed in an annex in the Noboru Report, *supra* note 46 at 44. The formalisation and application of the acquis preceded the formalisation of the Framework in 2017.

[543] "Thus, the EDRC has been requested by Council to carry out reviews of the applicants' economic situation and policies even though there are no OECD acts concerning macro-economic policies." *Supra* note 46 at 44. The application of the acquis preceded the formalisation of the Framework in 2017, and is detailed in an annex in the Noboru Report.

[544] Examples given in the acquis include the Basel Convention and the UN Framework Convention on Climate Change. *Ibid* 45.

[545] Even though the OECD states that it is based on the EU acquis, the body of common rights and obligations that is binding on all the EU member states, which is based on EU legal acts and secondary legislation. Its open ended scope differs from that of the EU's acquis whose scope, though broad, is enunciated clearly. See https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/acquis_en

confessional governance through information sharing that is self-disclosed and provided by the applicant to the OECD. [546]

Note that the OECD's disciplinary modes of governance on Members and members-in waiting are not sanction-based as understood in legal terms. Instead they are heavily *performative*. Though the OECD ultimately retains decision-making power on membership, this is the end-point of a process based on an assessment of factors, derived from information on a Member's evolving subjectivity that is the culmination of a lengthy and comprehensive preparatory process undertaken voluntarily by the prospective member. The satisfactory *performance* by the member-in-waiting of this information-sharing process is as important as any changes made to comply with OECD membership criteria as, significantly, the ongoing production, provision and use of information to the OECD, according to its desired protocols, is one of the key legal responsibilities of formal OECD Membership. [547] The processing and use of information is thus a legally sanctioned mode of Member engagement and OECD discipline as Article 3 the OECD's founding treaty articulates. This commits Members to undertaking specific actions of interstate co-operation, thereby legally obliging Members to engage in certain forms of collective action together, including to

[546] There are clear parallels here to confessional modes of governance highlighted by Foucault, where the 'confession of truth' is central to the production of a particular kind of subject. Here, the subject internalises the rules and regulations of their own subjection (and subjectivication) within a surveillance society, thereby taking an active role in their own surveillance becoming both the governor and the governed in that process. See Foucault *Discipline & Punish*.

[547] Article 3 of the Convention states that 'With a view to achieving the aims set out in Article 1 and to fulfilling the undertakings contained in Article 2, the Members agree that they will: (a) keep each other informed and furnish the Organisation with the information necessary for the accomplishment of its tasks; (b) consult together on a continuing basis, carry out studies and participate in agreed projects; and (c) co-operate closely and where appropriate take co-ordinated action.'.

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(b) consult together on a continuing basis, carry out studies and participate in agreed projects; and
(c) co-operate closely and where appropriate take co-ordinated action.

In this way, the so-called *soft* forms of governance of the OECD are anchored within and derive their legitimacy and a significant amount of their disciplinary power, from *hard* law, a fact overlooked by many commentators on the OECD's modes of governance. [548]

DAC membership

At the time of writing, [549] the DAC had thirty 30 Members[550] with several international organisations acting as Observers and participating in the work of the DAC and its subsidiary bodies. [551] Not all OECD Members are necessarily Members of the DAC. Equally, some states that are not members of either the OECD or the DAC also report to the DAC on their ODA expenditure. [552] Thus, though membership of the DAC is clearly important, it is not the only

[548] See on peer review generally, where attention has mainly focused on particular policy areas, or on how effective peer review is as a method of ideas diffusion and policy influence. Example, Hortense Jongen, "The authority of peer reviews among states in the global governance of corruption," (2018) 25 Rev Int Pol Econ 909, and contributions in Kersten Martens & Anja P. Jakobi (eds), *Mechanisms of OECD Governance: International Incentives for National Policy-Making*? (Oxford Scholarship online, 2010). This is the case even when the OECD's approach to peer review has been examined from a legal standpoint. See Georgios Dimitropoulos, "Compliance through Collegiality: Peer Review in International Law," Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law Working Paper Series, MPILux Working Paper 3 (2014), at 37.
[549] April 2019.
[550] Ireland completed the accession process in 1985; Spain in 1991; Luxembourg in 1992; Greece in 1999; Korea in 2010; Iceland, the Czech Republic, the Slovak Republic, Poland and Slovenia in 2013; and Hungary in 2016. The DAC website notes that "[I]t is a strategic objective for the European Commission that European Union Member States join the DAC." See http://www.oecd.org/dac/dac-global-relations/joining-the-development-assistance-committee.htm .
[551] These are the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, the International Monetary Fund, the United Nations Development Programme and the World Bank.
[552] The 2017 Development Co-operation Report included a chapter monitoring the ODA flows from thirty non-DAC Members. It was estimated that this amounted to USD 24.6 billion in 2015, compared to USD$32.0 billion in 2014. This consisted of 20 providers who reported to the OECD on their development co-operation programmes, as well as 10 other providers that were deemed 'priority partners' for the DAC. The Bill & Melinda Gates Foundation was the only private entity that reported. See OECD, *Development Co-operation Report 2017 - Data for Development*, (Paris: 2017).

institutionalised relationship that the DAC has with other states, international organisations and other development finance actors.[553] Membership of the DAC brings several obligations including implementing DAC recommendations (e.g. on untying aid); following DAC guidelines and policy statements when formulating Members' own policies; reporting development co-operation statistics to the DAC according to their format; participating in DAC meetings and at least one of the DAC's subsidiary committees, and undergoing peer reviews of their development co-operation programme and participating in others' peer reviews. [554]

Joining the DAC as a Member is a formal process involving a number of steps commencing with an expression of interest in membership by the applicant state, followed by a preliminary analysis by the OECD. If the outcome of this process is positive, the OECD then conducts a more thorough accession review of the applicant state. The DAC states that it is "open" to membership from countries that have (a) appropriate strategies, policies and institutional frameworks for development co-operation; (b) an accepted measure of effort (e.g. ODA/GNI ratio over 0.20% or ODA volume above USD 100 million), and (c) established a system of performance monitoring and evaluation.[555] Following this review, a report that makes a recommendation on the country's readiness to join the DAC is prepared. Based on this report, the DAC then makes a decision. If positive, the candidate country is invited to join the Committee. To formalise its accession, the candidate country writes to the OECD Secretary-General accepting the invitation and pledging to fulfil the obligations of joining the DAC.

[553] See also the reporting on ODA in Chapter 10, and DAC Peer Review in Chapter 11.
[554] See http://www.oecd.org/dac/dac-global-relations/joining-the-development-assistance-committee.htm
[555] By including the 'accepted measure of effort' criterion, the DAC excludes poorer states that do not reach this ODA threshold.

In analysing the respective membership accession processes of both the OECD and DAC, I have shown how these processes are occasions for deep and almost limitless OECD intervention in the applicant state's domestic policies, through diagnostic, remedial and surveillance activities such that the moment of formal accession can be viewed as the end point of a deliberate process of sovereign (re)construction within an international order that locates the OECD at the apex of international macroeconomic policy and relations. The membership process acts as a deliberate mechanism of juridification, whereby OECD political and economic norms are legalised and institutionalised in applicant Member states, in ways that may over-ride pre-existing policy, institutional and legislative frameworks therein. In doing so, the OECD's governance reach is considerably enhanced, and its internal normative hierarchy implanted and institutionalised at the national level.

If we recall Blichner & Molander's processes of juridification from Chapter IV,[556] we can see that both the OECD's and DAC's membership processes facilitate the juridification of OECD norms through several of these vectors. In my view, each of these processes of juridification are evident within the OECD and DAC membership processes. Thus, OECD and DAC membership processes are *constitutive* in the sense that the membership processes ensure that OECD rules that that elaborate obligation, delegation and precision are taken on board by the applicant Member state). They display *expansion and differentiation* in that they require the adoption of an increasing number of OECD norms and laws that expand in number, and are increasingly specific within a diverse range of policy areas. They inherently contain a *conflicts dimension* by

[556] These are constitutive; expansion and differentiation; the conflicts dimension; judicial power and legal framing.

requiring a re-ordering of legal orders within the applicant Member state takes place to reduce potential for conflict, or new judicial forms of conflict resolution are introduced such as investor-state dispute resolution). They re-contour *judicial power* through a privileging of the OECD's normative interpretations as authoritative. Finally, both the OECD's and DAC's membership processes create a *new legal framing mechanism* where applicant member states come to increasingly understand their identity and that of others, and their relationship to other states, in light of the legal order that the OECD presents as common sense.

Once a Member of the OECD and DAC, the organisation has a range of governance mechanisms and instruments through which it exercises authority and governs. In the following two sections I focus on first, its organisational structure, and second, its decision-making instruments, both of which are sanctioned by its founding convention and its interpretation of its mandate. My aim with the following two sections is to demonstrate how the OECD's and DAC's internal structures and decision-making instruments together create a tightly constructed governance environment of legal, executive and organisational mechanisms to generate, consolidate and implement its normative projects on institutional reform. I aim to reveal distinct ways that the governance signature of ODA is articulated. I will show how a key feature of the legal quality of this governance signature is the blurring of the boundaries between legal, executive and organisational instruments, such that a seamless juridical quality to all the governance instruments, regardless of formal legal origin or quality, can be discerned.

4. The organisational structure of the OECD and DAC

Article 7 of the OECD's founding convention designates a Ministerial Council, made up of a representative of each Member state of the OECD,[557] plus the European Commission, as its governing body. Decisions are adopted by mutual agreement, and the Secretary-General is the Chairperson. The OECD's Council meets regularly at the level of permanent representatives to the OECD and sets the organisation's work programme. However, Article 9 empowers the Council "to establish an Executive Committee and such subsidiary bodies as may be required for the achievement of the aims of the Organisation." Thus, it has three plenary standing committees; [558] a Secretariat with fifteen directorates or departments, and with about 250 specialised Committees,[559] a wide variety of working[560] and expert groups,[561] as well as various informal networks of ad hoc groups,[562] many with their own bureau staff and an elected chairperson.

It is important to note that the OECD has Committees and dedicated institutional mechanisms in policy areas in which it does not have an explicit formal mandate. [563] However, though

[557] At the time of writing it has 36 Member states (May 2019). See list at http://www.oecd.org/about/membersandpartners/.
[558] Executive Committee (ExCo), Budget Committee (BC) and an External Relations Committee (ERC).
[559] Committees include members and those with observer status to the OECD. Approx. 40 000 senior officials from national administrations participate in OECD committee meetings each year. See OECD website - http://www.oecd.org/about/whodoeswhat/. Committees cover all major areas of domestic policy and many major areas of international policy (see list https://oecdgroups.oecd.org/Bodies/ListByNameView.aspx). The development of outputs of 'high policy impact' through the production of data and statistics, as well as 'standards, guidelines and best practices,' along with surveillance and monitoring are explicitly included in their working methods. Many Committees have been active for several decades e.g. Committee on Financial Markets (founded in 1969), but new ones can be created, or the mandates of Committees can be revised, by Council (e.g. the mandate of the Health Committee was revised in 2017).
[560] Working groups include on Big Data and Open Data; public transport; several on tax matters; senior budget officials; public integrity officials, trade; health care; social policy and rural policy.
[561] Including on the economics of public health; pharmaceuticals and medical devices, and radioactive waste.
[562] Including on climate change and high-level monetary experts.
[563] Such as health, education, pensions, housing, climate change and others.

challenges to policy proposals and their supposed non-political, non-ideological orientation have been made in those non-mandated areas, [564] the authority of their messages and the legitimacy of the OECD's normative role in those areas has not been undermined. Also of note is the fact that the mandates of Committees, working groups etc. are focused on addressing OECD priorities in these areas, and do not formally recognise the policy goals or purposes established by Member states themselves, or other organisations with international mandates in these policy areas. [565] The Secretariat prepares the various studies, the key vehicles for the OECD's norm-promotion role, which are published as OECD studies. In this way, no individual or group of states is associated with their content.

[564] One of the influential and most well-known OECD periodic studies is the Programme for International Student Assessment (PISA) - a triennial international survey which aims to evaluate and rank education systems worldwide by testing the skills and knowledge of 15-year-old students (60-plus countries now participate). Though the Secretariat runs PISA, it is 'governed' by a PISA Governing Board, composed of representatives of OECD members and PISA associates. Education is not in the legal mandate of the OECD. PISA has been critiqued over several years on several grounds by education scholars, education policy observers and teachers. For example, "OECD and Pisa tests are damaging education worldwide – academics," The Guardian, 6th May 2014; William Stewart, "Does Pisa really tell us anything useful about schools?" Times Education Supplement 6th December 2016; Andrew Davis, 'Is it really possible to test all educationally significant achievements with high levels of reliability? (2015) 10 Ethics & Ed 372; María Domínguez, Maria-José Vieira & Javier Vidal, "The impact of the Programme for International Student Assessment on academic journals," (2012) 19 Ass in Ed 393.

[565] Policy areas such as health, education and housing come immediately to mind. Thus, for example, the mandate of the OECD's Education Policy Committee states 'The work of the Education Policy Committee (EDPC) reflects and complements the priorities of the OECD as a whole, in providing employment opportunities for all, improving human capital and social cohesion.' By contrast, see that of UNESCO (United Nations Educational, Scientific and Cultural Organization), an international organisation, with a legal mandate responsible for coordinating international cooperation in education, science, culture and communication. Its aims include "[S]trengthen(ing) the ties between nations and societies, and mobiliz(ing) the wider public so that each child and citizen: has access to quality education; a basic human right and an indispensable prerequisite for sustainable development; may grow and live in a cultural environment rich in diversity and dialogue, where heritage serves as a bridge between generations and peoples; can fully benefit from scientific advances; and can enjoy full freedom of expression; the basis of democracy, development and human dignity." UNESCO website 'Introducing UNESCO' available at https://en.unesco.org/about-us/introducing-unesco.

Figure 5.1 Who drives the OECD's work?

Source: OECD website

Formally, the DAC operates under the guidance of a full-time elected Chair, and through several interacting levels including

(i) annual DAC High-Level Meetings and Senior Level Meetings that bring aid ministers, agency heads and their senior advisors together to agree on policy directions, review performance and address emerging issues;

(ii) DAC Working Parties (on, for example, Statistics and on Aid Effectiveness), and Networks (on, for example, Development Evaluation, on Gender Equality, on Poverty Reduction, on Governance, on Emerging Markets and on the Environment). Both the Working Parties and Networks are sites that produce information and knowledge used to inform DAC policy work;

(iii) DAC delegates – the bureaucrats usually attached to their country's Delegations in Paris who intermediate between the DAC and their home ministries/agencies etc.; and

(iv) the Global Forum on Development, a joint initiative between the DAC and the OECD's Development Centre[566] that centres on an annual event targeting policymakers and development stakeholders.

While each of these mechanisms have distinct mandates, activities, actors and purposes, what is striking is their overlapping nature in terms of activities and relationships, and the utter busy-ness that they convey vis-à-vis normatively delineating what constitutes 'good' development and 'good' development financing.

A key feature of both the OECD's and DAC's organisational structure is its ability to blur the public-private divide, and the boundaries of its mandate, in both its identity and its work through its organisational mechanisms, an approach that echoes that of the earlier Economic Co-operation Administration of the Marshall Plan that innovated this approach. In relation to the DAC, for example, its Emerging Markets Network (EMnet) is a platform for dialogue and networking between OECD-based multinationals and their counterparts from emerging markets, thereby facilitating interaction between "high level officials, top executives from mature and emerging economies and OECD experts." These meetings are closed-door and are held at the OECD headquarters in Paris, in Beijing (organised by the Chinese Ministry of Commerce) and in an emerging market region.[567]

[566] The Development Centre is rather unique site focused on development within the DAC. Founded in 1961, its membership is open to both OECD and non-OECD countries. Signature policy activities includes Multi-dimensional Country Reviews (MDCRs) on countries' development strategies that 'incorporate rigorous benchmarking and measurement metrics with strategic foresight, combining the OECD's Well-being and Inclusive Growth frameworks with structural economic analysis.'; produces regional Economic Outlook documents on Africa, Latin America etc, OECD, OECD Development Centre Brochure (undated)

[567] "Throughout its existence, EMnet has proven a valuable tool for obtaining input from the private sector as well as disseminating OECD analysis to a high-level pool of corporate contacts from more than two dozen member companies. EMnet also proposes a wide range of services to member companies through privileged and customised access to the OECD's information resources and experts." OECD Development Centre Brochure (undated) at 15.

5. OECD and DAC decision-making instruments – blurring the boundaries between legal and executive authority

In this section, I briefly describe and analyse the main decision-making instruments of both the OECD and DAC. I highlight a blurred distinction between what are formal legal instruments identified as such in the OECD's Convention, and non-legal instruments that record and implement decisions. Article 5 of the OECD's Convention provides for its members, through the Council of Ministers, to take three kinds of legal action. These are (i) recommendations; (ii) decisions, and (iii) agreements with other non-member states and international organisations. [568] Though recommendations are nonbinding, they generally represent OECD policy advice to members and carry a lot of weight.[569] Their normative weight within and beyond the OECD is clearly evidenced in two of their features – first, in the expectation is that if a Member country cannot implement a recommendation or one of its provisions, it will abstain from its adoption, or enter a reservation (the latter being a practice normally associated with international treaty-making), and secondly, in the fact that increasingly, non-OECD Member countries are also signing OECD Recommendations, thereby performatively signalling the OECD's formal authority beyond its Members, through their acceptance.[570] Recommendations frequently include

[568] Article 5 states – "In order to achieve its aims, the Organisation may: (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organisations." Article 7 identifies the Council of Ministers, or of members Permanent Representatives, as the body for all of these acts.

[569] Bonucci notes that "[p]ractice accords (Recommendations) great moral force … and there is an expectation that Member countries will do their utmost to fully implement a Recommendation." Nicola Bonucci, 'The legal status of an OECD act and the procedure for its adoption,' (undated). Available at http://www.oecd.org/legal/legal-instruments.htm. Bonucci was the Director of the OECD's Directorate for Legal Affairs at the time of writing (July 2017, and remained in place until November 2019). The OECD's database records nine recommendations from the Development Assistance Committee on ODA.

[570] See OECD database on OECD legal instruments for list of Recommendations and non-OECD Member country adherents to certain Recommendations. Note that non-Members' acceptance of these Recommendations is especially significant as they have no official channel to engage in the future evolution of these instruments. It can

provisions for regular monitoring of their implementation; each Recommendation has a 'home' within one of the OECD's internal bodies. Saltzman notes that Member countries use OECD recommendations either as a means to influence domestic policy development, or as a precursor to a policy decision in their own domestic policy arenas, on the basis that the OECD has endorsed this particular approach. [571]

Decisions are, however, legally binding[572] though they occur less frequently than the adoption of recommendations. Though strictly speaking, OECD Decisions are not international treaties, they still entail for Members, the same kind of legal obligations as those enunciated in international agreements. [573] Finally, though the OECD Convention specifies "agreements with other non-member states and international organisations" as the third kind of legal action, the OECD's website itself lists Declarations, Arrangements and Understandings, and Treaties/Conventions as other "forms of legal agreements."[574] Though Declarations are not considered formal OECD Acts, and thus not intended to be legally binding, their purpose is to establish "relatively precise" policy commitments that Member country governments are expected to subscribe to, and their application is "generally monitored" by the relevant OECD body, as well as being noted by the OECD Council.[575] It is noteworthy that though a Declaration may not be recognised as a formal legal Act of the OECD, it will frequently have legal effects,

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be argued that their acceptance of these Recommendations implies a particularly passive legal and political agency.

[571] James Salzman, 'The Organisation for Economic Cooperation and Development's Role in International Law,' (2011) 43 Geo Wash Int'l L Rev 255 at 258.

[572] Bonucci notes that they are legally binding on all those Member countries who do not abstain when the Act is adopted, carry the same kind of legal obligation as those subscribed to "under international treaties," with Members obligated to take "the measures necessary" for their implementation. Bonucci, *supra* note 569 at 1.

[573] Woodward (2009), supra note 553 at 70.

[574] See https://www.oecd.org/legal/legal-instruments.htm.

[575] Ibid.

thus giving it significant normative weight.[576] Similarly, Arrangements/Understandings, though also not viewed as formal Acts of the OECD, are also noted by the OECD Council and their implementation is also often monitored. Though the OECD's formal legislative output is numerically less prolific than its Recommendations and other instruments, the content and the issues it has developed Conventions on, are significant in the wider schema of international relations. [577]

What is significant here about the legal nature of the OECD's decision-making instruments, is that regardless of their *formal* legal nature, they frequently produce identifiable legal effects in Member countries' domestic jurisdictions; they are often monitored by a relevant OECD body and thus Member countries' progress with implementing the contents of the decisions is backed by a disciplinary mode of governance of a particular hue (see later section on institutional mechanisms and their working methods for more discussion), and the universality of their normative weight is signalled in the voluntary adherence by non-OECD members to some of these instruments. Furthermore, the interlocking web of these agreements contributes strongly towards creating and maintaining the OECD's own juridical identity as an authoritative

[576] The ambivalent legal nature of Declarations has been highlighted by commentators. Dörr notes that legal doctrine is divided over whether a declaration in international law has legal effect as a source of law in itself, or whether it simply produces certain effects, e.g. legal obligations, by virtue of norms of treaty or customary law. See Oliver Dörr, 'Declarations,' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press online). However, in the OECD context, it is evident that Declarations certainly contribute to processes of formalisation and legalisation within Member states, and quite likely, beyond this.

[577] Topics on which it has negotiated agreements on include addressing tax havens; the prohibition of bribery in international business transactions; on nuclear energy; the regulation of hazardous wastes; the revision of codes of conduct on corporate governance; and the creation of rules for multilateral investment. See OECD database - http://webnet.oecd.org/OECDACTS/Instruments/ListByTypeView.aspx. In addition,

entity that produces decisions and determinations on important policy matters, in ways that are recognised as legitimate within the international development policy community.

In addition, and key to understanding the OECD's jurisdictional reach, is the fact that aspects of the OECD's legal governance (regardless of its formal legal quality) are frequently rolled out through, and implemented by, other international organisations. Thus, for example, Woodward notes that the Food and Agriculture Organisation's 1985 International Code of Conduct on the Distribution and Use of Pesticides superimposed the notification system at the centre of the OECD's 1984 Recommendation on Information Exchange Related to Export of Banner or Severely Restricted Chemicals. [578] This has also happened with the OECD's approach to the governance of ODA. Thus, the EU has incorporated the OECD's "Aid Effectiveness Agenda" into its 2010 revision of the Cotonou Partnership Agreement.

As one of the oldest OECD Committees, the DAC has available to it the full range of OECD governance instruments. Of particular note are DAC "Standards and Agreements" (which are actually Recommendations) of which six are recorded on the DAC website. [579] Though the majority of the Recommendations listed as legal instruments of the DAC are actually OECD *Council* Recommendations, the DAC itself also produces Recommendations. [580] Like Council

[578] Woodward (2009), supra note 553 at 73.
[579] These address the areas of 'Good Pledging Practice'; 'Terms and Conditions of Aid'; on Managing Corruption; on the management of Conflict Minerals; on Untying Aid, and on Principles for Blended Finance. See http://www.oecd.org/dac/dacstandardsandagreements.htm. However on the database of OECD Legal Instruments, 10 legal instruments are listed. The additional ones identified as 'in force' address 'Policy Coherence for Development;' the 'Paris Declaration on Aid Effectiveness' and several relating to Environmental considerations (e.g. an environmental checklist for bilateral and multilateral institutions). Note the interchangeability of terms – standards, agreements and recommendations – used.
[580] Though the OECD states that Recommendations are not legally binding, this is qualified with the expectation that 'Member countries will do their utmost to fully implement a Recommendation.' https://www.oecd.org/legal/legal-instruments.htm

Recommendations, they may or may not be adhered to by non-DAC OECD Members, and non-OECD Members alike. Council Recommendations under the ambit of the DAC are frequently constructed and written in the style of similar instruments in other international organisations such as the UN General Assembly. They begin with reference to the legal basis for the Recommendation and other relevant work undertaken by the OECD that forms an institutional history of solid work in the area; proceed to refer to other developments outside the OECD that echo this work; outline the significance of the issue and the nature of the response, and - especially for the purposes of this project - include a range of clear policy recommendations for action by OECD/DAC members, usually with details of a monitoring and reporting mechanism to the OECD Council or DAC. DAC-specific recommendations vary in their treatment of their subject matter.

One of the more lengthy ones, and repeatedly mentioned in the DAC's Peer Review of donors' ODA policies, is the DAC *Recommendation on Untying Official Development Assistance to the Least Developed Countries and Highly Indebted Poor Countries (2018).* [581] In the paragraphs that follow, I examine this Recommendation which, though formally is legally non-binding, articulates a very distinct approach to the legal conceptualisation of tied aid and public procurement, and to the legal order(s) that the DAC deem to be relevant to this state policy and practice. My intention in the paragraphs below is to trace and analyse the internal legal logic captured in this Recommendation, and in particular, to illustrate how this legal framing has potential consequences that may, in fact, undermine the humanitarian objectives that are

[581] DAC Recommendation on Untying Official Development Assistance to the Least Developed Countries and Highly Indebted Poor Countries, OECD/LEGAL/5015. Adopted on 25/04/2001 and amended on 21/07/2014 and 2018 (date 24/1/2019).

proffered by the DAC as rationale for the Recommendation. I do so by drawing attention to the anomalous treatment of the phenomenon of tied aid by the OECD's DAC, with the OECD's treatment of export credits via its Arrangement on Guidelines for Officially Supported Export Credits. [582] In this instance, a strong internal legal logic can be identified, intended to convey and bring about distinct legal effects on DAC Members' aid policies.

DAC Recommendation on Untying Official Development Assistance

Briefly, tied aid refers to aid provided on the condition that the aid recipient use the lender's own resources, for example where a grant or a soft loan for a capital project is made with the condition that equipment or services are purchased from the donor country only. Tied aid occurs most frequently in a bilateral context, [583] and poses obvious, often hidden costs and constraints on procurement options for aid-recipient states, [584] that can have longer-term

[582] Though it is not an OECD Act, it is incorporated, via a Council Decision, into European Community law. The Participants to this Arrangement are: Australia, Canada, the European Community (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom), Japan, Korea (Republic of), New Zealand, Norway, Switzerland and the United States. The Arrangement is an area of Community Competence under Article 113 of the Treaty of Rome and the European Commission represents Member States in negotiations. The Czech Republic, Hungary and Poland are observers. See http://www.oecd.org/trade/xcred/summaryoverviewofthearrangement.htm. The Arrangement means that some of the credits of national Export Credit Agencies that are procurement-tied can be counted as ODA if they contain a certain concessionality level, along with meeting other criteria. Livia Fritz & Werner Raza, 'Living up to Policy Coherence for Development? The OECD's disciplines on tied aid financing,' (2017) 35 Dev Pol Rev 759 at 764.

[583] Usually multilateral aid is subject to competitive bidding and thus is untied. Where the recipient country has no other choice but to comply with the condition imposed by the donor country, this aid is termed *formally tied*. Where the recipient is required to procure in specific countries or regions, this is termed *partially untied* aid. Annamaria La Chimia, *Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law: The Imperative for Change.* (London: Hart Publishing, 2013) at 30. Carbone points out that *informal tying* occurs when donors chose to fund only projects in sectors where their national firms have a competitive advantage; impose bidding procedures that favour their firms (such as issuing tender calls that are not easily accessible to bidders from developing countries); tie only a small component of their aid, but link present untied aid donations to larger purchases in the future, or only select companies that that have a historically strong access to credit markets, thereby automatically excluding companies in developing countries. Maurizio Carbone, 'Much ado about nothing? The European Union and the global politics of untying aid.' (2014) 20 Contemp Pol 103 at 104.

[584] While direct negative effects include overpricing (with some estimates putting the costs at between 15-30% extra), indirect effects include delays in delivery, a lower quality of funded goods and services, an inefficient allocation of resources following from highly inappropriate or lower priority purchases or selection of projects;

direct and indirect negative development impacts. Though evidence to support donors' perceptions that tied aid promotes trade and economic opportunity is scarce, [585] there continues to be marked reluctance amongst certain influential donors to untie their aid. [586] Efforts to untie aid go back a long way within the OECD, with Sweden pursuing efforts to untie aid back in 1969. Though a draft Memorandum of Understanding was prepared on the issue between ten donors at that time, the oil price shock of the early 1970s caused a pause in those efforts with tied aid later becoming explicitly utilised as an instrument of export promotion. [587] With rising concern amongst many OECD members that tied soft loans were being used to subsidise donor national industries, boost exports and thereby create trade distortions, the so-called Helsinki Arrangement was introduced in 1992 by the OECD. This aimed at the separation of commercially-motivated export credits and development-motivated aid credits. [588] Notably,

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potential environmental impact of some sectoral aid flows, e.g. infrastructure; factors related to the trade impacts of tying where it becomes a barrier to accessing markets and promoting inter-regional trade, or impacts on the local markets. See Edward J Clay, Matthew Geddes, Luisa Natali & Dirk Willem te Velde, *The Developmental Effectiveness of Untied Aid: Evaluation of the Implementation of the Paris Declaration and of the 2001 DAC Recommendation on Untying ODA To The LDCs,* (Copenhagen: Danish Institute of international Studies, 2008) at 35-37.

[585] Carbone: 105.

[586] Carbone notes that several sources indicate that the share of contracts going back to the donor doubled over the period 2003-2010 and stands at 90% for some donors. In 2010, tied aid stood at 76% of bilateral aid, up from 40% in 2000. Ibid.

[587] Causing an 'export credit war' in the 1970s and '80s, succeeded by a 'tied aid credit race.' Fritz & Raza 766. According to Hall, industrialized countries used tied aid to circumvent international agreements restricting export subsidies for capital goods, during the eighties. Steven Hall, 'Managing tied aid competition: Domestic politics, credible threats, and the Helsinki disciplines,' (2011) 18 Rev Int Pol Econ 646. "Mixed credits were loan packages at interest rates below the lender's cost of borrowing and well below market rates. Tied aid credits went further, combining official loans with a grant element that made the package even more concessional. Including the grant qualified these transactions as ODA and exempted them from the Arrangement [1978 Arrangement on Guidelines for Officially Supported Export Credits] disciplines. Donors diverted their foreign aid budgets into export promotion, financing commercially viable projects involving capital goods sales, rather than basic needs projects." At 649.

[588] This was done on the basis of two 'tests' – (a) 'whether the project is financially non-viable, i.e. does the project lack capacity with appropriate pricing determined on market principles, to generate cash flow sufficient to cover the project's operating costs and to service the capital employed,' or (b) 'whether it is reasonable to conclude… that it is unlikely that the project can be financed on market or Arrangement terms.' The latter refers to access to finance. OECD, Arrangement on Officially Supported Export Credits. Ex Ante Guidance for Tied Aid, 2005 Revision.

the terms of the Helsinki Arrangement have subsequently been incorporated, indirectly, into the WTO Subsidies and Countervailing Measures (SCM) Agreement, thereby ensuring that the Helsinki provisions are now respected by all WTO members. [589]

It was only several years later again that the DAC was given a mandate to work on a Recommendation to untie aid to Least Developed Countries (LDCs), [590] prompted by concern (especially from the United States), that concessional tied aid was being used to gain commercial advantage. [591] Adopted in 2001, and coming into effect on January 1st 2002, the Recommendation was later revised in 2014, [592] and again in 2018. [593] It states that the "intentions" of DAC Members are to "untie their ODA to the LDCs and HIPCs [Highly Indebted Poor Countries] to the greatest extent possible; promote and sustain adequate flows of ODA in terms of quality, volume and direction, in particular to the LDCs and HIPCs and ensure that ODA

TD/PG(2005)20 (Paris: OECD, 2006) at 4. The 'Arrangement' is described as a 'Gentlemen's Agreement' among the Participants. It is not a formal OECD Act, although it receives the administrative support of the OECD Secretariat. OECD, Arrangement on Officially Supported Export Credits, 1 January 2018, TAD/PG(2018)1. Participants to the Arrangement currently are: Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Switzerland and the United States.

[589] See Letter K, Annex 1 of the SCM. This means that they are now reinforced by the application of the WTO enforcement mechanism. The Helsinki Package also introduced a consultation mechanism which gives a Participant state the opportunity to request consultation for projects whose eligibility might be questionable. A full 'Aid Quality Assessment (AQuA)' can be undertaken for which Ex Ante Guidance was issued in 2005.

[590] It had earlier already formulated Guiding Principles for Associated Financing and Tied and Partially Untied Official Development Assistance in 1987. Fuhrer (1996), supra note 579 at 46-47.

[591] Fuhrer notes that tied aid was described as a 'predatory practice' used in highly competitive sectors such as telecommunications, transport and power, that were described as 'spoiled markets.' Fuhrer (1996), supra note 579 at 57.

[592] DAC Recommendation on Untying Official Development Assistance to the Least Developed Countries and Heavily Indebted Poor Countries DCD/DAC(2014)37/FINAL, 12th August 2014.

[593] The contents of the Recommendations regarding the objectives, principles and implementation are substantively the same. The only difference is the further extension of coverage to countries in the categories of "Other Low-Income Countries (OLICS)" and "IDA-only countries and territories". The former refers to low-income countries or territories that are neither in the LDC or HIPC categories (Zimbabwe and Tajikstan). The latter are countries and territories that are only eligible for financing from the International Development Association. Kosovo10; Kyrgyzstan; Maldives; Marshall Islands; Micronesia; Samoa; Syrian Arab Republic; Tonga. DAC, Revised DAC Recommendation on Untying ODA, DCD/DAC(2018)33/FINAL, 24th January 2019. Annex II.

to these countries will not decline over time as a result of the implementation of this Recommendation; (and) achieve balanced efforts among DAC Members."[594] It exhorts Members to "continue to provide untied ODA in areas not covered by the Recommendation when they already do so, and to study the possibilities of extending untied aid in such areas."[595]

Described by several commentators as "limited in scope,"[596] and the target of much criticism in several subsequent international development finance policy forums, [597] the Recommendation includes several restrictions. First, its application is limited to ODA granted to LDCs, HIPCs, OLICs and IDA-only countries and territories. [598] For non-LDC HIPCs, OLICs and IDA-only countries and territories however, the Recommendation will only apply until 2023. [599] As only an additional eight countries are HIPCs that are not LDCs, [600] with an additional two that are OLICs and eight that are IDA-only countries and territories, the expansion of coverage is thus limited. Secondly, both "investment-related technical co-operation and free-standing technical co-operation," as well as food aid are excluded from coverage by the Recommendation. The wording of the technical co-operation exclusion clause and the food aid exclusion clause are both very

[594] Ibid, para.2.
[595] Para 5.
[596] 'The coverage of the Recommendation suffers from numerous limitations, exclusions and derogations that significantly limit the range of the Agreement.' Chimia estimates that only 12% of total OECD bilateral aid is covered by the Recommendation. Chimia, supra note 583 at 101-102, 123.
[597] The further untying of aid was included within Goal 8 in the Millennium Development Goals and was urged at the International Conference on Financing for Development in 2002 in Monterrey, as well as included in the 'Addis Ababa Action Agenda' of the Third International Conference on Financing for Development in July, 2015. The untying of aid also remains a central aim of the Aid Effectiveness Agenda.
[598] However, it is thought that the Recommendation would cover approximately three-quarters of all ODA to LDCs and HIPCs, and is worth some USD $5.5 billion. Chimia supra note 583 at 122.
[599] Paragraph 21.
[600] These countries are Bolivia; Cameroon; Cote d'Ivoire; Ghana; Guyana; Honduras; Nicaragua; Republic of the Congo. Chimia notes that as just eight countries of the HIPCs were excluded from the Recommendation coverage, "As such, the inclusion of these countries has more symbolic than practical impact." Chimia supra note 583 at 102, Fn 32.

unclear.[601] Though in the latter case, the DAC Recommendation might be interpreted as referring to discussions on untying food aid within the WTO, the fact that this is unspecified (and in any case, progress on this matter within the WTO has been very slow), gives tacit support to the current food aid regime. [602] In any case (and thirdly), the Recommendation includes a derogation clause that permits DAC Members to "take measures inconsistent with the terms of this Recommendation" in exceptional circumstances "where they believe it to be justified on the basis of overriding, non-trade related, development interests." [603] No clarification is offered on what might reach this exceptional circumstance threshold and there is no oversight mechanism outlined for this clause. Finally, though the Recommendation does provide for a monitoring and evaluation mechanism, in fact, this is merely a reporting system. [604]

[601] In the former case, para 8 (ii) states "it is recognised that DAC Members' policies may be guided by the importance of maintaining a basic sense of national involvement in donor countries alongside the objective of calling upon partner countries' expertise.' In regard to the latter, para 8 (iii) states, 'it is recognised that DAC Members' policies may be guided by the discussions and agreements in other international fora governing the provision of food aid." In either case no elaboration is given of what 'national involvement' or 'agreements in other international fora' means.

[602] The United States donates roughly 50% of all international food aid and is the largest food aid donor. As its food aid is tied to domestic production, the USA procures over 99% of its food aid from American agricultural producers. Its food aid policy is also tied to domestic shipping requirements. Christie Kneteman, "Tied Food Aid: export subsidy in the guise of charity," (2009) 30 Third W Qty 1215 at 1216. Also Kimberly Ann Elliott & William McKitterick*, Food Aid for the 21st Century: Saving More Money, Time, and Lives*. Centre for Global Development Policy Brief, June 2013.

[603] Para 20. Derogations are simply to be notified to the DAC Chair and the OECD Secretary General – there is no oversight mechanism provided for, just a minimal reporting requirement.

[604] It consists of three elements. First, annual reports to the DAC on ODA flows; Members' technical assistance, food aid policies, as well as procurement practices; aid-recipient states' procurement practices, and individual DAC Members' concerns vis-à-vis the Recommendation. Secondly, 'input' into the individual Peer Reviews of DAC Members' ODA policies, and thirdly, a planned review in 2018. Ibid Para 21. One would not hold out much hopes for the content of this review. The Recommendation notes that a review of the earlier Recommendation carried out by the High Level Meeting in 2009 concluded that 'DAC Members fully met the commitments in the Recommendation to untie agreed categories of ODA and that improvements in effort sharing were significant and sustained.'

Taken together, I suggest that the weaknesses, gaps and limitations of the Recommendation undermine its capacity and ability to shift donor practices and policy on untying ODA in any real way. Though Chimia notes that the Recommendation has had deep resonance within the international community, [605] if one traces the international legal instruments referred to in the Recommendation, one can see that the Recommendation is really a palimpsest on liberalised public procurement markets. The Recommendation states that it aims to capture "the benefits of open procurement markets" for LDCs HIPCs, OLICs and IDA-only countries and territories[606] but it is clear that these markets are configured in a certain way. First, there is no definition – and thus limit – to what public goods and services can be marketised. Secondly, the Recommendation contains within it a detailed Procurement Regime consisting of several select legal and other governance instruments.[607] In my view, taken together, these instruments (one of which is an international convention) are focused solely on promotion of unfettered markets. Notably, any reference to national, regional or international human rights standards in the approach to the marketization of public goods and services is absent. Instead, and revealingly, the Recommendation exhorts "those responsible for procurement should promote respect from suppliers with agreed international standards of corporate social and environmental behaviour. This could be done through reference to environmental and social *considerations* in

[605] Chimia, supra note 583 at 123
[606] Para 3.
[607] Paras 14 – 16. The instruments listed are the DAC's Good Procurement Practices for Official Development Assistance, DAC(86)22 (Corrigendum, 2nd Revision), also reproduced in 'Development Assistance Manual: DAC Principles for Effective Aid. OECD 1992; the 1996 DAC Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement [DCD/DAC(96)11/FINAL]; the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions [C(2009)159/REV1/FINAL].

tendering procedures."[608] Thirdly, to compound the disavowal of any human, social, cultural, economic developmental or other possible goals that can be pursued through public procurement, the Recommendation states that "reinforcing partner country responsibility for procurement, with appropriate guarantees for effectiveness, accountability, probity and transparency is intrinsic to this initiative."[609] Therefore, the primary responsibility of aid-recipient states in their public procurement policies and practices is to the potentially interested commercial bidders and suppliers of goods and services. [610] The agency of the aid-recipient procuring state is oriented in one direction only – in service of private market dictates. This deliberately excludes consideration of an identity and a use of public procurement by the aid-recipient procuring state to progress and achieve social goals, a policy pathway that has

[608] Para 16. Italics added.
[609] Para 4.
[610] It is interesting to note that the first consolidated version of the DAC's Aid Effectiveness Principles included the Principle that 'Members will ascertain that aid recipients apply minimum standards of competitive procurement procedures and will reserve the right to review procedures before a supply contract is awarded.' It also included as part of this 'Principle' that Members will, 'as appropriate, request that the purchaser engage an independent qualified consultant or procurement agent whose tasks include the preparation of the bidding documents, the evaluation of the bids, assistance to the purchaser in the contract award as well as in the drafting of, and negotiations on, the contracts.' OECD, *Development Assistance Manual, DAC Principles for Effective Aid*, (Paris: OECD, 1992) at 115. Its 'Minimum Conditions for Effective International Competitive Bidding' include no reference to consideration of development goals or other non-cost-related factors as legitimate grounds for consideration in the tendering process. *Ibid* 116 – 118.

prior legal recognition at national, regional and international levels,[611] as well as receiving considerable scholarly attention. [612]

Thus, at the heart of this DAC Recommendation, lies an inherent tension between a poverty reduction-prioritised approach to public procurement and a neoliberal, markets-maximisation one, each with a different view of the aid-recipient state, (and donor) and of law and regulation. Carbone's research on the politics of untying aid includes a revealing quote from a DAC official that "the main priority for the DAC is effective competition and getting the best price for aid tenders: contracts must be awarded to the cheapest bidder, regardless of its long-term development impact."[613] Thus, it is perhaps not surprising that Fritz & Raza's analysis of the OECD's Arrangement on Officially Supported Export Credits concludes that it falls far short of the DAC's own Paris Principles on Aid Effectiveness.[614] While they propose greater "policy coherence" within the DAC approach to the untying of aid as a response to the several "inconsistencies" that they identify, this position – while understandable – fails to recognise the

[611] See for example, European Court of Justice case law, Corbeau judgement of 1993 where though it was acknowledged that the granting of special or exclusive rights to public undertakings might hinder the competition rules of the treaty, the Court also acknowledged that Article 106 (2) TFEU allowed Member States to grant such rights in order to ensure that the necessary services of general economic interest were provided, even if this meant that such rights were to restrict or even exclude all competition (Case C-320/91: para. 14). Later, in the BFI case (1998) the Court held that bodies that are governed by public law, and established for the specific purpose of meeting public interest needs, 'may choose to be guided by other than economic considerations. The fact that there is competition is not sufficient to exclude the possibility that a body financed or controlled by the State, territorial authorities or other bodies governed by public law may choose to be guided by other than economic considerations' (Case C-360/96: para. 43). For 'the needs in question are ones which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence' (Case C-360/96: para. 51).

[612] See for example, Christopher McCrudden, 'Using public procurement to achieve social outcomes,' (2004) 28 Natural Resources Forum 257; Christopher McCrudden, *Buying Social Justice. Equality, Government Procurement, and Legal Change*, (Oxford: Oxford University Press, 2007); Antoinette Calleja, *Unleashing Social Justice through EU Public Procurement*, (Taylor and Francis, 2015).

[613] Carbone, 2014:114.

[614] Fritz & Raza (2014: 774).

legal hierarchy and aporias within the governance architecture inherent in the Recommendation [615] that would likely ultimately undermine any humanitarian objectives pursued by a 'policy coherence' approach.

Thus, from the above analysis of the Recommendation on Untying Aid, we see that the soft law nature of the instrument belies the quite explicit 'hard' legal ordering that is contained within it. This internal legal logic is a highly particular one, one focused on the promotion of a markets-centred approach to the public procurement policies of aid-recipient states.

6. Conclusion

In this chapter, I described and analysed key legal governance technologies of the OECD and DAC that are central to the international governance of ODA. These are their respective legal mandates, the processes of membership, the structure of the OECD and DAC, and the legal and non-legal instruments of decision-making of both. I have shown that though these legal governance technologies are (mostly) clearly identifiable as formal law, they have additional features that intensify their juridical quality, and thus augment their authority and influence. First, the founding convention of the OECD legally inaugurates an almost limitless mandate for the OECD (on which the DAC's mandate is derived) for intervention in matters relating to economic development and the promotion of world trade in line with a Northern-centred transnational capitalist model of development. Within this jurisdiction, distinct and hierarchically differentiated subjectivities of the OECD (vis-à-vis other international

[615] Thus, the only formal law recognised in the Recommendation is the OECD's Bribery Convention. No international human rights law or other legal instruments at the national, regional or international level are referred to.

organisations), and OECD Members (vis-à-vis the rest of the world's states) is created. The former is granted authority to determine appropriate means by which to promote economic growth, and the mandate to implement these, with the latter forming the international community (if partial) from which the legitimacy of this universal mandate is realised. Secondly, this identity is a highly juridical one – it focuses on decision making, determinative policy-making etc. through organisations that are strongly based on information, data, deliberation and action. Thirdly, these legal instruments have strong juridification effects on Members, on non-members and on other "partners", as I have described in detail in relation to the OECD membership application process, and with the Recommendation on Untying Aid. Fourthly, the legal instruments themselves contain a strong internal legal logic. This is especially clear with the founding convention of the OECD, and though more implicit in the Recommendation on Untying Aid, I have shown how the Recommendation actually targets the public procurement policies of aid-recipient states. Fifthly, I have traced how performance and performativity (e.g. in the membership process and in the information-sharing obligations of Members) imbues the implementation of these legal instruments and contributes strongly to their juridical quality and legal effects (I will examine this element further in Chapter 11 on Peer Review). Finally, key to their reach and authority is a distinct blurring of legal and executive authority.

In this Chapter, I have shown how the jurisdiction of contemporary ODA is anchored in that of the OECD, inaugurated through its founding convention, and in the DAC, through its mandate. As we have seen in the previous Chapter, this governance space contains strong continuities with former international governance institutions. It echoes the language and the issues of representation of the League of Nations and mirrors its inflated influence in that its formal

reach and authority are far in excess of the mere number of states that are formal members of both the OECD and DAC. [616] These legal instruments are the anchor through which the OECD intervenes both directly and indirectly into a whole realm of issues, actors, locations and geographies under the rubric of 'development.'

At a simplistic level, the OECD - as an international organisation of less than 20% of existing recognised sovereign states in the world, the vast majority from the Global North and that are categorised as developed - has claimed a form of authority over international economic affairs that certainly is open to challenge on the grounds of democratic accountability and representation. However, through the analysis of the formal legal instruments above, and through the following chapters, I will show how these instruments create a solid foundation for the emergence and operation of other non-formal governance instruments such as policy positions, elaborated and implemented through bureaucratic and technocratic instruments. In the following chapter, I turn to examine key policy positions of the OECD on development, and the DAC on ODA, and trace how these articulate and augment the jurisdiction on development and ODA created through the legal instruments of the OECD and DAC respectively, and lend further weight to its governance signature.

[616] The OECD has 36 member states. The United Nations has 196, plus two observers – the Holy See and the State of Palestine.

Chapter 9 - OECD policy on development and the international governance of ODA – institutional and normative dimensions

1. Introduction

In the previous chapter, I explained how the formal legal instruments of the OECD and the Development Assistance Committee (DAC) (their respective mandates and structure, approaches to membership and decision-making instruments) are central to creating an international governance space with an almost unlimited authority to intervene within the domestic legal and policy sphere of Member states, applicant states, and non-members. Through these legal instruments the OECD and DAC claim a universal authority on international and domestic policy matters relating to the world economy, through a focus on the pursuit of economic growth and free trade. As I will show in this and the following chapters, a particular role for Overseas Development Assistance (ODA) is key to this project. These legal instruments create the context whereby, through institutional innovation within the OECD and DAC, several boundaries are blurred. These are between public and private; between the OECD as an international organisation with limited membership and with other international organisations with universal membership; between donors as a collective entity under the DAC, and aid-recipient states; and between states that are OECD Members and those that are not. Already, these legal instruments alone display distinct features of the elements of the governance signature outlined in Chapter 5. They are strongly juridical in that the OECD and DAC assume authority to decide upon and promote policies in both their Member and non-Member states that aim at achieving "sound economic expansion" within "the world economy." Through their membership application processes, and other legal and organisational instruments that develop

and monitor the implementation of these policies, profound legal repercussions on Member and non-Member states alike. Both the OECD and DAC have an identifiable internal legal logic or legal order with several features. This legal logic aims at the realisation of a markets-led, transnational neoliberal capitalist development model, through a juridification process that is identifiably constitutive, expansive and differentiated. It is clearly framed in legal terms, and obscures any tensions within the particular ranking of legal orders that this development model promotes. The ability of these legal instruments to mask the flawed basis of this universal authority is revealed in the irony that the OECD's membership consists of less than 20% of the recognised states in the world (the DAC is even more exclusive) revealing how these instruments create a unique form of non-representative authority, constituted through several kinds of legal instruments. Together, these create a robust legal foundation for the OECD's and DAC's jurisdiction on development and ODA.

In this chapter, I turn to examine the second of the governance technologies central to the OECD's and DAC's jurisdiction on development and ODA – this is the OECD's formal organisational policies on development, and the model of development that the DAC expects its donor members to pursue within their own national policies on ODA. I will show that, taken together, the OECD's policy discourse on development and the DAC's vis-à-vis donor ODA policy on pro-poor growth and poverty reduction, are key to its jurisdiction through two distinct, yet closely related, governance effects – normative and institutional. The normative effect relates to ideas about the kind of legal order that the OECD and DAC deem desirable to address issues

of the "common good,"[617] where questions of law, regulation, public policy and institutions are key. This normative agenda contains within it an internal legal order – the internal legal logic that I have earlier identified as key to the governance signature of ODA. In the section that follows, I will show that the OECD and DAC take an identifiably neoliberal approach to the role for law and regulation in debates on development and economic growth, with distinct implications for the legal subjectivity of states, and the relationship between states, people and markets. The institutional effect relates to how the OECD (and DAC) *itself* governs. This is not only about how it creates, legitimises, implements and monitors its ideas, but also how the OECD and DAC maintains, expands and entrenches its rule both internally (within its Membership, and within its various Committees, Directorates, Divisions and other organisational mechanisms), and externally (with Key Partners and by means of various institutional mechanisms through which it targets specific stakeholder groups such as other international organisations; regional international organisations; global business leaders; developing countries etc.). I approach this institutional dimension to the OECD's policy on development as a key component of how the OECD creates a jurisdiction through development policy discourse.

To summarise my analytical approach re. the key OECD organisational policies on development, and the DAC guidelines to donors vis-à-vis ODA's role in promoting that development model, I claim these have two strong governance dimensions - normative and institutional - that contribute in different yet complimentary ways to governance *of* and *by* ODA by the OECD and

[617] See Guzzini definition of governance in Chapter 1.

DAC. I trace and analyse the normative dimension through the internal legal logic implicit within the DAC's polices on development. [618] In doing so I reveal a neoliberal, transnational legal project at the heart of the model of development it promotes. I approach the institutional dimension of the OECD's policies on development as related to the establishment of a jurisdiction over which the OECD will assume authoritative governance. Here, the OECD's policy-making on development serves to delineate and expand new areas of international governance for the OECD itself.

Though a comprehensive longitudinal study of the OECD's approach to development remains both badly needed, and yet to be written, in the following section I focus on two recent moments of clarification and consolidation of the cornerstones of the OECD's policy approach to development, that illustrate how the OECD's policy discourse on development operates as a powerful jurisdictional technology. These two moments are the OECD's *New Approaches to Economic Challenges* (NAEC) initiative,[619] initiated in response to the 2008 global economic crisis, and the second is the *OECD's Strategy on Development* (Strategy)[620] initiated as the UN Millennium Development Goals strategy (to 2015)[621] was drawing to a close. The former reflects on critiques of the growth paradigm that were perceived to have significantly contributed to the 2008 economic crisis and its aftermath and thus is revelatory of the

[618] Recall that the internal legal logic is a key element of the governance signature of ODA.
[619] OECD Ministerial Council, *Final NAEC Synthesis New Approaches to Economic Challenges* (OECD: 2015).
[620] OECD, *Global Strategy on Development* (OECD, 2012), available at http://www.oecd.org/development/oecd-strategy-on-development.htm.
[621] The Millennium Development Goals (MDGs), based on the UN's Millennium Declaration (2000), contained eight goal areas. Here they are significant as they can described as the first comprehensive and universal policy on development. See UNGA, United Nations Millennium Declaration, 18th September 2000, A/RES/55/2. It was later succeeded by the UN's Sustainable Development Goals (2015 – 2030). However, their content is not important. What is important is the link between the OECD's decisions to respond to significant external initiatives with a turn to renewed policy-development initiatives internally.

normative role of the OECD's policy discourse on development. The latter exposes an institutional approach to governance – how the OECD used its normative role on development policy to rationalise and legitimise its *institutional governance* role in a crowded international institutional landscape. In section 3, I critically examine a strategy document produced by the DAC called *Shaping the 21st Century: The Contribution of Development-Co-operation,* (Shaping) that captures the latest iteration of DAC conceptual thinking on donor policies on ODA to achieve "pro-poor growth" (PPG), in a manner designed to engage with the then results that emerged from several UN Summits held during the early 1990's. This strategy articulated new subjectivities for aid-recipient states as development "partners" with donor ODA funding relationships reconceptualised as "partnerships." In my analysis of the content of all three documents, I aim to show how these policy documents are key instruments through which the OECD and DAC first, claim and exercise authority to proclaim as legitimate a neoliberal transnational economic order with its own internal legal logic (the normative governance dimension), and second, expands and deepens their legitimacy as the international locus of normative authority on development, thereby solidifying the basis of its own self-proclaimed jurisdiction (the institutional governance dimension).

2. Consolidating international authority on development– the OECD's *New Approaches to Economic Challenges* (2012) initiative

The OECD's underlying approach to development is based on a model heavily reliant on economic growth, [622] and thus an analysis of its response to challenges to the economic growth

[622] Or "pro-poor economic growth" a term that emerged within OECD development policy discourse in the 2000s. For details on this concept see its publication, 'Promoting Pro-Poor Economic Growth – Policy Guidance for Donors,' DAC Guidelines and Reference Series, (OECD: 2007). The concept, as one to guide policy decisions,

paradigm is deeply revelatory of its institutional approach to development. The OECD launched its *New Approaches to Economic Challenges* (NAEC) initiative 2012 to "reflect on the lessons from the financial crisis and to look into the shortcomings of analytical models, and to promote and adopt new policy tools and data."[623] Undertaken through an extensive internal and external engagement process, the NAEC aims at a "new growth narrative" to guide policy-making. [624] However, the approach adopted by the OECD to reflecting on the latest systemic challenges to a model of development premised on economic growth refines one adopted very early on in the OECD's history. Schmelzer's micro-study of the OECD's approach to the concept (or paradigm) of economic growth, and its institutional response to challenges to this during

remains ill-defined, and implies a range of understandings from policies that address income redistribution to policies that focus on poverty reduction. The OECD's use of the term builds on earlier ideas from David Dollar & Art Kraay who produced "Growth is Good for the Poor' for the World Bank (WB Development Research Group) in 2000, (claiming "[G]rowth on average does benefit the poor as much as anyone else in society, and so standard growth-enhancing policies should be at the center of any effective poverty reduction strategy.' at 27. Their data and arguments were the basis of the Bank's influential World Development Report 2000-2001 titled "Attacking Poverty." Though the data and modelling undertaken by Dollar and Kray were heavily critiqued at the time, and subsequently, their assertion of a causal relationship between economic growth and poverty reduction still holds sway in orthodox development economic thinking. See Malte Lübker, Graham Smith & John Weeks, "Growth and the Poor: A Comment on Dollary & Kray," Centre for Development Policy and Research, & The Department of Economics, School of Oriental & African Studies, University of London, October 2000. They state ''To state without regard to a country's economic characteristics, social structure, or political power relations that one specific package of economic and political policies will prove in practice to be universally good for the poor is to move well beyond the boundaries of normative economics into ideology." *Ibid*: 19. Subsequently, in the 20-teens, the term "inclusive growth' has become more prominent in OECD policy discourse, of which the NAEC is one thread.

[623] See OECD's website on the NAEC - http://www.oecd.org/naec/.

[624] OECD, *New Approaches to Economic Challenges (NAEC) – Update, June 2018.* Available at http://www.oecd.org/naec/. However, the likely dogmatic, mythologising character of the report and its contents are signalled in a recent statement by the OECD's Chief of Staff and Sherpa to the G20, Gabriella Ramos, who leads the NAEC initiative within the OECD. "We need a new approach to economics that isn't just about quantitative economics. An approach that integrates behavioural economics and complex systems theory, as well as economic history. We also need a new narrative to integrate all these different, often conflicting influences. So what might such a new narrative look like? The report concludes that it should be based on the best facts and science available, and contain four stories: a new story of growth; a new story of inclusion; a new social contract; a new idealism." Gabriela Ramos, 'We need an empowering narrative,' OECD Insights 23 June 2017, available at http://oecdinsights.org/2017/06/23/we-need-an-empowering-narrative/.

the period 1968 – 1974[625] offers important insights that certainly are relevant to the OECD's approach to economic growth and development today. If we understand economic growth to be a highly normative concept,[626] we can trace the prominence of these ideas, and the privileging of economic growth in the OECD's main institutional policy papers on development, down through the years.[627] What is key here is not the continuity and longevity of this idea, but rather how its contestation from within and outside of the OECD, have led to modifications to, and an ever-more sophisticated development of, *institutional* responses that ultimately serve to broaden and entrench the OECD's authority and governance of both Members and non-members through the newly adapted techniques and technologies applied to address the challenges to development itself. [628] In this way, the normative and institutional aspects of the

[625] Schmelzer's study is a history of the evolution of economic thought within an international organisation within a particular period of time. Though his work mainly focuses on the engagements and activities of economic elite thinkers and bureaucrats within and outside of the OECD during that time, his work contains tantalising glimpses of institutional practices that emerged at that time. (Here I noted references to a heightened organisational attention given to the use of statistics and data gathering techniques, not surprising in an international organisation dominated by economists and that professional and disciplinary outlook). Mattias Schmelzer, 'The crisis before the crisis: the 'problems of modern society' and the OECD, 1968-74,' (2012) 19 E Rev Hist 999 and later, Matthias Schmelzer, *The Hegemony of Growth - The OECD and the Making of the Economic Growth Paradigm,* (Cambridge University Press, 2016).

[626] Schmelzer proposes that it is based on four interlinked ideas – that GDP is an accurate and acceptable measure of economic activity; that growth is a panacea for most if not all economic and social ills (including low job creation and unemployment; budget deficits; global development, especially in the South, and even environmental destruction caused by development); that growth is almost synonymous with progress, improvement and development, and finally, that growth is essentially unlimited providing that states and governments pursue the correct macroeconomic instruments to pursue growth Schmelzer (2012) supra note 652 at 1000-1001.

[627] These include the DAC's 'Guidelines and Reference Series' – see Chapter 11 for a more detailed explanation of the role of the documents in this Series in Peer Review of donors' development co-operation policies.

[628] This mirrors the evolutions within the OECD's thinking on growth from being focused on economic growth in the 1980s and 1990s, to that of green growth in the early 2000s and more recently, to an institutional focus on 'inclusive growth'. Thus it recently developed an 'Inclusive Growth Framework' that includes a measure of "multidimensional living standards" designed to analyse the extent to which growth - in a given country and over a given period - translates into improvements across a range of areas considered important. The data challenges of this initiative are acknowledged, however, to be significant. See section 'Our approach to inclusive growth' at http://www.oecd.org/inclusive-growth/.

OECD's approach to development policy are *co-constitutive* of its evolving international governance role.

Schmelzer's narrative describes how growth became a central organising principle of the OECD quite early in its lifetime.[629] Almost at the same time, critiques of this paradigm across several fronts emerged. These ranged from challenges to the quality of life enjoyed by people in industrialised countries and to the protection of the environment, arising from within the discipline of economics itself, from within certain Member states,[630] and other international forums.[631] These prompted the OECD to develop an institutional response to these critiques. Though Schmelzer doesn't dwell in detail on the significance of the nature of the response, he documents how the resulting studies and policy debates focused on two areas. These were the development of alternative indicators and the establishment of comparative measurement techniques for "quality of life" that could be used to supplement or improve GDP as a measure,[632] and the founding of an Environmental Directorate within the OECD, along with a supervisory Committee, to lead debate and set agendas on policy development in this area. [633] These responses are based on the premise that new or modified forms of knowledge

[629] In 1961, the OECD declared the decade of the 1960s as one in which it would raise its combined GNP by 50%. Matthias Schmelzer, "The crisis before the crisis: the 'problems of modern society' and the OECD, 1968-74," (2012) 19 European Rev Hist 999 at 1001

[630] These focused on issues of pollution, over-crowded cities, the anomie of the individual etc Ibid:1003.

[631] Schmelzer notes the wide influence of 'The Limits to Growth' publication, released by the Club of Rome in 1972. Ibid.

[632] This was to be undertaken in three overlapping steps from 1970 – 1985 where, in the first phase (1971–1973), the organization aimed to find consensus on a definition of 'quality of life'"; then, (1973–1980), to proceed toward defining indicators that measure the quality of life; and the third step (1976–1985) was to partially implement and voluntary report on some of these indicators. Schmelzer notes that this plan was only partially successful. Matthias Schmelzer, *The Hegemony of Growth*, (Cambridge University Press online, 2016).

[633] The Committee's deliberations helped to develop a number of foundational concepts aimed at reconciling the demands of environmental protection with that of economic growth, such as the 'Polluter Pays Principle.' This was further supplemented with a small and restricted Sub-Committee of Economic Experts, in which economists from selected member countries developed environmental policy frameworks. Ibid: 290-91.

technology – expert knowledge (the Directorate, Committee and sub-committee of experts), and the production of indicators - would reorient policies away from their preoccupation with economic growth and better address social (and environmental) well-being. In summary, they represented a belief that knowledge technologies would successfully achieve political goals.

It is perhaps not surprising that this did not happen, and Schmelzer identifies several reasons for this – mainly to do with the technical challenge posed by the task, a lack of sufficient resources to adequately progress the project, and a shift in Members' attention away to addressing the impacts of the oil shock of the 1970s. [634] Here, I extend his analysis to examine the governance dimensions and implications of these responses, and more particularly, the wider significance to the evolution of international governance *per se*, of the turn to knowledge technologies as the primary response to what was essentially a political governance question (how to reconcile economic growth and environmental protection) by an international organisation, thereby also shaping the response of its Member states.[635] Four governance dimensions of the OECD's institutional response stand out – (i) the technicisation and (ii) the 'expertisation' of an issue that challenges the economic growth paradigm, thereby depoliticising it and giving experts and expertise a greater role in conceptualising and directing responses; (iii) the further deepening and development of technical (data and indicators) and bureaucratic (reporting, monitoring, a Directorate and committee of experts etc.) modes of

[634] Ibid 308-310. However, clearly, the project has never died. The current OECD iteration of the quality of life indicators is termed the OECD 'Better Life Index' – see http://www.oecdbetterlifeindex.org/#/11111111111.
[635] Unlike Schmelzer, I take the position that the perceived success or failure of these responses is not an indicator of their effectiveness. Rather, their significance lies in how new institutional governance relations evolved internally within the OECD, and externally between the OECD and other international actors, as an institutional response to the crisis. I claim this institutional strategy of crisis response is a key jurisdictional technology, that the OECD uses to evolve and re-entrench its authority and governance role internationally.

governance, and (iv) the creation and augmentation of OECD normative leadership in a pressing area of international economic policy (thereby enabling it to claim authority in this arena).

Taken together, these dimensions have a number of governance effects. First, there is a shift towards a form of executive rule by the OECD which, though formally rationalised by the need to develop pragmatic, scientific responses to challenges to the growth paradigm, serves to expand and consolidate the OECD's epistemic role in relation both to the domestic policy development of its Members, and wider international relations.

Secondly, this kind of response - representing a move towards calculation as a mode of direction, control and thus governance - can be said to foster a false image of ideological and political neutrality for the OECD as an international actor, and more especially within the domestic political spheres of its Member states. It signals the resort to a particular kind governance by the OECD as a legitimate and appropriate response to a deep challenge to the economic growth paradigm, the legalised raison d'etre of the OECD, as I have shown in the previous Chapter. This response has three distinctive silences. First, there is a silence on the identity and the means by which those who have greatest influence on the issue at hand benefit from, and maintain the order then in place. Secondly, there is a silence on what Member states (as Northern states with highly powerful roles in international relations), the OECD as an international organisation, and other actors can and should do to change a problematic economic growth-focused world and the conditions that perpetuate this. [636]

[636] I draw here from ideas on neo-liberal governmentality that examine the rise in a discourse of reliance. See for example, Jonathan Joseph, "Resilience as embedded neoliberalism: a governmentality approach," (2013) 1 Resilience 36; Brad Evans & Julian Reid, 'Dangerously exposed: the life and death of the resilient subject', (2013) 1 Resilience, 83 at 92.

Thirdly, there is a silence on the possible role of formal law and regulation to equitably address the governance questions posed by the consequences of, and tensions within, economic growth, as any legal and regulatory proposals made almost always focus on the protection and promotion of economic growth over other societal goals. From a governance perspective, these aporias are significant to the choice of policy options articulated through such an approach that become imagined as possible and feasible to the OECD and its Members.

Thirdly, these dimensions shift the resolution of these challenges to and tensions within economic growth farther away from dedicated political arenas at the international, regional and national levels. By focusing on addressing these issues within the OECD – an organisation whose membership is made up of the most economically powerful states in the world and excludes the majority of the world's states – the OECD becomes the *de facto* site of governance where responses to economic challenges that threaten the more powerful Northern economies become proclaimed as universal, and where response to these universal economic problems are articulated and mainstreamed as orthodox and appropriate economic policy. This occupation of a transnational policy space denudes the capacity of other international policy spaces with a more universal (for example, the UN) or more regional (such as regional economic organisations) membership to develop alternative, or heterodox analyses and policy responses.

Since then, this mode of institutional response of the OECD has been cyclically repeated whenever a crisis of sufficient severity necessitates a questioning of the fundamentals of the growth paradigm. This response consists of a process of reflection within the OECD, undertaken with methods similar to those that were developed in the OECD's early days, and resulting in

similar outputs.[637] The 2008 financial crisis prompted the latest iteration of this cycle, and resulted in the OECD establishing the NAEC. Though recognising the flaws in orthodox economic theory and ideas about development, along with those inherent in the models and instruments that evolved from these, [638] the substance of a report of the NAEC delivered at an OECD Ministerial Council meeting in June 2015, repeats all of the above-mentioned aporias, as well as the features of an OECD governance approach and an approach to general governance responses, that were evident in its first substantive reflection exercise undertaken in response to "The Limits to Growth."

Continuing the earlier precedent, the OECD adopted a highly sophisticated organisational response. It approached the NAEC as a "multi-stakeholder initiative"[639] divided the NAEC

[637] See previous iterations - almost one in every decade - such as the production of the very influential McCracken Report (1977) in response to the stagflation of the 1970s which, among other things, provided legitimacy to later critiques of the welfare state in the 1980s, while also providing improved analytical tools to undertake and underpin more detailed subsequent reviews OECD Members' economic policies especially in relation to labour and employment policies. Later, there was the 1987 report on "Structural Adjustment and Economic Performance" (OECD, 1987) which laid the ground for proposals on structural policy reform; the 1997 OECD Report on Regulatory Reform (OECD, 1997) which proposed seven recommendations to underpin approaches to regulatory reform that, though framed as applicable broadly and across sectors, included specific recommendations on regulatory reform to create of markets, and promote competition, trade and investment. It proposed that public policies such as protection of health, safety, and environment are '…better served by using competition-neutral instruments, such as well-targeted social regulations and market incentives, to change behaviour in competitive markets, rather than using economic regulations to restrict competition, claiming 'control of economic aspects such as the number of firms, or their size, services, and prices' is not necessary for such protection. *Ibid* 34.

[638] 'Economic models that rely only on inputs such as GDP, income per capita, trade flows, resource allocation, productivity, representative agents, and so on can tell a part of the story, but they fail to capture the distributional consequences of the policies we make, and do not address the fact that the growth process has only benefitted a few. They do not capture natural depletion, or incorporate environmental damage as liabilities. On the contrary, they assume that, by growing the pie, inequality of income and opportunities will diminish (the trickle-down effect), or that you can always clean after you grow. So we need a full re-vamp of our analytical frameworks and the assumptions that we make, to better capture the reality." Gabriella Ramos, OECD Chief of Staff and Sherpa to the G20. 'We need an empowering narrative' (22 June 2017) at http://oecdinsights.org/2017/06/23/we-need-an-empowering-narrative/.

[639] This was led by a working group, chaired by the OECD Secretary-General, comprised of representatives from OECD Member and Partner countries, various OECD policy committees (including its committee on business and on trades unions), and notably, its External Relations Committee and Global Relations Secretariat. See http://www.oecd.org/naec/objectives.htm

initiative into three pillars,[640] under which it undertook nearly 30 distinct projects that drew heavily on expertise both within and outside of the OECD. What did this demanding exercise produce? In the 2012 report, there are multiple (to the point of tedium), references to the need for better data, analytic and measurement instruments and economic models in order to address the complexities of understanding and addressing the challenge that growth "delivers progress for all."[641] In relation to the three aporias, the 2012 NAEC report is marked by the absence of any sharp analysis of the actions and decisions of policy actors and institutions that most contributed to the crisis.[642] Solutions, though framed as "an ambitious policy programme that requires political leadership as well as careful crafting and implementation," are instead bland-to-the point-of-meaningless exhortations. [643] Policy recommendations to states range

[640] Pillar 1. Reflection & Horizon Scanning (7 projects including ones titled 'A3 - The role of the financial system in the crisis and reforms required to promote sustainable growth' and 'A6 - How much scope to achieve growth- and equity-friendly fiscal consolidation?); Pillar 2. Policy Trade-Offs and Complementarities and Pillar (with 16 projects including ones titled 'B4 - Do policies that increase GDP per capita also increase median income?', ' B6 - Closing the loop: how inequality affects economic growth,' and social cohesion?' and 'B12(b) – Increasing the resilience of economies to exogenous shocks (Finance and resilience)', and pillar 3. Institutions and Governance (included 7 projects such as 'C1 - Revisiting the social contract: rebuilding trust for sustained economic recovery,' 'C5 - Promoting inclusive growth through better regulation,' and 'C6 - Implications of globalisation for competition.' These projects all drew heavily on expert knowledge, and information, data and modelling, from within and outside of the OECD.

[641] For example, 'The OECD should deepen and accelerate its efforts to build new cross-country datasets and to develop new international accounting standards applicable to economic data that provide a coherent and integrated view of the myriad data sources currently used …. Improved cross-country datasets would help to design better policy recommendations, and to support OECD Members in adopting more relevant and effective policies.' (ibid: 23); 'A range of new measurement frameworks, data, analytical approaches, assumptions and modelling are needed,' (ibid: 9); 'Governments also need better data, better analysis and ultimately better policies to address the declining levels of trust in institutions.' (Ibid: 25).

[642] The causes of the financial crisis are described thus – 'At its heart was increasing financial market integration and interdependence that followed deregulation in the 1980s and the 1990s which, combined with insufficient supervision, contributed to the build-up of unsustainable financial imbalances. The crisis erupted against the backdrop of a range of weaknesses in many countries' financial sectors, including flawed incentives across a wide spectrum of financial market participants. The interplay between the supply of credit with the demand for mortgages and securitised bonds (SBs) buttressed by institutional factors such as the rise of shadow banking was a critical determinant of the crisis.' Ibid 9.

[643] Thus, in relation to 'a change in objectives and perspectives,' the OECD (framing itself subjectively as the NAEC) calls for 'a greater focus on well-being and its distribution to ensure that growth delivers progress for all…for better integration of the financial sector and related risks in the analysis….[for] analysing the global economy as a

from the disarmingly generic, [644] to the sometimes puzzling, [645] to at times, contradictory. [646] On the role of law and regulation to make growth more equitable, the NAEC includes only two references. Both approach law's role in essentially a neo-classical terms, with the role of the state, laws and institutions being primarily focused on supporting a market ideal of facilitating efficient transactions, [647] and additionally – given increasingly globalised market integration –

complex adaptive system [as well as recommending] … the adoption of a longer-term perspective that considers how economies are embedded in institutions shaped by history, social norms and political choices…[recognition of] the importance of the multidimensionality and distributional effects of policies.' Ibid: 3-4.

[644] "Taxation systems need to be reformed to ensure they are progressive enough…Governments should promote gender equity in education, employment and entrepreneurship, as this is a key factor in economic development, growth, and well-being'." Ibid. The quality of policy recommendations does not improve with the greater specificity of the NAEC's projects' focus.

[645] Thus, in relation to tax reform, the OECD has previously undertaken a substantial "Tax and Economic Growth" project on tax reform to promote economic growth. In the NAEC report, it revealingly (if refreshingly) commented on the project as follows - "The Tax and Economic Growth project and its recommendations have been very successful in helping countries to put their economies on a higher economic growth path through tax reform. *Yet, many country Delegates have indicated that the recommended reforms are difficult to implement from a political economy perspective, also because the recommendations do not necessarily contribute to reducing inequality*." (Italics added). However, even in spite of this recognition, though the equitability of the tax policy recommendations made is clearly signalled, the substance of the recommendations in terms of achieving overall income equality goals are suspect. For example, "Increases in VAT rates (if any) should be accompanied with VAT base broadening – in particular the removal of reduced VAT rates on expenditure such as restaurant food, hotel accommodation and cultural goods that benefit the rich substantially more than the poor….There might be a case for increasing the taxation of personal capital income, potentially with a mild degree of progressivity, as a result of the strengthening in rules for (automatic) exchange of information for tax purposes between tax administrations." Ibid: 92. Similarly, the policy recommendations made under project B7 - Analysing growth and equality trade-offs in taxation states ' completely exclude consideration of corporation tax (especially surprising given the OECD's leadership in the BEPS tax evasion initiative). Elsewhere, one can find some confusingly worded statements on the merits of various taxation policies such as the following, '[W]ell-developed tax and transfer systems tend to reduce household-level economic instability. Moreover, household-level economic instability tends to be greater in more unequal countries, partly because policies such as the tax and benefit system help reduce both inequality and volatility.' Ibid: 31.

[646] Thus – in relation to project B12 (b) - Increasing the resilience of economies to external shocks (Finance and resilience), a policy implication identified is worded as follows – "Relaxing employment protection legislation for regular workers and product market regulation from very tight to moderately tight restrictions increases worker-level economic instability. However, deeper reforms which result in highly flexible labour markets and very competitive product markets bring greater individual-level economic stability (in addition to stronger growth)." Ibid: 104.

[647] Chantal Thomas, 'Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutionalist Critique of Institutionalism,' (2010-11) 96 Cornell L. Rev. 967. Indeed, elsewhere in the document the NAEC displays a continuing fealty to the principle tenets of the discredited Washington Consensus with its focus on the liberalization of trade, privatization of investment, fiscal austerity, and monetary stabilization as the basis of responsible economic governance.

the desirability and necessity of ensuring a co-ordination of regulatory regimes within and across jurisdictions towards that end. [648] Any ambivalence of the OECD to a role for law and regulation in making growth more equitable is clearly oriented towards progressing the latter. [649]

What is of interest here are the governance *effects* of the proposals within the NAEC report. Recall earlier that I identified two implications of particular importance that were evident from the OECD's first forays in the early 1970s into responding to systemic challenges to the growth paradigm – its functions of rationalising, legitimising and augmenting the OECD's own leadership role in this area of international relations, and of pacifying the patently political nature of governance questions arising (at the national and international levels) through

[648] As example of the NAEC's neo-classical institutionalist approach to law's role, see "Well-functioning product, labour and risk capital markets as well as policies that do not trap resources in inefficient firms – including efficient judicial systems and bankruptcy laws that do not excessively penalize failure – help firms at the national frontier to achieve a sufficient scale, enter global markets and benefit from innovations at the global frontier." Ibid: 111. As example of the NAEC's exhortation to states to attend to a transnational co-ordinating role, see its framing of the need for co-ordination of competition law as follows – "Competition authorities can generate harmful externalities on one another's economies if the authorities disagree about the effects of a global merger. Furthermore, a decision to block a merger by a large jurisdiction effectively vetoes it. Therefore, mergers involving the largest global companies will become increasingly difficult, as multiple approvals are required and the merger must satisfy the most cautious of investigating authorities. Administrative costs from multiple parallel investigations are high and delays in closing deals impose a variety of costs on business." Though the NAEC also recognises the significance of competition law to addressing cartels, it is clear that its problem tree arising from lack of co-ordination focuses more on the negative impacts to business' growth and transnationalisation. "Co-ordination failure can have a number of perverse effects. In particular,(1) inconsistent international treatment of the same merger could lead to an otherwise harmless and efficient merger being blocked or a merger deemed harmful by certain jurisdictions being permitted; (2) refusal of requests to co-operate can make it difficult for competition authorities to enforce their national laws; (3) duplicative and potentially excessive amounts of information are generated by multiple jurisdictions." Ibid: 119-121.

[649] The summary of project A3 on reforms of the financial system includes the bland recommendation that "Going forward, policy makers need to take a three-pronged approach to develop a sound and comprehensive system that serves the need of the real economy: restoring banks' health to improve bank lending, supporting the development of capital market finance, and preserving open and orderly capital movements regimes." But even this is delivered with the stern proviso that 'However, in designing the regulatory framework of the new financial landscape, policy makers need to balance stability and growth.' Meeting of the OECD Council at Ministerial Level, Paris, 3-4 June 2015, *Final NAEC Synthesis New Approaches to Economic Challenges* (OECD: 2015) at 71.

technocratisation and bureaucratisation. From this perspective, is impossible to escape the conclusion that, more than forty years later, the NAEC has served a similar purpose for the OECD. It is indeed telling, for an organisation with a variety of international law-making instruments available to it, that none of the recommendations from the NAEC (2012) report include consideration of a need for the OECD to develop legal or regulatory frameworks to address the challenges identified in the report. [650] We have already noted the complete absence of references to a possibility that states could promote greater economic equality and inclusion by strengthening their legal and regulatory frameworks in specific areas such as, for example human rights, racism, gender and other forms of inequality,[651] of indeed in policy areas such as taxation, housing and health services provision. On the contrary, the NAEC final report final section on "How to ensure continuous improvement going forward?" focuses entirely on tracing pathways for the OECD to build on this reflection process through a two pronged approach. First, it focuses on the steps necessary to enhance the OECD's analytical frameworks so as to retain its position as a recognised thought leader, (while modifying its internal organisational mechanisms to facilitate greater horizontal co-operation on NAEC-identified issues thereby enhancing possibilities to achieve this goal). Secondly, and at the same

[650] Reference is made to reviews of some OECD instruments for example in relation to corporate governance – see Ibid: 70. However, no references are made even to areas where the OECD has developed legislative instruments e.g. it Model Tax Convention on Income and Capital, its Tax Information Exchange Agreements, or guideline principles e.g. the OECD's Recommendation of the Council on a Policy Framework for Effective and Efficient Financial Regulation (2009) 26 November 2009 - C(2009)125 which contains the rather puzzling definition of the precautionary principle as "Precaution: A precautionary approach is warranted in financial regulation; policymakers should proactively anticipate and address emerging risks and problems and not initiate reforms solely in response to the onset of a crisis." See in the OECD's legal database at https://legalinstruments.oecd.org/Instruments/ListBySubjectView.aspx.

[651] Note that this would be in line with the recommendations within several of the General Comments of the UN Committee on Economic, Social and Cultural Rights on states' obligations to respect, protect and fulfil their ESC human rights.

time, it seeks to engage even more deeply with its Members, non-member governments and Key Partners in order to scrutinise and learn further from their approaches "on the ground".[652] While it may be an exaggeration to describe this approach as essentially a parasitical, self-centred organisational response, it is not an exaggeration to highlight that there are clear political and governance implications arising from this response. If the legal and political governance questions arising from the financial crisis have been muffled and distorted to being beyond recognition as such, then the OECD's response can only be analysed as one which obfuscates and ultimately refuses to address the legal and political governance questions that arise from the financial crisis, whatever the organisation's statements to the contrary. This kind of response can fairly be termed as a strategy of "political diffusion by technocratisation."[653]

If the OECD has responded to normative challenges to the fundamentals of orthodox economic policy approaches with such a set of ideas (one that is strongly oriented towards addressing OECD institutional considerations, over critical consideration of the areas and normative responses to deficiencies in the paradigm and knowledge elements), its creation of an organisational strategy on development is deeply revelatory of how it proposes to maximise the

[652] See Ibid 57-59.

[653] While it is an extraordinarily ambitious challenge to devise macro-economic policies applicable across very different countries, each with its own unique history, political establishment, institutional and demographic make-up etc., I would offer the additional critique that the NAEC's presentation of the policy ideas, framed as 'there is no alternative', is also problematic. By not identifying and clarifying as such, the underlying neoliberal premises upon which its policy prescriptions are based, by not acknowledging (even in footnotes) well-documented points of divergence and disagreement on those policy prescriptions, the NAEC is easily identifiable as an ideological treatise. This is directly at odds with the OECD's self-presentation of its work as data-based and –driven, implying an objective and neutral position on economic doctrine. A detailed critique of its policy prescriptions is beyond the scope of this paper at this time.

opportunity provided by an institutional response to a policy question to augment and consolidate its governance, both internally and externally.

Crucially, from an ODA governance perspective, is a recent OECD organisational re-orientation – it has re-focused on development as an organisational priority. In 2012, the OECD produced a *Global Strategy on Development*[654]in which it framed key changes to the global economic landscape, as challenges to its approach to its mission, articulated through the concept of development. Produced just prior to the target end-date of the UN Millennium Development Goals in 2015, and just after a key shift in OECD-led international thinking on development co-operation, the Strategy re-focused the OECD's approach to development through activities designed to deepen and expand its cognitive role (the generation and use of expert knowledge to be used in its peer learning/influencing and rules-generation activities) through a more comprehensive and deliberate outreach strategy undertaken through partnerships and other means. A critical reading of the *Strategy* suggests that at a key moment of institutional reckoning, the rubric of development now becomes the metaphor and means through which the OECD seeks to legitimise, maintain and expand its global ideological and policy reach. This will be further explored through a discussion on the OECD's institutional mechanisms that focus on development, below.

At the OECD's 50th anniversary Council Meeting at Ministerial level, its Ministers endorsed a new *Vision* in which it identified the need for a "new paradigm for development" towards strengthening the OECD's contributions to "higher and more inclusive growth in the widest

[654] The OECD has a special webpage for this initiative - http://www.oecd.org/development/oecd-strategy-on-development.htm.

array of countries" to achieve its mission of "promot[ing] stronger, cleaner, fairer economic growth and to raise employment and living standards."[655] Framed as a necessary organisational response to several "challenges,"[656] the strategy's aims are to (i) integrate the perspectives of developing countries in OECD analyses and policy advice; (ii) more effectively combine and consolidate the OECD's expertise, and (iii) better leverage the OECD's policy recommendations, practices and instruments by identifying the impacts of OECD policies on developing countries. [657] The approach outlined consists of four elements (i) building on "core expertise and experience," now re-framed as primarily development-oriented,[658] (ii) leveraging "comparative advantages," identified as its role in providing policy dialogue and peer learning,;[659] (iii) applying a "more comprehensive and inclusive" approach, whereby the OECD needs "to learn from diverse growth and development experiences, reflect them in its analytical frameworks and policy advice; and better leverage its collective expertise and resources" and finally (iv) adapting frameworks, upgrading skills and deepening partnerships. To progress the latter, the

[655] In several instances in its Vision document, it referenced its origin story (in the Marshall Plan) and the mandate articulated in its founding convention. 'OECD 50th Anniversary Vision Statement' C/MIN (2011) 6, Meeting of the OECD Council at Ministerial Level, Paris, 25-26 May 2011. It also mandated the OECD to design a Strategy on Development described as 'consistent with the Organisation's founding mandate to promote development within and beyond

[656] Summarised as a changed ('beyond all recognition') global economic landscape characterised by a changed 'world's centre of economic gravity' oriented towards developing economies and signalled by the emergence of the G20; a diversity of models of growth and development; changed development finance instruments and the role of ODA; a changing geography and nature of poverty, along with challenges arising from the economic crisis, climate change, food security etc. *Ibid*: 2-3.

[657] OECD *Global Strategy on Development* (OECD, 2012), at 3, available at http://www.oecd.org/development/oecd-strategy-on-development.htm.

[658] "It has promoted policy dialogue on development between members and developing economics based on rigorous analysis. IT has also worked to promote the social and institutional foundations of long-term prosperity. IN 1996, the OECD championed a series of ambitious development objectives, including halving the proportion of people living in extreme poverty by 2015. These were to become the basis for the MDGs." It identified its 'Economic Outlook' publications on Africa, Latin America and South-East Asia, along with its engagements with the Middle East and North African regions as key initiatives in this engagement with developing countries. Ibid. 3-4.

[659] It identifies as key to its legitimacy in this role as the fact that it is not directly engaged in field-based projects or in financing development "This is an advantage as it offers an 'arms-length' perspective." Ibid: 4.

OECD states it will target "strategic" partnerships with international and regional organisations on particular initiatives.[660] These are to be operationalised at several levels, including with Members through a "Policy Coherence for Development" (PCD)[661] approach; with "developing countries and other relevant international and regional institutions" through dedicated engagement in major international processes such as the post-MDG framework, the G20 (and its Development Agenda in particular) and the Global Partnership for Effective Development Co-operation, and with developing "partner" countries through tailored multidimensional policy reviews[662] and through regional approaches [663] – termed "clustering" where OECD

[660] Examples identified include the World Bank (on the Stolen Asset Recovery Initiative); the UNDP (on follow-up to Busan, the WTO on Aid for Trade, and others such as the Food and Agriculture Organisation, the UN Regional Economic Commissions and the Multilateral Development Banks.

[661] This concept is vaguely defined by the OECD, a fact that enables it to discoursively operate both in a catalytic and directional way to leverage greater cohesion within policy frameworks of the OECD and those of its Member states, as well as those of other states that it undertakes Reviews, in order to sharpen and prioritise a focus on the goal of the promotion of economic growth when considering a range of policy areas where the OECD sees it has authority including 'environmental, agricultural, fisheries, economic and financial policies, as well as … in the areas of trade, migration, security, energy, science and technology.' For its understanding of PCD, see an earlier OECD Ministerial Declaration on Policy Coherence for Development which states, 'We note with satisfaction the improved organisational mechanisms to promote coherence that have been put in place at the OECD and at country level, reflected inter alia in the OECD/DAC peer reviews as progress towards political commitment, better coordination, enhanced analytical capacity and monitoring of results,' OECD Ministerial Declaration on Policy Coherence for Development, C/MIN(2008)2/FINAL, Meeting of the Council at Ministerial Level, 4-5 June 2008.

[662] In an Annex within the SD document, the reviews are described as follows – "The reviews would take a comprehensive, diagnostic approach on the constraints to economic and social development in the country and on the interaction and coherence between the country relevant policies. They would build upon and combine existing expertise across the Organisation (e.g. economic surveys and assessments, Going for Growth, Getting it Right, Employment Outlooks, social policy brochures, PISA and PIAAC, Measuring Progress of Societies) and provide a basis on which to build an approach to country-studies more apt to fold employment, skills, green and social policies into the broader objective of development. They would involve active collaboration across the OECD and be conducted in close co-operation with the concerned country and partner institutions (e.g. Regional Development Banks). The reviews would contribute to define priority areas for future work with the OECD and to developing a new, comprehensive approach to economic assessments." *Ibid*. Annex 1 at 10.

[663] Ibid: 3-5. See also section entitled 'Platform for regional economic monitoring' in which the necessity of OECD engagement within regional initiatives was clearly detailed. "Regional groupings are increasingly looking to OECD expertise for enhancing their economic monitoring capacities and contributing to regional integration and equitable economic development. Building on OECD Regional Economic Outlooks and in collaboration with regional partners – for instance the ASEAN Secretariat and the ASEAN+3 Macroeconomic and Research Office (AMRO) in Southeast and East Asia – the proposed collaboration would: (a) analyse macroeconomic management and policy coordination in the region; (b) assess structural policies to enhance productivity and competitiveness; (c) develop relevant databases, notably in the area of revenue statistics (replicating the joint work with ECLAC-CIAT

Members and non-Members will engage together on similar policy challenges. The latter two are key strategies to develop, deepen and consolidate the OECD's policy influence with countries in the Global South, as these offer the OECD the opportunity to engage deep in the domestic and regional policy-making of developing country states, and of regional organisations whose membership primarily consists of developing countries.

Notably, the duration of this strategy is unspecified, thereby signalling that the OECD intends to mainstream and pursue this strategy indefinitely. [664] At a 2014 OECD Council Ministerial meeting, a "Lessons Learned" short document was produced in order to consolidate learning from the initial implementation period and outline directions for the SD's future implementation. A number of areas received particular attention, and here I focus on two – a further articulation of the Policy Coherence for Development (PCD) concept, and a sharper focus on strategic engagement with international institutions beyond the OECD. On the former, though the potential within the PCD objective- and target-setting to "identify synergies across the economic, social, environmental, legal and political domains to create enabling conditions for development [including] a rules-based trading system, sustainable use of natural resources, access to innovation and technology; and stable and more transparent financial systems, including others," was identified, it is clear that the OECD's approach to PCD is no longer just about coherence across policies within a particular jurisdiction such as within a developing country or a policy realm such as halting flows of illicit finance. Rather, as the "Lessons"

in Latin America) and of skills indicators (building on the joint work with the World Bank, ILO and UNESCO for the G20)." Ibid. Annex at 10.

[664] Two phases for implementation are identified, an initial phase (from mid-2012 to end 2013) and an overlapping second phase when the Strategy is integrated with the Organisation's Programme of Work Budget process, from 2013-14 onwards.

document states, "[T]he Organisation could further explore ways to foster coherence among the various agendas (development, sustainable development and environmental) and global development processes (UN post-2015 Sustainable Development Goals, G20, G8). The Centres of Government (COG) will have an increasingly important role to build common understanding and achieve consensus on the global development agenda."[665] Thus, the approach to PCD has

[665] Ibid: 8. According to the OECD, the 'Centre of Government' is the body that provides direct support and advice to the Head of Government and the Council of Ministers, for example: Heads of Prime Minister's Offices, Cabinet Secretaries, Secretaries- General of the Government. Within the OECD, CoG meetings began in the 1980s, and became an annual event in the 1990s. The objectives of these meetings are described as (i) To review issues of how to make the centre of national government work more effectively; (ii) To achieve a more in-depth understanding of decision and policymaking systems in the host country, and (iii) To work on broad governance issues fundamental to achieving economic and social public policy objectives. The meetings are hosted each year by one of the members of the network. The OECD states 'CoG constitutes a forum for informal discussion and remain one of the OECD's highest-level policy networks.' OECD website http://www.oecd.org/gov/cog.htm. The OECD's work with the CoGs directly engages with the pragmatics and deepest aspects of formal and informal governance at the highest levels within participating states. For example, its annual meeting of senior officials from Centres of Governance in October 2017 in Tokyo, focused on the theme of 'Decision-making in an environment of uncertainty and change.' 'Session notes' available after that meeting offered the following insights from the OECD on the decision-making processes utilised by senior government leaders and officials at that time. 'The financial and fiscal crises have put the spotlight on the ability of governments to take decisive action and mobilise key partners in support of those actions. … During the most high-pressure periods of the crisis, governments introduced abbreviated processes to speed up decision making (so-called "economic war councils" involving the head of government, minister of finance and one or two other senior members of the government). These events highlighted the importance of rapid-reaction analytical and political intelligence systems to facilitate effective decision making by the head of government. *The lessons learned then may well be useful again*.' Italics my own. This conclusion is deeply worrying since several authoritative critiques have been made of national government and international institutional decision-making processes during and after the 2008 economic crisis. For example, in relation to the European Commission's bailout of Ireland and Portugal, the European Court of Auditors (the EU's accounting watchdog) was scathing of the European Commission's and IMF's managing of the bail-out, and in particular of its refusal, in the Irish instance, to let senior bond-holders share some of the debt burden. It also criticized the management of early bailout funds, saying the Commission did not apply similar conditions to countries in comparable economic situations. "When comparing countries with similar structural weaknesses, it was found that the required reforms were not always in proportion to the problems faced or that they pursued widely different paths." Specifically in relation to Ireland's bailout, the report stated that 'In Ireland, although the Council decisions mentioned no specific conditions with regard to banking surveillance and sales of state assets and privatisation, these conditions appeared in the memorandum of understanding,' (at 37), and that though 'The IMF's ex post evaluation of the Irish programme suggests that alternative policy actions were available to contain the risks from higher burden-sharing, [they] were not pursued,' (at 49). European Court of Auditors, *Special Report: Financial assistance provided to countries in difficulties*, (European Union: 2015) at 8. These critiques have been echoed in several analyses of the management by Irish senior government leaders and bureaucrats of the bail-out process. Martin Wall & Cliff Taylor, 'Bailout secrets revealed in newly released cabinet papers,' Irish Times, Sat, November 28, 2015. OECD, 'Decision making in an environment of uncertainty and change,' Meeting of Senior Officials from Centres of Government, Tokyo, 26-27 October 2017. At 11. Available at http://www.oecd.org/gov/cog.htm.

moved to more strongly embrace a goal of achieving coherence of policy-making *across international institutions*, and across Member (and other) states through their high-level bureaucracies, around an implicit agenda of the promotion of economic growth according to a neoliberal model. [666] Related to this, is the identification of certain "global processes" for OECD attention and strategic engagement such as the post-MDG process, and the Global Partnership for Effective Development Co-operation (GPEDC). Interestingly, the OECD also identified a need to address financing for development "beyond ODA" as a "global process."

What the OECD's Strategy represents, then, is a clear-eyed decision to use its policy discourse on development as a governance *key* to open doors for the OECD to engage in the governance processes of not only its Member states, but of developing country "partners"; of various regional organisations and international organisations and political decision-making forums such as the G8, G20, the UN etc. in a *discriminate* way. As the Strategy document itself, and its 2014 "Lessons Learned" document clearly illustrate, the OECD's S*trategy on Development* is about using any influential space for policy debates *on* development as entry-points to spread OECD influence. Its modes of engagement are key – the production and presentation of the rich variety of knowledge instruments, is now utilised as a key technology of OECD jurisdiction. In doing so, the OECD not only operationalises a managerial approach to governance, but it also promotes this approach as good governance itself.

The OECD's most recent "new" directions in international policy on development articulate a partial, and clearly neoliberal normative prescription for economic policy at national and

[666] See earlier section on the NAEC. See also the notes from earlier CoG annual meetings.

international levels, and repeat a long-standing pattern of maximising the potential of a global economic crisis to re-embed and re-legitimise its ontological and epistemological role in prescribing institutional reforms within a crowded international organisational landscape. The DAC's approach to periodically re-articulating new directions on donor policy on ODA serves to elaborate on these purposes but in a different direction. Whereas the OECD's economic policy prescriptions aim at an international governance space structured to represent the interests of Northern/Western transnational capital, the DAC's aim is the Global South. Whereas the OECD's policy discourse on development makes minimal if any mention of a differentiated sovereignty between developed and under-developed states, the DAC's policy discourse aims to mask the power differential between donor and aid-recipient state through re-naming the latter as development "partners," with the ODA funding relationship re-named as a "partnership." Similarly, it addresses – and obscures – the vast disparity in the ownership of wealth between North and South through its promotion of a "pro-poor" model of economic growth. Thus, the DAC's policy discourse on development serves to strengthen and expand the OECD's policy influence, by elaborating in far greater detail three important facets. These are (i) the idea or model of development that is articulated or implied, and the role of ODA within that; (ii) the idea or model of governance that is implied, and the role of law within this;[667] (iii) the respective subjectivity of the aid-recipient state, and the donor. In the following section, I elaborate on these three facets in greater detail, in order to reveal how the DAC's policy

[667] This vector mainly focuses on governance at the national level, but refers to other levels where included in the relevant documents.

discourse on ODA veils a distinct ideological approach to governance and development, via ODA.

3. Consolidating international authority via the governance of ODA – the DAC's Pro-Poor Growth (2012) initiative

The DAC has consistently, if variously referred to "improving the welfare of people and fighting poverty" as the core rationale for ODA and as the ultimate goal of development. [668] But how to achieve this, and what should the role of ODA in this process be? For the DAC, these aims can be achieved only by the promotion of a pro-poor model of economic growth in aid-recipient states within a liberalised global economy, supported by some features of a liberal democratic system. The launch of the UN's Millennium Development Goals (MDGs) in 2000, along with the OECD/DAC strategy *Shaping the 21st Century: The Contribution of Development*, provided the rationale and impetus for the latest iteration of DAC conceptual thinking on the orientation of aid programmes by its members focused on poverty reduction and "pro-poor growth" (PPG).[669] In the following section, I critically analyse the DAC's approach to PPG as exhibiting a strong internal legal logic, an element that I identify is key to the governance signature of ODA. I begin with a brief overview of what constitutes PPG in the mainstream literature, and then I recount and analyse key ideas within two of the DAC Guidelines documents on ODA and poverty

[668] See the introductory comments in each of DAC's annual Development Co-operation Reports as example.
[669] Kakwani describes the geneology of the term beginning with Chenery and Ahluwalia's (1974) model of 'redistribution with growth' as a culmination of the critique of the trickle-down hypothesis that dominated development thinking in the 1950s and 1960s. The term 'broad-based growth' was used in the 1990 World Development Report, with it later becoming referred to as pro-poor growth during the course of the 1990s. Nanak Kakwani, Pro-poor Growth: Concepts and Measurement with Country Case tudies, UNDP International Poverty Centre, Working Paper No. 1, August 2004, 1 at 2. Development practitioners and policy makers are fond of the term "pro-poor growth" because, rather like Humpty Dumpty in Alice's Wonderland, to each of them "it means exactly what [they] want it to mean." Louise Cord, Humberto Lopez and John Page, " 'When I Use a Word.' ... and Poverty Reduction", World Bank working paper, unpublished (August, 2003) at 1.

reduction. These are *Poverty Reduction – DAC Guidelines (2001)*[670] and *Promoting Pro-Poor Growth: Policy Guidance for Donors (2007).* [671] These documents represent a consolidated approach by the DAC to an economic model proposed as PPG-compatible, as well an implicit idea of the role of law and governance, and of the subjectivities of the donor and aid-recipient state.

The documents are framed as "represent(ing) an emerging international consensus and a shared commitment and understanding of how to work together more effectively to help developing country partners reduce poverty"[672] as well as offering "practical information about the nature of poverty and best practice approaches, policies, instruments and channels for tackling it."[673] Though the governance *role* of these documents is never articulated explicitly (the pragmatic, as opposed to political purpose of the documents is more explicit and more to the fore), it is nevertheless quite clear that the creation of a dedicated, influential community of international norm-practitioners is envisioned. [674]

Several international organisations and academic researchers have debated the nature of PPG, a concept and approach to economic development that rose to prominence since 2000 after the articulation of the MDGs. The former have usually defined PPG simply as growth that

[670] OECD, *Poverty Reduction – DAC Guidelines,* (Paris: OECD, 2001).
[671] OECD, *Promoting Pro-Poor Growth: Policy Guidance for Donors* DAC Guidelines and Reference Series (Paris: OECD, 2007)
[672] Ibid 10.
[673] Description of the *OECD Poverty Reduction –DAC Guidelines* document on the OECD DAC website. Available at https://www.oecd-ilibrary.org/development/poverty-reduction_9789264194779-en.
[674] "Adoption of the Guidelines also means Members adopt a common view and understanding of poverty and appropriate approaches, frameworks and priorities for combating it. Their efforts will consequently be more coherent and mutually reinforcing, both among DAC Members and across the international system, given the full compatibility of the Guidelines with similar international frameworks." Ibid: 33.

benefits "the poor" and gives them more access to economic opportunities,[675] however the latter have engaged more in the kinds of policy choices that mark PPG as distinct from models of economic growth per se. In this respect, Klasen has articulated a more precise definition of PPG as "growth disproportionately benefiting the poor, that is, the income growth rate of the poor *must exceed the growth rate of the non-poor*," that has become fairly widely circulated within international development policy circles.[676] In addition, he proposes that measures used should differentiate between pro-poor growth and other types of economic growth; be sensitive to the distribution of incomes among the poor, giving greater weight to the poorest of the poor; not be sensitive to the particular choice of poverty line, and finally, allow an overall assessment of economic performance while giving more weight to the interests of the poor.[677]

Economic growth can be pro-poor in direct and indirect ways. It can *directly* favour those sectors and regions where the poor live (or are moving to) and use the factors of production they possess or are able to acquire. [678] In the longer term, growth can be pro-poor if linkages are made between different sectors, regions and factors of production. *Indirectly,* PPG can operate via redistributive policies, e.g. via taxes, transfers and other government spending.

[675] While the term 'the poor' is more dehumanising than the term 'people in poverty', I use the former as this is the term used by the OECD and other international organisations in this context.
[676] Stephan Klasen is a professor of development economics at the University of Göttingen in Germany, has held positions in the World Bank and has also done policy work for international organizations including UNDP, the World Bank, OECD, ADB as well as developing country governments and aid agencies. Italics added. https://blogs.worldbank.org/team/stephan-klasen
[677] Stephen Klasen, 'In Search of the Holy Grail: How to Achieve Pro-Poor Growth?' in B. Tungodden, N. Stern and I. Kolstad (eds), *Toward Pro Poor Policies-Aid, Institutions, and Globalisation,* (New York: OUP, 2004) at 64-65. Italics my own. He suggests that the population- and poverty-weighted growth rates indices proposed by Montek S. Ahluwalia & Hollis.B. Chenery as the only measures that meet these requirements.
[678]As the vast majority of people in poverty live in rural areas and depend directly or indirectly on agriculture for their livelihoods, then PPG must, in the short-medium term, focus on rural areas and aim at improving incomes in agriculture and make intensive use of labour. Ibid: 68-70.

Klasen notes that these kinds of policies are actually easier to achieve than more static redistributions of income, [679] but are more limited in scope and effect in developing countries than in industrialised developed countries. [680]

Klasen is clear that a strong state is needed to implement a pro-poor policy agenda. Though he acknowledges that economic reforms and liberalisation can play an important role in improving the incentives of the poor, these changes are usually insufficient in light of the extent of poor infrastructure, market imperfections, poor endowments and little access to productive inputs and credit. [681] There is less consensus on the right role of aid in promoting economic growth, and more especially on promoting PPG. Instead, it is widely acknowledged that the relationship between aid and economic growth is complex[682] and findings in the scholarly literature continue to be debated. [683]

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[679] He cites the examples of the East Asian economies who used resources generated by growth to expand mass education amongst people in poverty, and especially women. Klasen cautions that the success of indirect strategies is reliant on a dedicated policy process backed by strong political commitment. Ibid: 70-71.

[680] Stephen Klasen, "Determinants of Pro-Poor Growth," IFPR 2020 Focus Brief (International Food Policy Research Institute, 2007) at 2.

[681] Ibid. 4. This view is echoed by Saad-Filho who notes that historically, evidence has shown that public investment is key to PPG in three ways. First, it played an essential role in fostering growth and reducing poverty in several dynamic economies in East Asia and Latin America. Second, when public investment falter, aggregate profits decline, reducing incentives for private investment, and third, public investment can support quality foreign investment (as with Vietnam and China). Alfredo Saad-Filho, 'Life beyond the Washington Consensus: An Introduction to Pro-poor Macroeconomic Policies,' (2007) 19 Rev Pol Econ 513 at 521-522.

[682] Methodologically, establishing the nature of this relationship is challenging, depending on the models used to analyse data, and the quality of the data available. Thus, studies in countries in certain regions, e.g. South East Asia, are more conclusive and detailed in their analysis and can enable deeper comparisons.

[683] Channing Ardt, Sam Jones & Finn Tarp, "Assessing Foreign Aid's Long-Run Contribution to Growth and Development," (2015) 65 World Dev 6; Seng Sothan, "Foreign aid and economic growth: evidence from Cambodia," (2017) 27 J Int T 7 Ed Dev 168 at 169-172.

There are several strands to this debate and it is not necessary to examine these in depth here. One strand examines aid effectiveness with Jeffrey Sachs using moral (levels of extreme poverty), pragmatic (aid addresses a financing gap in countries too poor meet investment needs), and anecdotal evidence (family planning, eradiation of polio etc.) to argue that aid projects can make a real positive difference to development (Jeffrey Sachs, *The End of Poverty: Economic Possibilities for Our Time,* (New York: Penguin, 2005). William Easterly takes a far more critical view, claiming that aid fails because it creates perverse incentives for bureaucrats that have little effect on development and aid is not accountable or responsive to the people it is meant to serve. (William Easterly, *White*

For the DAC however, the PPG model it proposes differs to a considerable extent from that described by Klasen in a number of ways. First, PPG is defined much more loosely as applying when both the absolute and relative measures of poverty improve,[684] a much lower definitional threshold than Klasen's approach just described. "Pace" and "pattern" are now centre-stage, with efforts to hasten and increase rates of growth front and centre of policy attention. [685] Secondly, a market economy model, [686] focused on private sector development, is unequivocally deemed to be the best way of achieving the goal of inclusive, higher growth. Indeed, private sector development is clearly equated with private sector-*led* development in these documents with considerable and detailed – if high-level - policy advice prescribed to donors and aid-recipient states on how to promote this policy goal. [687] Thirdly, this private

Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good, (New York: Penguin, 2006). Other strands focuses on aid's impact on and effectiveness in addressing particular issues within development such as aid-recipient state governance (Paul Collier, *The Bottom Billion: why the poorest countries are failing and what can be done about it,* (Oxford: Oxford University Press, 2007), health, education, etc.

[684] OECD DAC (2007), supra note 736 at 19. PPG is when 'poor women and men are able to participate in, contribute to and benefit from growth, as measured by changes in the incomes of the households in which they live and the assets they and their children acquire to earn higher incomes in the future.'

[685] "Policies therefore need to promote both the pace of economic growth and its pattern, i.e. the extent to which the poor participate in growth as both agents and beneficiaries, as these are interlinked and both are critical for longterm growth and sustained poverty reduction." Ibid: 11.

[686] For example - "Well-functioning markets are important for pro-poor growth. Market failure hurts the poor disproportionately and the poor may be disadvantaged by the terms on which they participate in markets. Programmes are needed to ensure that markets that matter for their livelihoods work better for the poor….. a favourable investment climate which includes secure property rights and efficient markets that allow the productive assets of land, labour and capital to flow to areas where the returns are highest and increases access to these resources, including for the poor." Ibid. 12, 23. Deepening and strengthening financial markets receives particular attention. "Integration of microfinance institutions into the mainstream banking system, disaster insurance and insurance against shocks, new savings instruments and flexible delivery mechanisms can better address the risk mitigation needs of the poor, improve access of the poor to capital and increase resources available for further financial intermediation." Ibid 70.

[687] "These are: i) removing barriers to formalisation; ii) implementing competition policy; iii) promoting the supply-side response; iv) the financial sector's contribution to pro-poor growth; v) enhancing women's market access; and vi) constructing inclusive public-private dialogue. For the private sector to deliver pro-poor growth, five interlinked and mutually reinforcing factors need to be in place: i) providing incentives for entrepreneurship and investment; ii) increasing productivity through competition and innovation; iii) harnessing international economic linkages through trade and investment; iv) improving market access and functioning; and v) reducing risk and vulnerability." Ibid 57. See also OECD-DAC (2001), supra note 697 at 18.

sector-led, markets-oriented development model is clearly embedded in a globalised economy that facilitates the free flow of trade in goods, services and capital. [688] Though integration with the wider global economy is acknowledged to involve greater risks for the poor, these are identified as only relating to an anticipated contraction of "traditional sectors," a risk that can be mitigated by "careful" policy sequencing and if the poor themselves "diversify activities, change to new revenue earning activities or move geographically."[689] Fourthly, "the poor" are conceptualised in four linked ways[690] – as mobile units of labour who can "move" depending on economic demand; [691] as "essential" rights holders but who can, as labour units, be hired, fired and employed on flexible contracts at will;[692] as human capital that must be "invested" in, in order to generate economic returns, [693] and as units to be "empowered" to influence "political and social processes that affect their lives"[694] through participation in domestic policy-making processes, [695] (though with the purpose of the latter largely directed towards promoting policies for economic growth). [696]

[688] OECD-DAC (2007), supra note 698 at 63.
[689] Ibid 63.
[690] "Empowering individuals, families and communities is essential for developing human capital and for enabling poor people to merge with the social, political and economic mainstream of their countries and to shape their destinies." OECD-DAC (2001), supra note 697 at 56.
[691] Clearly, recognition is absent for the challenges of international migration for low-skilled workers.
[692] Thus, 'good practice in removing barriers to formalisation' includes the recommendation for donor practice to 'Promote labour law reform which protects essential rights while making it easier to hire and fire workers and to employ people on flexible contracts.'OECD-DAC (2007), supra note 698 at 81.
[693] Education and skills development are most frequently mentioned in the later document (Ibid 113, 143) with education, health and skills development more frequently mentioned in the earlier document (e.g. OECD-DAC (2001), supra note 697 at 45,51.
[694] Ibid 46.
[695] See for example a dedicated chapter in OECD-DAC (2007) on 'Political Empowerment and the Policy Making Process,' supra note 698 at 31-42.
[696] "Empowering the poor is essential for bringing about the policies and investments needed to promote pro-poor growth and address the multiple dimensions of poverty. To achieve this, the state and its policy making processes need to be open, transparent and accountable to the interests of the poor. Policies and resources need to help expand the economic activities of the poor." Ibid 11.

Thus, the DAC's PPG model contains an implicit, yet distinct, concept of governance and politics, and the role of law therein, one that can be described as carefully ambivalent. On the one hand, its internal legal logic clearly envisions a role of and need for law and regulation, in particular in relation to economic[697] and environmental governance.[698] On the other, de-regulation is identified as a solution to market failure, [699] and the removal of "poor quality" regulatory and administrative requirements seen as essential to the promotion of formalisation of businesses.[700] Regardless of this ambivalent view of regulation, states' policy-making role is largely framed in non-political, managerial terms. Thus, reconciliation of competing interests can be achieved through the formulation of national development plans and poverty reduction strategies that involve the private sector in their development. Though a role for civil society is recognised, their interest in PPG is articulated as focused mainly on the social and economic outcomes of growth. [701] Revealingly, when addressing institutional reform, only the public and private sectors are identified as relevant parties for dialogue on reform, with the private sector

[697] This is usually in relation to regulation vis-à-vis a particular sector such as the natural resources sector or the financial sector or in relation to barriers to formalisation. See for example OECD (2007), supra 736 at 69, 77.
[698] OECD-DAC (2007), supra note 736 at 29, 34
[699] According to the OECD, "The causes of market failure are manifold: inappropriate policies and institutions, unequal access to market information, concentration of market power, high cost of transactions and co-ordination failures or failing to take account of wider impacts such as on the environment. Even if markets do not fail, the poor may be disadvantaged when participating in them though discriminatory formal or informal institutions and higher costs of accessing markets. …. Deregulation has, in some cases, helped to improve market access and functioning for the poor." Ibid 29
[700] Ibid 77. The 'formalisation' thesis has a long lineage and has been articulated most widely through the ideas of Hernando de Soto. This views informal forms of business as an untapped reservoir of entrepreneurial energy, which is constrained by government regulations. Removing these regulations and improving property rights would promote growth and development. Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. (New York: Basic Books, 2000). A more cynical strain of this perspective views informal firms in parasitical terms, that avoid taxes and regulations and that compete unfairly with law-abiding, formal firms. Diana Farrell, 'The Hidden Dangers of the Informal Economy.' (2004) 3 McKinsey Q 27. In contrast however, are the views of Rauch and La Porta & Shleifer, who view levels of informality more in relation to levels of poverty and economic development - James E. Rauch, 'Modeling the Informal Sector Formally,' (1991) 35 J Dev Ec 33; Rafael La Porta & Andrei Shleifer, 'Informality and Development,' (2014) 28 J Ec Pers 109.
[701] OECD-DAC (2007), supra note 698 at 64

"encouraged" to monitor reform efforts to "help ensure that decisions made are implemented and can be modified if required."[702]

A similarly ambivalent approach can be discerned in relation to the subjectivity of the aid-recipient state. Though "country" or "partner" "leadership" (a euphemism for the political leadership of the aid-recipient state) is recognised,[703] it is viewed as flawed and in need of ongoing (and never-ending) reform and improvement to its institutions and policies. The link between government and the state and the latter's sovereign qualities are entirely absent; instead, policies and institutions result from "the interaction of the state, the private sector and civil society," ideally undertaken through managerial processes such as Poverty Reduction Strategies or other managed engagement processes. [704] Ultimately, the aim of such politics is to achieve political stability and social cohesion, whose value is framed primarily as being essential to achieving economic growth, [705] not necessarily as valuable in and of itself.

Thus throughout the articulation of a PPG "political" vision, a clear hierarchy emerges along several vectors; of the stronger juridical quality of private rights such as property and contract enforcement over those of human rights; [706] of a political process that is in service, ultimately, to a markets- and economic growth-oriented development model over a social or

[702] Ibid.
[703] Aid-recipient states are exhorted to 'exercise' leadership and donors to 'respect' country leadership ibid 44.
[704] Ibid : 64-65.
[705] "Economic, political and social stability help to avoid man-made shocks and so contribute to growth and more effective reduction of economic poverty." Ibid 28. See also 12, 27, 62. Also OECD (2001), supra note 735 at 44, 101
[706] Thus there is frequent mention of property rights being 'secure and transferable and contracts enforceable.' OECD-DAC (2007) supra note 698 at 62. Human rights, on the other hand, are never discussed in terms of enforceability. Instead, for example, political human rights are about influencing public policies. (Ibid 311); are important as a 'factor of development,' (OECD (2001), supra note 735 at 10); should be 'elevated' (ibid 24). Notably, rights-based approaches to human rights, though mentioned in (OECD 2001) are left out of the later 2007 document.

communitarian one; of a managerial approach to governance, implemented through plans, strategies and consultation forums, over a political one. [707]

In this we can also determine a clearly articulated subjectivity of the aid-recipient state by the DAC. It is one that is "flat" and featureless; contains no distinctive features of history, culture or political sensibility; is singular and disconnected from its neighbouring states or other regional or international organisations; most likely is corrupt and wilful, and definitely unequal as regards gender, and inefficient.

> Deficient governance, which is subject to change, includes a core set of factors that perpetuate poverty. Entrenched corruption and rent-seeking élites, lack of respect for human rights, weak institutions and inefficient bureaucracies, lack of social cohesion and political will to undertake reforms are all common features of bad governance and inimical to sustainable development and poverty reduction.[708]

It is a state in need of ongoing, in-depth and unlimited reform - a process that is rationalised on the basis that this will ultimately reduce poverty through the promotion of economic growth.[709] It actively wants to change,[710] and it is a good "change manager." [711] The "good" aid-recipient state is compliant and willing to be scrutinised in every area of policy, in every institution, at every level and at all times. Both its political and bureaucratic leadership and institutions require capacity-building (at all levels),[712] and are willing to partake unquestioningly in such

[707] "…nationally owned poverty reduction strategies suited to the local context through processes that strengthen the social contract in favour of pro-poor growth." OECD-DAC (2007), supra note 698 at 44.
[708] OECD (2001), supra note 735 at 43.
[709] "Institutional and policy reforms are consequently at the heart of efforts to reduce poverty through private sector development." (OECD-DAC (2007), supra note 698 at 58)
[710] "Pro-poor change cannot be imposed from the outside. The practice of providing "our solutions to their problems" is unproductive." Ibid 44.
[711] Ibid 210.
[712] "Capacity building within the public sector, including at local levels, is essential since obstacles to an enabling environment may also need to be resolved by local government officials. Governments should allocate requisite capital and operational budgets to set up administrative systems and train civil servants at national, sub-national and local levels."Ibid 71. Also 58, 65. 'Technical assistance' may also be required.

efforts. It is strongly neoliberal in outlook; development is conceived of and described predominantly in markets-focused terms;[713] there are many references to multiple utilitarian merits of decentralisation. [714] Where the establishment of institutions and authorities is considered, these are to focus on particular areas of private sector business promotion.[715] Similarly, it is a performing, norm implementing and thoroughly dialogic state, engaging in "intensive" and multiple dialogue processes with civil society, representatives of the private sector, towards hearing concerns, developing policy responses and monitoring their implementation with the stakeholders involved.[716] The politics of the policy engagement and

[713] For example, part of the DAC's policy statement on PPG states "Policies need to tackle the causes of market failure and improve market access. Well functioning markets are important for pro-poor growth. Market failure hurts the poor disproportionately and the poor may be disadvantaged by the terms on which they participate in markets. Programmes are needed to ensure that markets that matter for their livelihoods work better for the poor. Such programmes need to be carefully designed to avoid replacing market failure with government failure. Policies to tackle market failure should be accompanied by measures aimed at increasing economic capabilities of the poor." Ibid 12

[714] Here is one that frames the need for land reform both in markets and decentralisation terms. "Exploring new mechanisms for land reform. New approaches to land reform recognise the importance of land as one among several different assets in households' portfolios, the importance of market and non-market mechanisms for accessing land, and the fact that land reform can be sustained in the long term only if the new landowners can make productive use of their new asset. In general, all the approaches are much more decentralised, relying on incentive-compatible mechanisms to complement, rather than substitute for, the operation of land markets. (Ibid 162). Though it is beyond the scope of this study to examine the governance implications of this push towards 'decentralised co-operation,' it is important to note that decentralised co-operation (a term broadly understood as public and private aid provided by and through local authorities, networks and other local actors, or at the sub-national authorities levels) has begun to receive dedicated attention from the OECD, the EU and the World Bank in recent years. See for example the joint OECD-EU project on decentralised co-operation initiated in 2017. https://www.oecd.org/cfe/regional-policy/oecd-project-on-decentralised-development-co-operation.htm

[715] "Donors should provide technical assistance and capacity building targeted at supporting the formulation of competition policy and strengthening institutions responsible for enforcing competition law…. Donors should encourage developing countries to improve the capabilities of supervisory and regulatory authorities, strengthen financial intermediaries, support prudent mobilisation of savings and remittances and help bridge the gap between banks and microfinance institutions so that greater access to financial services is mainstreamed in the development of the financial sector." Ibid 47.

[716] Thus, donors are expected to "Facilitate structured, inclusive and effective public-private dialogue as a main element in institutional reform; organised at national, sub-national and local levels, as well as between these levels." (Ibid 58).

reform of the aid-recipient state are ultimately technocratic and managerial, [717] an approach epitomised by the DAC's location of Poverty Reduction Strategies and the technology of *Ex ante* Poverty Impact Assessments[718] as central to effective poverty reduction policy-making by the aid-recipient state, and recommended as the appropriate basis for donor aid modalities. [719] This view of the "good" aid-recipient state vis-à-vis promoting PPG departs in significant ways from the role of the state and the model of development articulated earlier by Klasen.

Closely connected with this is the DAC's constructed subjectivity of the DAC-member donor state. Though it shares a number of features of identity with that of the aid-recipient state, including a strongly neo-liberal approach, [720] its agency is considerably different to that of the aid-recipient state. It is omniscient (there is no policy area or activity within the aid-recipient state in which it cannot offer technical assistance, capacity building and policy guidance); omnipresent (there is no area or level of governance or stakeholder group excluded from its interventional purview, though strongly focused on private sector-led development),[721] and

[717] Thus, in relation to agriculture policy, "More attention must be given in particular to the role of effective monitoring frameworks in supporting improved decision making, flexible implementation, and increased accountability of the governments to all PRS stakeholders. Development processes are the outcomes of power, knowledge and information relationships: open monitoring frameworks can help promote the participation of all PRS stakeholders, including rural producers and their organisations, in the development of policies and investments with the aim of influencing and eventually re-orienting their implementation." Ibid 204.
[718] This particular approach to Poverty Impact Assessment is drawn from the DAC's 2001 Guidelines on Poverty Reduction, as well as other work on this area by the Asian Development Bank, and other initiatives within the OECD on PISA and sustainable livelihoods.
[719] "The methodology can be applied to most modalities of donor support: projects, programmes, sector-wide interventions and policy reforms." Ibid 300.
[720] Though with key differences. For example, decentralisation for the donor state means decentralising ODA decision-making and staff 'to the field' in areas such as country programme management, technical assistance, financial management and support staff, with the role of 'headquarters' being to assume strategic management of the policy area (OECD (2001), supra note 735 at 112, 121-122).
[721] One section of the EAM document is dedicated to private sector development, and the role of the private sector is framed as key to effective policy on infrastructure and agriculture.

strategic (focused on promoting "systemic change" and creating an "enabling environment").[722] Its approach to economic growth is markets-oriented, private sector-led and the DAC is quite specific about the policy advocacy position expected from donors vis-à-vis their relationship with aid-recipient states.[723] Thus, in the DAC's view, there is no limit to the jurisdiction, nor to the policy reach of the modes of intervention, that donors have to intervene in the domestic policy sphere of the aid-recipient state via the ODA relationship.[724]

4. Conclusion

In Chapters 3 and 4, I outlined the key elements of the analytical lens I use in this research based on the concepts of jurisdiction and signature. I proposed that this lens would be helpful towards revealing and critically analysing the legal quality and role of law in the OECD's international governance of ODA. In this chapter I examined key, highly normative policy positions on development adopted by the OECD and DAC in 2012. I argued that these policy documents, though formally not legal, are key contributors to both the jurisdiction of ODA, and

[722] Donors are exhorted to "Build capacities within stakeholder groups to organise themselves, to analyse key constraints, to participate in policy dialogue and monitoring of results and to advocate and negotiate systemic change." OECD-DAC (2007), supra note 698 at 71. Note that this strategic role, focused more on 'systemic change,' is far more prominent in the later 2007 DAC document. See references to encouraging the public sector of the aid-recipient state to 'foster a more conducive enabling environment' in, for example, 58.

[723] "Approaches that donors can emphasise in their policy dialogue with developing countries ● Mainstream strategies for private sector development into national development frameworks such as national development plans and poverty reduction strategies (PRS). ● *Link and, to the extent possible, merge private sector development and governance programmes under a comprehensive strategy* and advocate the use of key analytical tools, especially gender analysis tools. ● Facilitate structured, inclusive and effective public-private dialogue as a main element in institutional reform; organised at national, sub-national and local levels, as well as between these levels. Pay attention to risks and mitigate these by carefully sequencing reforms." Italics my own. (OECD 2007: 58)

[724] Thus, though it could be said that the DAC explicitly recognises just four main modes of intervention, including (i) strategic, including the strongly 'relational' activities described as partnerships, collaborations, dialogues etc. at the donor-aid recipient state or donor-sectoral representation level; (ii) frameworks e.g. aid-recipient state national poverty reduction strategies; donor ODA strategies at the donor national level or the country assistance level, (iii) financial instruments including programme aid, sector support, area-based support, project or issue-focused support along with special-purpose instruments such as debt relief, support for regional institutions etc., and (iv) technical assistance which can include 'expert' advice via consultancy, for example., in fact underpinning all of these is the constant monitoring.

the legal quality of the governance signature of ODA. In section 2 of this chapter, I identified two key governance dimensions of these policy documents – institutional and normative. With the former, the NAEC initiative and the Strategy on Development (2015), I showed how these, in the face of a deep external threat to the OECD's economic growth paradigm, the OECD used these instruments to re-authorise its role in international economic governance. They were key to rationalising and legitimising the OECD's self-proclaimed status as the key node of international policy and norm-making on international development. In this way they helped solidify the OECD's jurisdiction via its development policy discourse.

With the latter, the DAC's Guidelines documents on PPG and Poverty Reduction contain an identifiable neoliberal internal legal logic, promoted as desirable for donors and aid-recipient states to pursue and implement via ODA. Both the OECD's institutional strategy on development, and the DAC's on PPG and Poverty Reduction articulate and structure the subjectivities of donors and aid-recipient states in particular ways. This veils the power differential that ODA implies by describing aid-recipient states as "development partners;" reconfigures the subjectivity of the aid-recipient state as wilful and in need of reform, with a statal relationship with its peoples as managerial and not democratic and political. Similarly, the subjectivity of the peoples of aid-recipient states is constructed as that of resilient, mobile, malleable labour units.

I argue that these OECD's organisational strategy on development, and the DAC's policy guidelines on PPG and Poverty Reduction are essential governance technologies to the OECD's role as legal and normative authority in international economic policy making, and to the DAC's role as an international standard setter on donor ODA and international development policies.

By tracing the institutional and normative dimensions to their governance role, I have shown how they, respectively, contribute to the creation and maintenance of a cohesive jurisdiction in which the OECD is a premier recognised international authority on development, and the DAC is the premier recognised international authority on ODA. These dimensions have legal and juridical qualities that are not captured by the term soft law.

The previous chapter's assessment of the range of legal instruments available within the OECD and DAC framed these as a legal technology of governance that establishes a solid foundation for the emergence and operation of the policy, technocratic and bureaucratic technologies of governance. Together, these constitute the web of the OECD's jurisdiction via development and more particularly, its governance signature of ODA.

In the next two chapters, I focus on the final two governance technologies of the OECD and DAC – the technocratic governance technology of the concept of ODA, and the bureaucratic governance technology of the DAC's Peer Review of donor's co-operation policies.

Chapter 10 International governance through ODA - jurisdictional technologies of technocracy

1. Introduction

In the previous two chapters, I explained how two prominent governance technologies used by the OECD and Development Assistance Committee (DAC) in its governance of Official Development Assistance (ODA) – the law of the OECD and DAC, and their respective authoritative policy positions on development – constitute distinct, yet highly interlinked and sometimes overlapping technologies that help create an identifiable jurisdiction for the OECD and DAC. Within this jurisdiction, the OECD and DAC have almost limitless authority to intervene in both OECD-Member and non-member states' domestic economic policy, and in international economic affairs in a very particular way. This is facilitated through the rubric of promoting a neo-liberal growth-oriented development model (framed as pro-poor), in which law and regulation play a distinctly neoliberal role. I showed how both the law of the OECD and DAC, and their respective approaches to international development, constitute key international governance technologies that create and constitute a cohesive jurisdiction for the OECD. In this jurisdiction, the OECD has legally mandated authority in norm-making in international economic policy. For the DAC, this authority is as international standard-setter on donor development co-operation policy, and the kind of development that is to be promoted through this and ODA. I drew from the jurisdiction and signature analytical lens to show how this jurisdiction is institutionalised. Though the OECD and DAC policy frameworks on ODA are not identifiably formal legal instruments, I showed how they have hidden legal features, including their highly juridical nature; their possession of a strong, coherent internal

(neoliberal) legal logic, and their extension of this internal legal order to Members and non-members alike through its distinct approach to juridification.

In this chapter, and the following one, I examine the two other important governance technologies specific to the international governance of ODA that have been developed and implemented under the aegis of the DAC. The first is a technocratic governance technology.[725] This is the official definition of ODA and how this has become a standard (in each of evaluative, regulatory and rallying ways) in defining and international monitoring of donor finance for development. The second is a bureaucratic technology of governance.[726] This relates to the standards and guidelines used by the DAC within its periodic peer review mechanism of donors' aid policies. While both the law and the development policy positions of the OECD and DAC constitute key and overlapping institutional governance technologies within which the OECD's wider governance of/through development, and the DAC's governance of/through ODA are anchored, the definition of ODA (technocratic) is a DAC-related governance technology. While the peer review mechanism (bureaucratic) technology is a governance instrument pioneered by the OECD and used in several of its policy activity areas, here I focus on its particular use by the DAC to Peer Review donor development co-operation policies in line with its own internal Guidelines and Standards. In this chapter, and the one that follows, I critically analyse each of these technologies in order to reveal their role in creating and maintaining the OECD-DAC's

[725] Recall from Chapter 3 that I define technocratic governance as a kind of epistemological governance that relies heavily on numbers, indexes and data, as well as expert knowledge and expertise as a way to frame policy interventions for governance purposes.

[726] From Chapter 3, I defined bureaucratic governance in the context of this research as the administrative systems and procedures by which a policy objective (in the DAC case, reform of donor development co-operation policy) is progressed and achieved. Here, Peer Review, and the Guidelines that institutionalise that practice that include a set of policy standards for donors, is an example of bureaucratic governance.

jurisdiction on ODA, and how they contribute to the effectiveness of the OECD-DAC's rule via augmenting the density, the normative detail and the governance reach of ODA through its governance signature.

In this chapter, I describe and examine the OECD's approach to the definition of ODA, a cornerstone of international monitoring initiatives on donor development finance [727] and a concept that has now become the internationally accepted definition of ODA. As a numbers-heavy concept, its current articulation carries the appearance of neutrality and objectivity. However, I aim to show how, through a critical historical analysis of its evolution, the concept of ODA now in place was stripped of any potential critical and emancipatory potential during high-stakes negotiations on its meaning between the OECD and UNCTAD in the 1960s. The outcome of these negotiations was that the concept of ODA became the key referent for a political narrative of Northern donor benevolence to aid-recipient states in the Global South. This narrative succeeded in divorcing ODA from any recognition of the wider structural and material causes of wider problematic international economic and political relations, a position fought against by the G77 using diplomatic and legal strategies at that time.[728] Since then, this definition of ODA has been wholly adopted by international donors and aid-recipient states as the definition of "Official Development Assistance."

[727] "The definition of Official Development Assistance (ODA) has for 40 years been the global standard for measuring donor efforts in supporting development co-operation objectives. It has provided the yardstick for documenting the volume and the terms of the concessional resources provided, assessing donor performance against their aid pledges and enabling partner countries, civil society and others to hold donors to account." William Hynes & Simon Scott, *The Evolution of Official Development Assistance: Achievements, Criticisms and a Way Forward*, OECD Development Co-operation Working Paper, December 2013, at 1.

[728] This narrative is quite different to the OECD's narrative of the origins and evolution of the concept of ODA. See ibid 3-10 for a DAC-focused account of the evolution of clarity over the definition.

After this historical analysis, I then examine implications of the contemporary approach adopted by the DAC to ODA, to contouring the legal and political subjectivities of donors and aid-recipient states and the wider international order in very particular ways. The official definition of ODA has changed again in 2018, and I examine a recent initiative led by the DAC that promotes an increasingly financialized[729] model of development[730] that further orients the legal subjectivity of both the donor and aid-recipient state, and that of the state, to a more neoliberal purpose. This is its promotion of a universal concept of 'total official support for sustainable development' (TOSSD), through which the DAC proposes to revise and broaden recognition of what constitutes 'official (financial) support' for development.[731] I show how the DAC's policy move towards TOSSD (with its wider legal, political and economic ramifications)

[729] Briefly, financialisation is defined as "the increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies." GA Epstein, *Financialization and the World Economy*. (Cheltenham, UK: Edward Elgar, 2006) at 3. Financialisation reflects an overarching shift from productive to financial forms of capital accumulation that has become particularly prevalent in the last three decades (Andrew Gunnot & Paul Gellert, 'Financialization, Shareholder Value, and the Transformation of Timberland Ownership in the US,' (2011) 37 Crit Sociology 265 at 270-271). Recent research demonstrates that financialisation shapes social institutions and the mediation of power in fundamental ways. It constrains executive power in advanced capitalist economies (GF Davis & Suntae Kim, 'Financialization of the Economy' (2015) 41 Ann Rev Soc 203); shifts power relations within the corporate sector and transforms its governance (William Lazonick & Mary O'Sullivan, 'Maximising shareholder value: a new ideology for corporate governance,' (2000) 29 Econ & Soc 13); while also contributing to increasing economic inequality (Natascha van der Swan, 'Making sense of financialisation,' (2014) 12 Soc Ec Rev 99; Englebert Stockhammer, *Financialisation and the Global Economy*, Political Economy Research Institute Working Paper No. 240, November 2010. University of Massachusetts, Amherst).

[730] This directs greater amounts of ODA to 'leverage' varying (old and new) private development financing instruments through the rubric of 'Blended Finance' – thereby promoting a Northern-led private transnational financial sector-led model of development.

[731] "Total official support for sustainable development (TOSSD) includes all officially supported resource flows to promote sustainable development at developing country, regional and global levels where the majority of benefits are destined for developing countries, including those resources that support development enablers or address global challenges….To be eligible, the resources would need to be i) targeted at efforts to achieve the Sustainable Development Goals (SDGs) and to support the Means of Implementation agreed in the Addis Ababa Action Agenda and subsequent follow-on universally-agreed sustainable development strategies, ii) aligned with developing country development priorities and iii) in conformity with universally-agreed multilateral standards, principles and rules (e.g. WTO, Equator Principles, UN Responsible Investment Principles, etc.)." OECD, *TOSSD Compendium For Public Consultation*, (Paris: OECD, 2016) at 7.

has wider ramifications for transnational governance, and debates on funding emerging challenges in international development captured by the "beyond-development" slogan. [732]

I conclude with a reflection on how this technocratic instrument of governance furthers the OECD-DAC's jurisdiction of ODA via its governance signature.

2. ODA as a technocratic governance technology

Expert knowledge has long been recognised as essential to modern transnational governance, and an extensive body of knowledge now exists that traces its epistemic, political and, more recently, legal implications. [733] If we take technocracy as the "rule of expertise,"[734] in which numbers, data and experts serve several roles that include the provision of information and expertise on policy issues, but also of consensus-building amongst constituencies, and legitimising particular policy choices, we can see how a numbers- and data-heavy concept of ODA holds within it particular potential and power in a transnational governance context.

The significance of what constitutes ODA and the role that this concept plays in wider international policy discourse on international development cannot be underestimated. What we now call ODA has historically been a key vector through which several politically charged

[732] The 'Beyond Development' debate captures a range of theoretical and policy perspectives on development from critical, to heterodox to strongly neoliberal, on models of development that can address challenges such as financial instability, climate change, increasing insecurity and political instability etc.

[733] The governance mechanisms of the European Union have provided a rich source of analysis of technocratic instruments of governance that aims to address all three dimensions, where the relationship between democratic and participatory forms of governance have been challenged by the more managerial and technical modes adopted by the Commission, whose executive nature has been vindicated by the approach of the European Court of Justice's articulation of an "uncompromising" principle of supremacy of European Union law over national law. See Gráinne de Búrca, "Is EU Supranational Governance a Challenge to Liberal Constitutionalism?" (January 19, 2018). NYU School of Law, Public Law Research Paper No. 18-09. Available at SSRN: https://ssrn.com/abstract=3105238.

[734] Julia Metz,"Introduction," in Julia Metz (ed), *The European Commission, Expert Groups, and the Policy Process*. (London, Palgrave Macmillan, 2015) at 2.

issues have been articulated and debated since the post-World War II era up to today. These issues have included the nature of development; the 'proper' type of, and role for financial flows from North to South in service of development; what an equitable international financial and economic order could look like; the nature of Southern-state-led political and economic sovereignty; the legacy of responsibilities of former colonial powers to newly independent states, and the legal and political roles of various international and regional organisations, amongst other issues. Today, ODA constitutes a key element in almost all major international policy debates and policy positions on matters relating to the financing of international development, whether explicitly,[735] or implicitly. [736]

The OECD's DAC is now the main international institutional site through which international policy discourse on the purpose and use of ODA is channelled and led. This role derives mainly from its role as custodian and guardian of the content of the concept of ODA. Until 2018, the definition of ODA used by the DAC related to financial flows "to countries and territories on the DAC List of ODA Recipients and to multilateral institutions which are (i) provided by official agencies, including state and local governments, or by their executive agencies; and (ii) each

[735] Thus the financing of the UN's Sustainable Development Goals is addressed by the UN's Addis Ababa Action Agenda (2015) framed as "a new global framework for financing sustainable development by aligning all financing flows and policies with economic, social and environmental priorities." Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015), endorsed by the General Assembly in its resolution 69/313 of 27 July 2015. The use of ODA also figures prominently on international policy measures to address climate change. At the Paris Climate Change Conference in 2015, states parties to the UN Framework Convention on Climate Change agreed that In accordance with the principle of "common but differentiated responsibility and respective capabilities" set out in the Convention, developed country Parties are to provide financial resources to assist developing country Parties in implementing the objectives of the UNFCCC. ODA is one of the main sources of that funding.

[736] Core funding of the major multilateral organisations such as the UN agencies, along with the various multilateral development banks and other issue-focused financing facilities within the World Bank Group such as the World Bank's Global Infrastructure Facility or the IFC-Canada Climate Change Programme are examples of how ODA can steer or support these organisations in pursuing particular development finance policy and programme directions.

transaction of which is administered with the promotion of the economic development and welfare of developing countries as its main objective; and is concessional in character and conveys a grant element of at least 25 per cent (calculated at a rate of discount of 10 per cent)."[737] The OECD, and the DAC more specifically, has long been the authoritative international source of information on the amounts, sources and types of ODA, with an extensive dedicated database and data set on ODA flows, [738] as well as a website dedicated to the communication and analysis of this information. At the time of writing, all DAC members (including EU institutions), along with 20 non-DAC countries,[739] 46 multilateral organisations[740] and 26 philanthropic (private) donors[741] report data amenable to DAC analysis and are included in its capture and analysis of ODA.

[737] See OECD "Official development assistance – definition and coverage" at http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/officialdevelopmentassistancedefinitionandcoverage.htm#Notes. The new ODA definition, upon which reporting has begun in 2019, retains the purpose (the promotion of the economic development and welfare of developing countries) but aims at encouraging higher-rate concessional ODA at Least Developed Countries (LDC) and Low Income Countries (LIC). The new ODA definition includes a staggered concessional grant rate of at least 45% in the case of bilateral loans to the official sector of LDCs and other LICs (calculated at a rate of discount of 9 per cent); 15% in the case of bilateral loans to the official sector of LMICs (calculated at a rate of discount of 7 per cent); 10% in the case of bilateral loans to the official sector of UMICs (calculated at a rate of discount of 6 per cent), and 10% in the case of loans to multilateral institutions (calculated at a rate of discount of 5 per cent for global institutions and multilateral development banks, and 6 per cent for other organisations, including sub-regional organisations).

[738] The DAC Secretariat collects data using two different questionnaires. These are known as the DAC and Creditor Reporting System (CRS) questionnaires. The main differences are that the DAC questionnaire focuses on high level data, while the CRS questionnaire focuses on detail, right down to the individual project level. There are two main data updates each year. In April, high level (aggregated) figures are published on total aid given by donor countries for the previous calendar year. In December, these figures are updated with detail on how the money was allocated by recipient country, sector (health, education etc), geographical region and by income group (Least Developed, Upper Middle Income etc). Taken from the DAC's FAQ on DAC statistics - http://www.oecd.org/dac/financing-sustainable-development/development-finance-data/faq.htm.

[739] For example, Russia, the United Arab Emirates, Saudi Arabia and Israel.

[740] Including several of the UN agencies such as the UN Development Programme, UNICEF and the UNHCR, as well as the major international development banks, the World Bank and Organisation for Security and Co-operation in Europe.

[741] Including the Bill & Melinda Gates Foundation, the William & Flora Hewlett Foundation, the Ford Foundation, MasterCard Foundation, H&M Foundation and the Dutch Postcode Lottery.

This role enables the DAC to wield enormous epistemic and discursive influence within development policy across all of these sites and actors. This was not always the case. Key to the current approach and role of the DAC was its historic use of select international legal forums and international legal instruments, along with a strategy to conceptualise ODA in a very particular way. This approach sought to isolate ODA from wider international economic relations, via a highly data-driven technical manner, one that excluded a role for, or consideration of, the impacts and benefits of ODA on aid-recipient states, from their perspective. In the paragraphs that follow, I describe and examine key events and developments in the early decade or so over the mid-1960s to mid-1970s in which the nature of 'ODA'[742] was debated within forums within several international organisations. I focus in particular on debates that were undertaken concurrently and that overlapped between the first two UNCTAD international conferences,[743] and within the OECD's DAC, that concluded with the latter issuing a Recommendation on Terms and Conditions of Aid in 1972 which later became the now recognised Recommendation of 1978. [744] This period was key to the formalisation and wider (beyond the OECD and DAC) acceptance of the content of the concept of ODA. It also

[742] For this sub-section, I am using 'ODA' to describe the kinds of public finance from Northern donors to aid-recipient states that was identified for and associated with Southern development purposes, but was much broader in nature and scope than the current definition, and included purposes such as export credits and loan repayments. The DAC formally defined ODA in a Recommendation in 1972, and this became accepted as the internationally recognised and official definition.

[743] UNCTAD Conference, Geneva 23rd March – 16th June 1964 (called UNCTAD 1 here), and UNCTAD Conference, New Delhi, 1st February – 29th March, 1968 (called UNCTAD II here). Copies of proceedings available at http://unctad.org/en/Pages/Meetings/UNCTAD-Conferences.aspx.

[744] OECD DAC, Recommendation on Terms and Conditions of Aid, OECD/LEGAL/5006, Adopted on 28/02/1978. Available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-5006#_edn2.

resulted in the DAC becoming the recognised international site where political and legal thought leadership on donor financing would emanate.[745]

3. Contestation and contingency in concepts of ODA

The current approach by the DAC to the concept of ODA and its wider use within international development was largely formed during a high-stakes political tug-of-war between the DAC (representing the Northern donors, many of whom were former colonial states) and the UN via UNCTAD, (in which aid-recipient states, many of whom were newly independent, were in the majority), in the 1960s and early 1970s. During that period, several seminal events took place within the UN, and more especially within UNCTAD, by the G77, and separately, within the DAC, each prompting responses by the other.[746]

First, in December 1961, the United Nations General Assembly designated the 1960s as the "United Nations Development Decade."[747] A year earlier, and quite controversially, in Resolution 1522 (XV) of 15th December 1960, the General Assembly identified a target for the

[745] This narrative of the origins and evolution of the concept of ODA differs from the more widely-cited versions captured in the work of William Hynes & Simon Scott, *The Evolution of Official Development Assistance: Achievements, Criticisms and a Way Forward,* (Paris: OECD, 2013) and Simon Scott, *The accidental birth of "official development assistance,"'* OECD Development Co-operation Working Paper 24, (Paris: OECD, 2015). The latter, in particular, frames DAC efforts to develop a shared concept of ODA as an issue of concern to donors only. In doing so, they elide from view the deeply contested approach both of the DAC to its role as the legitimate articulator of that concept, and to its approach to ODA as divorced from its ties to the wider unequal economic relations between North and South that had been largely forged via colonial ties. In doing so, their treatment unintentionally lends legitimacy to that partial, though dominant historical narrative. My brief treatment of the evolution of the concept of ODA here merely highlights the need for further in-depth attention to an under-researched aspect of how evolving relations between newly emerging international organisations (the OECD and UNCTAD, and between these and the IMF, and the IDB), and North-South international relations (the emergence of the G77) were contested through legal spaces (in bilateral, multilateral and international institutional relations); via the autonomous use of legal instruments (the G77's extensive use of the Charter of Algiers), and through legal language (the terminology of claims recorded in reports of both UNCTAD conferences, for example).

[746] While the narrative recounted here is mainly chronological, I try and delineate the underlying governance logic relating to ODA which became crystallised with the DAC's issuance of a Recommendation in 1972 on the Terms and Conditions of Aid.

[747] UN General Assembly, United Nations Development Decade – A programme for international co-operation, General Assembly Resolution 1710 (XVI) of 19 December 1961.

increase of the flow of "international assistance and capital for development" to "approximately 1 per cent of the combined national incomes of the economically advanced countries."[748] Secondly, there occurred two significant international events - UNCTAD conferences, in Geneva in 1964 (UNCTAD I) [749] and in New Delhi in 1968 (UNCTAD II)[750] and, thirdly, in preparation for UNCTAD II, the First Ministerial Meeting of the Group of 77 met in Algiers in October 1967. At UNCTAD 1, the Conference reiterated the "1% of national income" target, along with a second target that the rate of interest on government loans to developing countries should not exceed 3%. [751] These targets were thus also committed to by DAC Member states at the time.

However, the policy debates on financing for development in UNCTAD 1 extended far beyond targets for financial flows, resulting in several proposals to reconfigure wider political and economic relations between North and South, and to fundamentally alter an evolving

[748] Note that the 1% target as expressed included several contentious implications including (i) that gross national product was the denominator for the target; (ii) that it was to include combination of public and private flows, thereby drawing the nature of both those sources of finance under Southern scrutiny, and (iii) thereby implying a need for greater Northern public monitoring of private financial flows to the South. All of these features of the 1% indicator proved to be very politically unpalatable to the Northern states. Scott (2015) described the target as 'preposterous' (Supra note 810 at 9).

[749] This was the first major North-South conference on development questions. During the negotiations at that conference, economic interests clearly crystallized along geopolitical group lines, and the developing countries emerged as a group that was beginning to find its own identity. UNCTAD I was recognized as a significant step towards "creating a new and just world economic order"; the basic premises of the "new order" were seen to involve "a new international division of labour" and "a new framework of international trade"; and the adoption of "a new and dynamic international policy for trade and development" was expected to facilitate the formulation of "new policies by the governments of both developed and developing countries in the context of a new awareness of the needs of developing countries". Finally, a "new machinery" was considered necessary to serve as an institutional focal point for the continuation of the work initiated by the conference. See https://unchronicle.un.org/article/early-days-group-77.

[750] See 'Proceedings of the United Nations Conference on Trade and Development, Geneva, 23rd March – 16th June 1964, Volume 1 Final Act and Report' and 'Proceedings of the United Nations Conference on Trade and Development, Second Session, New Delhi, 1 February – 29 March 1968 Volume 1 Report and Annexes, available at http://unctad.org/en/Pages/Meetings/UNCTAD-Conferences.aspx.

[751] UNCTAD 1 Report, 14 para 70.

international institutional landscape that was becoming populated with a range of regional and international legal organisations with emerging roles in international economic relations. [752] The UNCTAD I conference had some results on how the DAC Members approached aid. Earlier in 1961, the DAC had produced its "Resolution on the Common Aid Effort" – a mere political statement on softening the terms of aid via loans or grants with no targets or timeframes identified for DAC members. However, after UNCTAD 1, the 1965 DAC High Level Meeting adopted its first Recommendation on Financial Terms and Conditions, which recommended that "[M]embers who do not already provide at least 70 per cent of their official assistance in the form of grants should endeavour to provide 80 per cent or more of their total official assistance at favourable terms, i.e. either as grants or as loans with long maturities (25 years or more), at low rates of interest (3 per cent or less) and that the average grace period on loans should be 7 years." [753]

[752] Though the focus of the Conference was officially on trade relations, this was merely the discourse through which much wider and deeper systemic change was articulated. UNCTAD itself became formalised as a UN body, with a policy reach that could potentially address non-trade economic relations. UNCTAD I's Final Act included 15 'Principles' as a basis for international action on trade relations addressing non-trade related matters such as 'Economic relations between countries, including trade relations, shall be based on respect for the principle of sovereign equality of States, self-determination of peoples, and non-interference in the internal affairs of other countries (Principle 1); International institutions and developed countries should provide an increasing net flow of international financial, technical and economic assistance to support and reinforce …. the efforts made by them to accelerate their economic growth … on the basis of their national policies, plans and programmes of economic development. Such assistance should not be subject to any political or military conditions. This assistance, whatever its form and from whatever source, including foreign public and private loans and capital, should flow to developing countries on terms fully in keeping with their trade and development needs. International financial and monetary policies should be designed to take full account of the trade and development needs of developing countries (Principle 11). And more particularly, its Final Act made several recommendations in relation to (i) international financial co-operation; (ii) growth and aid; (iii) international financial and technical co-operation, (iv) the terms of financing for loans to developing countries; (v) the problem of debt servicing by developing countries, (vi) non-financial credit arrangements for capital goods; (vii) the promotion of private foreign investment in developing countries, as well as several proposals on international institutional arrangements to make development financing available to developing countries on favourable terms, including proposals on reform of the international monetary system. See Annex IV 1-26. 177-179.

[753] Quoted in Scott (2015), supra note 810 at 3. Note the OECD database of legal instruments does not include this version of the Recommendation. Direct enquiries to the Legal Unit of the OECD to obtain a copy did not prove

Scott notes that three problems quickly emerged from the implementation of this Recommendation. First, though its aim was to encourage DAC members that were lending at "hard" terms to move these ("soften" them) towards the DAC average, in fact, the opposite happened. Members who were lending at softer terms saw the opportunity to make less generous loans while still meeting the new criteria. [754] Secondly, the 1964 comparator (which included three indicators on maturity, interest rate and grace period) proved cumbersome to monitor. There was no overall quantitative measure of performance, making monitoring of progress a difficult task. Thirdly, the 1% target proved to be problematic. The DAC preferred a net national income as the denominator, as this "flattered its members' performance." [755] However, the 1% gross target remained the target within the UN.

While it is not possible to ascertain the G77's response to the DAC's 1965 Recommendation, we can clearly see that it falls far short of the UNCTAD 1 conference outcomes, on the narrowness of its focus (on grants and loans via official assistance only), the terms included, and its subsequent effects. In order to push forward on the ambitious UNCTAD 1 agenda, the G77 produced the Charter of Algiers (1967), the first comprehensive declaration and programme of

successful at the time of writing (April 2018). The Recommendation exhorted members to use their best efforts to reach "within three years" the average 1964 terms for total DAC commitments. However, Scott notes that it was hedged with qualifications – "[R]ecognising that some countries would find it hard and take more time, it was nevertheless "recommended…that significant progress will have been made by those members during this period" and that "For these countries, the rate at which, during the three-year period, they will have progressed toward the agreed objectives is the important factor". Ibid: Footnote 3 on page 3.

[754] Scott (2015), supra note 810 at 5.

[755] "Successive DAC Chairmen repeatedly criticised the one per cent target as ill-defined and unworkable. The Chair at this time, Willard Thorp, was still complaining about it twenty years later, observing that it "was, of course, an entirely arbitrary figure based on no calculations of need or ability to pay." He conceded, however, that it "did exert an influence" and even admitted that "It gave the DAC Chairman [i.e., himself] effective arguments to the general public, the news media and government officials during his visits to Member countries." Ibid: 8 at footnote 6. (Note Scott's reference for this quote does not appear in his bibliography, unfortunately. It is attributed to a 1985 OECD report).

action of the Group of 77. [756] Framed in urgent and stark terms, [757] the Charter included a detailed "Programme of Action" covering specific proposals and demands across seven areas including a dedicated section on "Development Financing." This sub-section addressed a further seven areas including the flow of public *and private* international capital, including the terms and conditions of development finance (which addressed a timeframe for achieving the 1% target – by 1968), and the untying of aid. [758] Worth noting here is that the G77's demands clearly targeted both public and private international capital flows;[759] addressed the role and

[756] The first Ministerial Meeting of the Group of 77 took place in Algiers from the 10-25th October 1967. The resulting Charter is captured in United Nations: Charter of Algiers (Coordination of Policies of Developing Countries in United Nations Conference on Trade and Development), (1968) 7 ILM 177. In my view, this event warrants much further attention as one moment (amongst several) when states from the Global South sought to use a new, dedicated Southern-led governance space, to engage in a rapidly evolving international governance landscape to articulate and progress a different agenda to that being articulated within the OECD, and the UN, at the time.

[757] It opens with the statement 'The lot of more than a billion people of the developing world continues to deteriorate as a result of the trends in international economic relations,' and continues with a list of several indices relating to stalled levels of per capita income; declining terms of trade and levels of exports; deteriorations in developing countries' purchasing power, increasing indebtedness (an increase from USD$10 billion to 40 billion from 1955 to 1966); trade distortion policies by developed countries amongst other issues. Notably, it stated 'in spite of the unanimously agreed target of 1 per cent of national income of financial resources to be provided to developing countries, actual disbursements have levelled off in absolute terms and declines as a proportion of gross national product of developed countries. While in 1961 the flow of development financing to developing countries amounted to 0.87 per cent of gross national product of developed countries, it came down to 0.62 per cent in 1966." Ibid.

[758] Other proposals in the section on development finance included the reduction of interest on loans to developing countries by developed countries to rates then-applied by the IDA; the creation of a Multilateral Interest Stabilisation Fund; a study on the issuance of commercial credits; measures to address problems of external indebtedness; the mobilisation of financial resources; a proposed scheme for supplementary finance as well as changes to the IMF's Compensatory Financing Facility (and other issues to do with the IMF's Special Drawing Rights). Ibid.

[759] This section was divided in two with the first dealing with the 'Flow of international public and private capital' on the latter which was stated that "Private investments should be of permanent benefit to the host developing country. Subject to nationally-defined priorities and within the framework of national development plans, private investments may be encouraged by incentives and guarantees.' Part Two Programme of Action. C. Development Financing, para (h).

policies of international and regional organisations; [760] and condemned the then-prominent support of a private sector-led model of development amongst donors and lenders. [761]

What is so very striking about the Charter's approach to the Development Financing section alone, is the holistic and comprehensive approach taken to the conceptualisation of development finance and the range of issues that the G77 identified as being both relevant and necessary for market-economy (OECD members) to address. Clearly, finance for development was seen as a deeply problematic, complex and interconnected *field* of activity, for which effective remedies would need to go far beyond the mere reaching of a target on a level of resource transfer as aid from North to South. Equally striking is the seriousness at which the G77 pursued this agenda through a carefully orchestrated diplomatic strategy, before the UNCTAD II conference in 1968. [762]

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[760] Thus "(c) Resources of the International Development Association (IDA) should be immediately replenished and augmented; (d) Developed countries and financial institutions should extend and intensify their support to regional development banks; (e) The International Bank for Reconstruction and Development (IBRD) should be made a Development Bank for developing countries exclusively." Ibid. 189.

[761] '(f) There should be no discrimination by international lending institutions against the public sector, in particular in industry.' Ibid.

[762] "The representatives of the Group of 77 participating in the Ministerial Meeting at Algiers decided to send six high-level Goodwill Missions to visit the following groups of countries respectively: (a) The Benelux countries, France, the Federal Republic of Germany, and the headquarters of the European Economic Community (EEC) in Brussels; (b) The United Kingdom of Great Britain and Northern Ireland and the Nordic countries; (c) The United States of America, Canada, IBRD and IMF headquarters in Washington, D.C.; (d) Italy, Austria, Switzerland, the Holy See, and the headquarters of the European Free Trade Association (EFTA) and UNCTAD in Geneva; (e) The socialist countries of Eastern Europe; (f) Japan, Australia and New Zealand. These missions, which were entrusted with the task of informing and persuading, were to acquaint the respective Governments of the countries to be visited of the conclusions of the Meeting so as to contribute to the creation of the best possible conditions for negotiations on the programme of action at the second session of the Conference. The Governments of the countries to be visited expressed their willingness to receive the Goodwill Missions. The visits then duly took place. The President of the Ministerial Meeting of the Group of 77 presented the Charter of Algiers to the General Assembly of the United Nations at its twenty-second session and to the Secretary-General of the United Nations." UNCTAD Report II, 13-14. In addition, there were extensive regional consultations before the meeting in Algiers. It was preceded by regional meetings of the
African, Asian and Latin American countries members of the Group of 77, held at Algiers, Bangkok and Bogota, which adopted the African Declaration of Algiers, the Bangkok Declaration and the Charter of Tequendama respectively. Ibid

At UNCTAD II in 1968, both the G77 (Global South) and OECD (donors from the Global North) came prepared for intense debate. The OECD had just previously undertaken a Ministerial Meeting which included preparations for the conference in Paris from 30th November to 1st December 1967. [763] At the Conference, it was clear there was a strong risk of what Mr. Raul Prebisch, Secretary-General of UNCTAD and other delegates termed a "deadlock."[764] The G77 strongly reiterated their conceptualisation of development finance as articulated in the Charter of Algiers, linking the debt problem to historically prevalent hard terms of assistance; deeper problems within the international trade regime, and the burden of capital flight on account of royalties, interest, dividends and profits, and the repatriation of capital. [765] On the treatment of developing countries' increasingly unsustainable debt burdens, several of the G77 supported a proposal for interest subsidies on development loans and supported a proposal for measures like the "Bisque clause," found in the two loans extended by the United States of America and Canada to the United Kingdom of Great Britain and Northern Ireland in 1945, which provided for deferment of interest and amortization payments in a fixed number of years in which the United Kingdom suffered balance of payments difficulties, to be incorporated in all development loans. [766] In addition, they proposed the multilateralization of assistance as a

[763] It formally submitted a report from an OECD Special Group on Trade with Developing Countries to the UNCTAD II conference in which it agreed to grant non-reciprocal preferential treatment to exports of manufactures and semi-manufactures from the developing countries. However, that commitment was viewed with some scepticism by many G77 members as, according to Mr. Alinaghi Alikhani, Minister of Economy of Iran, it included 'so many exceptions, reservations and safeguards that it could not satisfy the needs of the developing countries.' (United Nations, Proceedings of the United Nations Conference on Trade and Development, Second Session, New Delhi, 1 February - 29 March 1968, Volume I Report and Annexes. At 123-124).

[764] Ibid, 422. Other G77 delegates used the same term including Niger as well as the Director of the Economic Commission for Africa.

[765] Ibid.

[766] Ibid: 286-287. This was a clause in the Anglo-American Financial Agreement of 1946, which provided a waiver of the 2% interest payment in any year in which the UK's foreign exchange income was 'not sufficient to meet its pre-

method to overcome the problems of tied aid and the reliance of recipient countries on limited sources for financing their development. [767]

However, the "developed market-economy countries" (many being OECD members) countered with the proposal that any response should adopt a case-by-case basis and should take account of "ensuring an equitable distribution of the burden among creditors." Though supporting G77 calls for some kind of an early warning system on debt, they suggested that the joint reporting system of the IBRD and OECD "and also the efforts of IMF should prove adequate to the task."[768] Overall, the Conference proved disappointing in terms of progressing the G77 agenda on international economic and financial system reform. The OECD members responded to only a few of the G77 proposals. One of these was the 1% aid volume target, that became revised downwards towards a minimum of 0.75 per cent *of their GNP* by way of *net official* financial resource transfers. [769] On the matter of softening the terms of loans, Scott records that "…the Group B [developed] countries in the UNCTAD successfully minimised controversy on the question of terms by pointing to the review of the Terms Recommendation under way in the D.A.C." [770] In doing so, debates and proposals on creditor responses to debtor development loans were thus sequestered back into the creditors' domain via the DAC, without any further right or opportunity of engagement by the G77.

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war level of imports adjusted to current prices.' Edward S Mason & Robert E Asher, *The Word Bank Since Bretton Woods,* (Washington, Brookings Institution 1973) at 216.

[767] Ibid: 288.

[768] Ibid. Note how this strategy, one that resorts to activities of international legal institutions dominated by Northern member states (one that relies on the work of future anticipated legal technologies to respond to pressing international North-South relations issues by those entities), echoed similar moves made many decades earlier with the League of Nations' PMC oversight of Mandatories' governance of their territories.

[769] Ibid 419.

[770] Scott (2015), supra note 810 at 10.

The DAC resorted to statistical means to solve the conundrum of how to develop a measure of "official development assistance" while also reviewing its earlier 1965 Recommendation in order to further soften the terms of aid. While a Supplement was agreed and added to the 1965 Recommendation, its complexity made it unwieldly for Members to apply, though it did exclude export credits for commercial purposes from its menu of what constituted official aid. With the exclusion of export credits, the concept of Official Development Assistance began to formally take shape (though issues such as debt relief, administrative costs, concessionality criteria as well as guarantee schemes, equity investment and subsidies to the private sector were all still debated). [771]

The narrow range of issues now pursued by the DAC in its approach to ODA is in stark contrast to the issues raised as intrinsic to development finance proper within UNCTAD II by the G77. Though some of the UNCTAD II issues were indeed taken up in the Report of the 1969 Pearson Commission on International Development,[772] what remained consistent between the DAC's and the Pearson Report's approach was their shared definition of ODA as official development assistance involving first, a 25% grant element to qualify as an ODA loan; secondly, a surgical separation of ODA from the wider web of international economic relations, and thirdly, the affirmation of a donor interest-centric, statistics-heavy conceptualisation of the term, one that

[771] Ibid 15.

[772] Lester Pearson et al., *Partners in Development. Report of the Commission on International Development*, (New York, 1969). Wright notes that the Pearson Report was central to a Western entrenchment of a particular view of want constituted aid, and its role in North-South relations, and also to the emergence of the World Bank in its defence and expansion. He notes that subsequent to the report, the World Bank solidified its international position as a key aid actor - its spending increased from $1.1 billion in 1968 to $3.4 billion in 1973, with an increase in staff numbers from 767 to 1,654 within that period. Matthew Wright, *The Pearson Commission, Aid Diplomacy and the Rise of the World Bank, 1966-1970*, (unpublished PhD thesis, 2017) Durham theses, Durham University. Available at Durham E-Theses Online: http://etheses.dur.ac.uk/11986/.

excluded any assessment of the relative benefits to aid recipient states, or their stake in its governance, as part of its meaning.

The focus on capturing the nature of development finance assistance led the DAC to propose the separation of total official and private flows into the categories of ODA, Other Official Flows (OOF) and Private Flows. Hynes & Scott note that separating ODA from OOF allowed the identification of official transactions designed to promote the economic and social development of developing countries at financial terms "intended to be concessional in character". While both ODA and OOF excluded military transactions, OOF included transactions that were either not concessional or not developmental. Loans extended by official agencies to nationals of the donor country in support of transactions with developing countries were also recorded as OOF. However, equity investments in a developing country by an official agency could be recorded as ODA. [773] The creation of these ancillary concepts (OOF in particular) augmented a wider donor policy narrative of philanthropically-motivated benign investment, but one that was selective; the longer-term impacts of these financial flows, and the right and opportunity of recipient states to determine the nature and purpose of these investments remained beyond the purview of these concepts.

After several years, the DAC's Recommendation on Terms and Conditions of Aid (1978) (which remained the officially recognised defined approach to 2018, if with minor modifications) defined Official Development Assistance (ODA) in the terms above. [774] Additionally, the

[773] Hynes & Scott (2013), supra note 810 at 5, footnote 16.

[774] "[T]those flows to developing countries and multilateral institutions provided by official agencies, including state and local governments, or by their executive agencies, each transaction of which meets the following tests: (a) it is administered with the promotion of the economic and development welfare of developing countries as its main objective, and (b) it is concessional in character and contains a grant element of at least 25%.'" "DAC

Recommendation exhorts Members to "endeavour fully to maintain or achieve as soon as possible an average grant element in their ODA commitments of at least 86 per cent."[775] Controversially, even today, are areas that were then and still are included in the calculation of ODA such as (i) administrative costs; (ii) the education costs of foreign students in the donor country; (iii) in-donor refugee costs, and (iv) "developmental awareness" initiatives.

For the purposes of this research project, the history behind the definition of ODA is pertinent to the influential role that this concept plays in the contemporary international governance of development finance. Donor executive authority has been maintained and legitimised through international legal means in several ways including first, on what constitutes "economic development and welfare." Recall that the key criterion of ODA as "the promotion of the economic and development welfare of developing countries as its main objective." There is no standard or guideline to provide further clarification on what this means, thereby leaving its broad definition in the hands of the donor. This means that, even today, purposes such as the reduction of poverty, the promotion of human rights etc. – all frequently cited in donors' international development policy rhetoric – can be entirely absent from the direct impacts of ODA-funded initiatives, and yet those activities can still be counted as ODA. Instead, a privileging of the economic realm within this definition, gives donors both a clear direction and considerable leeway within that realm, on what is permissible to be funded as ODA from the

statistics generally measure costs to donors, and consideration of typical opportunity costs incurred at diverting resources from domestic investments to aid played an important part in determining a reference rate of interest for calculating grant elements. For practical purposes this was set as 10%." DCD-DAC, *Converged Statistical Reporting Directives for the Creditor Reporting System (CRS) and the Annual DAC Questionnaire, Addendum 2, Annexes - modules D and E*. DCD/DAC(2013)15/ADD2/FINAL. (Paris: OECD, 2013) at 5.

[775] For LDCs, this was to be at least 86% to each least developed country over a period of three years, or at least 90% per cent annually for the least developed countries as a group. (Para 8).

public purse. Secondly, the highly technical, numbers-heavy definition of ODA finally agreed by donors is stripped of any connection to wider international economic relations that create and sustain economic disparities between donor and aid-recipient states such a debt, trade, investment and the legal institutions that support these. Thirdly, a particular kind of aid-recipient state subjectivity and agency has been created: at best, it is one that is almost completely absent, and passive (a recipient). No right or opportunity for intervention in decision-making on the nature and purpose of donor-ODA is accorded the aid-recipient state by the DAC. Finally, the DAC has assumed an international mandate for DAC policy evolution, and become the key international site for policy debate on ODA. This is despite the DAC and its mother institution, the OECD, having limited membership of states or the engagement with other international bodies with universal membership, such as UNCTAD. In the following section, I identify and examine some consequences for the international governance of ODA, of its appropriation by the OECD's DAC.

4. Mainstreaming the OECD's approach to ODA in international development policy

In tracing the historical background to the current concept of ODA, I have illustrated how the contemporary definition of ODA, as an international measure of North-South financial flows, now excludes any links with systemic international economic and financial relations and institutions (an indirect governance consequence of the evolution of the concept), and has become the sole preserve of DAC thought leadership, monitoring and governance. I now turn to exploring how this concept is used within international and domestic development financing

policy. [776] First, the ODA definition is undoubtedly a key anchor concept by which donors define and elaborate their international development policy, including their approach to development finance. Several donors such as Canada have included the definition of ODA as part of their legislative framework on international development. [777] Thus the DAC's concept of development has been closely – and sometimes legally – integrated with donor domestic international development policies, thereby shaping the approach by domestic institutions dealing with international development, including the activities of national domestic financing corporations and the development financing of national development banks,[778] as well as their engagement with the multilateral institutions and other entities.

Secondly – and crucially for the purposes of this thesis - the DAC ODA definition is essential for the financing of domestic policy reform within aid-recipient states, an activity that is key to the sectors in which private-sector led development is predominant and most lucrative. Miyamoto

[776] The concept and measurement of ODA continues to be a source of debate within international policy, scholarly and civil society circles. Thus far, however, commentary has not focused on the legitimacy of the OECD DAC as the hub of international policy and decision-making in that area. For a discussion on the relevance of the concept to a changed ODA landscape with a wider range of donors, see Felix Zimmermann & Kimberly Smith, 'More Actors, More Money, More Ideas for International Development Co-operation,' (2011) 23 J Int Dev 722; Heiner Janus, Stephan Klingebiel & Sebastian Paulo, 'Beyond Aid: A Conceptual Perspective on the Transformation of Development Cooperation,' (2015) 27 J Int Dev 155. For a good overview of debates about the concept of ODA and some proposals on revising it further, see David Roodman, *Straightening the Measuring Stick: A 14-Point Plan for Reforming the Definition of Official Development Assistance (ODA*), Centre for Global Development Policy Paper 044 June 2014.

[777] See Canada's Official Development Assistance Accountability Act (2008) S.4. This is different to legislating for the UN 0.7% aid target. However, states that have legislated to meet this target (e.g. the United Kingdom) use the DAC's definition of ODA in their legislation. See UK International Development (Official Development Assistance Target) Act 2015, Chapter 12. Also Belgium's Federal Law for Development Co-operation (2013) - see *The Belgian Development Corporation, 2013 – A Summary*, at 2. European Parliament, 'The European Council and EU Official Development Assistance,' December 2015.

[778] For example, several of the European DAC Member states that have national development banks, include international development financing (of which ODA is one modality) as part of their portfolio of activities.

& Chiofalo note that almost 20% of Official Development Finance (ODF)[779] to infrastructure was allocated to the address the policy framework of, and other non-physical aspects related to, infrastructure sectors in 2014, particularly for energy. Spending here including technical assistance and capacity building for relevant ministries in power sector policy and regulatory reforms, especially for renewable energy.[780] Framed as supporting an "enabling environment,"[781] this refers to ODA funding of policy, regulatory and institutional reform initiatives (such as a system for establishing clear property rights, and low costs of regulation on business) in aid-recipient states, targeted at creating the conditions necessary for the operation of domestic businesses and entrepreneurs, and the facilitation of international trade and investment. [782] It has been estimated that, in 2015, approx. US$9.9 billion of ODA was spent on delivering activities targeted at strengthening the enabling environment for private sector

[779] Official Development Finance (ODF) consists of Official Development Assistance (ODA), which is concessional, and developmental Other Official Flows (OOF), which are non-concessional. It excludes export credit OOF as its main objective is not developmental. Ibid at 3.

[780] Kaori Miyamoto and Emilio Chiofalo, *Official Development Finance for Infrastructure With a Special Focus on Multilateral Development Banks*, OECD Development Co-operation Working Paper 30, (Paris: OECD, 2016) at 10.

[781] This term has become increasingly used by the major international development organisations in the post-Washington Consensus era. Briefly, the term derives from ideas associated with the "enabling state," a concept introduced by Neil Gilbert & Barbara Gilbert in their seminal work *The Enabling State : Modern Welfare Capitalism in America* (Oxford University Press online, 1989), and elaborated in further works such as Neil Gilbert, *Transformation of the Welfare State: Work and Insecurity Under the Triumph of Capitalism*, (New York: Oxford University Press, 2002). Usually used in juxtaposition to the welfare state, the role of the enabling state in welfare provision has been captured by the idea of "public support for private responsibility" through limiting the direct role of the state and to increase private financing and delivery of social benefits through state promotion of privatisation via regulation and legislation, the provision of tax incentives, service purchase agreements etc. The OECD has engaged with this policy approach to the role of the state in the provision of social services in its own deliberations on social welfare services. Neil Gilbert, "The "Enabling State?" from public to private responsibility for social protection: Pathways and pitfalls" OECD Social, Employment and Migration Working Papers No. 26 (2005).

[782] Cecilia Caio, "The enabling environment for private sector development – donor spending and links to other catalytic uses of aid," Development Initiatives Discussion Paper, May 2018 at 4 and 9. Caio estimates that appox. US$16.6 billion was spent in OOF (ODA and other forms of official finance), through loans, equity, grants and technical co-operation, 12, 25

development, including general regulatory reform re. business promotion, in targeted market areas such as infrastructure, access to finance, and labour force measures.[783]

Thirdly, the definition of ODA is highly relevant to the work of development finance institutions and international finance institutions, including MDBs that are unique conduits for the whole range of official finance flows, not just ODA, in aid-recipient states. [784] The 'official' (public) part of the ODA definition enables them to 'blend' different types of official finance into ODF to address a variety of aims involving a range of different public and private actors within a development financing agenda which can be rationalised under an 'economic development and welfare' agenda. Thus, for key sectors of development finance and development activity such as infrastructure, ODA is key to catalysing further public and private investment in infrastructure – but of a kind overwhelmingly focused on private sector-led development. [785] It also enhances the unique role of MDBs as development actors and public financing vehicles with a mandate to directly support and engage with the private sector. This is done through a variety of OOF-funded financial instruments such as guarantees, equity and loans with the aim

[783] Ibid. 9.

[784] These can include what are called Multilateral Development Banks (MDBs) which are those with ownership by two or more sovereigns that have developing countries as an important (if not only) subset of borrowers. So-called sub-regionals are also included. MDBs thus include the World Bank (international); the African Development Bank, Asian Development Bank and other regional MDBs (note that these banks operate concessional (ODA-derived) and non-concessional funds); sub-regional banks such as Banque Ouest Africaine de Développement/ West Africa Development Bank and the Central American Bank for Economic Integration, as well as newer entrants to development financing such as the BRICS New Development Bank (NDB) and the Asian Infrastructure Investment Bank (AIIB). Raphaëlle Faure, Annalisa Prizzon & Andrew Rogerson, *Multilateral Development Banks – a short guide,* ODI, December 2015.

[785] Figures for 2014 show that 56% of official financing for infrastructure was concessional finance (i.e. ODA) and 44% was non-concessional (i.e. OOF). Of the 60 billion provided by development partners, 43% was disbursed by bilateral development partners and 57% by multilaterals, particularly the Multilateral Development Banks (MDBs), which together accounted for half of the total disbursements. If only flows reported to the DAC are considered, ODF for infrastructure increased by 6% – or USD$ 2.7 billion – when compared to 2013. Kaori Miyamoto & Emilio Chiofalo, Official Development Finance for Infrastructure: With a Special Focus on Multilateral Development Banks, OECD Development Co-operation Working Paper 30, November 2016, at 5.

of mobilising additional financing for infrastructure and other sectors. This raises questions about the distance of donors from MDB funding decisions,[786] the compatibility of donor MDB-led investment projects to the aims of national development plans of aid-recipient states, and the nature of the decision-making role (if any) of the aid-recipient states in these kinds of MDB investment decisions.

Fourthly – and key for understanding its governance role and modality – the governance of ODA has now been thoroughly 'indicatorised'[787] by the DAC, thus contributing much to its removal from popular politics domestically (within both donor and aid-recipient states), and within the international realm more widely. This has implications for the extent to which donor states' publics or other entities can influence the domestic policies of donors on ODA, and aid-recipient states can input into the future development of donor ODA policy more generally. [788] Finally – and as we shall see below in relation to TOSSD – the current definition of ODA, and the role of the DAC as its guardian, provides a solid foundation for an elevated role for the DAC in

[786] The International Finance Corporation (IFC) lends to the private sector and is part of the World Bank Group. A very recent study using new data for more than 3,000 IFC projects over the 1995-2015 period showed that (joint) IFC Board membership of countries where borrowing companies are based and of countries where the projects are implemented increases the likelihood that these countries receive IFC loans. Axel Dreher, Valentin Lang, Katharina Richert, "The political economy of International Finance Corporation lending," (2019) J Dev Ec (accepted manuscript available online from J Dev Ec).

[787] This term describes the process whereby legal concepts and norms are described and elaborated through numbers, data and indicators. This approach to elaborating the content of a legal norm, and providing a means of tracking its implementation is particularly prevalent in human rights law. The governance implications of this process are many, including a more likely evolution of the norm in ways that are reliant on available data, that may not originally have been developed with human rights monitoring in mind; a greater involvement of experts and expertise in debates on norm development and a greater likelihood of a turn away from other more participatory and democratic ways of elaborating and monitoring the norm, and an increasing technicisation of the legal norm in question. See special issue of (2015) 12 Int Org L Rev for insights into this area.

[788] Thus, recent UNCTAD conferences have all but ignored ODA policy, with the sparse references re-iterating the need for donors to more swiftly achieve the 0.7% ODA target. See for example United Nations Conference on Trade and Development fourteenth session July 2016 (UNCTAD XIV) Outcome Documents - the Nairobi Azimio (TD/519/Add.1) and the Nairobi Maafikiano (TD/519/Add.2 and Corr.1).

the promotion of a particular kind of ODA-supported economic development policy. Already we have seen how the OECD and DAC privileges a model of development that is exclusively private sector-led and privileges support of transnational capital through the role of ODA.

5. From ODA to TOSSD – towards greater mobilisation of private sector development by ODA

As noted earlier, the DAC's approach to the concept of ODA is framed as predominantly technical and numbers-focused, and is focused solely on the terms of the definition of ODA. DAC Members' (and as we've already seen, other non-DAC and non-OECD Member states that also voluntarily report) reporting of data on ODA is governed by a number of Reporting Directives, whose content is constantly monitored and adapted by a DAC Working Party on Development Finance Statistics (WP-STAT).[789] In recent years, the DAC has made a concerted attempt to 'modernise' DAC statistics, and has endorsed a number of directives to change the data and reporting process used to monitor ODA. [790] These changes include i) a new taxonomy

[789] Though the legal status of these 'Directives' is unclear within the taxonomy of legal governance instruments listed by the OECD, (officially, only Recommendations produced by the DAC hold legal weight within that Committee), the term 'Directive' implies strong normative weight.

[790] In December 2014, the High Level Meeting of the DAC approved a reform of ODA reporting rules. Previously, all loans with a grant element exceeding 25% could be fully reported as ODA, irrespective of their financing terms. With the change, the former 10% discount rate is abolished, it will now depend on the recipient country's income level. The wider the spread between the loan interest rate and the discount rate, the greater the loan's concessionality. "The discount rate will now be higher when the recipient country has a low income level. It will range from 6% for an emerging country such as China or South Africa to 7% for a country such as Guatemala or Nigeria, and 9% for the poorest countries. For the same loan, the proportion recorded as assistance will thus be larger for a country with little or no access to market financing (see chart below). This approach recognises *the donor's risk exposure and hence its financial effort*." (Own italics) Léonardo Puppeto, 'The new rules for Official Development Assistance loans: what's at stake?' Trésor Economics, No. 161 March 2016. Ministère des Finances et des Comptes Publics, Paris. Available at https://www.tresor.economie.gouv.fr/. This creditor-focused perspective is echoed by the OECD's own presentation of the 2014 changes with 'DAC members reached a historic agreement to provide a fairer picture of provider effort by changing how the grant element is calculated.' OECD, 'What is ODA?' April 2018. Available at http://www.oecd.org/dac/financing-sustainable-development/development-finance- standards/officialdevelopmentassistancedefinitionandcoverage.htm. However, in fact the changes are also aimed encouraging DAC donors to shift their concentration of ODA in middle income countries. 'On average,

of financial *instruments*, and ii) a regular data collection on amounts mobilised *from the private sector* by official development finance interventions, [791] and are crystallised in the concept of Total Official Support for Sustainable Development (TOSSD). A dedicated focus has now emerged on the role of other (non-concessional) officially extended or supported financial flows as a source of development finance for which a grant element or concessional rate of interest does not apply for ODA-eligibility purposes. As part of the revision of guidelines on the Creditor Reporting System, the DAC requested its Members "to review more fully, in consultation with other interested Committees of the OECD, their basic approaches to extending such flows to developing countries, and their relationship to aid and development considerations." [792] The former mandatory ODA reporting system has changed to now reflect and include non-concessional Official Finance.

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of the $137bn in loans granted by DAC members in 2006-2013, 12% went to LDCs and other LICs, 57% to lowermiddle income countries (LMICs) and 22% to uppermiddle income countries (UMICs)." (Puppeto, Ibid. 5) Note also that this modification of the terms of ODA happened ahead of the international meetings in 2015 – the Addis Ababa conference on financing for development in July, and the adoption of the UNSDGs in September in the context of the UN's 2030 Agenda for Sustainable Development.

[791] Development Co-operation Directorate, Development Assistance Committee, Converged Statistical Reporting Directives for the Creditor Reporting System (CRS) and the annual DAC questionnaire. Chapters 1-6. DCD/DAC (2016)3/FINAL, at 5. These modifications to reporting requirements were to take effect in 2017 reporting on 2016 flows. Starting with 2018 data, the new grant equivalent measure (see footnote above) will become the standard for reporting, with the headline ODA figures published on that basis. See Appendix 1 for a table listing the new categories and instruments. In an Annex to this report, it is noted that the methodologies to measure amounts mobilised from the private sector are a 'work in progress and will be duly reviewed by the WP-STAT to identify the need for possible adjustments. Reporting will be expanded to cover other leveraging mechanisms as and when the WP-STAT progresses on the methodological work. Members have also suggested work on measuring more indirect "catalytic effect" of public interventions including grants for technical assistance, policy support, feed-in-tariffs development, etc. It is generally recognised that the catalytic effect remains difficult to measure statistically.' Development Co-operation Directorate - Development Assistance Committee, Converged Statistical Reporting Directives for the Creditor Reporting System (CRS) and the Annual DAC questionnaire - Addendum 1 annexes - Modules A, B and C. DCD/DAC(2016)3/ADD1/FINAL at 37.

[792] Development Co-operation Directorate - Development Assistance Committee, Converged Statistical Reporting Directives for the Creditor Reporting System (CRS) and the Annual DAC questionnaire - Addendum 1 annexes – Modules D & E, DCD/DAC(2016)3/ADD2/FINAL at 13.

These formalised changes to data collection on ODA illustrate a further deepening of the DAC's policy focus on deepening and expanding ODA's support of private sector-led development. The detail of this policy turn can most closely be traced by an analysis of the categories and the purpose codes of the CRS database derived from data requested from donors via its annual questionnaire on ODA statistics. The list of financial instruments now to be included in the DAC's statistics includes a range of debt instruments (including asset-backed securities); mezzanine finance instruments[793] and equity and shares in collective investment vehicles,[794] clearly targeted at the mobilisation of private capital investment in developing countries. This has potential positive and negative effects. On the positive side, donors that have established profit-making dedicated development finance institutions using ODA such as development banks or specific windows like the UK's CDC [795] will now be able to get credit for this investment. One risk of mainstreaming TOSSD as a broadened definition of what the DAC includes in its annual ODA statistics, is that TOSSD may lead donors to allocate reduced amounts to ODA contributions to states, if they are able to show higher TOSSD numbers at the

[793] Mezzanine finance is a hybrid of debt and equity financing including subordinated loans (this is where debt holders are ranked, so that if a borrower defaults, creditors who own subordinated debt will not be paid out until after more senior debt holders are paid in full); preferred equity (where a shareholder – in this case the public finance investor – has no voting rights), and other hybrid financing instruments.

[794] OECD DCD-DAC (2016), supra note 818 DCD/DAC(2016)3/ADD1/FINAL at 67 (see also (c) in Appendix 1, List of Financial Instruments, in this document).

[795] CDC (or CDC Group plc) is wholly owned by DFID with the primary shareholder being the UK Secretary of State for International Development. It was established in 1948 and was originally called the Colonial Development Corporation). According to its most recent financial statements, it is a development finance institution that invests its capital in private sector businesses in developing countries. Its principal activity is risk capital investment. It invests directly in companies through debt and equity instruments. It also invests in companies indirectly through fund investments and other investment vehicles managed by third party investment fund managers. The CDC's most recent figures for 2018 show a total profit of UKGP£6.0 million (compared with a loss of £72.8 million in 2017), representing a return of 0.1 per cent on net assets for the 2018 year. The average annual return on net assets since 2012 was 6 per cent. From CDC, "Making a difference: read our 2018 Annual Review and Annual Accounts," 1 July 2019. Available at https://www.cdcgroup.com/en/news-insight/news/making-a-difference-read-our-2018-annual-review-and-annual-accounts/.

same time. It also raises the risk of tied aid, as donors may use their DFIs to disburse subsidies to domestic or favoured firms, over allocating investment capital to the most effective institutions.[796]

While the G77 have always recognised the value of private investment as an instrument of development, it is revealing to examine the approach taken by the DAC to this area of development finance, crystallised in its recent launch of the TOSSD concept. The OECD's Development Co-operation Directorate claims that "TOSSD would incentivise broader external finance for development as a *complement* to developing countries' own domestic resources" and it "aims to *complement* ODA by increasing transparency and monitoring important new trends that are shaping the international development finance landscape, including: i) the leveraging of/catalytic effect of ODA, ii) the use of blended finance packages, and iii) the use of innovative risk mitigation instruments in development co-operation."[797] The benefits to aid-recipient countries of TOSSD data have been identified as helping recipient countries better track the volume, nature, and use of officially supported resources they receive, enabling them to "improve strategic development planning processes, better manage budget outlays, and strengthen balance of payments statistics." Other benefits conjectured include (i) identifying "invisible flows" (e.g. illicit financial flows, transfer pricing); (ii) increasing transparency regarding public debt obligations – including contingent liabilities arising from public/private partnerships, and (iii) tracking the development results or impact of TOSSD flows. [798] Nowhere,

[796] Sonny Kapoor, "Billions to Trillions – A Reality Check," Re-DEFINE Policy Brief for Stamp Out Poverty, March 2019, at 10.
[797] http://www.oecd.org/dac/financing-sustainable-development/tossd.htm Own italics.
[798] Minutes of Item 7 - Brainstorming session on civil society concerns about the TOSSD framework. Second meeting of the TOSSD Task Force - San José, Costa Rica, 6-7 December, 2017. Available at

however, is there any recognition of the role or right of aid-recipient states or communities to determine the kinds of private transnational investment that will be supported by TOSSD. [799] Though the DAC have been careful to state that TOSSD does not replace ODA as an indicator of official development finance, the recent emergence of TOSSD and its rhetorical location in DAC development finance policy discourse alongside the ODA measure, gives subtle but significant legitimacy to a deeper policy shift whereby donor ODA may increasingly engage with private financial sources and actors on investments in aid-recipient states, without any direct involvement by the latter.

Furthermore, though several concerns have been raised by NGOs and some other observers about the risks associated with the rise to prominence of an enhanced role for Blended Finance as an international development finance instrument,[800] few have engaged directly with the role that the inclusion of TOSSD within the statistics gathered annually on ODA plays in promoting the latter as a policy goal, and how the 'indicatorisation' of the governance of TOSSD may lend

http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/tossd-task-force.htm.

[799] In an informal interview in August 2016 with a DAC Member state development finance official, the official noted his concern that the emergence of TOSSD shifts the focus of ODA policy attention to its role in the facilitation of transnational private capital. He queried whether this signalled a return to an era of Northern state-supported transnational capital-led development, as was the case in colonial times with the British East India Company and the Dutch East India Company.

[800] Key issues include (i) the risk of development finance inflation; (ii) diversion of ODA from other aid modalities and an increased risk of aligning Blended Financed projects with donors' political and economic priorities, compared with other forms of ODA (e.g. the support of national private sector companies); (iii) the push to derive a profit risks concentrating OOF on countries and sectors with a lower risk profile, such as middle-income countries; (iv) a higher risk of lack of demonstrable development effects because of weaknesses in monitoring and evaluation systems, or inadequate definitions of additionality; (v) a lack of coordination with bilateral aid agencies and other donors; (vi) fudged project ownership within aid-recipient states, and within the several project sponsors and weak accountability mechanisms for affected stakeholders to channel their concerns and hold donors accountable. Adapted from Javier Pereira, *Blended Finance - What it is, how it works and how it is used*. Eurodad & Oxfam International (February 2017), Available at http://www.eurodad.org/Entries/view/1546703/2017/02/13/Blended-Finance-What-it-is-how-it-works-and-how-it-is-used

further to these risks. I suggest that the risks posed by the prominence of TOSSD, and its elaboration alongside ODA using similar data-based technologies, are further strengthened by prominence of the Blended Finance agenda within the UN's Agenda 2030. Though 'Blended Finance' in international development finance policy has existed for many decades, it rose to prominence as the 'new' development financing idea in the negotiations for the post-2015 development agenda and the linked Financing for Development (FFD) negotiations. In 2014, the report of the UN Intergovernmental Committee on Sustainable Development Finance discussed blended finance as a key resource for development. [801] By then, however, the OECD and the World Economic Forum together had produced several policy publications that mapped out an international policy agenda for promoting Blended Finance within international development finance, one that explicitly relied on official sources of international development finance. This policy agenda framed Blended Finance as the magic bullet to address perceived funding gaps to realise the UN SDGs [802] However, there is a strong risk that Blended Finance veils a deeper shift in public development finance that reflects one of the key concerns of an increasingly financialized global economy. This concern is that profit becomes privatised and risk becomes socialised.[803]

[801] Though it noted issues in the implementation, such as poorly designed blended finance partnerships leading to increased risks for the public sector). UN General Assembly (2014), Report of the Intergovernmental Committee of Experts on Sustainable Development Finance. Section E, pp35. Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/69/315&Lang=E

[802] Publicised under the slogan 'From Billions to Trillions.' See the several publications called the 'Blended Finance Toolkit' issued by the WEF. Available at https://www.weforum.org/reports/blended-finance-toolkit. Blended finance was already being promoted by the business sector steering committee in the FFD negotiations, as well as being prominent in certain countries, including Canada, Australia, USA, and the EU bloc.

[803] By this I mean that public funding is used to adjust the risk/return metrics to attract investors to invest in developing countries, by reducing the risk to for-profit corporate actors of their investment into development projects through project financing arrangements such as "mezzanine finance" and "first loss adjustment." The latter is where the public investor takes the initial losses of the investment, and the former is where the private

How do the Blended Finance and TOSSD measurement agendas coincide? Blended Finance has become SDG-friendly by being translated into TOSSD by the DAC. As stated by the OECD,

> What the world needs now are shared statistical tools and measures for ensuring a coherent, comparable and unified system for tracking SDG–relevant investments that can inform strategic planning, identify emerging needs and priorities, and assess progress in matching supply with needs…. TOSSD will track all financing provided by official bilateral and multilateral institutions – regardless of the level of concessionality involved or instrument used. It will also capture private resources that are mobilised through official means. The TOSSD framework is composed of two pillars: i) cross-border flows, and ii) support for promoting development enablers/addressing global challenges (the Global Public Goods agenda).[804]

An international Task Force, supported and led by the OECD's Development Co-operation Directorate, has been established to elaborate the statistical features of the new measurement framework of TOSSD and to prepare a first set of Reporting Instructions. At the time of writing it has met four times. [805] By linking TOSSD to the UN's SDGs reporting framework, the DAC has internationalised and legitimised both its historic role as custodian of the concept of ODA and elevated its emerging approach on Blended Finance within international development finance policy to the status of an international development policy framework, in several key ways. First, it has grafted its approach to the concept of ODA as a highly technical and numbers-reliant concept (one divorced from the wider web of transnational real economic relations between North and South, and one where authority for development rests primarily with Northern donors) directly onto TOSSD via the conceptual form of the former. In this way, the

investor can get larger and earlier payments of any profits. Blended Finance covers a range of quite complex financial arrangements.

[804] TOSSD Task Force Final Terms of Reference, 7 December 2017. Available at http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/tossd-task-force.htm

[805] In Paris, in Costa Rica, in Ottawa and in Brussels.

DAC's approach to ODA, acts as a 'wormhole'[806] through to potentially a significantly altered, new era of international development finance one with a carefully crafted 'technical' and seemingly apolitical, data-heavy governance framework. Secondly, the universal recognition of the DAC's role and approach to ODA and its promotion of TOSSD as key to a universal measurement of 'Official Financial Flows' enables the OECD (an international organisation with select membership) to engage directly within two other key contemporary international development policy frameworks - the international UN Addis Ababa Action Agenda,[807] and the UN's Sustainable Development Goals – on a par with, and possibly even surpassing in influence, the role of the UN. In my view, the concept of ODA (and TOSSD) is thus a conduit for the potential evolution of an unparalleled governance role for a non-representative international organisation, and one that does not itself deliver or administer development finance directly.[808] Thirdly, I suggest that the DAC's approach to the governance of ODA and to TOSSD formalises a link between the different international legal governance frameworks of public finance (at the national and international levels) with that of private international finance. After the last Global Financial Crisis, several extensive and detailed studies have identified, analysed and proposed

[806] A wormhole is a hypothetical interconnection between widely separated regions of space-time (Oxford English Dictionary online). It is a popular term in many genres of science fiction, visually captured and frequently used in the Star Trek series.

[807] This Agenda (or AAAA) is the outcome document of the United Nations Third International Conference on Financing for Development, being held in Addis Ababa, Ethiopia in July 2015. It contains commitments and initiatives designed to achieve the UN's Sustainable Development Goals, and addresses issues such as the domestic mobilisation of finance, ODA, international taxation governance, and Blended Finance. UNGA Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), 17 August 2015, A/RES/69/313. See https://www.un.org/esa/ffd/ffd3/documents.html.

[808] Other international entities within the UN (which has universal membership) such as the UN's Statistical Commission and the UN's Financing for Development Office (FfDO) (established within the Department of Economic and Social Affairs (DESA) of the United Nations Secretariat on 24 January 2003) come to mind.

responses to the regulatory gaps and shortcomings of global financial markets.[809] By linking public domestic and international financial flows with private transnational ones via TOSSD, the DAC has now created and deepened a governance relationship between two legal regimes. The nature of this relationship remains underexplored and requires greater critical analysis than can be given here. However, in my view, a solid risk exists that the international governance of state-originating public international development finance will be further dispersed, and may possibly become more subservient to the acknowledged, flawed regulatory approach of global financial markets.[810] In doing so, by default, it increasingly links the domestic governance of public finances of aid-recipient states (who have deeper and more extensive development and governance challenges than those of donors), to that of the regulation of international financial markets, and risks further enmeshing the futures of vulnerable peoples and communities, to a financialized, risk-based, private capital-accumulating model of development - one where risk is increasingly socialised while profit is privatised - led by a Northern-based, weakly regulated transnational financial sector.

6. Conclusion

This chapter has aimed to show that, far from ODA being a mere quantitative measure of concessional public development finance for aid-recipient states, it is in fact a key element of the international governance *of* ODA, and international governance *by* ODA. I have shown how

[809] This led to a number of significant institutional changes to the international financial regulatory landscape with the G20 providing political impetus, international reform efforts being co-ordinated through the Financial Stability Board (FSB) and member standard-setting bodies, including the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO) and others. However, systemic regulatory challenges continue to remain. See contributions in Tony Porter (ed), *Transnational Regulation after the Crisis,* (London, Routledge, 2014).

[810] Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century*, (Cambridge: Cambridge University Press, 2015), at 19.

the historical strategy of the DAC to its seizure of the normative content of the concept of ODA, and a technocratic approach to its governance, has cemented the concept of ODA as a key technology of governance, with the DAC as the designated international authority on development finance. Here, the DAC (and OECD) creates, legitimises and deepens its jurisdiction over the development pathways of aid-recipient states, and of donor development co-operation policy, in hidden ways.

Each of the four elements of the governance signature concept - its approach to juridification, its internal legal logic, its juridical nature and a performative approach to its implementation – are evident here and are revelatory of how this technocratic governance technology has hidden legal qualities. In the sections above, I have aimed to show how the concept of ODA both was increasingly juridified over time, both horizontally and vertically, through the production of Reporting Directives to donors and other international reporting parties; through the legal reporting obligation on DAC members, and through the legal and policy adoption of the DAC definition of ODA within donor domestic development finance frameworks. Through its expansion via TOSSD towards deeper engagement with private, for-profit forms of finance, and its implementation through intermediaries such as MDBs and their remit to engage with private investors, the concept of ODA has been an able vehicle through which the OECD's DAC has progressed an implemented a very particular kind of development, one founded on a neoliberal transnational model of capitalist development. We have also seen how ODA has its own internal legal logic, one that has been key to facilitating particular kinds of legal and regulatory reforms in aid-recipient states, reforms that privilege the promotion of for-profit, private sector-led development, under the rhetoric of creating an enabling environment. In this, ODA is

key to the articulation and international promotion of an internalised neoliberal legal order, focusing on key sectors of the economy such as infrastructure, energy and agriculture.

Its juridical quality is instanced in the exclusive and sweeping authority of the DAC and donors to make decisions on the nature of the concept of ODA, how it will be tracked, monitored and modified - an authority now enshrined in the mandate of the DAC, and in the legal frameworks of some influential donors. In this, the exclusion of aid-recipient states, and the communities upon which ODA-funded projects are visited, from decision-making on ODA, legalises and further institutionalises their erasure from a very influential part of international relations with deep domestic reach. Though not examined in detail in this chapter, this pattern of authority has been institutionalised by a strong performative dimension such as the routine and periodic practices such as the annual reporting by donors on ODA (and now TOSSD). In my view, the institutionalisation (including the legalisation) of the concept of ODA in the way described in this chapter is powerful evidence of the juridical role of this technocratic governance instrument in the international governance of ODA. The legal quality of this governance instrument – captured in the features of its governance signature – are key to its international influence. Far from merely representing a quantitative measure of development financial flow, the concept of ODA represents a deeply political, juridical cut.

In the next, and final, chapter in this part of the thesis that addresses the contemporary OECD and DAC governance of and by ODA, I turn to the fourth technology of governance, and the second under the exclusive purview of the DAC. This is the bureaucratic technology of DAC Peer Review of donor policy on ODA, in which it applies self-described “international standards.” My approach to the analysis of this technology differs somewhat to that of other authors that have

examined the OECD's approach to Peer Review as a disciplinary form of governance practice. Instead, I draw attention to the overlooked normative and legal content of the OECD DAC's own "standards" and "guidelines" that it produces for use in the DAC Peer Process, and how the detailed official approach to DAC Peer Review acts as a legitimising veneer for a highly exclusive decision-making process on a sensitive area of donor international policy. In this, I argue, bureaucratic governance practice masks a problematic, clearly juridical governance process.

Chapter 11 International governance of ODA – bureaucratic technologies of jurisdiction

1. Introduction

In the previous chapter, I focused on the concept of ODA and its role in the international governance of ODA. By critically examining its history, and its current content, I aimed to show how, while ODA might appear at first glance to be a mere numerical measure of donor finance to aid-recipient states, in fact this concept contains within it a highly select approach to development and to the financing of development, one denuded of any real connection to the wider international financial and economic system deemed that have been historically and repeatedly identified as problematic by the Global South. Furthermore, the contemporary role of the DAC as sole international custodian of the concept gives the DAC and OECD unchallenged ontological and epistemic authority within international development policy. This role has important governance implications for both the DAC as an entity, and donor members of the DAC. First, it enables both of these to determine, prescribe and financially support institutional reforms across a broad range of sectors within aid-recipient states as part of ODA-funded development. Second, through its marriage with TOSSD, the concept of ODA becomes a conceptual catalyst and legitimising conduit for a DAC-led donor shift towards greater ODA-supported engagement with private financial instruments. Third, the significance of ODA for international development policy (relating to universal policy frameworks like the UN's SDGs, and issue-specific ones like climate change, health, education etc.), means that the weight of DAC and donor engagement in determining the content and purposes of ODA leverages additional influence by them in international development policy. Juridical aspects of the legalised and institutionalised concept of ODA as a governance instrument are key to this

influence. These are first, including the role of the DAC as the executive authority on ODA. Secondly, there is the range of instruments (including legal, technocratic and bureaucratic ones) that institutionalise ODA as foundational to development finance within the OECD; within many donors at the national level, and influential development actors such as multilateral development banks. Thirdly, there are the differentiated subjectivities that are automatically ascribed to donors and aid-recipient states, each with a differentiated authority and agency, within the definition of ODA. In these ways, I aimed to show how the concept of ODA acts as a key technocratic instrument of governance towards institutionalising the jurisdiction of the OECD-DAC, and has hidden juridical qualities that lend significantly to its governance reach and influence.

In this final chapter, I focus on one of the key bureaucratic governance technologies of the OECD – that of Peer Review (PR). PR is recognised as a highly influential international governance instrument in wider international relations literature, [811] and more recently in legal literature. [812] Here, I critically examine the OECD and DAC's practice of periodic Peer Review,

[811] See collection in Rianne Mahon, & Stephanie McBride (eds), *The OECD and Transnational Governance*, (Vancouver: UBC Press, 2008), within which Arne Ruckert, "Making Neo-Gramscian sense of the Development Assistance Committee," 96 – 113, is a DAC-focused contribution. Also Kerstin Martens & Anja Jakobi, *Mechanisms of OECD Governance: International Incentives for National Policy-Making? (*Oxford Scholarship online, 2010), and also Richard Woodward (2009), supra note 553. Peer Review, in various forms, is also used by other international organisations such as the WTO's Trade Policy Review Mechanism; the UN's Human Rights Council's Universal Periodic Review mechanism, and the African Union's African Peer Review Mechanism (APRM), under the framework of the implementation of the New Partnership for Africa's Development (NEPAD). Though Peer Review is largely viewed as a European-international construct, Jonas, writing in the context of the APRM, notes observations on early African civilisations that are, he claims, suggestive that the concept of peer review has African origins. Obonye Jonas, "Reflections on the Practices and Experiences of African States in the African Peer Review Mechanism (APRM) and the Universal Periodic Review Mechanism (UPR): A Human Rights Perspective," (2012) 45 Comp & Int'l L J S Afr. 428.

[812] See later section for more detailed commentary on legal scholarship on peer review, an area of activity has received little dedicated legal attention. For an exception, see Georgios Dimitropoulos, "Compliance through Collegiality: Peer Review in International Law," Max Planck Institute Luxembourg for International European and Regulatory Procedural Law Working Paper Series, WPILux Working Paper 3 (2014).

and the DAC-led Peer Review of donor policy on development co-operation, in particular. I focus on two elements. First, there is the DAC official guidelines documents that describe the content of the assessment standards and criteria against which donor development co-operation policy is assessed. Secondly, there is the underlying approach to governance by PR that is contained within it , and implemented through surveillance, fact-funding, diagnosis (involving decisions on flaws and weaknesses and their remedies) and monitoring. While the OECD's PR process has received some dedicated scholarly attention to date,[813] the DAC's PR process has not yet been examined from a critical legal perspective. My intention with this analysis of the DAC's approach to PR in this project is three-fold. First, I aim to reveal how the highly bureaucratic PR instrument and process (and DAC's in particular) is central to the creation of the OECD-DAC's jurisdiction via ODA. I trace the parallels with governance practices introduced by the League of Nations' Permanent Mandates Commission that, I argue, have contributed much to the contemporary effectiveness of PR as a governance technology, and I examine the role of law in the implementation of the OECD and DAC's PR process. Secondly, I trace and examine explicit elements of the DAC's PR's governance signature. These include its juridical quality via its model of epistemic authority and decision-making that places the DAC in an ever more influential governance role vis a vis the community of donors. Both its juridical quality and an internal legal logic are evident through its creation and implementation of normative "standards" on donor development co-operation policy, its continual generation and

[813] Jongen Hortense, "The authority of peer reviews among states in the global governance of corruption," (2018) 25 Rev Int Pol Econ 909; Neils Thygesen, "Comparative aspects of peer review: OECD, IMF, and the European Union," in K. Tanaka (ed) *Shaping policy reform and peer review in Southeast Asia: Integrating economies amid diversity, (*Paris: OECD, 2008) at 135; Tony Porter & Michael Webb, " The Role of the OECD in the Orchestration of Global Knowledge Networks," in Mahon & McBride (2008), supra note 528 at 43.

refinement of data-reliant technologies to undertake surveillance and assessments, and the internal legal implicit in the standards. Thirdly, though I earlier identified the significance of repetition and performance in Chapter 4 as a distinctive feature of a governance signature, it is here in relation to the DAC's PR process, that its significance to the overall effectiveness and cohesion of the OECD-DAC's approach to the international governance of ODA is most evident.

This chapter proceeds as follows. In the following section, I describe the OECD's approach to PR and how it acts as a governance technology. Drawing from the jurisdictional and governance signature analytic that I use in this project, I trace its links to modes of governance implemented by the League's Permanent Mandate's Commission, and highlight the partial and strongly neo-liberal legal and regulatory model underpinning its reform agenda, as evidence of its internal legal logic. In section three, I examine the key ways that the DAC's approach to PR helps create and solidify a jurisdiction via its role in the international governance of ODA, and how this hidden legal logic is further elaborated in a donor policy context. In section four, I focus on the disjuncture between the framing of this exercise as a one of mutual, collegial learning, one carefully designed to be independent, transparent, objective and technical, and the partial, selective nature of the technical Guidelines used to assess donor policy.[814] From an analysis of the contents of one of the core standards that anchor the PR methodology, I aim to shed light on the nomocratic nature of the state and law, and the managerial approach to

[814] These are two main documents. These first is OECD DAC, Information Note on the DAC Peer Review Process, DCD/DAC(2019)15 15th April 2019. This document provides an overview of the steps of the peer review and is intended to help all the various parties involved in the exercise understand their role and the different steps involved. The second is OECD DAC, DAC Peer Review Reference Guide, 2019-20, DCD/DAC(2019)3/FINAL, 13th March 2019. This document is much more technical in content and lists the areas for analysis within the donor's development co-operation policy, and the standards and the sources by which these will be assessed. See Section 4 that follows for greater detail.

donor governance of development co-operation that is foregrounded within that. I claim that such an approach to the state and to law is highly receptive to a neoliberal model of development. Finally, I shed light on a feature of the DAC's PR's governance that is particularly significant to the effectiveness of its governance signature - its performative quality.

2. The OECD's approach to Peer Review

Though many international organisations now utilise Peer Review as a key organisational working method, [815] the OECD's approach to Peer Review is held in especially high esteem by scholars [816] and practitioners alike. [817] Perhaps this is partly due to the OECD's pioneering role in developing this working method - the OECD's Peer Review method was forged in the early days of its predecessor OEEC, and actually preceded the OEEC's initiation of annual economic reviews of its Members. [818] In recognising the unique role that Peer Review plays within the OECD's governance repertoire, Woodward notes that while idea generation and data

[815] The WTO has its Trade Policy Review Mechanism; the Financial Stability Board have a peer review system, and the UN, UNCTAD, the African Union and the IMF also use peer review in their menu of working methods.
[816] 'Even though the OECD is not a universal organization it can take on the role of evolving a universal framework for the conduct of peer reviews and providing a platform and global infrastructure for the international peer assessments.' Dimitropoulos (2016), supra note 575 at 338-339.
[817] Fabrizio Pagini, now with the Italian Ministry of Economy and Finance, wrote a frequently cited publication released by the OECD on Peer Review in 2002. Fabrizio Pagani, Peer Review: A Tool for Co-operation and Change. An Analysis of an OECD Working Method, SG/LEG(2002)1, (Paris: OECD Publishing, 2002). The OECD itself takes pride in a wider recognition of its PR method. "One measure of the success of the OECD peer review process is that other international organisations have also adopted the method, although the practice has been most extensively developed at the OECD." OEC website 'Peer Review' at https://www.oecd.org/site/peerreview/.
[818] Thygesen notes that the OEEC conducted – though it did not publish – peer reviews on trade policies. In embarking on this activity, it forged a breakthrough in the activity of an international organisation at the time. The IMF had not yet developed its surveillance and was strictly focussed on exchange rates; the GATT had not yet begun its trade policy reviews and the European Economic Community (EEC) of six nations was launched only at the beginning of 1958. He suggests that the primary motive for embarking on peer review at the time was to understand the effects of increasing international linkages in trade, migration and finance. Later, however, it become more focused on understanding policy implementation in countries and in identifying elements of best practice and policy failure. The US and Canada's membership in 1960-61 further enhanced the status of peer review as US policy makers were especially keen to understand the sources of the growth performance in Europe which continued to outpace that of the United States into the 1960s. Thygesen (2007), supra note 878.

production are key [819] these activities are more associated with policy co-ordination and convergence. By contrast, peer review and other surveillance activities are more directly related to *policy change*. [820] It is through the latter two activities that the implementation of new ideas and approaches to policy content can be ensured.

Peer Review has been recognised as a uniquely powerful mode of governance by several commentators,[821] with the predominant scholarly view of the Peer Review process viewing the effectiveness of its governance as arising from its "soft" nature. This includes the persuasiveness of its ideational value; the authority of the OECD as an independent, expert source of unbiased knowledge [822] the OECD's presentation of the purpose of PR as benign, [823]

[819] Woodward notes that the OECD currently holds about 40 databases of figures for 26 broad subject areas including statistics on banking, education, employment and labour markets, health, insurance, investment, national accounts, social expenditure, trade, taxation, telecommunications and other areas. He notes that it is particularly adept a developing datasets for previously untouched issues and for developing internationally standardised methodologies to make data more complete, reliable and internationally comparable. Richard Woodward, 'The OECD and Economic Governance" Invisibility and Impotence?' in Kerstin Martens & Anja P. Jakobi (eds), Mechanisms of OECD Governance: International Incentives for National Policy-Making? (Oxford University Press, 2010), 54 at 57.

[820] Woodward (2010) Ibid at 54. Emphasis added.

[821] A frequently cited source is Michael Barnett, Martha Finnemore *Rules for the World International Organizations in Global Politics*, (Ithaca, N.Y: Cornell University Press, 2004) who note that "the authority of [IGOs] often consists of telling people what is the right thing to do' and '[IGOs] are often authoritative because of their expertise. … Specialized knowledge derived from training or experience persuades us to confer on experts, and the bureaucracies that house them, the authority to make judgements and solve problems." At 20, 24. As Porter & Webb point out, "The OECD can be seen as a paradigmatic example of an identity-defining international organization. Its primary impact comes through efforts to develop and promote international norms for social and economic policy … . It defines standards of appropriate behaviour for states that seek to identify themselves as modern, liberal, market-friendly, and efficient." Tony Porter & Michael Webb, 'Role of the OECD in the Orchestration of Global Knowledge Networks,' in Rianne Mahon & Stephen McBride supra note XXX. Also Martin Marcussen, "Organization for Economic Cooperation and Development as ideational artist and arbitrator: reality or dream?" in Bob Reinalda & Bertjan Verbeek (eds) *Decision Making Within International Organizations*, (European Consortium for Political Research, 2004) at 90.

[822] Tony Porter & Michael Webb ibid 43 at 52.

[823] This is the official view promulgated by the OECD. "The point of the exercise is to help the state under review improve its policymaking, adopt best practices and comply with established standards and principles." OECD, "Peer Review At A Glance," Available at https://www.oecd.org/site/peerreview/peerreviewataglance.htm

based on egalitarian, collaborative and collegial methods of operation.[824] Thus, its legal features and juridical qualities, and their significance to its utility and effectiveness as a mode and instrument of governance have largely been overlooked.

In general, any method of PR undertaken by an international body shares the following elements – a basis for proceeding; an agreed set of principles, standards or criteria against which the country's performance will be reviewed; a set of procedures that leads to the final report, and designated actors with clear roles, to undertake the review. [825] For the OECD, the main actors involved in any of its PRs include the relevant subsidiary body of the OECD (the Committee or Working Party); the reviewed country [826] (mainly the civil servants from the designated national authority), the examiner countries [827] and finally, the Secretariat which has responsibility for producing documentation and analysis, offering logistical support and upholding "quality and values of independence and accuracy with the review."[828]

Though there can be a variety of steps and activities involved, Pagini has identified three phases. These are first, a preparatory phase consisting of a background analysis or self-evaluation by the country under review. The issuance of a questionnaire prepared by the relevant Directorate Secretariat is key to this phase as both the questions included in the

[824] As the OECD states, "The peer review is a discussion among equals," OECD ibid. See especially, Fabrizio Pagani, (2002), supra note 882. Many scholarly commentators have also adopted this view – see Tony Porter, 'The OECD and Global Finance: The Governance of New Issues, New Actors, and New Financial Frontiers,' in Kerstin Martens & Anja P. Jakobi (eds), *Mechanisms of OECD Governance: International Incentives for National Policy-Making?* (Oxford University Press, 2010), 98 at 113.
[825] Ibid Pagani (2002) at 7.
[826] This can be an OECD Member or non-member state.
[827] The choice is usually done by rotation. Normally examiners carry out their review role in their official capacity as representatives of their state, though sometimes this can be in a personal capacity. They represent the subsidiary body as a whole.
[828] "The independence, transparency, accuracy and the analytic quality of work of the Secretariat are essential to the effectiveness of the peer review process. " Ibid Pagini (2002) at 10.

questionnaire and the responses by the designated authority are important for agenda-setting purposes. Though a PR can have a designated list of "standards" and "principles" that it states are the basis for the PR, in fact a PR can include non-listed issues as well. Here, the institutional intelligence communicated via the Secretariat is key – it is they that design the questionnaire and play a lead role in the undertaking of the PR. [829] As we will see with the DAC's approach to Peer Review, the terms "standards," "guidelines" and "benchmarks" are not acutely defined by the OECD and, in practice, appear to be sometimes used interchangeably. [830]

The second phase is that of consultation, where the examiners and Secretariat undertake a consultation with the designated national body on the area in question. A visit (called a "mission"[831]) is undertaken to the country in question. Other stakeholders including civil society and interest groups can also be consulted at this stage. The Secretariat prepares a draft of the

[829] This issue was raised in an informal interview in August 2016 with a civil servant of a national donor development policy department who is a member of the DAC. A PR of that donor undertaken several years earlier began with a questionnaire that included reference to whether or not the donor's policy included a policy commitment to Blended Finance. This type of development financing strategy had not, at the time, been formally articulated as an agreed DAC policy position, though discussions were underway within the DAC on that topic at that time. Thus the Secretariat appear to have wide scope to determine policy areas and issues for analysis through the PR process, (whether through the initial questionnaire or otherwise), beyond the listed standards and guidelines specifically identified as relevant to that assessment.

[830] This is despite the availability of definitions that would appear to be entirely appropriate for the OECD's PR activity, and that may provide helpful clarity on the relative institutional weight given to the different types of instruments, if such a difference exists. For example, a well-recognised standard for what constitutes a standard has been issued by the International Standards Organisation. It is "A document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of die optimum degree of order in a given context." In Nils Brunsson & Bengt Jacobsson, *A World of Standards,* (Oxford: Oxford University Press, 2002), at 15. Brunsson & Jacobsson themselves define standards as "expert knowledge stored in the form of rules." Ibid 41. I discuss the governance implications of such terminological obfuscation later in this chapter.

[831] Note the use of a term mainly used in a diplomatic context to describe official representation in a given foreign country which functions under the supervision of the Ambassador. Thus, performatively and symbolically, the OECD PR exercise displays and enacts the trappings of the international relations of sovereign states. In doing so, it draws from the symbolic and very real political weight of that context, thereby belying any idea that the PR is mainly technical assessment. In this case, however, it is the OECD that benefits from the symbolic significance, drawing partly on the diplomatic credence of the reviewing states.

final report, which usually follows a prescribed format. It notes elements of the country's performance that are deemed positive and of concern, and it presents draft conclusions and outlines recommendations. The draft is shared with the examiners and representatives of the designated authority from the country under review, the latter whom can respond to the contents. Adjustments to the contents can be made at this point, before the report is submitted to the body responsible for the review.

The third stage is that of "assessment"[832] and this is when the report is discussed at the plenary meeting of the body responsible for the review. Though the discussion is led by the examiners, members of the reviewing body are encouraged to participate and a decision to adopt or note the report is made, usually by consensus (depending on the guidelines for the PR process for that body). What is important here is the consensus nature of the decision-making process (thus lending organisational weight to the final report) and that the results of the peer review are captured in a dated report. The contents of this report serve as a benchmark for an interim review, and for the next full PR several years later. Thus the insular, self-referential and periodic nature of the PR process are key features to its mode of surveillance governance. However, this does not affect the prestige or authority of the PR process. Usually, the results are made public, through the issuance of a press release and other materials on the final report and its recommendations. Frequently, the contents of the PR are discussed in national parliaments[833]

[832] Pagini (2002), supra note 882 at 10-11.
[833] In the most recent DAC PR of Ireland's development policy, representatives of the DAC Secretariat met with the Parliamentary Committee on Foreign Affairs and Trade (February 4th, 2014). Questions on that meeting and the PR were raised the following day in the Dáil (lower house of parliament). See https://www.oireachtas.ie.

and within other domestic and international policy forums in which the state under review participates. [834]

From this brief overview of the PR process, I now wish to highlight several parallels between the OECD's PR process and the reporting process utilised by the Mandates Commission under the League of Nations, described earlier in Chapter 6 of this thesis. The similarities in methodological approach include first, the prominence of data and knowledge generation (the translation of social phenomena into facts). As with the PMC, this is done by the OECD through use of a common questionnaire or survey to extract information from the participating state, according to shared understandings of key concepts, and in a format that enables international comparison. I noted earlier how this step is essential to the creation of a distinct field of activity amenable to international governance, by the body that seeks to govern the area through assessment, in this case of participating states engaged in a common area of domestic policy (with the DAC PR, the field of activity selected for governance is donor policy on development co-operation).

Second, there are several parallels between the PMC and the OECD with their respective institutional strategies that aim to bolster wider perceptions of non-partisanship, objectivity and credibility. These include the key role of both institutions' Secretariats in shaping and implementing the review method. As noted by Pagini earlier, the role of the relevant OECD

[834] Thus, for example, Ireland launched the report of its positive DAC PR at a side event at the Third International Conference on Financing for Development at Addis Ababa in July 2015, at the Irish Embassy there. This gave the Irish state – a small state donor by international standards, though one with a long history of engagement in East Africa - a heightened public profile within international aid diplomatic circles in its role as a donor, as it did for the OECD's DAC's role in international development policy at an important negotiations event on a future international policy framework on development finance. (Note: I was in attendance at the launch).

Secretariats is very important to maintaining a perception of the independence and integrity of the OECD PR process, attributes that are key to the wider legitimacy, credibility and effectiveness of the PR process. [835] Similar to the League's PMC, the scrutiny and discussion of the participating state's OECD PR report is undertaken by an OECD Committee with a mandate to operate on behalf of the wider organisation, thereby lending the wider organisation's authority and legitimacy to that process. Furthermore, the background role of expertise and expert commentary to establishing organisational normative positions is evident in both organisations. Thus, the League's PMC's members consisted mainly of individuals with a recognised reputation on colonial administration, while the OECD has a dedicated strategy of engaging with experts to develop organisational normative positions on policy. These positions may later evolve into guidelines on good practice and other such instruments of policy guidance applicable to all Members, and may also act as standards for assessments of states' policy practice in the undertaking of the PR. [836] In this way, the normative positions that are taken by the Directorate in question are validated by supposedly objective scientific evidence.

[835] When the PR review process comes under any public scrutiny, attention turns to who the reviewing states are, vis-à-vis the state under review, and not on the role of the Secretariats. This was clearly in evidence during questions of the Irish Parliamentary Committee on Foreign Affairs and Trade to the DAC Secretariat. Supra note 22. Yet, the Secretariat are highly influential in structuring the enquiry underpinning the PR process.

[836] The criteria by which expertise is deemed as such by the OECD is vague. The opinion of 'experts' is frequently sought for the contents of flagship publications, but it is not at all clear on what basis the selection of these sources as experts (or their expertise) has been determined. Separately, both Dostal and Watts assert that research chosen by the OECD on economic and social policy is selective, frequently lacks rigour, and is presented in a particular style (key concepts undefined; key terms repeated without qualification, and consequences of policy choices elided) to convey authority and impartiality about policy design. Dostal views this approach as the deliberate closure of organisational discourse. Jörg Michael Dostal, "Campaigning on expertise: how the OECD framed EU welfare and labour market policies – and why success could trigger failure," (2004) 11 J European Pub Pol 440, and Watts highlights how this approach, over time, ensures that particular policy positions are likely to become conventional wisdom. Marin Watts, 'The role of the EOCD in the design of macroeconomic and labour market policy: Reflections of a heterodox economist," Centre of Full Employment and Equity Working Paper No. 10-02, November 2010. University of Newcastle, Australia, at 13.

Thirdly, there is the underlying benign rationale for these exercises. "Peer review can be described as the systemic examination and assessment of the performance of a State by other States, with the ultimate goal of helping the reviewed State improve its policy making, adopt best practices, and comply with established standards and principles."[837] This rationale operates to elide from view the deeply political nature of – and select approach to - the purpose, process and outcome of the PR. I examine these features further in the following section on the DAC's PR of donor development co-operation policy, and the guidelines and standards it uses in that activity.

Fourthly, though public accountability for the League's Mandatory system of governance was deemed key to its legitimacy, a value also shared by the OECD with respect to its PR process, the organisational practices that underpin those endeavours were, and are, deeply circumscribed. For the PMC, accountability was reduced to the mere public availability of the report, and a highly constrained petitions system. Many decades later, though the OECD cites engagement with select domestic stakeholders via consultation during the PR process as central to the PR activity, these are, in fact, restricted, tightly controlled and heavily choreographed. Though the final report is publicly released, the OECD's approach to stakeholder consultation is heavily at odds with accepted good practice for international organisations. [838] Arguably, the

[837] Pagini (2002), supra note 882 at 4.

[838] The OECD's and DAC's methodologies for PR do not include standards or guidelines for public consultation in either the donor, or relevant aid-recipient states. However, international good practice standards exist for such activities such as the ISO's "Guidance for national standards bodies-Engaging stakeholders," (ISO, 2011) available at https://www.iso.org/publication/PUB100269.html, or the AA1000 Stakeholder Engagement Standard (2015) based on the principles of inclusivity, materiality and responsiveness. AccountAbility, "AA1000 Stakeholder Engagement Standard," (London: AccountAbility, 2015) available at www.accountability.org In other international organisations' PR processes, external consultation and engagement is facilitated e.g. the International Trade Union Confederation has inputted into the WTO's TPRM process, in previous years. The UN's Universal Periodic Review process also includes dedicated conduits for engagement by recognised stakeholders such as NGOs, and

OECD's approach to accountability is even more circumscribed than that of the PMC's as currently, no formal or independent review or appeals process for the state under review, or for interested outside parties exists.[839] National parliaments, people or organisations from the participating state (or aid-recipient states of the donor state, in the case of the DAC PR) cannot challenge, add to or request a review of the conclusions and recommendations of the report.

Why is it important to trace these parallels in the PMC's methods of reviewing the governance approach of the Mandatory states, and the OECD's Peer Review process? My point here is to reveal the significance of temporality to the OECD's creation and institutionalisation of jurisdiction through its governance instruments. Its approach to PR contains deep connections to instruments (both legal and non-legal) of, and approaches to international governance developed in the colonial era within a then-new international realm of governance and a new international organisation. Bureaucratic governance instruments such as PR are key to the OECD's (and DAC's) governance reach, relevance, role and authority. These help underpin and maintain a particular kind of governance dynamic that retains features of international colonial governance. I have shown in Chapter 6 how the modes of governance adopted by the PMC facilitated an approach to scrutiny of colonial governance that left the exploitative nature of the relationship between the colonial power and the colonised territory essentially politically and economically intact. As the PMC's existence and role was constitutionalised in the League of Nations' covenant, effectively an essentially a sophisticated form of executive rule was

representatives can attend the review meeting (though not contribute). See Human Rights Council resolution 5/1 of 18 June 2007.

[839] Given the limited external engagement into the PR process, the absence of such a mechanism underlines the select nature of the review, and the limited epistemic field from which it draws to consider important matters of public policy.

internationalised and legalised. This form of rule drew on a powerful mix of law; a civilizational-development political discourse; bureaucratic and expert working methods, in addition to recognition of the need to link back at distinct moments to a wider public, in order to achieve legitimacy and maintain authority. The shared features elaborated above show remarkable symmetry between the bureaucratic governance modes and dynamics of both the PMC and the OECD (and DAC). Though a genealogical account of the origins and evolution of the OECD PR process remains to be undertaken, [840] available evidence on the evolution of PR within the OECD,[841] and the shared states membership between the PMC, the early OEEC and the early OECD, lends weight to my claim that these preliminary indications of a shared history are sufficient to warrant further investigation into possible continuities in governance between the League's PMC and the contemporary OECD's DAC.

I now turn to a consideration of the strongly neo-liberal legal logic that informs the model of legal, regulatory and governance reform inherent in the OECD's approach to PR. Reviews can be undertaken of Members, and non-Members, the latter by request. Currently, the OECD undertakes four significant Peer Reviews [842] including an influential review of Members'

[840] Unfortunately, it was beyond the possibilities of this research project to undertake an investigation into the archives of the OEEC and the early OECD in order to genealogically trace the origins of the PR methodology, and their relationship with the evolving law of those international organisations. This would be a project of great value to understanding the evolution of modes of international governance in the decolonial era, and to further deepening our understanding of the continuities in modes of colonial governance with contemporary international governance.

[841] See Thygesen, (writing as Chair of the OECD's Economic and Development Review Committee) who has described the origins of the OECD's contemporary practice of PR as lying within the OEEC' practices of monitoring trade liberalisation and the multilateralization of payments amongst its members under the Marshall plan. Supra note 878 at 1.

[842] Including Economic Surveys undertaken by the Economic and Development Review Committee (EDRC); the Peer Review of the Development Assistance Committee (addressed in the following section); Environmental Performance Reviews (these now encompass some non-OECD Members such as Brazil, China and South Africa) and a PR on Regulatory Reform.

regulatory reform on the basis of the OECD *Report on Regulatory Reform*. [843] This PR specifically targets the domestic institutional make-up of the Member states' governance, the role of law and regulation in that, and is clearly reform-focused. Its view of regulation and, within that, the role of the state, is highly partial, and heavily leans towards a neo-liberal, economic growth-focused, market-supporting state.[844] As example, though some acknowledgement of certain areas of non-economic public policy goals of law and regulation is made (limited to broad brush stroke references to social and environmental goals), more detailed references to policy areas within these, or to other topics such as human rights protection, climate change etc. and the role of law and regulation therein, is entirely absent. An instrumental, economic efficiency narrative of law's role clearly underpins the approach to regulatory reform, with no recognition made of the symbolic, cultural or other significance of law and regulation to the determination of appropriate legal and regulatory reform efforts, or the consideration and balancing of

[843] The mandate for these reviews is a series of Council Recommendations on Regulatory Reform, the latest issued in 2012 that includes 12 principles to underpin domestic regulatory reform. These include a commitment to a whole of government policy on regulatory quality; adherence to principles of open government; oversight of regulatory policy; the integration of Regulatory Impact Assessment; periodic assessment of regulation against policy goals; reporting on regulatory performance; policies on regulatory agencies; review of legality and procedural fairness within regulations and by regulatory authorities; application of risk assessment methods to regulatory design; fostering of regulatory coherence; building regulatory capacity; and recognition of international standards and transnational effects of domestic standards. Their underpinning in New Public Management thinking is very evident. See OECD, Recommendation of the Council on Regulatory Policy and Governance (Paris: OECD, 2012) at 4-5. Interestingly, the OECD website link for Canada's reviews on regulatory reform includes a link to the then-Conservative government's 'Red Tape Reduction Plan' released in 2012 which, amongst other commitments, introduced legislative backing for a 'One-for-One Rule' that required regulators to offset new regulations with an equal reduction from the stock of existing regulations. https://www.oecd.org/gov/regulatory-policy/regulatory-policy-canada.htm

[844] This approach to regulatory reform is legalised via the Recommendation of the Council of the OECD on Regulatory Policy and Governance (2012). Article II of the Regulation recommends Members to, when implementing regulatory reform, adhere to principles that include consideration of the impacts of regulation on competitiveness and economic growth; evaluation of the competitive effects of regulation on various economic players in the market, and to base decisions on risk assessment methods (as opposed to other methods such as the do-no-harm principle). See Recommendation at http://www.oecd.org/gov/regulatory-policy/recommendations-guidelines.htm

interests necessary in any exercise of democratic governance.[845] There is a complete silence on the governance dilemmas of how to address the many points of intersection of economic regulation with the achievement of legitimate non-economic public policy goals, with the result that the Recommendation clearly prioritises the protection and promotion of economic growth over other public policy goals. Furthermore, its framing of regulatory reform is technicised, thereby enabling the OECD to elide recognition of the political stakes involved in any exercise of legal and regulatory reform. [846]

One of the areas examined as part of the review process undertaken by the Regulatory Review Committee, is the use of Regulatory Impact Analysis (RIA) in each state.[847] This constitutes one

[845] As example, a word search on the Recommendation revealed one mention of the word "equality" compared to 22 mentions of the words "efficient" or "efficiency."

[846] "Regulatory reform, understood as the changes that improve the quality of regulation, provides a real opportunity to stimulate economic activity, unlock productivity and growth gains and balance the measures that seek to restore fiscal health but risk undermining recovery." OECD, OECD Regulatory Policy Outlook 2015, (OECD Publishing, 2015) at 23. There is a clear hesitancy detectable within the OECD's regulatory reform policy documents to identify legal reform as a component of, or indeed the bedrock of, regulatory reform. However, that it is undeniably a target of such reform is revealed through closer scrutiny of the OECD's survey questions and methodology on assessing RIA where the survey focuses on two categories defined as 'primary law' and 'subordinate regulation', and there are multiple references in the survey to law, for example, whether regulatory authorities' roles are legally mandated etc. In this way, the political stakes of the legal and regulatory reform agenda are erased by reframing it as a technical exercise. See details of the RIA methodology described in Christine Arndt et al. "2015 Indicators of Regulatory Policy and Governance: Design, Methodology and Key Results", OECD Regulatory Policy Working Papers, No. 1, (Paris: OECD Publishing, 2015).

[847] The OECD has been heavily promoting RIA as a vehicle and instrument for promoting international regulatory co-operation, a key goal of its activities in this area and in which it has recently dedicated more institutional attention and resources. In 2014 it instigated a 'Partnership' of over 50 international organisations 'to foster collective action among IOs and their constituency to promote greater quality, effectiveness and impact of international rules, regardless of their substantive scope.' Participating IOs include – the IMF, the ILO, the IOS, OSCE, UNCITRAL, WHO, WTO, WIPO and many others. See also OECD Flyer, 'A Partnership for Effective International Rule-Making(IO Partnership),' (undated) Available at http://www.oecd.org/gov/regulatory-policy/a-partnership-for-effective-international-rule-making.htm. Late in 2017, it instigated an ' Academic Friends of the IO Partnership' described as 'a flexible and open advisory group' – designed to facilitate the exchange of relevant information on international rule-making between the two communities and to provide a forum where further (bilateral and other) cooperation opportunities may be raised'. Invited academics listed as 'Academic Friends' include Profs Kenneth Abbott, Robert Howse, Petros Mavroidis, Joost Pauwelyn, and Jan Wouters. Many of the 21 listed have international reputations as scholars in international economic law and in EU integration and governance.

of the three areas of indicators that make up a new index on regulatory reform - the OECD's "Indicators of Regulatory Policy and Governance" (iREG). [848] This latter technology in the regulatory reform PR is starkly revelatory of a key feature of the overall OECD approach to PR that remains under-examined by scholars.[849] This is the fact that the OECD PRs are embedded in much more numerous, more varied in mode of implementation, and much broader in scope, of surveillance and monitoring activities of states. These form a thick web of connected instruments through which a highly normative, contingent idea of the ideal state is continuously being constructed, performed and reviewed towards further adaptation. Thus, Pagini's report includes an Annex that lists (at 2002) an inventory of OECD monitoring and surveillance activities. It shows 68 separate instruments, operationalised under 14 OECD divisions or directorates, with frequencies of implementation ranging from "continuous," to every six months to every two years, to a six-seven year cycle. This sizeable *number* of instruments fails to fully capture the *depth* and *reach* of each. For example, under the Financial, Fiscal and Enterprise Affairs Directorate, there are 18 distinct instruments through which the Directorate obtains information from Members, and Members regularly communicate to that

[848] The indicators focus on three core areas of regulatory policy: stakeholder engagement, RIA and ex post evaluation. An index ranking countries in each of these three areas is produced and released. It is clear from the OECD's report, "OECD Regulatory Policy Outlook 2015" that its understanding of law and regulation is highly influenced by a 'law and economics' approach with terms such as regulatory efficiency, and literature from behavioural economics frequently cited. See OECD, OECD Regulatory Policy Outlook 2015 (Paris: OECD, 2015).
[849] Thus though commentary from several scholars such as those in Mahon & McBride's collection describe the modes of governance enacted by the OECD's epistemological and surveillance governance as deliberative, persuasive, self-regulatory, collaborative, inquisitive, mediative, normative and indeed, regulatory, these 'soft' terms fail to capture the sheer *reach* and *extent* of the OECD's governance within the domestic policy sphere of participating states (whether Members or non-Members), the cumulative *effects* of this kind of OECD (and DAC) governance on participating states' governance, and the longer term impacts of this kinds of governance over *time*. See Appendix 3 for the list of DAC-only sub-groups that DAC Members are expected to engage with, on development co-operation policy only.

Directorate. [850] In relation to the OECD's DAC, it alone includes nine subsidiary bodies, of which the Working Party on Statistics,[851] and on Aid Effectiveness regularly engage with DAC members on details on donor co-operation policies and systems.

Having critically analysed the governance approach, with its own internal legal logic, inherent in the OECD's PR governance technology, I now examine the approach to peer review taken by the DAC.

3. Peer review of donor ODA by the OECD's Development Assistance Committee

The DAC conducts reviews of the "development co-operation efforts" of each of its Members every five or six years, according to a methodology that is periodically revised and updated. [852] Officially, the aims of the review are described as to "improve the quality and effectiveness of development co-operation policies and systems, and to promote good development partnerships for improved impact on poverty reduction and sustainable development in developing countries," with policy change therein framed as ensuring that they are "fit for purpose."[853] The review is not limited to the relevant ministry or agency responsible for international development, but rather involves a "system-wide" analysis of the Member under review. [854] With stages closely matching those described earlier by Pagini, the DAC's PR explicitly includes fact-finding, analysis and reporting as core activities of the PR. A detailed list

[850] Pagini supra note 882 at 15-20
[851] This is the body responsible for the collection of development finance statistics from DAC member countries, non-DAC countries, multilateral organisations and private donors. See Appendix 1 for the tightly scheduled reporting cycle, authorised by a legal Recommendation.
[852] As mentioned earlier, the current methodology is contained in two documents - OECD DAC, Information Note on the DAC Peer Review Process, DCD/DAC(2019)15 15th April 2019, and OECD DAC, DAC Peer Review Reference Guide, 2019-20, DCD/DAC(2019)3/FINAL, 13th March 2019. (This replaced an earlier methodology agreed in 2014).
[853] OECD DAC, Information Note on the DAC Peer Review Process, DCD/DAC(2019)15 15th April 2019, at 2.
[854] OECD DAC, DAC Peer Review Reference Guide, 2019-20, DCD/DAC(2019)3/FINAL, 13th March 2019, at 2.

of criteria establishes the level of expertise and experience of the representatives from each of the two examining countries, [855] with the review process to include a "mission" to the review Member headquarters, as well as up to two "field missions" to states in receipt of development funding from the donor (these are called "partners"). [856] Once a final report of the review is agreed and completed, the reviewed Member is expected to publicise it through a high profile launch in their capital, and is "encouraged to launch the peer review report in parliamentary settings, with the presence of parliamentarians, government and civil society."[857] Added to the most recent iteration of the DAC PR methodology is the expectation that, in addition to mid-term reviews (24-36 months after the PR), each Member voluntarily submits a "management response to the peer review recommendations articulating the intended follow-up."[858]

DAC Peer Reviews are highly influential with states. Ashoff reports that, according to a 2007 evaluation, more than 90% of the DAC members rated their policy impact as "medium to very high" with 88% of the recommendations of the PR being partly or fully implemented in the previous two years, according to the DAC Secretariat.[859] He notes that the German government made frequent reference to the DAC recommendations when undertaking reform of its own aid system. [860] DAC PR reports are also highly regarded within the Member development co-

[855] These include their being senior managers, with at least 10 years' experience at national and global levels.
[856] Supra note 880 DAC Information Note at 5.
[857] Ibid at 7.
[858] Ibid at 7.
[859] Guido Ashoff, 50 Years of Peer Reviews by the OECD's Development Assistance Committee: an Instrument of Quality Assurance and Mutual Learning, German Development Institute Briefing Paper, December 2013 at 1.
[860] Indeed, Ireland recently produced a new national policy document on international development. In it, it stated that "the OECD Development Assistance Committee (DAC) peer review will remain a critical measure of our quality over time." Government of Ireland, A Better World – Ireland's Policy for International Development, (Dublin: Dept of Foreign Affairs & Trade, 2019) at 33. In a 2007 DAC peer review of Canada's development program, the DAC encouraged "the Canadian government to accelerate the concentration of bilateral aid on fewer countries and to disengage from countries where Canada does not have a comparative advantage, phasing out projects that are

operation institutions. Ashoff notes that the same evaluation recorded that three-quarters of the DAC Members rated the quality of the PR reports as high or very high. [861] An indication of how well-regarded they are is the increase in requests from *non*-DAC Members to have a PR undertaken of *their own national policies and systems*, and/or that have already participated in, or wish to participate in future PR exercises *as observers*.

More recently, the OECD has further developed its techniques of observation, assessment, measurement and ranking through aesthetic means. It has revised the contents of its PR reports to add a new visual evaluation of the extent to which the state has implemented the recommendations of previous evaluations. This visual is prominently located on the webpage listing the reviewed Member's PR reports. Below, I include images taken from the DAC website that capture the performance of Ireland (Fig 11.1) and Canada (Fig 11.2).

unlikely to make a durable impact on poverty reduction." A later 2012 report of the peer review of Canada, commended Canada's efforts to narrow its thematic and geographic focus. House of Commons, Canada. Report of the Standing Committee on Foreign Affairs and International Development, Development Cooperation for a More Stable, Inclusive and Prosperous World: A Collective Ambition, 42nd Parliament, 1st Session, November 2016, at 4-5.

[861] This evaluation is not publicly available from the DAC's website.

Figure 11.1 Ireland – implementation of peer review recommendations from 2009.

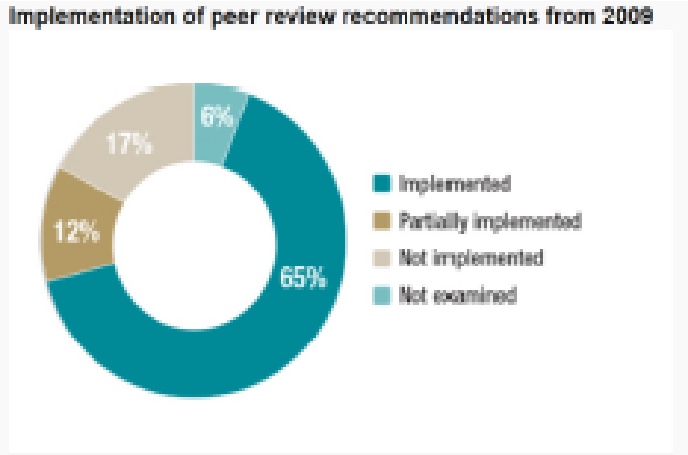
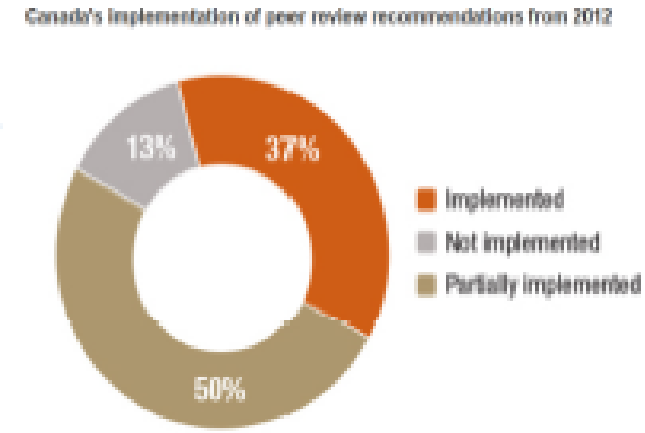


Figure 11.2 Canada – implementation of peer review recommendations from 2012.



Though the official framing of the DAC PR is that "there is no 'one size fits all' model. Each peer review is situated in its own context," [862] and that the DAC does not rank its members in terms

[862] OECD DAC Peer Review Reference Guide (2019-2020), supra note 881 at 2.

of their performance, [863] it is not difficult to see how comparisons between reviewed donors can be made and likely will be in the future. Such a move brings a new governance analytic to bear on governance by PR – the potential future role of rankings and indexes in global governance – as a kind governance by proxy. [864] But if governance by numbers and aesthetics exemplifies a recent addition to how the DAC governs through its PR, it also defines a new field of donor governance for the OECD's DAC beyond its historic measurement of ODA – that of measurement of how *reform-oriented* its Members *are* (and implicitly, *should* be). By constructing data to ontologically capture reform, and by translating this into a numbers-infused visual, the DAC PR opens up and enters a new mode and realm of DAC governance of donors' development policies and systems. In doing so, it succeeds in obscuring the politics of DAC governance in two areas with this move. The first area is that of an enhanced role for DAC epistemic authority as a result of its foray into the new area of the *adequacy of donor reform* of their development co-operation. The second area is the new DAC area of *comparative assessments* of donor reform of their development co-operation policies and systems, according to prior DAC PR prescriptions. The latter extends the DAC's jurisdiction vertically (assessing donor governance in comparative international terms), with the former extending it horizontally (through making assessments of the adequacy of donor reform efforts). Through

[863] Ms. Karen Jorgenson "[W]e do not rank our members. There is not yet a scoring system; *we might get there some day*." Excerpt from Irish Parliamentary Committee on Foreign Affairs meeting February 2014, (on file with author). Italics own.

[864] There is now a rich body of literature on the role of indicators and indexes in global governance. See for example, Sally Engle Merry, '"Measuring the World: Indicators, Human Rights, and Global Governance' (2011) 52 Current Anthrop 588. Kevin Davis, Angelina Fisher, Benedict Kingsbury, & Sally Engle Merry (eds) *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford University Press, 2012); Kevin Davis, Sally Engle Merry, and Benedict Kinsbury, *The quiet power of indicators: measuring governance, corruption and rule of law* (Cambridge University Press, 2015).

resort to indicators and an arresting visual derived from the PR process, the DAC has thus further extended and strengthened the authority, legitimacy and reach of its own governance intervention in donors' development co-operation policy. In doing so it asserts jurisdiction both epistemically and via the breadth of its policy reform reach.[865] This move relies on the almost imperceptible introduction of a simple calculative technology, illustrating the significance of its incorporation into the PR instrument – a highly bureaucratic governance instrument.

In the following section, I critically examine the hidden politics – and juridical nature - of the kind of reform promoted by the DAC through its PR, through an analysis of the analytical method that underpins the DAC's PR.

4. The DAC's methodology on peer review – "dimensions," "components" and "indicators"

Framed as impartial and objective, the DAC reviews donor development policy based on seven "dimensions," each of which has between two and four "components of analysis." These are identified as "benchmarks and conditions that define a good and effective development co-operation actor." [866] The following figure summarises this method. For each of these components of analysis, the DAC ascribes several indicators that elaborate further on the detail of the component. Thus, for example, the extent to which a donor's organisational structures

[865] Linking the politics of knowing (epistemic authority) to that of governance, the term "epistemic jurisdiction" has been coined to capture the power to produce or warrant technical knowledge for a given political community, topical arena, or geographical territory. Usually utilised when describing governance at the state level, it draws attention to the legally backed (usually state-based) power to know and its mapping against territorial and political boundaries. More recently, it has been applied in contexts of global governance. See David E Winickoff & Matthieu Mondou, "The problem of epistemic jurisdiction in global governance: The case of sustainability standards for biofuels," (2017) 47 Soc St Sci 7 at 9.

[866] OECD DAC Guide (2019), supra note 881 at 2.

and management systems are "fit for purpose" is captured in the three listed components of dimension "4. Structures and Systems – 4.1 Authority, mandate and co-ordination; 4.2 Systems, and 4.3 Capabilities throughout the system."

Figure 11.3 DAC peer review components of analysis

Components of analysis

Dimension	Components of analysis
1. Global efforts for sustainable development The member has a broad, strategic approach to global sustainable development, encompassing global challenges, policy coherence for sustainable development and awareness raising at home	1.1. Efforts to support global sustainable development 1.2. Policy coherence for sustainable development 1.3. Global awareness
2. Policy vision and framework Clear political directives, policies and strategies shape the member's development co-operation and are in line with international commitments, including the 2030 Agenda.	2.1. Framework 2.2. Principles and guidance 2.3. Basis for decision-making
3. Financing for development The member's international and national commitments drive its ODA volume and allocations and its other financing efforts to support the 2030 Agenda.	3.1. Overall ODA volume 3.2. Bilateral ODA allocations 3.3. Multilateral ODA allocations 3.4. Financing for sustainable development
4. Structure and systems Organisational structures and management systems for development co-operation are fit for purpose, with appropriate capabilities.	4.1. Authority, mandate and co-ordination 4.2. Systems 4.3. Capabilities throughout the system
5. Delivery modalities and partnerships The member's approach to delivering in partner countries and through partnerships is in line with the principles for effective development co-operation.	5.1. Effective partnerships 5.2. Country level engagement
6. Results management, evaluation and learning The member plans and manages for results, in line with the SDGs, building evidence of what works and using evidence to learn and adapt.	6.1. Management for development results 6.2. Evaluation system 6.3. Institutional learning

Source: OECD-DAC Peer Review Reference Guide (2019) at 5.

In the *Peer Review Reference Guide* each of these components are further ascribed several "indicators." However, the indicators here are not numerical data-based ones, but narrative-based and normative. Thus, for example, under "4.1 Authority, mandate and co-ordination," the DAC *Guide* articulates the indicator as "Responsibility for development co-operation is clearly defined, with the capacity to make a contribution to sustainable development outcomes."[867] "4.2 Systems" has an indicator "Innovation and adaptation" that specifies that "The member has capabilities to introduce, incentivise, measure the impact of, and potentially scale, innovation in development co-operation policies."[868]

Clearly, these indicators may well prove challenging to reviewers to formally assess. Thus, for each dimension (including its components and indicators), the Guide includes a list of "Core" and "Other references" documents – with the former defined as "agreements that establish concrete recommendations or commitments," and the latter as "standards, principles and good practices."[869] However, these reference documents are to provide the evidence base for assessment of the more specific governance components, and higher level dimensions of analysis on donor development co-operation policies and systems.

One of the Core Reference documents for "4. Structure and systems" is an OECD-produced document titled *Better Aid: Managing Aid – Practices of DAC Member countries*, published in 2009. [870] In essence, this draws from an earlier study that summarised "effective aid

[867] Ibid at 16.
[868] Ibid.
[869] Ibid at 4.
[870] This study was an update on an earlier 2008 study based on a 5-year review of peer reviews undertaken by the DAC. The earlier study was OECD, *Effective Aid Management: Twelve Lessons from DAC Peer Reviews*, (Paris: OECD, 2008).

management" via twelve "lessons" (see Fig 11.4 for a summary of these taken from the document).

Figure 11.4 Effective Aid Management

Twelve Lessons from DAC Peer Reviews

Lesson 1: Have a clear, top-level statement of the purpose, whether in legislation or another form that has wide ownership and can remain relevant for a sufficient period.
Lesson 2: Avoid letting short-term pressures jeopardise the long-term common interest in effective development.
Lesson 3: Set a clear mandate and establish mechanisms to ensure that policies are assessed for their impact on poor countries.
Lesson 4: Invest in delivering, measuring and communicating results of aid-financed activity.
Lesson 5: Task a sufficiently senior and publicly accountable figure with clear responsibility at the political level for delivery.
Lesson 6: Rationalise bilateral aid structures to facilitate coherent action at country level.
Lesson 7: Promote coherence between diverse aspects of multilateral aid.
Lesson 8: The decentralisation of responsibility to the field can be beneficial, but it needs high quality, lean supporting systems.
Lesson 9: Radical reforms in delivery are vital as donors must deliver more aid per head of agency staff, while increasing effectiveness.
Lesson 10: Most donors should focus assistance on fewer countries, sectors and, in particular, activities.
Lesson 11: Develop a stronger culture of managing for results and align incentives accordingly, but to promote, not weaken, local structures of accountability.
Lesson 12: Securing and developing well-qualified, motivated local and expatriate staff is essential to effectiveness. Quality agencies attract quality staff.

This approach by the DAC to its PR methodology is significant. Here, we see the detail of how a systemic review of a complex, multidimensional area of domestic policy making and its international implementation is reduced to an assessment of "effectiveness," where the latter is framed almost solely in technocratic managerial terms. This is a highly partial methodology. It erases the historical and contemporary political and material context in which this sensitive area of international relations is embedded.

A further analysis of the discourse of the "12 lessons" reveals the role of governance concepts and policy prescriptions prominent within the New Public Management (NPM) [871] perspectives to public sector reform. NPM is championed by the OECD, in particular from the 1990s onwards.[872] Scholars have highlighted how the OECD's promulgation of a technocratic approach to public management reform, is broadly reflective of an NPM approach. This contributes to a particularly neoliberal approach to global governance, where governance is conceptualised as a calculative rationality through which the "competitive performance" of nation-states is managed with the same technologies used to manage the performance of private capital. [873]

An examination of the implicit legal logic internal to the DAC's approach to "good" donor governance of ODA contained in these "12 lessons," the *Better Aid: Managing Aid* document, and the *Peer Review Reference Guide* more generally reveals that it is one that is strongly based

[871] NPM is strongly associated with a shift towards 'accountingization' as a way of supposedly fostering greater accountability and efficiency in public administration. According to Hood, the emergence of NPM reflects a higher trust in the market and private business methods and lower trust in public servants, a position articulated through a discourse of economic rationalism. He identifies seven dimensions to the NPM shift which include (i) a greater disaggregation of public organisations into separately managed 'corporatised' units for each public sector 'product'; (ii) a move towards greater use within the public sector of management practices drawn from the private corporate sector; (iii) a greater stress on discipline and parsimony in resource use over institutional continuity, the maintenance of public services and on further policy development; (iv) a move towards more explicit and measurable or checkable standards of performance; (v) attempts to control public organisations in a more 'homeostatic' style according to pre-set output measures. Christopher Hood,
'The "New Public Management" in the 1980s: Variations on a Theme,' (1995) 20 Acc Org & Soc 93.

[872] See key publications of the OECD's Directorate for Public Governance and its activities such as its 'public governance scans' and the production of its annual 'Governance at a Glance' index. http://www.oecd.org/gov/. The OECD's work in this area was matched by that of others including the UNDP's. UNDP, *From Old Public Administration to the New Public Service – Implications for Public Sector Reform in Developing Countries,* (Global Centre for Public Service Excellence, Singapore: UNDP, 2015).

[873] Chandana Alawattage & Manal Elshihry, 'The managerialism of neoliberal global governance. The case of the OECD,' in Annabelle Littoz-Monnet (ed) *The Politics of Expertise in International Organizations How International Bureaucracies Produce and Mobilize Knowledge,* (London: Routledge, 2017), 167 at 168. This builds on a wider body of literature that explores how 'audit' culture reflects neoliberalism's emphasis on the state's role in engineering and intensifying competition. Peter Miller & Nikolas Rose, *Governing the present: administering economic, social and personal life*, (Cambridge: Polity Press, 2008); Jamie Peck, *Constructions of Neoliberal Reason,* (Oxford: OUP, 2010) at 52-53.

on a neoliberal view of the donor state, that contains a particular idea of politics, public decision-making and law inherent within it. This conception of governance as clearly technocratic, and the role for law within this approach to governance, has deeper implications for the model of the state and the role of law promoted therein. Raymond Plant's treatment of Michael Oaskeshott's distinction between a telocratic order of society, or a *telocracy* (an order devoted to the pursuit of some overall end, goal, or purpose) and a *nomocracy* (a rule-governed order not devoted to the attainment of particular ends) is insightful here. [874] Both have a different view of the rule of law, and its role. For a *telocracy*, issues of policy displace a concern with the rule of law, since a telocracy is based upon the idea of the achievement of a common purpose where the role of government and politics is to mobilise the members of society and resources in the pursuit of this goal. Thus, in a telocracy, the nature and scope of law is made subordinate to the achievement of that common purpose; policy may be more important than law, and such an approach frequently underpins a fascist, welfare or social democratic state.

In a *nomocracy*, the government makes law but law is not seen as a means of attaining common or collective goods or outcomes. The role of government is to provide law as a public good, with a focus on the provision of contract and property rights, in line with a role for law that focuses more on the rules of the game that shape how people make choices, and less on directing people towards particular ends, goals and purposes[875]. This view places the role of

[874] "Nomocratic politics focuses on the idea of political institutions as providing a framework of general rules which facilitate the pursuit of private ends, however divergent such ends may be. It is not the function of political institutions to realize some common goal, good, or purpose and to galvanize society around the achievement of such a purpose. Rather, nomocratic politics is indifferent to common ends and has an interest in private ends only in so far as they may collide [whereas] [A] telocracy implies the organization of the state and its institutions in pursuit of a single overriding goal or a comprehensive goal within which other values will be given a subordinate place." Raymond Plant, *The Neo-liberal State* (Oxford Scholarship Online, 2010) at 6-7.
[875] Ibid 8.

competitive markets as central to the organisation of society. If these are working, there is little or no need for regulation. However if there are problems, the solution lies in strengthening markets, not in greater regulation. [876] "Government is more like a governor in a complex engine. It is not part of what directly makes the 'engine go', but rather regulates the speed at which the various parts move."[877] The law in a nomocracy is considered to be both neutral and impartial, with politics in a nomocracy concerned with the business of "considering authoritative prescriptions from the standpoint of their worth and of reconsidering subtractions, additions, or amendments' to such prescriptions … mainly concerned with improving the framework within which we engage in self chosen actions." [878]

The contents of both the *Peer Review Reference Guide*, and the *Better Aid: Managing Aid* core reference document, vividly portray a nomocratic donor state. Thus, while *Better Aid* acknowledges that a legislative framework for donor ODA governance may be helpful for accountability purposes, "exhaustive legislation on development assistance can hinder efficiency….[and] legal safeguards can unintentionally pose problems and constrain moves towards the harmonisation, alignment and accountability called for in the Paris Declaration and the Accra Agenda for Action."[879] In the DAC view, law is not intended to capture political aims and hold donor ODA policy to adherence to objectives such as poverty reduction, consultation with aid-recipients and respect for human rights. [880] But this approach to law extends beyond

[876] Ibid 242.
[877] Ibid 8
[878] Ibid.
[879] OECD (2009), supra note 33 at 16.
[880] These three objectives are the criteria of Canada's ODA policy and enshrined in its Official Development Assistance Accountability Act (2008) and are enshrined in section 4.1 of the Act. Interestingly, the DAC Peer Review of Canada undertaken after the introduction of the Act gives only summary mention to the Act and frames it wholly as an accountability mechanism in terms of reports to parliament, and fails to link the three 'criteria' to the

consideration of donors only. Even in the face of some, if cursory, recognition of a range of development "challenges" including a global financial and economic crisis, food insecurity and climate change, the nature of the DAC-preferred approach to donor development co-operation policy is overwhelmingly managerial and not one that engages with international legal obligations. Thus, no reference is made to international or domestic legal agreements and policy frameworks such as international human rights law or environmental law that address these issues.

And what of the subjectivity of the aid-recipient state in the DAC's governance of ODA? Aid-recipient states are given the moniker of "development partner". [881] In both texts, the sovereign identity of the aid-recipient state – as an entity with a legally-recognised personality that has distinct legal and political obligations towards its people, and towards the wider

orientation of existing monitoring frameworks in place with the various statutory bodies involved in the implementation of Canada's ODA policy, including the Canadian International Development Agency (CIDA). "The main purpose of the act is to strengthen accountability within Canada's development co-operation system… The ODA Accountability Act lays out three conditions or criteria that must be satisfied for international assistance to be reported to Parliament as ODA assistance." OECD, *Canada – Development Assistance Committee Peer Review 2012* (Paris: OECD, 2012) at 22. This differs markedly from the understanding of Global Affairs Canada (GAC) who describes the purpose of the Act as '[T]o ensure that all Canadian official development assistance (ODA) is focused on poverty reduction and is consistent with aid effectiveness principles and Canadian values." Perhaps even more significantly in terms of the significance of this interpretation, GAC uses each of the three criteria to determine eligibility for ODA "If you intend to apply for funding from Global Affairs Canada, please note that your application will be assessed against the criteria set out in section 4.1 of the Act." It has developed 'Guidance Notes' on each of the three criteria for organisations preparing funding applications. See GAC website http://international.gc.ca/gac-amc/publications/odaaa-lrmado/index.aspx?lang=eng. It is difficult to reconcile this approach from GAC to the purpose and implementation of the Act, with the description of the Act given by the DAC in its (2012) Peer Review. One possibility is that the GAC's governance of ODA constitutes both a parallel and overlapping 'jurisdiction' on ODA with that of the DAC's.

[881] Tellingly, the term 'development partner' is also ascribed to CSOs. "While CSOs in developed countries can be strong development partners, they are also an important source of aid funds." OECD (2009), supra note 33 at 6. This departs somewhat from the clarification in the 2001 Poverty Reduction Guidelines on terminology that "[T]he bilateral assistance community as "development agencies" or "agencies", as opposed to "donors", a term inconsistent with partnership processes and modalities. Similarly, developing countries are referred to as "partner countries" or "partner governments" (not as "recipients"). "Stakeholders" in the text refers to developing country civil societies." OECD (2001), supra note 697 at 35.

international realm in ways that differ from other development actors – is entirely absent from the texts. Rather, the subjectivity of the development partner articulated therein is amorphous, unpeopled, ahistorical and undifferentiated from the interests of the DAC-defined donor. It has a passive subjectivity, lacking in self-defined agency, and without any recognition of a decision-making role as a sovereign. [882] Similarly, where (infrequently) mentioned, the approach to the governance of ODA by the aid-recipient state is entirely absent of any reference to domestic legal and policy frameworks that may articulate their own desired national development goals and pathways, or to regional and international legal agreements to which they may be parties.

Thus the DAC's approach to the governance of ODA created through the PR governance technology and methodology is one that clearly constitutes a jurisdiction that places the DAC at the apex of authority on donor development co-operation policies and systems and of donors' and aid-recipient states' roles within that. This bureaucratic technology includes a strong reliance on technocratic modes of governance for its authority, and contains within it its own internal highly partial concept of the state and politics as a nomocracy. This approach also views the state as a model that is, and can be, continually reformed, with law's role and nature viewed in instrumental and technocratic ways. The juridical quality of the DAC's approach to PR is further augmented by the obligation contained in Article 3(a) of the OECD's founding agreement that its Members "furnish the Organisation with the information necessary for the

[882] Thus, in a section that describes donor management of bilateral aid, the document recounts that "DAC members involve headquarters, embassies and development agencies in planning assistance programmes for partner countries. Most donors also involve the partner country government in bilateral consultations when preparing country strategies and some involve other local actors as well…… Donors are also considering adjusting disbursement plans to schedules and formats *better suited to partner countries' needs*, and disbursing general budget support in the first six months of their financial year." OECD (2009), supra note 33 at 63. Emphasis added. Note the order of this description, and the ascribing of a 'stakeholder' identity to the aid-recipient state, similar to other actors. Note also the framing of the relationship of the aid-recipient state primarily in passive terms.

accomplishment of its tasks." This is augmented further by a requirement for DAC membership that applicants undergo peer reviews of their development co-operation programme. [883]

5. The significance of performativity to governance by Peer Review

As I mentioned in the introduction to this chapter, a key contribution that PR contributes to the creation, constitution and maintenance of the jurisdiction of the OECD and DAC, one that is central to the effectiveness of its governance signature, is the periodic, repetitive nature of this technology of governance, and how, over time, it functions to distil and consolidate the governance dynamics and effects of each of the legal, policy and bureaucratic instruments elaborated in the preceding chapters of this section of the thesis. Butler's concept of performativity is helpful here to drawing attention not only to the utterance that brings forth a reality or a subjectivity, but to the variety of processes that produce those ontological and political effects, and in particular, the conditions that enable those effects to be realised. [884] On the latter, I have earlier in this chapter, and in Chapters 6 and 7, drawn attention to the significance of history to the contemporary approach to international governance via peer review, and to the contemporary approach to the international governance of ODA more

[883] OECD DAC, 'Joining the Development Assistance Committee (DAC),' (undated) available at https://www.oecd.org/dac/dac-global-relations/joining-the-development-assistance-committee.htm.

[884] Though Butler's notion of performativity is most closely associated with her views on gender, it is also bound up with politics and legality. She builds the concept of performativity from John Austin's analysis of utterances as having three parts – locution, illocution, and perlocution. Illocution refers to speech acts that have effects derived from the saying of something (e.g. marriage, or the delivery of a legal jufgment). Illocution brings something into being by the mere saying of the utterance. Perlocution, on the other hand, is when effects follow from an utterance only when certain other kinds of conditions are in pace. Perlocution thus draws attention to the conditions that help bring about those effects. Judith Butler, Performaitve Agency, (2010) 3 J Cult Economy 147 at 147-148. Also Stephen Young, "Judith Butler: Performativity," Website Critical Legal Thinking, 14th November 2016, available at http://criticallegalthinking.com/2016/11/14/judith-butlers-performativity/.

generally.[885] However, on the former, and specifically in relation to the contribution that peer review makes to the OECD's and DAC's governance of ODA (and via ODA), Butler's highlighting of the significance of the codification and ritualization of an uttered discourse, how its governance effects depend on its continual re-establishment, time and time again through processes of reiteration and sedimentation, a phenomenon she describes as a paradox in that it is both regenerative and accumulative. [886] In my view, this concept of performativity captures an essential dynamic that is key to the governance contribution of peer review. The periodic revision of the standards (by which the DAC assesses donors' development co-operation policies and systems through PR) ensures that the PR process will always be open to new issues and areas for intervention. The periodic nature of the PR process (ever 5-6 years, with a 6-month managerial report after its formal conclusion, and a mid-term review before the next PR) ensures that the donor will remain under constant surveillance and assessment. It means that the cumulative effect of these reviews and the subsequent implementation of the reforms, normalises a DAC-defined legal and political order, not only of donor development co-operation policy and systems, but in areas, and towards other legal actors beyond this. In doing so, the contingency and artificiality of this order, the process of "selection, elision and exclusion" that has gone into constructing this order, is masked. Furthermore, if and when there is a

[885] Thus, history is important to understanding the contents of the founding convention on the OECD, and how the DAC came to be housed within the OECD (Chapter 6 and Chapter 8). I also showed, in Chapter 10, how the definition of ODA, now legalised in an OECD DAC Recommendation, and institutionalised in the domestic legal and policy frameworks of many donors, was strategically developed over time by the DAC in ways that divorced it from any links to wider structural and systemic elements of international relations, and held its governance away from universal international organisations like the UN, or forums like UNCTAD.
[886] Butler (2010), supra note 884 at 139.

breakdown in the model of governance prescribed by the DAC, this becomes an occasion for further illocution and perlocution. [887]

In this way, this performative aspect of the PR, as one of the four key elements of the governance signature of ODA, reinforces each of the other three elements of the governance signature of ODA. Thus, the PR monitoring process augments the already existing approach to juridification within ODA. It is a means through which the legal and normative frameworks implicit in the OECD's view of development, and the DAC's view of development co-operation to be implemented by the donor through ODA, is articulated and monitored. The PR process strengthens the highly juridical quality of ODA, by reinforcing the identity and roles of the DAC (and OECD respectively), as the pre-eminent and executive authority on and decision-maker over donor development co-operation policy, and international development policy. This identity and role is replicated within the immediate ODA relationship between the donor and aid-recipient state.[888]

As I have shown just above from the documents identified as sources for standards for assessment on donor development co-operation policy for the PR, the PR processes contains a strongly nomocratic, neoliberal view of governance by the state, based on the principles and practices of New Public Management. In this way, the internal logic evident in how donors are supposed to implement and orient their development co-operation policy within the PR process, reinforces and compliments the internal legal logics inherent in each of the other

[887] Recall that this strategy is one already used several times by the OECD – see Chapter 9.
[888] This dynamic operates on a similar principle to pyramid selling

governance technologies of the OECD and DAC's governance of ODA, elaborated in Chapters 8-10.

6. Conclusion

This chapter analyses the approach of the OECD's approach to Peer Review, and the DAC's approach to the peer review of donor's development co-operation policy. I argue that PR is a transnational governance instrument that surveys and diagnoses areas for policy reform and policy change and for which the OECD is internationally recognised. This instrument is key to both the OECD's and DAC's repertoire of governance technologies, and plays a key role in its international governance of ODA. I critically analysed the governance dynamic inherent in this instrument and revealed its strongly juridical qualities. These include the legal mandate that the OECD and DAC have to demand, receive and process information from their Members, develop "facts" and diagnose areas for reform for which regulatory reforms are prescribed. This processes creates an executive identity for the OECD and DAC as unquestioned epistemic authorities. In my analysis of both the OECD's and DAC's approach to PR, I revealed that the PR process contains a hidden internal legal logic in which three features can be identified. First, the principles of New Public Management are to the fore. A nomocratic model of the state, with a distinct approach to law (technocratic, where markets are privileged as the central organising principle of society) and to politics, one very amenable to neoliberal policy precepts, is discernible. Secondly – and as with the legal, policy and technocratic governance instruments analysed in the preceding chapters in this section of the thesis - a differentiated legal and political subjectivity and agency is separately ascribed to donors and to aid-recipient states. Thirdly, the approach to policy reform promulgated within the OECD and DAC makes no

acknowledgement of the significance of history or material factors or wider structural or systemic issues to the emergence or resolution of identified areas for reform. Similarly, almost entirely absent is any recognition of existing domestic, regional and international legal commitments to which donor and aid-recipient states may be parties.

I argue that that particular attention must be given to a unique feature of peer review that lends special weight to its effectiveness as a governance instrument – this is its performativity. Drawing from Judith Butler's approach to that concept, I showed how the dynamic and repetitive nature of PR – including its response to breakdowns in its policy reform prescriptions – are key to enabling the DAC (and the OECD) to continue to create, institutionalise and expand their jurisdiction over, and through, ODA.

In the following concluding chapter, I seek to review the whole argument of this thesis so as to sustain the underlying claim of this thesis. This is that the legal quality of the international governance *of* ODA, an activity that stems from and is directed through the OECD and DAC, is intimately connected to how the OECD and DAC govern *through* ODA. Tracing and critically analysing the legal quality of this international governance framework and the governance dynamic that underpins it, and is promoted through it, proves challenging to conventional international legal analysis. In response, I suggest that a critical legal analytical method based on the concepts of jurisdiction and the signature may prove more effective in this endeavour. This lens may have potential for critical researchers that seek to examine law and legality in contemporary global governance in ways that identify and reveal the hidden influences of colonial and imperial history; the emergence and existence of executive rule by international authority; the permeation of a development model with an internal legal logic that is highly

partial, and the creation, universalisation and normalisation of an international political and legal order that is denuded of the legal and political instruments, subjectivities and powers that may name and challenge the causes of and contributors to the deeply problematic relationship between donors and aid-recipient states today.

Chapter 12 Findings and Conclusion

1. Findings

In this project I have shown that although ostensibly ODA is about the transfer of concessional finance from richer donor states to poorer aid-recipient states for humanitarian purposes related to their economic development and welfare enhancement, it masks a much deeper interventionist governance engagement by donors deep into the realm of aid-recipient states. This intervention extends far, far beyond the technical and administrative requirements necessary for the transfer of funds and its accountability. Thus, in Appendix 1 relating to discussions in Chapter 1, my examination of the modalities and specific technologies of ODA delivery and governance of two different, if influential, donors – that of the EU and UK –in relation to Tanzania and its Public Financial Management Reform Programme revealed several features in common. First, the practices and instruments that underpin the EU's and UK's approach to ODA create what are, in reality, contracts for donor-determined regulatory and public sector reform in Tanzania.[889] This is achieved through – and masked by - a range of bureaucratic and technocratic exercises, instruments and mechanisms at the level of the individual aid-recipient state,[890] and with each donor. [891] This flies against the public purpose of

[889] Recall that, for the EU, there are three kinds of Budget Support Transfers – Good Governance and Development Contracts; Sector Reform Contracts, and State Building Contracts.

[890] Thus, Tanzania has a Five Year Development Plan (the Mukukuta II Plan), underpinned by a Tanzania Development Vision 2025. The Development Plan includes multiple sector-focused government reform initiatives, including Public Sector Reform, Public Financial Management Reform, Legal Sector Reform, Local Government Reform etc. Institutionally, Tanzania has a (donors) Development Partners Group, consisting of several policy 'clusters' of donor representatives that track the major national policy arenas. Each Cluster has a further several bureaucratic mechanisms including Reviews, Consultation groups, Basket Fund Steering Committee meetings, monthly donor meetings etc.

[891] Thus, the EU's ODA programme for Tanzania is captured by a National Indicative Programme in which Budget Support is key. The delivery of Budget Support, however, is a modality is an exercise in donor governance. For the EU, this is done through bureaucratic and technocratic activities of budget support dialogue, capacity

Budget Support, an ODA modality that aims at maximising aid-recipient state ownership of ODA. Secondly, the normative content of these public service and government reform contracts clearly subscribe to the principles and approach of New Public Management (NPM), an approach to governance that seeks to bring the principles and practices of the private sector to bear on public governance. Over time, if adopted along with other neo-liberal institutional reform efforts, this approach to governance aims at a deep restructuring of the institutions of the state and re-articulation of the relationship between the state and its peoples. Thirdly, the model of development that underpins these reform contracts is clearly neo-liberal with the primary aim being the pursuit of legal, regulatory and policy change towards the creation of an international investor-friendly aid-recipient state. Specifically, I showed how the UK's public financial support for Tanzania's plans for Public Finance Management Reform, through its dedicated ODA administration body, DFID, was oriented towards influencing the Government of Tanzania to reverse then-recent, democratically introduced, changes to its natural resources legislative, regulatory and policy framework. Such changes had been aimed at giving the Tanzanian state more decision-making power and more authority over, as well as more royalties from, recent discoveries of major reserves of gas off-shore, as these were anticipated to be a major source of revenue for development into the future. Fourthly – and crucially for the purposes of this project - the EU's approach to Budget Support and DFID's approach to Tanzania's Public Financial Management Reform demonstrate distinct juridical qualities. [892] By

development, performance assessment and regular monitoring and reporting, in addition to the transfer of finance. Tanzania, for its part,

[892] The concept of juridical includes the following features - the presence of a clearly identifiable absolute authority and executive power (associated with that authority); the ability for, or an expectation of, determinative decision-making; the presence of practices and methods that are recognisable to the Executive Authority (and to its law, and law more generally) as legitimate (for example, a particular mode of reasoning, a way of establishing 'facts'

this I mean that new agents – donors – are inserted into national policy and legal decision-making processes in ways that are not formally legally recognised and cannot easily be captured by existing domestic oversight (of the aid-recipient state, or the donor). There appears to be no formal limit to the policy arena that donors can engage in, or to the kind of legal and institutional reform that can be pursued by them. Though managerial, bureaucratic and technocratic instruments characterise the governance of ODA between the donor and aid-recipient state, it is clear that authority and executive decision-making remain almost solely with the donor. Finally, though ODA is a very politically sensitive area of international relations, demonstrates real connection to donors' individual and unique histories and political interests, [893] and does not currently operate under a dedicated international agreement, it is not an exaggeration to say that the modalities and technologies of donors' ODA demonstrate remarkable similarity, such that an underlying cohesion and coherence across donors' ODA policies (the normative content) and delivery mechanisms (the technical instruments) can be discerned.

How is it that ODA is imbued with such deep and limitless influence in aid-recipient state law, regulation and public policy? What helps explain this coherence in the governance form and in content of ODA? How does it so easily traverse so many diverse areas of international relations

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and compiling a 'fact pattern' to make decisions, the provision of 'evidence' such as written reports from experts or other specialist technical inputs, finally the creation of a subjectivity (and associated agency) that is recognisable to a contract created by that Authority, and thus may is 'legal' to the actors and Authority, and likely is considered thus by law more generally.

[893] See how former colonial states still give the most of their ODA to their former colonies – Daina Chiba & Tobias Heinrich, "Colonial Legacy and Foreign Aid: Decomposing the Colonial Bias, (2019) 45 Int Interactions 474. Also, a recent study demonstrates that IFC Board membership of countries where borrowing countries are based, and where projects are implemented, increases the likelihood that those countries will receive IDC loans. See Axel Dreher, Valentin Lang & Katherina Richert, The Political Economy of International Finance Corporation Lending, (2019) J Dev Ec (accepted online version).

that are addressed by sometimes competing legal and regulatory frameworks and levels? Does an intrinsic dualism or dialectic to the international governance of ODA exist, that connects the international governance OF ODA, to international governance BY ODA, and if so, where is law in this relationship?

My premise is that by answering these questions, new light may be shed on how law in, and the legal form of the international governance of ODA, helps manifest and distribute power in international relations, in hidden and unaccountable ways. This relationship helps create and maintain deeply problematic subjectivities, relations and conditions that negatively affect not only aid-recipient states and the people that live in them, but also raise questions about prevalent disciplinary understandings of the nature and role of law in contemporary international relations. My aim with this thesis, thus, has been to develop ways of better understanding this link, and to expose the dynamic and complex relationship between law and power at the international level more deeply, and differently, to what is revealed by mainstream, liberal understandings of law.

2. The analytical lens - jurisdiction

Though ODA has been the focus of much scrutiny in international relations, political science and international development studies disciplines, its international governance, as an entity in itself, has rarely received much attention. This element of ODA activity has almost completely escaped legal analysis until recent years, [894] a situation that is perhaps not surprising in a

[894] Though this situation has changed more recently, further legal attention is warranted.

discipline that is founded on formal distinctions, binaries and a belief in institutional formality, certainty and predictability.

This project engages with these questions through an analytical lens and a research method that together, are critical, conceptual and empirical. Though clearly founded in law (critical legal theory and legal philosophy), it also draws on insights from other disciplines such as critical international political economy and international development studies. My unit of analysis for this research is the Organisation for Economic Co-operation and Development (OECD), and in particular, the pivotal role and work of its Development Assistance Committee (DAC). The role of this prestigious and influential international organisation, and its approach to the international governance of ODA, until now, has escaped critical legal scrutiny.

My research of law and legality in the OECD and DAC's approach to the international governance of ODA reveals both a deeper conundrum about law's manifestation and role in governance at the international level[895], as well as the need for further legal research on an under-recognised, if very important, area of legal scholarly research in international affairs. I embarked on this project through the development of an analytical lens resting on two concepts. The first is that of jurisdiction, and in Chapter 3, I drew from writings from legal philosophy and international legal theory to develop an approach to the international governance of ODA as the creation and maintenance of jurisdiction. Employing Berman's

[895] Because ODA has no international law, does it then not legally "exist"? Because it originates from states as donors, does it then not have a recognisable international institutional form? Because it is heavily framed in "halo" terms by donors – the reduction of poverty etc. – are its donor politics more difficult to legally address (by way of contrast, corruption (including of ODA) by aid-recipient states is quite visible in international development policy)? Because legal scholars have thus far addressed the legal manifestation of ODA through normative constitutional if diverse lenses of international economic law and global administrative law, is "naming and taming" the only approach to take to a legal analysis of the international governance of ODA?

insights [896] on this concept, I revealed the hidden ways that ODA acts as a jurisdictional device through its symbolic function of naming and authorising actors with particular subjectivities or social life as requiring intervention, and how it creates and extends a particular order of one community onto an "Other" along with the hierarchy of identities and relations implicit within this. Building on with contributions from Dorsett & McVeigh, Douzinas, Drakopolou and Valverde, I developed an analytical lens in order to trace the contours of the jurisdiction of ODA by focusing on authority and authorisation,[897] the identifiable governance technologies that created, maintained and implemented this jurisdiction; [898] the approach to time, temporality and to space; [899] and the artifacts that embody and represent the jurisdiction of ODA. [900] Through this lens, I was able to identify several novel aspects to the jurisdiction of ODA.

First, history and temporality are, quite simply, foundational to the contemporary international governance form of ODA. By this I mean that the main governance instruments of law,

[896] That jurisdictional rules reflect and *construct* social conceptions of space, which are not intrinsic to the physical world they operate in; secondly, how jurisdictional rules establish the *dominion* of a community *over* a 'transgressor'; thirdly, how the assertion of jurisdiction symbolically *extends the membership* of a community to subjects beyond its previous incarnation, and fourthly, how the assertion of jurisdiction can *open a space* through which norms are articulated that may challenge sovereign power. See Chapter 3, section 4.

[897] This focused on questions such as (i) who/what is given authority (the decision-maker/law sayer); who/what constitutes the law-hearers/community? (ii) On what areas/activities are they given authority? What forms of authority are authorised for each subject? What rights/duties/obligations are authorised for each subject? (iii) What are the ways that the governance of ODA presents and authorises law, relations between laws and the subjectivities of donors and aid-recipient states within the legal realm (its internal legal logic)? (iv) What are the material and other conditions of possibility that help bring this about, legitimise and naturalise this relationship of authority?

[898] Consisting of law, influential policy frameworks, bureaucratic-institutional mechanisms that have an executive or deliberative function, and technocratic devices that are essential to creating entities amenable to governance such as the concept of ODA.

[899] What continuities does the contemporary governance of ODA have with historical iterations of institutionalised relations between northern and southern states? What is the inherent view of time (past, present, future)? How do the governance instruments of ODA conceptualise space/territory and its relationship to governance? At what levels does the international governance of ODA most acutely engage with donors and aid-recipient states?

[900] I did not develop this element in depth in this project as, unlike other areas of international relations that have an identifiable formal law or institution as a lynchpin, with ODA, the OECD is not readily associated with the international governance of ODA as a jurisdiction.

dedicated policy positions on the nature and purpose of development, bureaucratic mechanisms whereby transnational diagnoses and assessments for developmental remedies could be undertaken, and technocratic governance devices to capture key aspects of social life to be made amenable to governance, have precedents in two moments in history. The respective approaches of two international institutions - the League of Nations and its Permanent Mandates Commission (PMC), and the Marshall Plan's European Recovery Programme-related institutions of the Organisation for European Economic Co-operation and its Overseas Territory Committee, and the US' Economic Co-operation Administration, though different, contributed important precedents, approaches and instruments of governance that remain prominent to the international governance framework of ODA today.

In Chapter 6, I traced how the creation of the League of Nations inaugurated a new international governance realm through new law and a new international organisation. While this inaugurated new legal and political subjectivities, and governance relations between colonial powers themselves, and between colonial powers and colonies and territories, there were strong continuities and overlaps with transnational colonial governance. Though an apparently new legal subjectivity of "advanced nation" and "Mandatory" was created for colonial powers, arguably the League created a new international forum that effectively legitimised continuities in colonial power through new international legal and institutional means. Though a novel approach to international administration had strong continuities with colonial administrative approaches and methods, it also marked a significant departure. Technocratic devices such as surveys to gather information to create data and generate "facts," and the creation of bureaucratic deliberative and decision-making instruments such as the

PMC's supervisory mechanisms of rapporteur and periodic reporting method, masked what was, in effect, the retention of executive authority in international affairs by the former colonial powers through the legal construction of the League's Council, Assembly and PMC. Dedicated policies on political and economic relations between "advanced nations" and "colonies and territories….inhabited by peoples not yet able to stand by themselves under the conditions of the modern world" were now newly articulated at the international level through the concept of Trusteeship, and "Open Door" respectively.

This combination of novel law, dedicated policy approaches on economic development, along with new instruments of international bureaucracy and technocracy, was repeated in the institutions designed to implement the Marshall Plan's Economic Recovery Programme (ERP). The context and purpose were different, however, and this marked several important departures from the League's PMC governance approach. Now the US was the primary political and economic power, and arguably, the ERP inaugurated a new era in international relations of explicitly donor-led transnational governance, based on customs union theory. In this moment, through a creative combination of donor institutions (such as the US' Economic Cooperation Administration (ECA))[901] and international institutions (such as the Committee on European Economic Co-operation (CEEC)), along with already existing instruments and practices of transnational governance (surveys, data collection, committees, reports etc.), an innovative model of economic development founded on transnational corporate capitalism emerged, one that was rationalised by donor-determined economic humanitarianism. One governance effect

[901] Recall that the ECA heralded a new kind of administration and administrative structure that could direct expert input from industry as needed, without political interference. Hogan described this structure as neocapitalist. Supra note 446.

of the US' approach to the ERP was the creation of new spaces and geographies for intervention, ones that now co-existed alongside, and deep within, prior sovereign boundaries. Here, legal and institutional innovations helped create new governance spaces for sanctioned donor-led intervention, this time right in the heart of the domestic policy of sovereign states. In Chapter 7, I considered in greater detail the governance effects of these innovations, and in particular, how they blurred formerly distinct boundaries between international and national levels, and between the public and private (corporate) realms, through new instruments of governance. Furthermore, these instruments masked the executive authority wielded by the US as primary donor for the ERP. One clear continuity between the institutions created by the ERP and the current OECD today, is how the Overseas Territories Committee of the Organisation for European Economic Co-operation later evolved into the OECD's Development Assistance Committee.

Why is this history important to the contemporary international governance of ODA? The League no longer exists, neither does the CEEC. My point here is that these moments in history inaugurated new spaces, instruments and rationales for intervention that continue to inform and shape the contemporary international governance of ODA. Most obviously, this historical lens reveals how law and institutions created, maintained and legitimised an executive role for non-representative international organisations, and Northern, powerful economic states in interventions in states in the Global South. This pattern informs and underpins the contemporary role of the OECD and DAC, and Northern donors in the development policies of states in the Global South today. Less obvious perhaps, but nonetheless equally valid, is the institutional pathway through which one model of transnational capitalist economic relations

became forged in international development policy as the only model of common-sense international development. Thus, in paying attention to history in law's role in international governance from the League era onwards, my research points at the significance of temporality to contemporary governance, and how transnational governance rationalities, instruments and practices that were inaugurated in the colonial era, continue to exist, shape and inform contemporary international relations between what were formerly "advanced nations" and "colonies and territories." A temporal lens thus reveals the living legacy and continuing significance of colonial governance to the contemporary international governance of ODA. Recognition of this fact means that, for example, proposals from Global Administrative Law perspectives to "name and tame" the international governance of ODA through a donor law of development co-operation based on principles of development; collective autonomy and ownership; individual autonomy and human rights, and coherence and efficiency, risks sanctioning and further masking a very problematic area of international relations. It also points out the naivety of current thinking and efforts around changing the underlying model of development to become more "inclusive" or "sustainable" will result, somehow, in more equitable economic and political relations between the Global North and South.

This is because a distinct pattern of authority and authorisation characterises the jurisdiction of ODA created and maintained by the OECD-DAC that has become institutionalised through legal, policy, bureaucratic and technocratic instruments. Here, *each* governance technology has distinct and overlapping legal and juridical features. It is here where the legal form of the international governance of ODA connects the governance *of* ODA with governance *by* ODA. In my analysis of each of these governance instruments of the OECD and DAC, I capture the legal

quality of this pattern of authority and authorisation through the concept of the governance signature. In the following section, I show how this latter concept reveals hidden legal features to each of the OECD-DAC governance instruments examined in Part III (Chapters 8, 9, 10, 11) of this thesis.

3. The analytical lens – the governance signature

In Chapter 4, I explained this concept in greater detail. It consists of four features that are identifiable in each of the four governance technologies, to varying degrees. In the following paragraphs, I recap each of those features and give examples of how each of the governance instruments displays that feature.

The first feature is its *juridical nature***.** As discussed above, the concept of the juridical includes the following features - the presence of a clearly identifiable absolute authority and executive power (associated with that authority); the ability and expectation of determinative decision-making; the presence of governance practices and methods that are recognisable to the Executive Authority (and to its law, and perhaps law more generally) as legitimate (for example, a particular mode of reasoning, a way of establishing 'facts' and compiling a 'fact pattern' to make decisions, the provision of 'evidence' such as written reports from experts or other specialist technical inputs), and finally the creation of a subjectivity (and associated agency) that is recognisable to a contract created by that Authority, and thus is 'legal' to the actors and Authority, and likely is considered thus by law more generally.

The OECD's founding convention ascribes unlimited powers to the OECD to pursue and expand an economic growth-oriented model of development within its Members and non-members

alike, through unrestricted (if "appropriate") means. [902] This is the primary inaugural – and legal – source of the OECD-DAC's jurisdiction on ODA. However, juridical qualities imbue each of the policy, bureaucratic and technocratic instruments as well. Thus, for example, the DAC's current mandate authorises it to generate "analysis, guidance and good practice" to DAC Members and "the expanded donor community" on "pro-poor sustainable growth and poverty eradication," while analysing and shaping "the global development architecture."[903] In this role, the DAC's mandate creates an identity for the DAC as the primary ontological and epistemological authority on ODA and development co-operation. This identity as an Executive Authority is augmented through several of governance instruments such as its membership application process that enable the OECD (and DAC) to make executive determinations on the quality of applicant domestic legislation and policy and areas that lie beyond the formal remit of the OECD and DAC. In relation to ODA, specifically, the DAC's bureaucratic and technocratic instruments of governance such as the methodology of the donor Peer Review process (its survey in order to establish "facts" and its assessment and diagnosis of participant states' performance according to self-determined "standards and guidelines"), and the highly select view of development finance that the concept of ODA captures, are examples of the variety of governance practices and methods that been created by the OECD and DAC to enable determinative decision-making. These form the basis of a contractual-like relationship between the OECD-DAC and its Members on future engagement. Here, precedent (an authoritative decision that can act as an example for future scenarios of the same nature)[904] proves highly

[902] Article 2.
[903] See the OECD DAC mandate at http://www.oecd.org/dac/thedevelopmentassistancecommitteesmandate.htm
[904] Derived from Blacks Legal Dictionary online version via Catalog.

significant to building up what can be viewed as doctrinal precepts on the international governance of ODA. A telling example of this is in how the standards for DAC Peer Review of donor development co-operation policy are developed. In Chapter II, I showed how one of the core reference documents used in Peer Review was derived from an earlier piece of research framed as "good practice."[905]

It would be a mistake, however, to ascribe a juridical quality only to the law and legal instruments of the OECD and DAC. In Chapter 9, I showed how two influential DAC policy documents on pro-poor growth assigned a clearly differentiated and hierarchical subjectivity to both the donor and the aid-recipient state. The donor is given an omniscient and omnipresent subjectivity, one mandated to exercise considerable agency in determining the area for, and nature of reform of, the aid-recipient state within the ODA relationship. By contrast, the subjectivity of the aid-recipient state is flat and featureless, one without sovereign identity in terms of political agency. It is framed as corrupt, wilful, inefficient and in need of in-depth reform. Once within the ODA relationship, the aid-recipient state is expected to be compliant and willing to be scrutinised in every area of policy, in every institution, at every level and at all times. Not only are these differentiated subjectivities recognisable and deemed appropriate within the field of ODA, but in my view, their manifestation within the ODA relationship means that these identities creep into other areas of international law as well. Thus, the EU's role as a major ODA donor to African regional organisations and states under the EU-ACP Cotonou Agreement, gave it significant leverage in its attempts to reconfigure the membership of

[905] See Chapter 11, section 4, Fig. 11.4 - this is the "Twelve Lessons From DAC Peer Reviews" on effective aid management.

several African regional organisations (that had overlapping membership) to coincide with the regional economic entities with which it wanted to conclude Economic Partnership Agreements (trade agreements). Similarly, the most recent World Trade Organisation Trade Facilitation Agreement, [906] legally links developing country legal reform to the availability of donor financial support. While jurisprudence on the contents of this agreement remains to be developed, in my view, the inclusion of new special and differential treatment (SDT) measures in the agreement that link the requirement of developing countries and least developed countries (LDC) to implement the agreement, with the availability of adequate donor Members' provision of financial assistance to support their capacity to do so, marks a worrying development. It includes no clause that clearly differentiates the availability of donor finance from the decision of developing countries and LDCs to implement the Agreement in a way that works for their development ends. This startling legal erasure of the decision-making agency of aid-recipient states in an international legal agreement merely reflects their erasure in the ODA relationship.

[906] The World Trade Organisation Trade Facilitation Agreement (TFA) entered into force on 22 February 2017. See, Section II, Special and Differential Treatment Provisions for Developing Country Members and Least-Developed Country Members. Section II of the Agreement contains the special and differential treatment provisions (S&DT) for developing country and least-developed country (LDC) Members and reveals quite a novel approach. There are three categories of provisions that address S&DT – A, B and C – the difference between each being the time period of implementation allowed and, in relation to category C, the additional existence of requisite assistance and support necessary for capacity building to facilitate implementation for developing country and LDC Members. Upon entry into force of the TFA, developing and least-developed country Members designate particular TFA commitments for implementation as either A, B or C to a Committee on Trade Facilitation. Already, some commentators have highlighted troubling aspects of the TFA for the development prospects of developing and LDC Members that the Section II provisions do not address. These include concerns at the overly prescriptive nature of some of the TFA's provisions and the unnecessary intrusion into domestic policy space; the unclear implications arising from the scope of some of the vague terms included in the TFA on domestic legislation and regulatory processes; the nature and extent of costs associated with the upgrading and maintenance of TFA processes and institutions; the lack of clarity on the amount and nature of dedicated international funds available and concerns over the risk of diversion of domestic resources in to trade facilitation efforts at the expense of other areas of public spending, as well as fears that the Agreement will further augment the trading capacities of exporting countries at the expense of importing countries. Kinda Mohammadieh, 'A WTO Treaty on Trade Facilitation? Regulatory, Institutional, Legislative, and Cost Challenges for Developing Countries', South Bulletin 75, 7th October 2013.

The second feature of the governance signature is the approach to *juridification* inherent in the governance instruments. This is the process by which the international governance of ODA becomes more formalised, standardised and – in some instances – formally legalised, over time. This process of juridification is key to tracing both how the governance role of the OECD-DAC vis-à-vis ODA and wider international development policy became so singularly authoritative over time and perceived as legitimate. Note that this occurred in an international governance realm with several potentially competing international organisations. Juridification also helps reveal how the OECD promotes a highly partial neo-liberal transnational model of development such that it becomes a highly influential policy narrative in wider international development policy. In Chapter 4, I explained how I drew from Blichner & Molander's insightful work on this concept that identifies five dimensions to juridification. [907] In this thesis, I have identified how each of the five dimensions are evident across the law, policy, bureaucratic and technocratic instruments of governance of the OECD-DAC. Thus, the constitutive dimension of juridification is evident in both the founding convention of the OECD and in the mandate of the DAC. In Chapter 8, I demonstrated how both instruments establish the basis for a wide role and almost limitless authority for both entities in international economic affairs, in international development policy, and in international development finance and ODA in particular. The second dimension of juridification relates to how activities become more and more subjected to regulation, or more detailed regulation through "expansion and differentiation." Both processes are evident in several of the DAC's governance instruments of ODA. For example, the

[907] These are constitutive; expansion and differentiation; a conflicts dimension; judicial power and legal framing. See Chapter 4 for how I articulated these elements to take cognisance of the international governance of ODA.

DAC clearly expands its authority and governance reach through its Peer Review methodology of donors' development co-operation policy. This methodology relies significantly on the production and use of an increasing number of self-described "internationally-agreed policy guidelines" [908] several of which are listed as "core reference documents" in its Peer Review methodology. Related to this is the DAC's insertion of itself as a monitor of donors' responses to international agreements and commitments from other international legal entities, thereby expanding its role as an authority on non-OECD-DAC governance instruments.[909] It also further develops its laws and regulations on ODA through differentiation. This is evident in its approach to the evolution of the concept of ODA. In Chapter 10, I demonstrated how the DAC has recently moved to expand the reach of the concept of ODA to better promote and capture the role of concessional ODA in "catalysing" private investment through the concept of Blended Finance, and non-concessional official finance through the concept of Total Official Support for Sustainable Development (TOSSD).[910] For both concepts, extensive new guidelines and

[908] Now numbering almost twenty, and addressing issues ranging from pro-poor growth, to poverty reduction, to state-building in situations of conflict, environmental fiscal reform etc. See https://www.oecd-ilibrary.org/development/dac-guidelines-and-reference-series_19900988

[909] The methodology for the Peer Review process includes an assessment of donors policy responses to the UN Framework Convention on Climate Chante (2015) (the "Paris Agreement"); the UN's Addis Ababa Action Agenda of the Third International Conference on Financing for Development (2015), and the European Commissions "New European Consensus on Development 'Our World, Our Dignity, Our Future;' Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission." (2016). See DAC Peer Review Reference Guide (2019-20).

[910]See the official definition of ODA that was in place until 2019, described in Chapter 1. In brief, ODA can take the form of (i) grants, where financial resources are provided to developing countries free of interest and with no provision for repayment, or (ii) soft loans, which have to be repaid with interest, albeit at a significantly lower rate than if developing countries borrowed from commercial banks. Since 2019, ODA has changed from an estimate of 'financial flow' to an estimate of the 'grant equivalent.' The grant equivalent is an estimate, at today's value of money, of how much is being given away over the life of a financial transaction, compared with a transaction at market terms. The grant equivalent is the grant element multiplied by the amount of money extended. The DAC claims that this is a more accurate estimate of a donor's ODA. OECD-DAC "Official Development Assistance (ODA)," April 2019. Available at https://www.oecd.org/dac/stats/What-is-ODA.pdf

instructions to donors on their development finance policy have been produced. [911] These instructions signal that donors' development finance policy must evolve further in such identified directions.

The third dimension of juridification relates to how the OECD-DAC addresses conflicts and tensions between the different kinds and levels of legal frameworks, political regimes and between public and private actors. From my analysis of the four main governance instruments of the OECD-DAC, I suggest that there are four main strategies that the OECD-DAC adopts when its laws and normative development project come into conflict or tension with other laws and governance regimes, or indeed, with reality.

The first, and most prominent strategy, is that of creating its own legal order*ing* within the jurisdiction of ODA. By this I mean that it selects and prioritises certain laws, regulations and normative orders and certain legal fields over others. The laws that are clearly prioritised are those relating to the promotion of business interests and of transnational corporate economic activity, and thus the laws that are privileged within this ordering process are mainly in relation to international economic law (trade, investment and financial transfers), and at the domestic level, laws that promote and protect the establishment and operation of businesses. Other legal orders are simply left out of consideration (such as domestic laws that might run contrary to the underlying premise of international economic law or the promotion of transnational

[911] Curiously, the document relating to donors' policy towards Blended Finance, called "OECD DAC Blended Finance Principles for Unlocking Commercial Finance for the Sustainable Development Goals (2019)" is currently identified as formal Recommendation by the DAC, and not as a less weighty "guideline." This is interesting as it is evidence of a pattern of blurring the distinction between the legal quality and normative weight of the various decision-making and advisory instruments. I return to the governance effect of this blurring later in this section.

economic activity). Thus, a holistic view of domestic law of the donor and more especially, the aid-recipient state, is completely absent in DAC considerations of legal reform. We saw in Appendix 1 how the UK's DFID strategy on public financial management reform took a distinctly antagonistic view of then-recent legislative change in Tanzania that gave the Tanzanian state greater authority in, and revenue from, mining concessions. This approach is entirely permissible within DAC guidelines to donors on legal reform to be promoted via their ODA. [912] Similarly, legal obligations that states (both donors and aid-recipient states, in particular) may have via other legal regimes at the regional and international levels are almost never referred to.

A second strategy is the technicisation of law. This is where its political, communal and symbolic roles (and potential for these roles) are erased and transformed to that of a technical device that can be captured, anchored and instrumentalized through the issuance of data and indicators. This is most clearly evident in how the OECD's approach to the concept of ODA. In Chapter 10 I showed how, over time, the OECD appropriated the concept of ODA and structured its meaning away from that promoted by the G77 in the early UNCTAD conferences. Under the DAC, this shift in normative content resulted in it becoming completely divorced from its original links with the wider international economic system and the laws and institutions that were identified as requiring radical change by the G77 in the Charter of Algiers. Furthermore, it has now fully indicatorised the concept of ODA, whereby annual reports are produced on donors' ODA contributions. While data is produced on where the ODA flows, no

[912] See Chapters 9 and 11.

information is produced (nor is it possible to be produced, given the current definition tracked by the DAC) on the *impact* of ODA on poverty reduction or other areas meaningful to the measurement of development. Similarly, though a Recommendation on Tied Aid is now in place for many years, I have shown how the normative content of this Recommendation belies its apparent purpose, and retains greater potential for ensuring a stronger focus on the promotion of private markets through aid-recipient states' public procurement policies, than it does on the tying of aid by donors. In this way, by technicising ODA and the instruments through which it is governed by the DAC, any of the original potential of the concept to contest and challenge wider systemic issues in international economic relations has been thoroughly blunted.

A third strategy adopted by the OECD-DAC in the face of deep conflict between its own normative order project of development and policy prescriptions therein, and their relevance to reality as experienced by its Members and non-members alike, is its *institutional* response of reinvention and renewal. As I highlighted in Chapter 9 on the institutional effects of its policy on development, whenever the OECD and DAC have faced an internal or external challenge such that its international economic policy agenda is deeply challenged, it engages in a thorough-looking performance of research, review and reflection, before emerging with a "new" policy framework, and a prescription of policy reforms to meet the crisis, in which the OECD's governance role will continue to be key. This was the response it took to the challenges in the late 1960s-early 1970 to the economic growth paradigm it was promoting; to the financial crisis of 2008-2012, and (as I showed in Chapter 8 on its membership approach) to a challenge to its elevated international role in the early 2000s. Lately, its efforts at reinvention have seen it adapt this strategy to include a deliberate link with international policy frameworks on

development of organisations such as the UN, that have universal membership. Thus, the most recently articulated mandate of the DAC formally links its approach to development policy with the UN's Sustainable Development Goals.[913] In my view, this is further evidence of a clever if parasitic institutional move to link its project of institutional reform to the more universal policy agendas of select international organisations.

The fourth juridification dimension is that of what Blichner & Molander term an increase in "judicial power" where one party obtains greater competency or authority to judge in cases of conflict. They locate the sources of this power as lying mainly in the indeterminacy of law and/or a lack of transparency. In the former case, a lack of clarity exists on what rules to apply or how a certain rule is to be interpreted. In the latter case, the greater the lack of transparency, the greater the power of those that are experts on the system, or that have experience from within it. In relation to the OECD-DAC's approach to the governance of ODA, both of these elements are evident across the governance instruments on ODA. A significant source of the OECD's and DAC's authority in international affairs is the wider perception of the high value of its expertise in economic policy and in development co-operation, through the "correct" policy prescription and their advocacy of this as the relevant "truth" across a wide range of policy areas and governance instruments. I have highlighted its executive decision-making role in its policy development work on, for example, the ingredients of pro-poor growth; in its bureaucratic work on Peer Review and its diagnostic methodology on, for

[913] Thus it plays a highly important role in the G20. Its Chief of Staff is Sherpa to the G20 and its Global Governance and Sherpa Unit, co-ordinates OECD support for the various G20-led policy initiatives. The OECD has also formally linked with the WTO in relation to Aid For Trade and Trade Facilitation. See https://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm.

example, what constitutes the appropriate systems and processes for the authority, mandate and co-ordination role of the donor's development co-operation approach; and in its technocratic work on ODA, including its most recent issuance of Principles on Blended Finance to donors that outlines how donors should orient their ODA policy to "Deploy blended finance to address market failures, while minimising the use of concessionality." [914]

The final dimension of juridification is that of "legal framing" which refers to what Blichner & Molander describe as an increased tendency to understand the self and others, and relations between both, in light of a common legal order. This is where subjects will increasingly see themselves as belonging to a particular community of legal subjects with a shared set of legal rights, duties and obligations. Legal framing is perhaps most evident in the legally-backed membership process of the OECD that I described in Chapter 8, where interested applicants undergo an incredibly invasive formation process, requiring extensive reform of their internal legal, regulatory and policy frameworks according to an OECD-determined prescription. However, it is also exists in other OECD-DAC governance instruments. Thus, in Chapter 10 on ODA, recall that not only are the thirty (30) DAC Members reporting annually on ODA to the DAC according to the prescribed format, but voluntarily, a further twenty (20) non-DAC member countries report, along with a further forty-six (46) international organisations and initiatives such as the International Labour Organisation, and the Global Fund to Fight Aids, Tuberculosis and Malaria (GFATM), and another twenty six (26) private philanthropic entities such as the Bill and Melinda Gates Foundation. This rise in "legal framing" of non-OECD and –

[914] See the OECD-DAC Blended Finance Principles (2019), supra note 911.

DAC members' development finance activity (in the latter case), and domestic economic policy and institutions, (in the former case), is evidence of an increase in the policy relevance and influence of the OECD-DAC far beyond its own Membership.

The third legal quality of the governance signature identifiable across all four governance technologies of law, policy and bureaucratic and technocratic instruments is that of the *internal legal logic* that each contains and advocates. The term legal logic aims to capture the kinds of laws that are recognised and excluded within the international governance of ODA, and the kinds of relations between different laws and legal regimes that it fosters. In particular, this lens helps reveal the kinds of legal subjectivity and legal relations that are created, recognised and promoted within the international governance of ODA, and the consequences of this for how donors and aid-recipient states, in particular, engage with law and legal frameworks beyond the governance of ODA. For the particular international governance framework of ODA, all models of development are not created equally, and it does not recognise all laws as equal either. In this thesis, I have shown how, across all four of the OECD-DAC governance instruments of law, bureaucracy, technocratic and bureaucratic governance technologies, a strongly neoliberal legal logic exists, one implies a particular view of the state, and of law. On the former, this neoliberal legal logic requires dedicated, ongoing and strong state intervention in social relations to construct and maintain markets. Here the state's mode of governance reflects the technocratic, managerial practices of New Public Management. [915] On the latter, as Villmoare and Stillman have pointed out, a very particular "Janus"-faced kind of law exists in this approach. In one of

[915] See Chapter 11 in particular, for how this approach is delineated in relation to donor governance of ODA. See Chapter 9 for how this is elaborated by the OECD and DAC on their respective key policy documents on development, and on the kind of development policy to be pursued via ODA.

the faces, law helps shape, adapt and create a neoliberal state, with law losing many of its welfare and regulatory responsibilities, and with state law working more intensively on behalf of the market and private property. In the second face, law itself is transformed with its democratising and contestation potential increasingly restricted. [916]

Thus, in my analysis of the OECD's legally-backed membership preparation process (captured in its "Framework" document) in Chapter 8, though framed as based on twin pillars of member commitment to a market economy and democratic values, the numerous OECD Acts that a prospective member must demonstrate adherence to are all strongly market-focused, and highly prescriptive.[917] Furthermore, I demonstrated how the Recommendation on Untying Aid privileges the promotion of a markets-centred approach to the public procurement policies of aid-recipient states. In Chapter 9, on the DAC's major policy frameworks on development captured in guidelines to donors, I showed how the model of pro-poor growth implied a market economy model, based on private sector-*led* development. Here, de-regulation is identified as a solution to market failure, and the removal of "poor quality" regulatory and administrative requirements is seen as essential to the promotion of formalisation of businesses. Instead, according to the DAC, regulation should facilitate the free flow of trade in goods, services and capital as the best way of achieving the goal of inclusive, higher growth. In this model, legal rights of people that are "the poor" are conceptualised almost solely as units of mobile labour capital who can be hired, fired and employed on flexible contracts at will.

[916] Adelaide H. Villmoare & Peter G. Stillman, "The Neoliberal State's Janus Faces of Law," (2014) 65 St in Law, Pol & Soc 31 at 32. See discussion in Chapter 1.
[917]

In Chapter 10, I focused on a technocratic governance technology – the concept of ODA. I showed how the history of the content of the concept of ODA, its governance location within the DAC, along with changes to its content, and its use within international development finance policy more broadly (alongside a new concept of Total Official Support for Sustainable Development (TOSSD), and a new approach to development finance called Blended Finance), help orient both donor development co-operation policy and ODA-supported development investments into an increasingly private-sector-led and financialized model of development. One consequence of this turn is the implicit neoliberal approach to law and law's role in development.

Furthermore, one can discern a distinct international dimension to the internal legal logic of the governance of ODA. This has two features – first, it proclaims and aims at the maintenance of the OECD as the lynchpin norm generator on international economic policy at a global level;[918] secondly, it privileges consideration of international economic law over other kinds of international and regional law within its policy prescriptions international economic policy more generally, and for donor development co-operation policy and ODA more specifically. [919]

Here, I propose that the history of the normative content of the concept of ODA, along with a critical scrutiny of its contemporary governance, reveal the duality of the legal governance dynamic (governance *of/by* ODA) at the heart of this thesis.

[918] This is a feature across all of the OECD and DAC's governance technologies but it particularly pronounced in its law (Chapter 8) and its policy pronouncements on development (Chapter 9).
[919] This is evident across all of its governance technologies (see chapters 8, 9, 10 and 11).

The final legal quality of the governance signature of the jurisdiction of ODA is its *performative* quality. This quality draws attention to how the legal strength and authority of the international governance of ODA are strongly reliant on the internal dynamic to many of its governance technologies. Here, I draw from Butler's concept of performativity that highlights how governance effects depend on continual re-establishment, time and time again through processes of reiteration and sedimentation, a process she describes as a paradox that is both regenerative and accumulative.[920] This dynamic of repetition and re-invention is evident across each of the OECD's four contemporary governance technologies examined, but also was a feature of the governance practices of the League's Permanent Mandate System via its Mandatory reporting requirements, and that of the governance of the Marshall Plan. Within the contemporary governance technologies of the OECD[921] and DAC,[922] practices of continual reinvention are clearly evident. Here it is important to note that that these processes of re-articulation and re-invention are elaborated in ways that do not constitute a significant departure from an underlying normative policy agenda of a private sector-led, economic growth-oriented model of development based on the free movement of capital. [923]

[920] Butler, (2010), supra note 884. See chapter 4 for a more detailed explanation of the term and my use of it as a key feature of the governance signature of ODA.
[921] Thus, in Chapter 9, I showed how the OECD periodically adopts an organisational strategy of policy reinvention when faced with a deep challenge to the validity of its policy prescriptions or its authority (e.g. its *New Approaches to Economic Challenges (NAEC),* its *Global Strategy on Development* and *Vision 2025).*
[922] See in Chapter 8, the most recent mandate of the DAC; in Chapter 9 the more recent guidelines to donors on poverty reduction and pro-poor growth; in Chapter 10, the latest revision to the concept of ODA, and its expansion and linkage with TOSSD and Blended Finance, and in Chapter 11, the continuous evolution of the DAC Peer Review Process with its internal standards and guidelines on "best practices."
[923] Thus the concept of development evolves in to that of sustainable development; economic growth evolves into inclusive, pro-poor growth etc.

In the following section, I reflect on the implications of these findings for understanding the international governance of ODA, and law's role and the nature of legality therein. I then explore the potential of this rather unusual analytical lens for further research from a critical perspective on law's in contemporary global governance.

4. Conclusions

The field of ODA is a powerful world-making arena of international affairs. This thesis demonstrates that it is an area of legal activity worthy of dedicated legal analysis, and especially from a critical perspective. While it seeks to build on and augment recent legal enquiry by Dann, Tan and others, this thesis demonstrates that there is much further scope for critical legal investigation.

This research reveals the highly dynamic quality of law and legality in the international governance of ODA, a quality that enables ODA to hold and fix several legal functions at the same time even if these are contradictory. Capturing the nature of law/legality in international governance of ODA is much more complex than a more mainstream approach to legal analysis based on binaries of law/non-law; international/national; hard law/soft law etc., and the liberal perspective of law that views it as distinct from politics. This mainstream, liberal approach to law fails to capture and explain some of the unique features of the international governance of ODA. These include the following features.

First, under the international governance framework of ODA, we see how, under a legal claim of universal governance, a Northern-dominated international organisation with limited membership has asserted universal jurisdiction in international economic policy. The OECD's

founding convention contains within it a unique universality/particularity binary. The OECD has a universal mandate on international economic policy, (one that is effectively limitless in its policy boundaries and in the reach of its policy prescriptions) and yet retains an exclusive right to select and admit states as members.

Secondly, the international governance framework of ODA engages with history and with temporality in ways that beg further analysis. On the former, while it is perhaps facile to draw attention to the fact that the creation of new legal subjectivities, doctrines, institutions and governance instruments in the League of Nations are deeply resonant with contemporary legal subjectivities, doctrines, institutions and governance instruments within the OECD today, legal concepts such as institutional and doctrinal precedent are only one avenue into examining the relationship between time and law. What this means is that, if critical analysis of law in international relations addresses the intimate, mutually reinforcing relationship between law and colonisation, and law and political economy, [924] a far richer picture of law and legality in international relations emerges. On the latter, I have shown how governance practices of repetition and renewal have strengthened and augmented the governance traction of governance technologies that have varying relationships with formal law.

[924] By political economy, I use Fine's elaboration of the concept that "First, political economy is holistic, attempting a systemic analysis of the workings of the economy as a whole and independent of the otherwise isolated individuals who comprise it. Second, it takes social and economic structures and relations as its starting point, thereby placing emphasis upon class and stratification more generally. Third, by the same token, notions of power and conflict come to the fore, how they are forged and how they are exercised, not least through the state and internationally. Fourth, economic categories are subject to critical examination and reconstruction in meaning as opposed to a closed and a historical understanding of the economy as inputs and outputs, production and utility, etc. with a corresponding need to divide variables into exogenous and endogenous, even if the boundary between the two shifts in favor of the latter as economic imperialism proceeds. Last, systemic tendencies and processes, such as globalization, monopolization, and uneven development, as opposed to more or less harmonious and efficient market (and non-market) coordination of aggregated individual optimizing strategies." Ben Fine, ""Economic Imperialism" A view from the Periphery," (2002) 34 Rev Rad Pol Econ 187 at 197.

Thirdly, in spite of the lack of an international legal treaty on ODA as an influential area of international activity, it displays remarkable cohesion in its governance form, and in the development project pursued via ODA. Both of these dimensions have distinct legal and political effects on the subjectivities and agency of donors, but in particular on aid-recipient states. Fourthly, the legal quality of the international governance of ODA enables a level of deeply influential legal and institutional reform, instigated by donors within the aid-recipient state, in ways that escape the legal and democratic scrutiny of aid-recipient states.

The research methodology and analytical lens used in this project to capture and analyse the link between governance *of* ODA and governance *by* ODA (or the link between law and politics in ODA) relied on a rather unusual elaboration the concepts of jurisdiction and the signature. Both concepts have deep links in mainstream legal doctrine and legal practice, though in very different ways. Though my use of them in this analytical lens undoubtedly begs further refinement, this exercise demonstrates their analytical value to critical legal research on ODA, notably in an area of international relations that to all intents and purposes has no dedicated "international law."

These concepts may, with further refinement, also have research value in exploring the legal form of areas of global governance that rely heavily on so-called "soft law" instruments of governance such as with the area of development finance, and in areas of international economic governance such as international finance, where soft-law governance technologies predominate. Similarly, I suggest that concepts such as the juridical, juridification, the legal form etc. may also have much potential for critical legal research on law's role in areas of global

governance that may not conform to the world of international law elaborated in the Vienna Convention on the Law of Treaties. [925]

In seeking to trace and understand law's role in the governance of rapidly evolving areas of transnational activity such as development finance, I suggest that legal researchers may find much potential in articulating long-held legal concepts and ideas in new ways, in order to approach law in global governance less as architecture, but more as ivy on edifice. [926]

[925] Vienna Convention on the Law of Treaties (1969). United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

[926] Here I am reacting to ongoing debates about the nature of international law captured in concerns about its defragmentation and, as remedy, hopes for cosmopolitan constitutionalism. This debate engages legal perspectives from all perspectives, including from the natural law tradition. See a recent intervention by Brian McCall*, The Architecture of Law: Rebuilding Law in the Classical Tradition* (University of Notre Dame Press, 2018).

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Appendix 1: Governance via ODA – specifics of donor-aid recipient state governance instruments and practices

In the following paragraphs, I focus on two sides of ODA governance – the first is that of an international donor, the EU and its approach to Budget Support. Budget Support is a key modality of ODA and the preferred form of donor financing by aid-recipient states. The second relates to an aid-recipient state – that of the United Republic of Tanzania (Tanzania)[927] - and describes the myriad of processes and mechanisms and instruments in place, located within that state – physically and institutionally – that donors use to partly manage their locally-implemented ODA strategy. We will see how the governance framework of ODA permits a range of donor interventions deep in the heart of aid-recipient states' domestic policy making far beyond the mere technical transfer and oversight of financial resources to the aid-recipient state, and how a certain kind of neoliberal legal logic underpins donor rationality.

1. From ODA modality to governance contracts via Budget Support

As the EU notes –

> "Budget support is an aid modality. It should not be seen as an end in itself, but as a means of delivering better aid and achieving sustainable development results. It involves dialogue, financial transfers to the national treasury account of the partner country, performance assessment and capacity development…. it is important to distinguish between the budget support aid modality, which incorporates all four elements of this package, and budget support funds, which relates only to the financial resources transferred to the partner country." [928]

[927] Swahili: *Jamhuri ya Muungano wa Tanzania*.

[928] European Commission, *Tools and Methods Series Working Document: Budget Support Guidelines. Programming, Design and Management – A modern approach to Budget Support*, September 2012. (Brussels: EuropeAid DevCo, 2012) at 11. Since the time of writing an updated version (2018) has been issued.

The EU's approach to Budget Support elements of dialogue, transfers, performance assessment and capacity development are described in its *Guidelines* using apolitical, highly technical terms such as risk management exercises, quality assurance protocols, tranche design, baseline assessments, indicators, targets, tracking surveys and the like, and accompanied by tools such as 'checklists' for use in assessing aid-recipient states' performance in public financial management. But these terms and technologies, framed as surveillance techniques to ensure adequate donor governance of ODA, disguise what are, essentially, strategies and channels for deeply political, donor-instigated interventions in aid-recipient states' domestic budgetary and other policy processes, and in domestic governance institutions. Evidence of this can be found in details of the prescribed approach to each of the dialogue, transfers, performance assessment and capacity development activities, located in the technical implementation documents used to guide EU bureaucrats.[929]

For example, the *Guidelines* specify that Budget Support dialogue covers both "process," including formal meetings and "informal contacts which may be at least as important in influencing and adding value to the development process," and "content, addressing the specifics of policy areas of interest to the donor, including 'performance indicators."[930] The three kinds of EU Budget Support transfers are described as - "Good Governance and

[929] The interventionist content of these Guidelines is at odds with the approach to Budget Support contained in the more publicly accessible policy documents on the European Commission's website. For example, see the following description – "The European Commission's policy on budget support is fully in line with the 2030 Agenda for Sustainable Development. It supports countries in providing the resources required to ensure the right mix of public goods and services to achieve their policy objectives. It assists countries' efforts to improve their tax systems and to benefit more from domestic resources, without increasing the tax burden for the poor." Website of the European Commission https://ec.europa.eu/europeaid/node/13967.

[930] Ibid. 42.

Development Contracts," targeting reforms in national development policy and strategy;[931] "Sector Reform Contracts" focusing on sector reforms towards "improve(ing) service delivery,"[932] and "State Building Contracts" to provide budget support in fragile and transition situations. Note the term contract now included in the description of each type of budget support, implying features associated with a contract recognised in law. [933] This imbuing of the financial transfer with the legal logic of contracts is further augmented by the EU *Guideline's* specification that "(a)ny transfer is always made *after* the agreed conditions for payment have been respected."[934]

The activity of performance assessment is closely, if implicitly, linked to donor conditionality, a feature of donor ODA that frequently causes friction with aid-recipient states, with the *Guidelines'* explicit recognition that the donor scheduling of variable amounts of budget support can have strong "incentive effects" on the aid-recipient state's policy performance. [935] Capacity development for the aid-recipient state via the Budget Support modality, according to the *Guidelines*, opens the opportunity for the EU to play "a facilitation role…. supporting the partner to define realistic capacity development targets….(and) a catalytic role by building on demand for change, providing access to knowledge and facilitating dialogue between

[931] Aimed at 'fostering domestic accountability and strengthening national control mechanisms (an important basis for improving governance and adherence to fundamental values); or on strengthening core government systems and supporting broader reforms, such as macroeconomic management, public financial management (including procurement and the fight against corruption), domestic revenue mobilisation and public sector reform, and addressing constraints to sustained and inclusive growth.' Ibid 13.

[932] 'The value added of a SRC is often in supporting an acceleration of reforms, in improving efficiency and effectiveness of sector expenditures, in knowledge sharing or capacity development.' Ibid 14.

[933] These features include freedom to contract and mutuality of intent by both parties, lending a false perception that these features are inherent in Budget Support.

[934] Ibid 13 – 14.

[935] Ibid 47. This, however, is described in the technical language of outputs and outcomes, with a recommendation that performance assessments should be aid-recipient state government led. Ibid 48.

stakeholders" in select public policy areas including public financial management, tax reforms and tax administration, public expenditure reviews and reforms of the public sector and public administration, including audit institutions, judiciary bodies, internal audit and control institutions and parliaments. [936]

This analysis of the official approach taken by the EU to Budget Support, reveals that the transfer of ODA clearly constitutes a governance relationship between donor and aid-recipient state, far beyond the technical and administrative requirements to effect a financial transfer. Legitimising this level of intimate intervention at the aid-recipient state side is the thick web of donor-originating bureaucratic organisational arrangements such as Donor Co-ordination Groups, and sub-groups that are enmeshed within and operate alongside aid-recipient states' own aid management bureaucratic mechanisms, government departments and domestic policy processes.

2. Donor liaison and co-ordination as governance - Tanzania

Tanzania's mechanisms for co-ordinating donor engagement are recognised as one of the most advanced and deliberate in aid-recipient states. By the mid-1990s it had a national Planning Commission, supplemented by sectoral strategies for the social services sector, agriculture, infrastructure and the civil service. Dedicated systems and institutional mechanisms were set up to exchange information between donors and the various parts of the Tanzanian state, and separately between donors themselves, with the establishment of a Donor Assistance Committee (of the main OECD Development Assistance Committee donors) that met once a month. This mechanism paralleled joint Government – Donor meetings, Joint Evaluation

[936] Ibid 50.

Committee and Joint Management Committee monthly meetings.[937] The Tanzanian Donor Assistance Committee was replaced in 2004 by the Development Partners Group (DPB) of 17 bilateral and five multilateral donors. A new kind of Government of Tanzania–DPG planning instrument was developed called the Tanzania Assistance Strategy, later replaced by the Joint Assistance Strategy for Tanzania (JAST) that expired in 2011, itself replaced by a more recent Development Co-operation Framework.

Under the DPG, several policy Clusters exist, each with several Working Groups. One example is the Development Partners Agriculture Working Group (A-WG) of 19 bilateral and multilateral donors engaged in the agricultural sector in Tanzania. Meeting monthly, the Group has a sophisticated working method, including terms of reference and a code of conduct agreed between government and donors, with meetings and work schedules organized through a modified troika chairing structure. The Working Group dialogue, planning and implementation methods include annual Agriculture Sector (AS) Reviews, the annual Agriculture Sector Donor Partner (ASDP), Joint Implementation Reviews (JIR), Agriculture Sector Consultative group meetings, Quarterly ASDP Basket Fund Steering Committee Meetings and other various sub-groups specializing in specific thematic areas. The chair, co-chair and secretariat act as the leaders of the group, with other donors being either active or delegating members. At the time of writing, the DPG website noted that the A-WG was chaired by Food and Agriculture Organization of the United Nations (FAO) and co-chaired by United States Agency for International Development (USAID). The secretariat of the group is based at the Dar es Salaam

[937] In addition, the World Bank and IMF balance-of-payments support programme was negotiated and managed by an Inter-Ministerial Technical Committee (IMTC). See Gerry K. Helleiner, supra note 17.

office of the FAO. [938] In addition to aid administration and review mechanisms, donors are also engaged in key national fora on financing development including annual Public Expenditure Reviews, reviews of its General Budget Support, and reviews of policy reform (undertaken through reviews of Memoranda on Economic and Financial Policies). [939]

Currently, Tanzania is operating under a *Five-Year Development Plan II (2015/16 – 2020/2021)* that combines and replaces two prior frameworks that separately focused on economic growth (the first five-year plan) and poverty reduction (the Mukukuta II) plan. The *Plan* seeks to incorporate aspects of *Tanzania's Development Vision 2025* that aims to make Tanzania a middle-income country by 2025. [940] Institutional reform is a central underpinning policy aim of these plans, reflecting wider international development policy on a changed role of the state to foster a particular kind of transnational capital-led neoliberal reform. [941] The significance of

[938] See http://www.tzdpg.or.tz/dpg-website/dpg-tanzania.html

[939] These include key actors at the national level such as the Bank of Tanzania, and at the international level, such as the IMF. United Republic of Tanzania, Joint Assistance Strategy for Tanzania (JAST), December 2006, at 23.

[940] See the Tanzania Development Vision 2025 at http://www.mof.go.tz/mofdocs/overarch/vision2025.htm.

[941] The rationale for these reforms is elaborated in Vision 2025, where the three underlying principles for 'good governance' are (i) unleashing the power of the market and the private sector; (ii) striking a balance between the state and other institutions (markets and the economy), and (iii) promoting democratic participation. Ibid: 23-24. The market-enhancement focus of these principles is reflected in specific law and regulation reform initiatives elaborated in both the most recent 5-year plans (the 2011/2012 – 2015/2016 Plan and 2016/2017 – 2020/2021 Plan, respectively). Of note are references to improvements to Tanzania's score on the World Bank's 'Ease of Doing Business Index' (DBI) in both documents as rationales for and evidence of, success in particular kinds of reforms. Thus the 2011/2012 5-year plan notes the state's dedicated attention to legal reform to encourage business investment, including in areas such as infrastructure, access to finance, macro-economic stability, taxation and labour market efficiency, and commits it to further specific reforms in getting construction permits, the registration of property, obtaining financial credit, cross-border trading and closing a business, with dedicated attention to Special Economic Zones to be employed as an efficient instrument to improve the ease of doing business in targeted regions. United Republic of Tanzania, *The Tanzania Five Year Development Plan 2011/2012 – 2015/2016: "Unleashing Tanzania's Latent Growth Potentials*," President's Office, Planning Commission (Dar es Salaam: 2012) at 41. The current 2016/17 Plan makes the DBI's twelve areas (that include starting a business, registering property, protecting investors and enforcing contracts) and improvements in the Index' scores, a central part of its reform agenda. United Republic of Tanzania, *National Five Year Development Plan 2016/2017 – 2020/2021: "Nurturing Industrialisation for Economic Transformation and Human Development,"* Ministry of Finance and Planning, June 2016 at 82-83.

donor funding of reform to Tanzania's development strategies over the years is reflected in the existence and work of multiple sector-focused donor-government reform initiatives. These include the Public Service Reform Programme (PSRP), the Public Financial Management Reform Programme (PFMRP), the Legal Sector Reform Programme (LSRP), the Local Government Reform Programme (LGRP), the National Anti- Corruption Strategy and Action Plan (NACSAP), and for the Revolutionary Government of Zanzibar's Economic and Financial Reforms, Institutional and Human Resource Reforms, and the Good Governance Reform programmes. This highlights both the centrality of legal reform to development planning, and to donor's funding agendas, and raises a question about the kind of legal logic employed in these reform programmes.

In both instances – the Tanzanian *Five Year Development Plan II*, and the myriad reform programmes and plans - oversight of a financial transfer is clearly an entry-point to a much deeper, almost limitless engagement by the donor within the aid-recipient state's domestic policy processes and institutions in ways that are beyond domestic democratic legal and parliamentary scrutiny by the aid-recipient state. It is especially notable that a distinguishing feature of this intervention is its permeation by particular kinds of neoliberal logics of agency (of the donor and aid-recipient state) and of law.

In order to further examine the logics of agency and of law underpinning this approach, for the former, I draw from Foucauldian insights used within the fields of global governmentality and developmentality[942] that elaborate on how rationalities of neoliberal development

[942] The term developmentality has been used less frequently in more recent research on governmentality and development than one might have thought. My sense is that it is still a term and an approach in the early stages of development. For eefficiency reasons, I have grouped these issues related to a governmentality approach to the

underpinned by processes of technocratisation, bureaucratisation, and a managerialist approach, bring about a differentiated agency for the donor and the aid-recipient state.

3. Rationalities and subjectivities within the international governance of ODA

Governmentality strategies work through a combination of 'truth' discourses that shape what is politically reasonable, practicable and doable. In this context, ODA relies on powerful narratives and discourses of development that shape conditions of possibility for 'development.'[943] These discourses underpin highly normative political rationalities that act as coherent, relatively autonomous systems of meaning.[944] Rose & Miller discern three attributes to political rationalities that underpin their influence and that distinguish them from mere

ODA relationship together under the 'developmentality' heading, even though many of the authors may not label their contributions as such. Developmentality examines the project of international development, highlighting specific features of the exercise of power within international aid where subaltern aid recipients 'are deliberately inscribed a particular logic that renders their unconscious self-governance in accordance with the governor's, or donor's mentality.' JHS Lie, 'Developmentality: indirect governance in the World Bank-Uganda Partnership,' (2015) 36 Third W Q 723 at 725.

[943] Here, we can think of evocative narratives in the evolution of development thought such as President Harry Truman's inaugural address in which he pitched democracy as the antithesis of communism, and articulated a U.S.-led vision of the world as follows – "… a world in which all nations and all peoples are free to govern themselves as they see fit, and to achieve a decent and satisfying life. Above all else, our people desire, and are determined to work for, peace on earth—a just and lasting peace—based on genuine agreement freely arrived at by equals." Truman's Inaugural Address, January 20th, 1949 available at https://www.trumanlibrary.org/whistlestop/50yr_archive/inagural20jan1949.htm. More recently, we have had the UN's Sustainable Development Goals, which were introduced in a similar laudatory fashion by the then Secretary-General of the United Nations, Mr. Ban Ki-Moon. "We have reached a defining moment in human history. The people of the world have asked us to shine a light on a future of promise and opportunity. Member States have responded with the 2030 Agenda for Sustainable Development. The new agenda is a promise by leaders to all people everywhere. It is a universal, integrated and transformative vision for a better world. It is an agenda for people, to end poverty in all its forms. An agenda for the planet, our common home. An agenda for shared prosperity, peace and partnership. Above all, it pledges to leave no one behind." Secretary-General's remarks at Summit for the Adoption of the Post-2015 Development Agenda, 25 September 2015, available at https://www.un.org/sg/en/content/sg/statement/2015-09-25/secretary-generals-remarks-summit-adoption-post-2015-development

[944] Rose & Miller define political rationalities as '…the changing discursive fields within which the exercise of power is conceptualised, the moral justifications for particular ways of exercising power by diverse authorities, notions of the appropriate forms, objects and limits of politics, and conceptions of the proper distribution of such tasks among secular, spiritual, military and familial sectors.' Nickolas Rose and Peter Miller, "Political Power beyond the State: Problematics of Government," (1992) 43 British J of Soc 173 at 175.

political rhetoric. These are especially helpful to identifying their prominence within development policy discourse within the international governance of ODA, and to understanding the added potency they lend to the international governance of ODA. These attributes are (i) their *moral* form – they elaborate the ideals to which government should be directed and describe the appropriate powers and duties for authorities and how these are to be distributed between different kinds of authorities; [945] (ii) their *epistemological* character – political rationalities are elaborated in light of the objects to be governed, such as society, the nation, the economy etc. In this process, the subjectivity of the persons or the entity to be governed is described – as legal subjects with rights; as labour in relation to production; as children to be educated; as 'the poor' etc. Within the international governance of ODA, the subjectivities of both donors (as 'partners') and aid-recipient states (as develop*ing* and in need of reforming, and capacity-building) is thus constructed; and (iii) the articulation of subjectivities and entities such as 'markets,' 'investment' etc. in such a way as to be amenable to intervention through various *governmental technologies*.

In the context of ODA, neoliberal development is the primary rationality of rule underpinning the international development. This views the integration of the developing country aid-recipient state into the global economy as the primary, if not only, route to 'development.'[946] In

[945] Rose & Miller give the following as examples, - freedom, justice, equality, mutual responsibility, citizenship, common sense, economic efficiency, prosperity, growth, fairness etc. Ibid: 179.

[946] In this context, I find useful Madra & Adaman's definition of neoliberalism that views it as an 'interdiscursive horizon' of two clusters of ontological projects with shared epistemic foundations – "…[N]amely, pro-market and post-market, both of which aim to reorganise the social such that all human behaviour is governed through an interface of economic incentives." In this definition, these projects work as a dialectic, with the pro-market approach claiming there are never enough markets and that new markets can always exist to satisfy the interests and choices of economic actors. Meanwhile, the post-market market position proposes that markets may not be adequate or sufficient in and of themselves, and so there is always potential to design and implement mechanisms that incentivise market actors to reconcile their interests in a compatible manner through the market mechanism. Yahya M. Madra & Fikret Adaman, 'Neoliberal Reason and Its Forms: De-Politicisation Through Economisation,'

this rationality, the subjectivity of the developing country state takes a particular legal and political form, shaping its authority vis-à-vis its own citizenry and wider international economic institutions. But in the ODA relationship, promotion of this neoliberal development rationality is nested within another rationality that focuses on the nature of appropriate donor-recipient aid relations. This centres on key concepts such as 'partnership,' and 'ownership' that are ubiquitous in international development discourse, at every level, and in every area of development activity. [947] In the short analysis that follows, we will see how these concepts, in fact, belie the principles of equality, power sharing and consensus that they suggest. Abrahamsen,[948] and separately Best,[949] both suggest that these concepts, and their related technologies, arose in response to the widespread failure of World Bank and IMF policy prescriptions and modes of intervention implemented during the era of structural adjustment in the 1980s, and the subsequent questioning of the organisations' legitimacy in knowledge and

(2014) 46 Antipode 691 at 692. This definition reveals several dimensions of why and how neoliberal development reason is central to the governance of ODA. First, the ongoing quest for opportunity for marketization and economisation that drives the neoliberal development project, ensures that that the project of development will also continue as a never-ending project, and that the development project itself will likely continue remain the fundamental premise of the relationship between donor and recipient, and North and South. Secondly, it helps normalise and legitimse the existing unequal power relationship between a 'developed and globally integrated' donor state, and an 'in the process of developing' aid-recipient state. Thirdly, the depoliticising effects of both the normalisation of the economisation of the social and the technocratisation of neoliberal governance are mirrored in the governance logics of ODA as we will see.

[947] See policy and programme documentation of the major donors such as the World Bank Group Directive on Country Engagement, July 1 2014; the EU – Joint statement by the Council, the European Parliament and the Commission, The New European Consensus on development 'Our World, Our Dignity, Our Future,' (2017/C 210/01), 30th June 2017;

Their extensive use has caused one commentator to call for the retirement of the terms. Willem H Buiter, ''Country Ownership': a term whose time has gone,' (2007) 17 Dev in Practice 647.

[948] Rita Abrahamsen, "The power of partnerships in global governance," (2004) 25 Third W Quarterly 1453.

[949] Jacqueline Best, *Governing failure. Provisional Expertise and the Transformation of Global Development Finance* (Cambridge University Press, 2014) at 7. Also, Jacqueline Best, "Legitimacy Dilemmas: the IMF's pursuit of country ownership," (2007) 28 Third W Qty 469.

expertise which this failure engendered. [950] Thus the emergence of these concepts should be viewed within the context of a need by those organisations (and indeed other international donors who largely followed their policy prescriptions in their own donor programmes) to re-establish their legitimacy and credibility within the wider international development community, and especially with ODA-recipients.[951]

Abrahamson highlights the ubiquity of the term 'partnership' in descriptions of North-South aid relationships as a dubious attempt to indicate that the historically unequal power differential has now been reversed in favour of the South. Partnership promotes a view of the ODA relationship as inclusive, egalitarian, horizontal, mutually negotiated and embarked in which 'development co-operation' has replaced the previous term, 'aid', and where developing countries are primarily *partners* rather than *recipients*. This rearticulation implies that aid-recipient states are active creators of their own future and development trajectories rather than the objects of external benevolence. In this way, the term 'partnership' engages discourses of agency and responsibilisation where aid-recipient states are now responsible to manage their underdevelopment wisely. [952] The latest revised version of partnership in international development policy[953] signalled yet a new turn – the inclusion of non-state actors,

[950] Note how these concepts, and the approach that they underpin, emerged in response to an institutional reputational crisis. This parallels the OECD's institutional response to similar challenges. See Part III, Chapter 9.
[951] Remember, donor diagnosis of the failure of structural adjustment also identified recipient governance and lack of political will as key contributors to the failure. See earlier section on good governance. Also Best (2014), supra note 949 at 91.
[952] Abrahamson, supra note 948 at 1461.
[953] Busan Partnership for Effective Development Co-operation, Fourth High Level Forum on Aid Effectiveness, Busan, Republic of Korea, 29 November – 1 December 2011. Available at https://www.oecd.org/dac/effectiveness/busanpartnership.htm.

such as the private sector and civil society, as partners 'in coalition' with aid-recipient states, to be managed via a technocratic focus on the 'effectiveness' of development. [954]

Equally, the principle of 'country ownership' continues to remain prominent. 'Ownership' is the willing assumption of responsibility for an agreed program of policies, by officials in the aid recipient state who have the responsibility to formulate and carry out those policies, based on an understanding that the program is achievable and is in the country's own interest.[955] Its prominence as a concept in ODA policy discourse and ODA governance more particularly, crystallised within the OECD's DAC who, in 1996, released *Shaping the 21st Century – The Contribution of Development Co-operation*.[956] In it, the OECD proposed a "global development partnership" that "respects local ownership of the development process," and "where each developing country and its people are ultimately responsible for their own development." It identified developing country 'responsibilities' to include (amongst others) adherence to appropriate macroeconomic policies; creating a climate favourable to enterprise and the mobilisation of local savings for investment; carrying out sound financial management, including efficient tax systems and productive public expenditure, and fostering accountable government and the rule of law. Elaborated thus, "ownership" implies a qualified form of

[954] Thus, the OECD recommended ten 'success factors' for making partnerships effective including "agree on principles, targets, implementation plans and enforcement mechanisms; clarify roles and responsibilities; maintain a clear focus on results; measure and monitor progress towards goals and targets and mobilise the required financial resources and use them effectively.' OECD, Development Co-operation Report (2015): Making Partnerships Effective Coalitions for Action, (Paris: OECD 2015) at 19.

[955] Hames M Boughton & Alex Mourmouras, "Is Policy Ownership An Operational Concept?" IMF Working Paper WP/02/72 (IMF, 2002) at 3.

[956] OECD DAC, *Shaping the 21st Century – The Contribution of Development Co-operation*, (Paris: OECD, 1996).The strategy contained seven goals including reducing by half the proportion of people living in extreme poverty between 1990 and 2015; enrolling all children in primary school by 2015, and eliminating gender disparities in primary and secondary education by 2005. The OECD claimed that these goals were the genesis of the later UN's Millennium Development Goals. See http://www.oecd.org/about/secretary-general/millenniumdevelopmentgoalsajobwelldone.htm.

sovereignty where aid-recipient states shoulder 'responsibilities' to adopt a particular neo-liberal approach to development, but where 'ultimate' responsibility for the success and outcomes of these policies rests with them only. Historical and structural factors beyond the aid-recipient state's control that militate against the socio-economic success of this kind of development for people and communities within the aid-recipient state are excluded from consideration within this "ownership" rubric.

The rationalities just described have to be constructed in ways that they can be instrumentalised in an ODA donor-aid recipient governance relationship, that promotes and retains executive decision-making by the donor, and shields the ODA relationship from democratic accountability, in particular within the aid-recipient state. In the following section, I outline two techniques - technocratisation and bureaucratisation, and one particular kind of decision-making and governance – managerialism – that facilitate this.

4. **The prominence of New Public Management (NPM)**

The governance of ODA implies an inherent spatiality – with donors and aid-recipient states often quite a distance apart. In this context, techniques that enable 'governing at a distance' are key. These include technocratisation - where the use of science or expert knowledge, along with technologies and practices of audit and counting, along with bureaucratisation (where increasingly bureaucratic instruments, processes and practices are used, such as documents, checklists, guidelines, and committees and sub-committees such as in-(recipient) state Donor Co-ordination Groups, as described earlier in Tanzania) are central. Techniques of New Public Management (NPM), a governance approach that introduced disciplines of the market into the

state with its audits, targets, internal markets, performance indicators, and emphasis upon outputs[957] are highly visible.

For donors, this turn can be seen in the UK's current UK aid strategy that includes a dedicated approach to "Value for Money" and "Payment by Results" in assessing project "success."[958] It stresses the necessity for all government departments using ODA to have a clear plan reflecting "international best practice" on programme design, quality assurance, approval, contracting and procurement, monitoring, reporting and evaluation processes, and includes commitments to ensure that spending decisions are based on "rigorous evidence," derived through regular project performance assessment. In 2011, a dedicated Independent Commission for Aid Impact was established to help with this task. [959]

This orientation is also visible in the national plans and strategies of many aid-recipient states. For example, Tanzania's first five-year plan included an explicit commitment to the adoption of "New Public Management Principles" in its Local Government Reforms Programme. The reforms, which included a "Decentralisation-by-Devolution" (or D-by-D) policy were introduced in order to "bring the decision making process related to the provision of services closer to the people, to make the Government and service delivery more responsive, efficient and effective."[960] It is curious that a continued commitment to NPM remains, as initiatives to de-

[957] Andrew Gamble, "Two Faces of Neo-liberalism," in Richard Robison (ed.), *The Neo-Liberal Revolution: Forging the Market State,* (London: Palgrave, 2006), 20 at 30. .

[958] UK HM Treasury & Department for International Development, *UK aid: tackling global challenges in the national interest,* November 2015. Available at https://www.gov.uk/government/publications/uk-aid-tackling-global-challenges-in-the-national-interest. See Chapter 4 for explicit approach to "Value for Money." This includes a move away from traditional budget support and a requirement for departments that spend ODA to use "rigorous evidence to underpin spending decisions" at 25.

[959] Ibid 21-25.

[960] Supra note 941, the 2011/2012 – 2015/2016 Plan at 40.

bureaucratise and decentralise Tanzanian government have long preceded the first five-year plan, with questionable results. A ten-year Civil Service Reform Programme, begun in 1991, already included a similar objective. Though the programme was deemed to be successful in reducing the numbers of public service staff by 25% by 1998, results in terms of decentralisation of decision-making were very weak. One commentator noted that though reforms were made, new institutions remained unused except for meetings, with "ownership of the reform remain(ing) with donors and external consultants based in the President's Office, Public Service Management."[961] It was against this backdrop that the D-by-D reforms were introduced. Though available data suggest that results to date have been mixed,[962] commitments to NPM principles in civil service reform still continue in reform plans.[963]

[961] John S. Kihamba, "New Public Management Issues in Tanzania," in Benon C. Basheka, Lukamba-Muhiya. Tshombe (eds), *New Public Management in Africa, Emerging Issues and Lessons*, (New York: Routledge, 2017) 149 at 161.

[962] The authority of local governments over policies and services remains severely limited. While legislation allocates responsibilities for a wide range of policy sectors to local government, numerous legal clauses permit central government to issue binding guidelines and to supervise council decisions. Amendments to the Local Government Act passed in 2006 strengthened the position of deconcentrated central government officials such as the regional and district commissioners, resulting in ex ante supervision of council decisions. In terms of fiscal decentralisation, though the introduction of block grants to local governments increased their funding, their autonomy has been circumscribed by the abolishing of a number of local taxes, thereby curtailing possibilities for local governments to raise their own revenues. Second, much central funding is spent on salaries in education and health, where central government retains human resources responsibilities. Finally, and more frequently in recent years, central government has imposed national policy priorities on local government. Rudie Hulst, Wilhelm Mafuru & Deogratias Mpenzi, "Fifteen years after decentralisation by devolution: political-administrative relations in Tanzanian local government," (2015) 35 Public Admin Dev 360.

[963] Thus, the UK 'Business Case Summary Sheet – Strengthening Public Financial Management in Tanzania (2018 – 2023) clearly links its support for public financial management reform to initiatives for improving the wider business environment for the private sector. To this end it links financially supporting initiatives in public financial management to "Working with the Ministry of Finance & Planning to support the formulation of prudent fiscal and tax policies, and facilitate payment of arrears and VAT refunds to business entities; supporting the strategic GoT-donor dialogue platform with information and advice on fiscal and tax policies for a conducive business environment; support policy advocacy and research on business environment through reputed think-tanks ….work with the wider HMG and continue to raise challenging business environment issues facing international investors." Ibid at 7. Available at https://devtracker.dfid.gov.uk/projects/GB-GOV-1-300379/documents

The technocratisation of aid-recipient state development planning is especially visible in the latest Tanzanian five-year plan. Assessment of progress of the previous five-year plan to 2015 is described as follows – "[O]verall performance was 50 percent based on achieved indicators…. [with]FYDP performance (to) reach 60 percent by June 2016." Visually, the document that captures the policy goals and commitments of Tanzania and Zanzibar, is data heavy, with policy goals and commitments for each of the twenty-three policy areas for the forthcoming period presented in tabular form, along with timeframes, indicators and objectives listed.[964] Narrative sections are peppered with terms such as "interventions," "flagship projects," "priority areas," "criteria," "factors" and "indicators."

This aesthetic is also reflected in other important aid-recipient plans funded by donors. Thus, the *Five Year Medium-Term Strategic Plan for the Public Finance Management Reform Programme (PFMRP) Phase V (2017/18 – 2021/22*) for Tanzania and Zanzibar summarises its whole five-year reform programme covering macro-economic management (fiscal and tax policies); financing the budget; processes for budget preparation, execution, accounting and reporting; financial accountability systems (internal controls and procurement); external oversight (such as Parliamentary and from the Comptroller and Auditor General the National Audit Office), and on reforms of local government revenues and expenditures, in a sixteen-page continuous table of data, listing seven "PFM (public financial management) Challenge," areas with forty-three sub-challenges, where initiatives to address these are described via columns

[964] Performance targets and indicators are described for each of the following sectors – manufacturing, industrial sector, mining, construction, agriculture, trade, natural resources management, tourism, science and technology, the creative industry, human development, education, skills development, health, water and sanitation, urbanisation and housing, food security, social protection, good governance, macroeconomic stability, infrastructure and services and improving performance in ease of doing business. See summary list of tables in pages xvii-xviii, supra note 941, the 2016/2017 – 2020/2021 Plan,

titled "PFMRP Objectives," "Baseline (2017)," "Result (2022)," and "Responsibility" (name of government department).[965] The presentation of such important and sensitive areas of domestic policy making in tabular form, and the range and depth of donor scrutiny and intervention, are easily masked by their presentation in such a format. This also presents public finance reform as an essentially technical exercise, denuding it of its deeply political character. [966] In this way, the technocratisation of reform efforts contains a hidden legal and political logic, that helps evade domestic democratic scrutiny.

5. The managerial turn in ODA governance – the rise of a particular kind of decision-making

Knafo et al examine managerialism's distinct, "scientific" approach to decision-making that aims at making it more rigorous, formalised and technical. This empowers managers, providing them with new forms of agency, in opposition to traditional authorities and decision-making processes. [967] In the paragraphs that follow, I examine how the application of these insights into

[965] Government of Tanzania, Five Year Medium-Term Strategic Plan for the Public Finance Management Reform Programme (PFMRP) Phase V (2017/18 – 2021/22), 50-66. On file with author

[966] Though it is beyond the scope of this paper, it would be a useful exercise to compare the PFMRP strategies of Tanzania's donors to an independent 'standard' on what constitutes sound public financial management. One methodology on public financial management is PEFA – a methodology for assessing public financial management performance. It consists of 94 characteristics across 31 components of public financial management in 7 broad areas of activity. The latter include budget reliability; transparency of public finances; management of assets and liabilities; policy-based fiscal strategy and budgeting; predictability and control in budget execution; accounting and reporting, and external scrutiny and audit. See https://www.pefa.org/content/pefa-framework.

[967] Literature on neoliberalism stresses the operation of a less interventionist kind of governance that relies on incentives and calculative tools to encourage and predict human behaviour, with the role of bureaucratic institutions being key intermediaries for the enforcement and protection of market rule. A focal point of governmentality literature examines processes of subjectivation – the ways (through discourses, rationalities, technologies of governance etc.) that individuals fashion themselves into subjects on the basis of what they take to be the truth. Knafo et al highlight that, in both literatures, though managerialism has frequently been framed as an extension of neoliberal thinking and neoliberal subjectivation, its distinct lineage has lent it towards a particular kind of decision-making that both neoliberal and governmentality literatures frequently overlook. Samuel Knafo, Sahil Jai Dutta, Richard Lane & Steffan Wyn-Jones, 'The Managerial Lineages of Neoliberalism,' (2019) 24 New Pol Econ 235 at 241. For neoliberalism, see Jamie Peck, *Constructions of Neoliberal Reason,* (Oxford: Oxford University Press, 2010). For subjectivity in governmentality, see Jason Weidner, "Governmentality, Capitalism and Subjectivity," (2009) 23 Global Soc 387.

ODA governance, with the addition of a legal inflection to this analysis, helps reveal a juridical logic that is particularly latent, if invisible, in the governance of ODA-funded reforms. I take the recent Tanzanian five-year *Public Financial Management Reform Programme (2017/18 – 2021/22)*[968] (PFMRP) and the approach of its donors – and the UK's Department for International Development (DFID) in particular - as an example. In short, I aim to demonstrate how a managerialist approach to the governance of the Tanzanian PFMRP by donors, subverts and sets aside national legislatively-backed institutions of financial decision-making and places the donor (in this case DFID) in a position as executive decision-maker, whose role and input remains beyond accessible public scrutiny and accountability to the Tanzanian people. In this case, the particular managerial kind of donor governance of the PFMRP, results in the insertion of the donor as an executive or highly influential decision-maker, into Tanzanian national financial governance, in ways that are beyond formal law. This also leads to a donor-led highly skewed approach to public financial management reform.

It is notable that the legal and regulatory framework on public financial management in Tanzania has been significantly strengthened over the previous 10-15 years with the introduction of a Public Finance Act (2004), a Public Audit Act (2008), a Public Procurement Act (2011), a Budget Act (2015) and a VAT Act (2015). Part II 5 (2) (c) of the Public Finance Act vests the National Assembly, via the Minister for Finance and Treasury, with responsibility for "the control ….over such resources and public moneys ….and (that) transparent systems are established and maintained which (i) provide a full account to the National Assembly for the

[968] United Republic of Tanzania Ministry for Finance and Planning, Public Financial Management Reform Programme (PFMRP) (2017/18 – 2021/22), September 2017. Available at http://www.mof.go.tz/index.php/public-financial-management-reform-programme-pfmrp

use of resources and public moneys; (ii) ensure the exercise of regularity and propriety in the handling and expenditure of resources and public money."

The PFMRP articulates a multi-faceted "robust and effective" programme management and implementation process[969] that includes the following elements

(i) the creation of a high level strategic and policy dialogue mechanism between Tanzania/Zanzibar, and donors (Development Partners or DPs) on PFM issues "to provide an opportunity for senior officials of the MOFP and DPs to discuss policy level PFM issues and reform priorities". This group is to meet at least two times per year and will be chaired by the Permanent Secretary to the Treasury (PST), or the Deputy Permanent Secretary, Public Finance Management (DPS PFM);

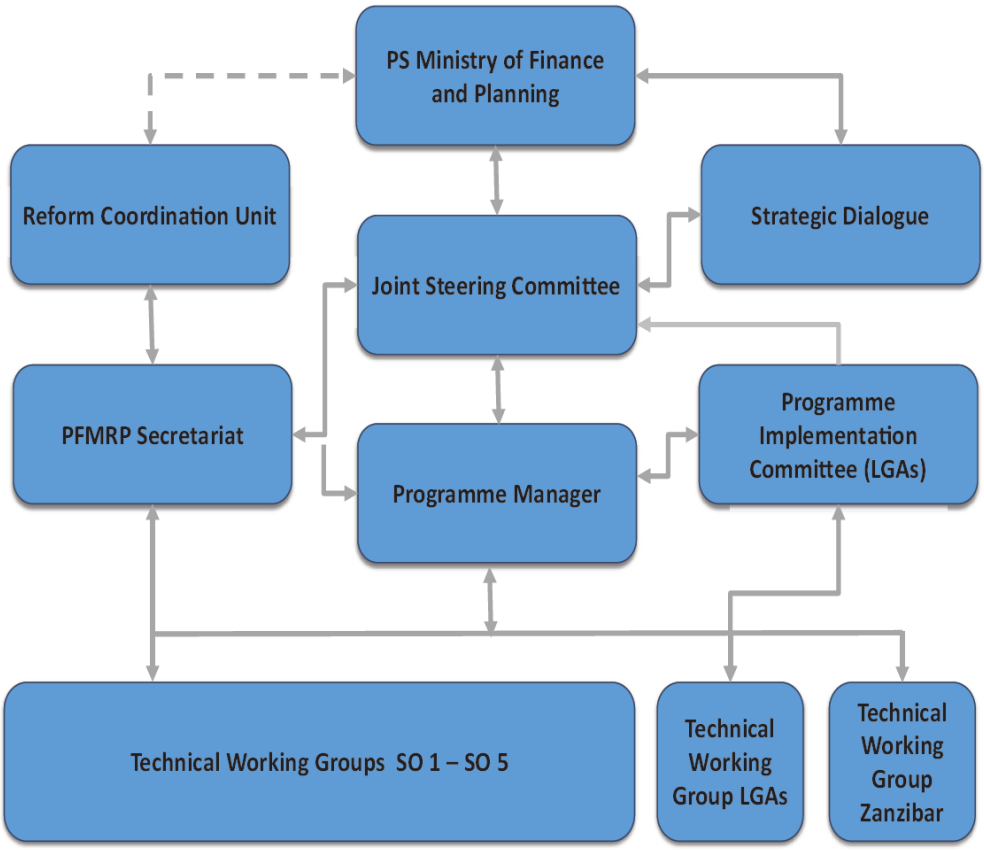
(ii) a Joint Steering Committee composed of representatives from Tanzania-Zanzibar and donors, to be co-chaired by either the Permanent or Deputy Permanent Secretary to the Treasury and by the Chair of the PFM DP Group (the mandate of the Committee is to provide oversight, guidance and direction to the implementation of the reform programme and has approval authority for all its work);

(iii) Technical Working Groups on each of the seven strategic objective areas of the PFMRP, to be co-led by a lead implementing agency and parallel donor counterparts (the purpose of these groups is to provide a forum for technical discussions in order to build consensus on implementation prior to the Joint Steering Group meetings).

While the PFMRP also has a Secretariat and a Programme Implementation Committee (to which civil society members may be invited), from the above we can clearly see that donors are fully involved in leadership, decision-making and technical advisory roles in the key implementation mechanisms of the PFMRP. [970] However, their invisibility within these roles is, revealingly, visually captured rather well in the organogram below. In the section dealing with the implementation mechanisms for the PFMRP, there is no recognition of the legal responsibility of the National Assembly in oversight of PFMRP, nor is reference made to reports by any elected representative or bureaucrat to the National Assembly.

[969] Ibid xi.
[970] Ibid 38-41.

Figure 1.1 Institutional arrangements for PFMRP Phase V



Source: Ministry for Finance and Planning, PFMRP Phase V (2017/18 – 2021/22)[971]

The UK's responsible aid body, DFID is both a key funder and actor in the Tanzanian PFMRP and governance mechanisms. It chairs the PFM Development Partners Group; was the lead donor in the preceding Phase IV Reform Programme; works closely with other key international donors such as the IMF's Policy Support Instrument and the World Bank's Development Policy

[971] Ibid at 37

Operations, as well as the budget support operation of the EU. [972] DFID's "Business Case" for "Strengthening Public Financial Management" rationalises its intervention in managerial terms through what it describes as "key PFM indicators." DFID asserts that these demonstrate that "[w]hile Tanzania's performance in some areas has been better than its peers, it remains below average in others." These indicators use data from the World Bank and the International Monetary Fund (IMF) to assert that on, for example "fiscal policy," Tanzania scored 3.5 out of 6, with "limited improvement recorded in recent years," and that in relation to "Budgetary Management," Tanzania scored 3.0 out of 6, with "budget credibility is low and affects budget execution." [973]

This managerial framing of a rationale for DFID intervention is supplemented with an institutional one. Another part of the rationale described for continuing its involvement in supporting Tanzania's PFMRP was to "enable the UK to sustain its comparative advantage and build on positive momentum," from its previous role. [974] It is notable that the UK is one of the largest suppliers of foreign direct investment (FDI) to Tanzania with a 36% market share, followed by the US and China.[975]

Though the scope of the PFMRP includes the wider institutional arrangements for Tanzania's macro-economic, budget and financial accountability systems, DFID's focus prioritises reform aimed at improving the regulatory environment for business in Tanzania, with a specific focus

[972] See DFID, Business Case, supra note 963 at 3. DFID also finances the IMFs Africa Regional Technical Assistance Centre.
[973] Ibid 5.
[974] Ibid 9.
[975] This is according to the Tanzanian Investment Hub at https://www.tanzaniainvest.com/uk. The significance of UK investment to Tanzania is confirmed by DFID. See DFID. "Doing Business in Tanzania: Tanzania Trade and Export Guide," 26th February 2019 at https://www.gov.uk/government/publications/exporting-to-tanzania/exporting-to-tanzania.

on the natural resources extractive sector. In 2015-2016 major reserves of gas were discovered offshore in Tanzania, near to Dar es Salaam and Mozambique. In July 2017, the Parliament of Tanzania passed three new laws, amending previous laws governing the natural resources sector. [976] Together, these Acts introduced significant changes to the national governance of oil and gas, including empowering the Tanzanian National Assembly to direct the Government to re-negotiate contracts relating to the development of natural resources (including minerals and oil and gas) that contain "unconscionable terms", including those entered into before the amendments come into force. Though the term "unconscionable" is not strictly defined in the law, the Act identified it as a provision or requirement that is intended to either: (i) restrict the right of the State to exercise full or permanent sovereignty over its wealth, natural resources, or economic activity; (ii) restrict the right of the State to exercise authority over foreign investment within the country and in accordance with the laws of Tanzania; (iii) is inequitable and onerous to the State; (iv) restrict periodic review of the arrangement or agreement; (v) secure preferential treatment designed to create a separate legal regime to be applied for the benefit of a particular investor; or (vi) deprive the people of Tanzania of economic benefits derived from subjecting natural wealth and resources to beneficiation in the country.

[976] These are the *Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017* ("Unconscionable Terms Act") that mandates the Government to renegotiate or remove terms from investor-state agreements that Parliament considers *"unconscionable;"* The *Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 ("Permanent Sovereignty Act")* requires Parliamentary approval for future investor-state agreements, which must *"fully secure"* the interests of Tanzanian citizens, and restricts investors from exporting raw minerals, repatriating funds and accessing international dispute resolution mechanism, and the Written Laws (Miscellaneous Amendments) Act, 2017 *("Miscellaneous Amendments Act")* amends the Mining Act, 2010 ("*Mining Act*") by (among other things): establishing a Mining Commission to regulate the industry; overhauling the requirements for the storage, transportation and beneficiation of raw minerals; and increasing royalty rates and government shareholding in mineral right holders.

The new legislation introduced a requirement that (i) the Tanzanian Government shall have a non-dilutable free carried interest of no less than 16% in the capital of mining companies that have mining operations under a mining licence or special mining licence in Tanzania; (ii) the right for the Tanzanian Government to acquire up to 50% of any mining asset commensurate with the value of tax benefits provided to the owner of that asset; (iii) an increase in revenue royalties from 4% to 6% on gold, copper, silver and platinum exports, and from 4% to 5% on uranium exports. Furthermore, Section 28 of the Amendments Act added several new provisions on local content, obliging mineral-rights holders to give preferences to goods and services produced by Tanzanian companies and by Tanzanian citizens. [977]

Of special interest to states with bilateral investment treaties with Tanzania is a provision that prohibits adjudication of disputes relating to natural resources by "any foreign court or tribunal", and provides that all disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by "judicial bodies or other organs established in the United Republic and accordance with laws of Tanzania". [978]

Finally, the new legislation amends various existing pieces of legislation, including the Mining Act and the Petroleum Act. Among other things, the law asserts that the Tanzanian people own all minerals, petrol and natural gas. The law replaced the previous Mining Advisory Board with a more powerful Mining Commission as advisor to the Government on mining matters, with powers to examine annual reports of mining companies, suspend and revoke licences and

[977] Nicola Woodroffe, Matt Genasci and Thomas Scurfield, "Tanzania's New Natural Resources Legislation: What Will Change?" Natural Resource Governance Institute, August 2017.
[978] Supra note 976, Art. 11 of the *Natural Wealth and Resources (Permanent Sovereignty Act, No. 5,* 2017.

permits, audit the quality and quantity of minerals produced and exported, as well as audit companies' capital investment and operating expenditure.

It is not unreasonable to assume that these legislative changes and their impacts on foreign investment in the natural resources sector were what DFID had in mind when it noted in its "Business Case" that

> With the advent of the new government under President Magufuli, Tanzania is undergoing a political and economic transition that is quite disruptive….[R]adical measures being taken to review contractual arrangements with the private sector pose significant risks for the investment climate …. [T]he new economic policy on natural resources and mineral wealth has weakened investor confidence. The aggressive approach to tax collection and the prevailing policy uncertainty is affecting business sentiment. The fact that there are limited opportunities for the private sector to engage with the government on policy issues has aggravated the situation.[979]

DFID stated that its involvement in PFMRP will also "directly support" improvement in the business environment by

- Working with the Ministry of Finance & Planning to support the formulation of prudent fiscal and tax policies, and facilitate payment of arrears and VAT refunds to business entities;
- Supporting the strategic Government of Tanzania-donor dialogue platform with information and advice on fiscal and tax policies for a conducive business environment; support policy advocacy and research on business environment through reputed think-tanks and through a flexible financing mechanism that will be available to support initiatives identified across the UK government departments in Tanzania
- Continue to provide a strong linkage and be a channel for communication between the UK Government and the Ministry of Finance & Planning to raise challenging business environment issues facing international investors. [980]

Notably, DFID highlighted that its role in PFMRP "will enable us to explore new ways for policy influencing and advocacy by working with reputed local think-tanks on public financial

[979] Supra note 963, DFID Business Case at 4.
[980] Ibid 7.

management and business environment issues. Building a body of research and evidence in relevant policy areas and engaging with multiple stakeholders could possibly lead to better policy advocacy outcomes." [981]

Here we clearly see DFID as donor promoting and pursuing a particular *kind* of public financial management reform, one clearly targeted at meeting the interests of *transnational* business capital, and with no recognition of orthodox public financial management systems within Tanzania. There is a double irony here. First, there is no clear link between DFID's planned intervention in Tanzania's PFMRP and the PFM indicators that it used to rationalise its intervention in the first place. Secondly, DFID's intervention strategy is directly contrary to current international principles of public financial management. These stress the responsible management and monitoring of government assets and the transparency of asset disposal (this would include royalties, for example). It also advises the preparation of estimates of the fiscal impact of *all* proposed changes in revenue and expenditure policy for the budget year and the following two fiscal years, and that these be submitted to the legislature for consideration.[982] DFID's strategy on public financial management reform as elaborated in its "Business Case" include no reference to a necessity for an independent financial impact assessments of its proposals, or of ensuring that any proposals are democratically scrutinised and debated. Thus, we see how a managerial framing of donor intervention masks a highly partial, executive intervention in Tanzanian public financial management in ways that escape domestic legal

[981] Ibid 9.
[982] PEFA, *Framework for assessing public financial management*, (Washington DC: PEFA, 2016), 12, 39, 46 and 53.

oversight and democratic scrutiny within Tanzania. This kind of donor intervention – clearly, a kind of governance – is legally and institutionally invisible.

6. Revealing the legal and juridical qualities of the international governance of ODA

When taken together, I propose that the particular governance approach underpinning the EU's approach to Budget Support and DFID's approach to PFMRP contains a distinct if hidden juridical quality and legal logic with several identifiable features. On its juridical quality, first, it inserts new agents - donors - into national financial and budget deliberation and decision-making processes in ways that are not formally legally recognised, and whose approach cannot easily be captured by existing domestic legal oversight in that policy arena. This means that donor interventions in this important arena of national policy making remain hidden from domestic policy and legal scrutiny and oversight. The approach to the governance of ODA clearly permits the pursuit by DFID – who in this instance is an instrument of the foreign policy interests of the UK - of a policy agenda that may well be disconnected, if not directly counter to, a legitimately institutionalised domestic policy agenda. Again, this kind of policy engagement by the foreign state is not captured by the current legal and regulatory oversight mechanisms on public sector policy reform, or by domestic oversight of donors of ODA. Related to this, this kind of intervention is not captured by international law either. [983]

Secondly, the kind of engagement of donors facilitated and legitimised by the international governance of ODA is one of direct intervention in any area of domestic policy and institutions of the aid-recipient state. No limit to the scope and reach of, or terms of engagement relating to, that intervention currently exist. Thirdly, and related to this, the presence or absence of

[983] Thus, the concept of consent as articulated in the VCLT does not legally recognise this kind of intervention.

domestic law on donor engagement is telling. In my view, this absence is significant to the difference in the influence, legitimacy and authority in both donor and aid-recipient state approaches to ODA-funded initiatives and its governance. The UK's DFID strategy is legally sanctioned in the UK, as is the EU's within its own legal instruments. [984] This creates a legal scenario whereby, in the absence of an international legal agreement, a foreign (donor) state's policy intervention in another (aid-recipient) state, possesses greater formal legal recognition than frequently exists in the aid-recipient state's own domestic legal institutions. This raises a host of issues from a conflict of laws perspective, on how to allocate authority to different legal regimes on an issue involving and affecting both. [985]

Fourthly, the instruments, practices and processes upon which the international governance of ODA relies significantly, are oriented towards, and recognised as legitimate for, decision-making by the donor (or cluster of donors). The mode of reasoning that underpins this decision-making, the categorisation of social life and use of data to create 'facts' and produce 'fact patterns,' and the capture of this knowledge and data in certain kinds of documents such as plans,

[984] Note that the European Development Fund (EDF) under which the EU has its largest geographic instrument in the development finance policy area, with €30.5 billion allocated to the 11th EDF for 2014-20. European Council Regulation (EU) 2018/1877 of 26 November 2018 on the financial regulation applicable to the 11th European Development Fund, and repealing Regulation (EU) 2015/323.

[985] "Conflict of Laws is a body of rules and a set of interpretive approaches that help decision-makers to determine whether they can legitimately assert regulatory authority over the issue at hand, or whether some other regulatory authority has a greater claim to the issue." Annelise Riles, "Managing Regulatory Arbitrage: A Conflict of Laws Approach," (2014) 47 Cornell Int L J 63 at 92. Currently there is no recognised 'regulatory authority' on ODA, and no recognised dispute or arbital body exists. While it may seem obvious that even though Tanzania does not have a distinct legal regime framing its legal approach to donor activity within Tanzania, a donor's approach (e.g. DFID's) to its ODA-funded PFM-reform would lie within Tanzanian jurisdiction, that interpretation is more open to challenge when it comes to ODA-funded policy entities such as the regional international organisation, the East African Community, made up of member states of the East African region, but that receives a significant amount of ODA to run itself. The EAC, similar to Tanzania, has no legal framework governing the engagement of donors in its activities.

evaluations, indexes and statistics, constitutes for all intents and purposes a recognised 'book' of evidence, for the purposes of donor executive decision-making.

Fifthly, this particular kind of managerial approach to decision-making within ODA creates, at the one time, a dispersed decision-making apparatus, while integrating lower and more distant orders within a more centralised process. As example, the Tanzanian PFMRP includes an incredibly wide range of financial governance mechanisms, instruments and sectors, reaching simultaneously into the heart of Tanzania's national decision-making processes, while also into the outer reaches of its local government. The establishment of a sophisticated implementation apparatus of the PFMRP, with donors at the heart of it, creates an additional and distinct financial governance mechanism. This kind of managerial governance thus facilitates a greater drive towards centralisation of financial decision-making powers in two ways. The first way concentrates knowledge and direction on financial sector reform within one distinct national unit, and removes other legitimate sectors and levels of government from direct engagement into decision-making therein. The second direction claims, legitimises and consolidates the role of donors as co-partners with the Tanzanian state on financial reform, thereby edging out – in practice and in imagination - other stakeholders such as domestic or regional entities from consideration as legitimate or authoritative actors with a stake in the outcome. Certainly, one could not imagine that trades unions, or representatives of famers, women or other communities, would be accorded similar recognition within domestic Tanzanian institutions of governance.

Finally, these governance instruments create differentiated subjectivities of aid-recipient states (and donors) via ODA that permeate across areas of international activity covered by all bodies

of international and regional law. It is not an exaggeration to suggest that the governance of ODA plays a hidden role in influencing aid-recipient states' engagement in other areas of bilateral, regional and international activity. [986]

The attention given by donors to the twin activities of budget and financial management (via Budget Support as a whole, and the PFMRP more particularly), and to law and institutional reform, in support of a globalised neoliberal development project represent a far-reaching pincer-like grip on two highly political areas of domestic democratic policy and authority. However, the way that donor intervention is carried out in these activities – with a strong reliance on technocratic and bureaucratic processes and instruments - imbues what are deeply political decisions on how to generate and spend national resources, and what laws and institutions might best promote domestic development, with a technical and bureaucratic veneer. No exercise - such as a domestic legal impact assessment to examine the compatibility,

[986] While the linking of ODA to human rights conditionalities is well reported in the popular press (e.g. several EU countries, including Denmark, Sweden and Belgium, had cancelled in 2018, bilateral aid programmes worth around €50 million to Tanzania, and the EU was reported to be close to invoking Article 96 of the Cotonou Agreement and cutting off all financial support and political relations with the Tanzania government in response to the decline in respect for human rights following the election of President John Magufuli in December 2015. Benjamin Fox, "EU waits for Tanzania to back up change of heart on stalled trade deal," EURACTIV March 25th, 2019, at https://www.euractiv.com/section/economy-jobs/news/eu-waits-for-tanzania-to-back-up-change-of-heart-on-stalled-trade-deal/?utm_source=EURACTIV&utm_campaign=35c19b075e-RSS_EMAIL_EN_GlobalEurope&utm_medium=email&utm_term=0_c59e2fd7a9-35c19b075e-114736287). What is less reported is EU diplomatic manoeuvres to encourage African countries to sign Economic Partnership Agreements with the EU under the Cotonou Agreement, and to open up their economies to access by foreign markets, using ODA as a lever. Here, the provision of ODA (an area of international activity not currently addressed by an international legal agreement) is directly linked to the implementation of a strand of international law – in this case, the WTO Agreement on Trade Facilitation (TFA), entered into force on 22nd February 2017. In the WTO Trade Policy Review of the East African Community, on 20th March 2019, the EU called on Burundi and Tanzania to ratify the Trade Facilitation Agreement and noted its contribution of €50 million from the 11th European Development Fund for the period 2014-2020, to the East African region to support regional economic integration and support for trade. Here we see the clear political linking by the EU of its ODA to the EAC to the status of ratification of an international trade agreement by two EAC member states. EEAS, "EU Statement at the Trade Policy Review of the East African Community (EAC)," 20th March 2019, Geneva. Available at https://eeas.europa.eu/delegations/world-trade-organization-wto/59932/eu-statement-trade-policy-review-east-african-community-eac-20-march-2019_en.

response to, and impact of, such legal and institutional reform initiatives - is included in this technical approach. Thus, the legal and regulatory, as well as distributional, politics of these decisions recedes, or are elided from view.

The longer-term effects of this form of governance on domestic and international governance remain unclear. For example, it is not implausible to suggest that the level of attention to information, data and budgeting processes in the PFMRP by and to donors, when allied to their influence on progress and outcomes of the PFMRP, may well shift or divert national decision-making in other arenas such as the Tanzanian National Assembly. It may also have consequences for perceptions and the operation of law, institutions, the state, people and non-legal persons. It limits perceptions of the purpose of law and institutions - and of law reform - to a role of promoting market-based business activity almost wholly.[987] The convening, deliberative, challenging and even emancipatory potentialities of law recede from consideration, and over time, disappear. As Brabazon points out, social relations become framed as issues of mediating private interests through competition and contract, thereby frustrating the pursuit of collective social goals; formal equality becomes emphasised over substantive equality, with a just legal process prioritised over just results. [988] The role of the state gradually becomes contoured to one aimed at facilitating the functioning and deepening of the market, and less about one focused on progressing social change in service of the public interest. [989] Public collective engagement in policy-making – from petitions to protest –

[987] Tor Krever, "Law, development and political closure under neoliberalism," in Honor Brabazon, Neoliberal Legality: Understanding the role of law in the neoliberal project, (Abingdon, Oxon: Routledge, 2017), 22 at 37.
[988] Honor Brabazon, "Dissent in a juridified political sphere," in Honor Brabazon, Neoliberal Legality: Understanding the role of law in the neoliberal project, (Abingdon, Oxon: Routledge, 2017), 167 at 169.
[989] Ibid 173.

becomes framed and assessed less in terms of the underlying factors prompting the protest, and more on whether the protests are considered lawful and legal. [990] Thus, in the instance of public financial management, the current governance approach inherent in Tanzania's PFMRP (and DFID's intervention therein) makes no acknowledgement of deliberative democratic approaches to public financial management such as participatory budgeting, a form of devolved financial decision-making that also aims at being more democratic. [991] Managerial approaches to governance occlude such forms of democratic participation.

In recognising the existence and operation of this kind of juridical quality and legal logic within the international governance of ODA, it is important to highlight that both are largely permitted to exist and continue because they are taking place under the aegis of the development project. The fact that the PFMRP is partly funded by ODA under the rubric of development is key to the isolation of the governance of the PFMRP from the already existing domestic governance institutions on public financial management.

This development dimension has several important political implications. It means that as long as donor ODA engages with the PFRMP, donors are very likely to continue a level of influence

[990] It is interesting to speculate on whether the rise in the criminalisation of dissent and the deterioration in the recognition and enjoyment of rights necessary for popular forms of democratic engagement such as freedom of expression and assembly, may parallel donor promotion of legal reform that prioritises market protection and promotion, and focuses less on the kinds of laws and reforms that make for an engaged citizenry. According to a recent report from the Special Rapporteur on Human Rights Defenders for which an international survey of state practices on the protection of human rights defenders was undertaken, a wide range of legal and institutional efforts have been adopted to undermine and frustrate the work of human rights defenders. "Country entries reveal the use of administrative procedures and local by-laws to close human rights organizations, the prosecution of human rights defenders for fictitious tax and other offences and the criminalization of dissent through prosecution on various grounds, including for "defamation of the nation." UNGA, Situation of Human Rights Defenders. Report of the Special Rapporteur on the situation of human rights defenders, Michael Forst. 23 July 2018, A/73/215 at paras 42-43.

[991] Participatory budgeting is a democratic process whereby community members decide how to spend part of a budget. It first emerged in Brazil in the late 1980s and is now documented in about 1,500 cities around the world. Abigail Friendly, Participatory Budgeting: The Practice and the Potential, IMFG Forum. No. 6, 2016.

that far outweighs their financial contribution. [992] This kind of foreign state intervention, and its opaque and under-scrutinised approach, becomes normalised as part of the de facto mode of ODA governance, and will likely continue as long as ODA is accepted by Tanzania.

[992] As a percentage of GDP, ODA declined from more than 10% in 2009 to 5.6% in 2014, caused by a reduction of bilateral grants as well as multilateral loans. Antonie de Kemp & Martin van der Linde, Impact of Ending Aid – Tanzania Country Study, (Netherlands Ministry of Foreign Affairs, 2016), 15. Separately, donor aid to support the PFMRP is valued at just £45 million, of which DFID proposed to contribute just £11 million. DFID Business Case: 2.

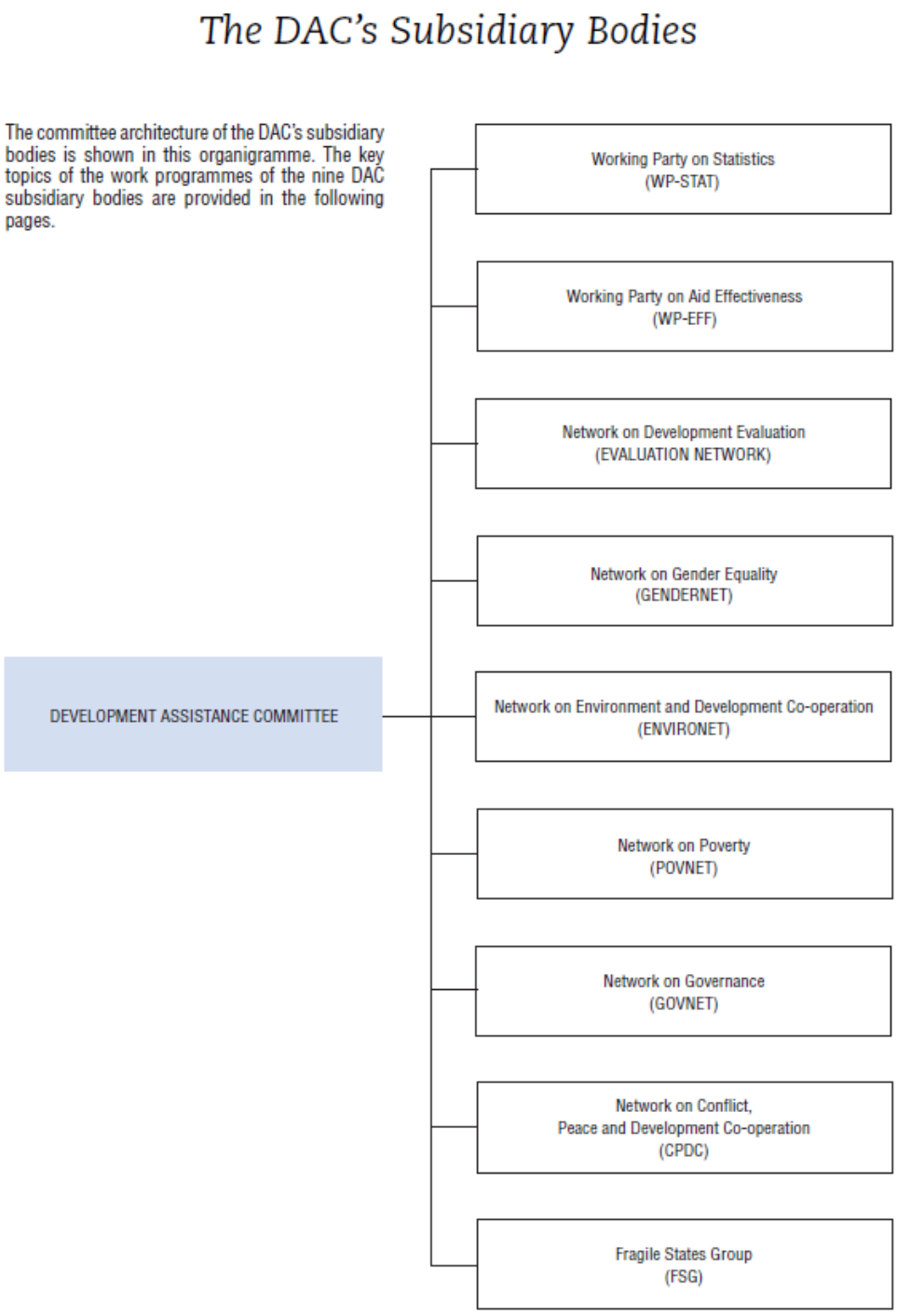
Appendix 2 Jurisdictional lens

Elements	Focus aspects
Authority and authorisation	• Who/what is given authority (the decision-maker/law-sayer); who/what constitutes the law-hearers/community? • On what areas/activities are they given authority? What forms of authority are authorised for each subject; what rights/duties/obligations are authorised for each subject? • What are the ways that the governance of ODA presents and authorises law, relations between laws and the subjectivities of donors and aid-recipient states within the legal realm (its internal legal logic)? • What are the material and other conditions of possibility that help bring this about, legitimise and naturalise this relationship of authority?
Governance Technologies Type, Mandate, Reach, Mode of power	• Legal, regulatory. • Official policy strategies on ODA, development and law's role in development • Bureaucratic-institutional mechanisms and practices that have an executive/policy/deliberative/convening function (DAC Peer Review) • Technocratic devices – statistics, data, indicators, indexes, expertise (concept of ODA)
Time/temporality and space/place	• What continuities does the contemporary governance of ODA have with historical iterations of institutionalised relations between northern and southern states? • What is the inherent view and role of time (past, present, future)? • How do the governance instruments of ODA conceptualise space/territory and its relationship to governance? At what levels does the international governance of ODA most acutely engage with donors and aid-recipient states?
Representation	• What are the artifacts (here, texts), events or locations that embody and represent the jurisdiction of ODA?

Appendix 3 Governance signature

Juridical nature	• Presence of an absolute *authority/executive power* • Ability/expectation of determinative *decision-making* • *Practices and methods* that are recognisable to the Authority (and to law) as *legitimate* (e.g. mode of reasoning; "facts" and "fact pattern;" written reports (evidence) • *Creates subjectivities/agency recognisable to law* (a contract), in ways that alter legal meaning and legal subjectivity
Approach to juridification	• Constitutive • Expansion and differentiation • Conflicts dimension • Judicial power • Legal framing
Legal logics (internal)	• What kind of laws are recognised/privileged/excluded within the governance of ODA? What kinds of relations are fostered between different laws/levels of gov? • Who/what is given legal subjectivity; what kinds of legal subjectivity are foregrounded; what kinds of relations between actors are fostered? • How do these subjectivities/relations shape/contour their legal subjectivity in non-ODA areas? • What is the role of the state?
Performativity	• Links to temporal patterns – recurrence, repetition, a performance of subjectivity, authority and rule

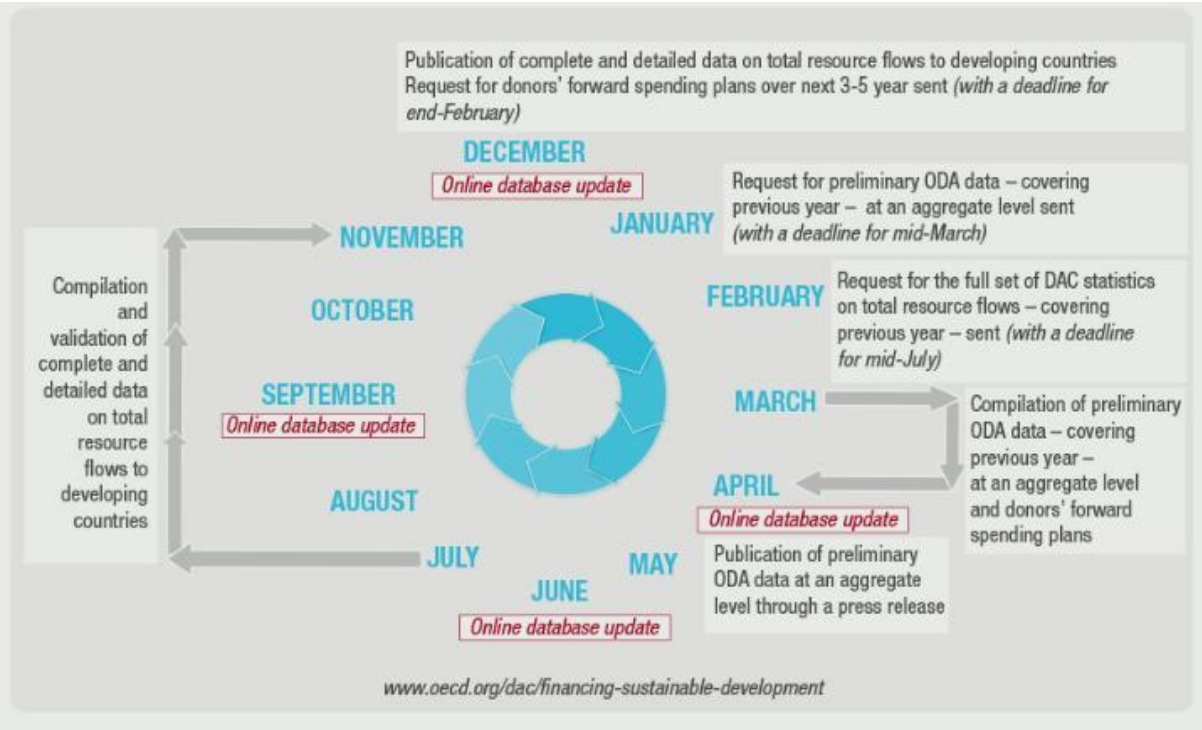
Appendix 4 The DAC's Subsidiary Bodies



Source: OECD, Development Co-operation Report 2008, 113.

Appendix 5 The DAC statistics reporting cycle.

The DAC Working Party on Statistics reporting cycle. The DAC and Credit Reporting System online databases are updated every quarter (April, June, September, December).



Source: http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/data-collection-and-resources-for-data-reporters.htm

Appendix 6 Ethics approval notice

File Number: 01-15-04 **Date (mm/dd/yyyy):** 02/04/2015

Université d'Ottawa University of Ottawa
Bureau d'éthique et d'intégrité de la recherche Office of Research Ethics and Integrity

Ethics Approval Notice

Social Sciences and Humanities REB

Principal Investigator / Supervisor / Co-investigator(s) / Student(s)

First Name	Last Name	Affiliation	Role
Penelope	Simons	Law / Common Law	Supervisor
Siobhan	Airey	Law / Law	Student Researcher

File Number: 01-15-04

Type of Project: PhD Thesis

Title: Shadowing Neoliberal Development? Exploring the Role of International or Overseas Development Aid

Approval Date (mm/dd/yyyy)	Expiry Date (mm/dd/yyyy)	Approval Type
02/04/2015	02/03/2016	Ia - Partial

(Ia: Approval, Ib: Approval for initial stage only)

Special Conditions / Comments:

Please note that this ethics certificate covers only research activities that take place in Canada and Belgium. Before recruitment and/or data collection can begin in Tanzania, a copy of the approval from the Tanzanian Commission for Science and Technology must be submitted to the uOttawa Ethics Office and an updated ethics certificate (for full approval) granted.

550, rue Cumberland, pièce 154 550 Cumberland Street, room 154
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File Number: 01-15-04 **Date (mm/dd/yyyy):** 02/04/2015

Université d'Ottawa University of Ottawa
Bureau d'éthique et d'intégrité de la recherche Office of Research Ethics and Integrity

This is to confirm that the University of Ottawa Research Ethics Board identified above, which operates in accordance with the Tri-Council Policy Statement (2010) and other applicable laws and regulations in Ontario, has examined and approved the ethics application for the above named research project. Ethics approval is valid for the period indicated above and subject to the conditions listed in the section entitled "Special Conditions / Comments".

During the course of the project, the protocol may not be modified without prior written approval from the REB except when necessary to remove participants from immediate endangerment or when the modification(s) pertain to only administrative or logistical components of the project (e.g., change of telephone number). Investigators must also promptly alert the REB of any changes which increase the risk to participant(s), any changes which considerably affect the conduct of the project, all unanticipated and harmful events that occur, and new information that may negatively affect the conduct of the project and safety of the participant(s). Modifications to the project, including consent and recruitment documentation, should be submitted to the Ethics Office for approval using the "Modification to research project" form available at: http://research.uottawa.ca/ethics/submissions-and-reviews.

Please submit an annual report to the Ethics Office four weeks before the above-referenced expiry date to request a renewal of this ethics approval. To close the file, a final report must be submitted. These documents can be found at: http://research.uottawa.ca/ethics/submissions-and-reviews.

If you have any questions, please do not hesitate to contact the Ethics Office at extension 5387 or by e-mail at: ethics@uOttawa.ca.

Signature:

[redacted]

Kim Thompson
Protocol Officer for Ethics in Research
For Barbara Graves, Chair of the Social Sciences and Humanities REB

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Appendix 7 Interview questions guide – donors/aid recipient states

1. Personal introduction; purpose of the research project; reason for undertaking interviews and use of any information shared; ethics protocol in place and issues of consent and confidentiality; contact for follow-up and for any issues emerging.

2. Governance context for (donor/aid-recipient state) ODA
    a. From your perspective, what are the main issues and challenges that arise in relation to the governance of ODA?
    b. What are the main governance frameworks or signposts in place that (donor/aid-recipient state) takes into account when implementing ODA in (region/state)?
    c. Review list of governance instruments - for each, what is their main contribution?

3. Aid modalities
    a. Do particular governance risks or challenges arise with particular kinds of ODA e.g. Budget Support, grants etc.?

4. Donor's aid relationship with recipient state (and vice-versa)
    a. Role of concepts – approach to country ownership; working in partnership and mutual accountability; policy coherence for development – how interpreted and implemented?

    Aid-recipient state relationship with donors (and vice-versa)
    b. What are the main institutional mechanisms via which donor liaison is undertaken in-country; purpose; how operationalised in practice (decisions, communications, follow-up etc.); role of concepts in practice (country ownership etc.)

5. Role of law
    a. What role does law play in guiding (donor/aid-recipient state) approach to ODA (any specific ones, and/or donor/recipients' own international legal commitments and own legal frameworks)?

    b. What approach has the donor taken to law in its ODA initiatives e.g. proposals for legal and regulatory reform; conditionality etc.

    c. What of other kinds of governance instruments e.g. data, institutional mechanisms such as donor co-ordination groups etc.

6. Conclusion
    a. Is there anything that's relevant that I haven't asked? Any person I should talk with?
    b. Reminder of confidentiality; purpose of any notes taken – review notes with interviewee if requested; reminder of contact details; permission to follow-up.

Bibliography

Tanja Aalberts, *Constructing Sovereignty- Between Politics and Law,* (London: Routledge, 2012).

Rita Abrahamsen, "The power of partnerships in global governance," (2004) 25 Third W Quarterly 1453.

Amitav Acharya, 'Studying the Bandung conference from a Global IR perspective,' (2016) 70 Australian J Int'l Aff, 342.

C. Adam, G Chambas, P. Guillaumont, JS Guillaumont & JW Gunning, 'Performance-based Conditionality: A European perspective', (2004) 32 World Development 1059.

Georgio Agamben, *The Signature of All Things – On Method* (translated by Luca D'Isanto with Kevin Attell), (New York: Zone Books, 1999).

Siobhan Airey, "The WTO's Trade Facilitation Agreement – New Beginnings on Multilateralism and S&D?" (2015) 10 Can Int'l Lawyer 27.

Chandana Alawattage & Manal Elshihry, 'The managerialism of neoliberal global governance. The case of the OECD,' in Annabelle Littoz-Monnet (ed) *The Politics of Expertise in International Organizations How International Bureaucracies Produce and Mobilize Knowledge,* (London: Routledge, 2017), 167.

Robert Aldrich, 'Imperial *mise en valeur* and *mise en scène*: Recent works on French colonialism' (2002) 45 Hist J 917.

Michael Allen, Foundations of Forensic Document Analysis: Theory and Practice, (John Wiley & Sons Ltd, 2016).

JE Alvarez, *The Impact of International Organizations on International Law* (Brill/Nijhoff online 2016).

Casper Andersen & Andrew Cohen, *The Government and Administration of Africa 1880–1939,* (Abingdon, Oxon: Routledge, 2016) Vols 1 and 5.

Antony Anghie, *Imperialism, Sovereignty and the Making of International Law,* (Cambridge: Cambridge University Press, 2004).

Antony Anghie, "Colonialism and the birth of international institutions: Sovereignty, Economy, and the Mandate System of the League of Nations," (2002) 34 J Int'l L & Pol 513.

Channing Ardt, Sam Jones & Finn Tarp, "Assessing Foreign Aid's Long-Run Contribution to Growth and Development," (2015) 65 World Dev 6.

Christine Arndt et al. "2015 Indicators of Regulatory Policy and Governance: Design, Methodology and Key Results", OECD Regulatory Policy Working Papers, No. 1, (Paris: OECD Publishing, 2015).

Guido Ashoff, 50 Years of Peer Reviews by the OECD's Development Assistance Committee: an Instrument of Quality Assurance and Mutual Learning, German Development Institute Briefing Paper, December 2013.

Toshihiro Atsumi and Daniel M. Bernhofen, *The effects of the unequal treaties on normative, economic and institutional changes in 19th century Japan*, University of Nottingham Research Paper Series, Research Paper 2011/19, 1.

Anthony Aust, “Alternatives to Treaty-Making: MOUs as Political Commitments,” in Duncan Hollis, *The Oxford Guide to Treaties,* (Oxford: Oxford University Press, 2012), 46.

Sara Bandstein, *What Determines the Choice of Aid Modalities?* (Karlstad, Sweden: SADEV, 2007).

Cécile Barbière, Dario Sarmadi, Fernando Heller, Georgi Gotev & Mark Briggs, ‘European countries focus aid on ex-colonies,’ EURACTIV Apr 20, 2015 (updated: Apr 27, 2015). Available at https://www.euractiv.com/section/development-policy/news/european-countries-focus-aid-on-ex-colonies/.

Michael Barnett & Raymond Duvall, “Power in international politics,” (2005) 59 Int Org 39.

Elizabeth Dávid-Barrett, Mihaly Fazekas, Olli Hellmann, Lili Márk & Ciara McCorley, Controlling Corruption in Development Aid: New Evidence from Contract-Level Data. Budapest: Government Transparency Institute Working Paper 2017:03. Available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103395.

Lorand Bartels, “Jurisdiction and Applicable Law in the WTO,” Society of International Economic Law, Working Paper 2016, No 18.

George Kibala Bauer, ‘Germany’s Marshall Plan for Africa,’ March 15, 2017, *Africa is a country* available at http://africasacountry.com/2017/03/germanys-marshall-plan-for-africa/.

Jennifer L. Beard, *The Political Economy of Desire – International law, development and the nation state* (Abingdon, Oxon: Routledge-Cavendish, 2007).

Michael C Behrent, “Foucault and Technology,” (2013) 29 Hist & Tech 54.

Patrick D. Bellegarde-Smith, “Dantes Bellegarde and Pan-Africanism,” (1981) 42 Phylon 233.

Julie Benn, Cécile Sangaré & Tomáš Hos, ‘Private Foundations’ Giving for Development in 2013-2015: Ongoing efforts to better reflect private philanthropic giving in OECD-DAC statistics on development finance,’ OECD Development Co-operation Working Papers, (Paris: OECD, 2017).

Andrew Bennett & Jeffrey T. Checkel (eds), *Process Tracing - From Metaphor to Analytic Tool,* (Cambridge University Press, 2014).

Walter Benjamin, “The Work of art in the Age of Its Technological Reproducibility” [First Version]. Trans. Michael W Jennings. (2010) 39 Green Room 11.

Paul Schiff Berman, “The Globalisation of Jurisdiction,’ (2002) 151 U Penn L Rev 311.

Jacqueline Best, *Governing failure. Provisional Expertise and the Transformation of Global Development Finance* (Cambridge University Press, 2014) at 7.

Raymond F Betts, *Assimilation and Association in French Colonial Theory 1890 – 1914* (Columbia University Press: New York 1961).

Frank Biermann, *Earth System Governance: World Politics in the Anthropocene,* (Cambridge, MA: MIT Press, 2014).

Arne Bigsten & Sven Tengstam, “International Coordination and the Effectiveness of Aid,” (2015) 69 World Dev 75.

Lars Chr. Blichner and Anders Molander, “Mapping Juridification,” (2008) 14 ELJ 36.

Armin von Bogdandy & Matthias Goldmann, “The Exercise of International Public Authority through National Policy Assessment: The OECD's PISA Policy as a Paradigm for a New International Standard Instrument,” (2008) 5 Int Org L Rev 241.

Peter De Bolla, “Review: Disfiguring History,” (1986) 16 Diacretics 48.

Hames M Boughton & Alex Mourmouras, “Is Policy Ownership An Operational Concept?” IMF Working Paper WP/02/72 (IMF, 2002).

Honor Brabazon, “Dissent in a juridified political sphere,” in Honor Brabazon (ed), *Neoliberal Legality: Understanding the role of law in the neoliberal project*, (Abingdon, Oxon: Routledge, 2017), 167.

John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge, UK: Cambridge University Press, 2000).

Irus Braverman, Nicholas Blomley, David Delaney & Alexandre Kedar (eds), *The expanding spaces of law: a timely legal geography,* (Stanford: Stanford Law Books, 2014).

Samuel Brazys, Johan A. Elkink, Gina Kelly, “Bad neighbours? How co-located Chinese and World Bank development projects impact local corruption in Tanzania,” (2017) 12 Rev Int Orgs 227.

Stephen McBride & Rianne McMahon, *The OECD and Transnational Governance* (Vancouver: UBC Press, 2008).

Stephen Brown, Molly den Heyer and David R. Black (eds), *Rethinking Canadian Aid (2nd ed.)* (Ottawa University Press, 2017).

Chris Brummer*, Soft Law and the Global Financial System: Rule Making in the 21st Century*, (Cambridge: Cambridge University Press, 2015).

Wendy Asbeek Brusse & Richard T. Griffiths, “Exploring the OEEC’s Past: the potentials and the sources,” in Richard T Griffiths, *Explorations in OEEC History,* (Paris: OECD Historical Series, 1997) at 15.

Willem H Buiter, ‘’Country Ownership’: a term whose time has gone,’ (2007) 17 Dev in Practice 647.

Gráinne de Búrca, “Is EU Supranational Governance a Challenge to Liberal Constitutionalism?” (January 19, 2018). NYU School of Law, Public Law Research Paper No. 18-09. Available at SSRN: https://ssrn.com/abstract=3105238.

Graham Burchell, ‘Liberal governance and techniques of the self’ (1993) 22 Economy & Soc 267.

Craig Burnside & David Dollar, "Aid, Policies, and Growth," (2000) 90 Am Ec Rev 847.

Busan Partnership for Effective Development Co-operation, Fourth High Level Forum on Aid Effectiveness, Busan, Republic of Korea, 29November – 1 December 2011. Available at https://www.oecd.org/dac/effectiveness/busanpartnership.htm.

Judith Butler, “Performative Agency,” (2010) 3 J Cult Economy 147 at 147-148.

Buttonwood, ‘What is the OECD?’ The Economist, July 6th 2017 at https://www.economist.com/the-economist-explains/2017/07/05/what-is-the-oecd.

T.C. ‘The Economic Development of the British Colonial Empire’ (1943) 20 Bull Int News 139.

From CDC, “Making a difference: read our 2018 Annual Review and Annual Accounts,” 1 July 2019. Available at https://www.cdcgroup.com/en/news-insight/news/making-a-difference-read-our-2018-annual-review-and-annual-accounts/.

Cecilia Caio, “The enabling environment for private sector development – donor spending and links to other catalytic uses of aid,” Development Initiatives Discussion Paper, May 2018.

Alec Cairncross, *Economic Ideas and Government Policy: Contributions to Contemporary History*, (London: Routeledge, 1996).

Brian McCall*, The Architecture of Law: Rebuilding Law in the Classical Tradition* (University of Notre Dame Press, 2018.

Zach Campbell, “Europe’s deadly migration strategy - Officials knew EU military operation made Mediterranean crossing more dangerous,” Politico 2/28/19, available at https://www.politico.eu/article/europe-deadly-migration-strategy-leaked-documents/.

Canadian House of Commons, Canada. Report of the Standing Committee on Foreign Affairs and International Development, Development Cooperation for a More Stable, Inclusive and Prosperous World: A Collective Ambition, 42nd Parliament, 1st Session, November 2016.

Jean Carabine, ‘Unmarried Motherhood 1830 – 1990: A Genealogical Analysis,’ in Margaret Wetherall, Stephanie Taylor & Simon J Yates, *Discourse as Data, A Guide for Analysis* (Milton Keynes: Open University Press, 2001) 267.

Andrea Carcano, *The Transformation of Occupied Territory in International Law.* (Leiden, the Netherlands: Koninklijke Bril, 2015).

George Cavallar, ‘Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?’ (2008) J Hist Int L 181.

Joseph Chamberlain. Speech at the Royal Colonial Institute Dinner, 31 March 1897 in Allan Bullock & F. W. Deakin, *The British Political Tradition Book Six The Concept of Empire Burke to Attlee 1774 – 1947. Edited by George Bennett.* (London: Adam & Charles Black, 1962) at 318.

Nicholas Charron, “Exploring the impact of foreign aid on corruption: has the “anti-corruption’ movement been effective?” (2011) 49 Dev Economies 66.

Daina Chiba & Tobias Heinrich, “Colonial Legacy and Foreign Aid: Decomposing the Colonial Bias, (2019) 45 Int Interactions 474.

Alberto Chong & Mark Gradstein, “What determines foreign aid? The donors' perspective,” (2008) 87 J Dev Ecs 1.

Sabine Clarke, “The Research Council System and the Politics of Medical and Agricultural Research for the British Colonial Empire, 1940 – 1952.” (2013) 57 Med Hist 338.

William Clayton, Memorandum by the Under Secretary for Economic Affairs (Clayton), May 27th, 1947 reproduced in Meredith Hindley, *How the Marshall Plan Came About.* (Marshall Foundation, 1998) at 22-23. Available at http://marshallfoundation.org/library/documents/marshall-plan-came/.

Jacob Katz Cogan, Ian Hurd & Ian Johnstone (eds)*, The Oxford Handbook of International Organizations,* (Oxford University Press, 2016).

Anthony J Colangelo, “Jurisdiction, Immunity, Legality, and *Jus Cogens,”* (2013-14) 14 Chicago J Int’l L 53.

Committee of European Economic Cooperation, Vol. I: General Report; Vol. II: Technical Reports. (Washington: U.S. Government Printing Office, I947).

Alice Conklin, “Colonialism and Human Rights, A Contradiction in Terms? The Case of France and West Africa, 1895-1914,” (1998) Am His Rev 419.

Alice Conklin, *A Mission to Civilise: The Republican Ideas of Empire in France and West Africa 1895 – 1930* (Stanford University Press: Stanford, California, 1997).

Stephen Constantine, *The Making of British Colonial Development Policy 1914 – 1949* (London: Franck Cass, 1984).

Fredrick Cooper, *Decolonisation and African Society The Labour Question in French and British Africa*, (Cambridge: Cambridge University Press, 1996).

Nicola Cooper, “Colonial Humanism in the 1930s - The Case of Andrée Viollis,” (2006) 17 French Cult Studies 189.

Julienne Corboz, “Third-way neoliberalism and conditional cash transfers: The paradoxes of empowerment, participation and self-help among poor Uruguayan women,” (2013) 24 Australian J of Anthrop, 64.

Louise Cord, Humberto Lopez and John Page, " 'When I Use a Word’ ... and Poverty Reduction", World Bank working paper, unpublished (August, 2003).

Neil MacCormick, *Questioning Sovereignty*: *Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999).

M. P. Cowen and R. W. Shenton, *Doctrines of Development*, (London: Routledge, 1996).

Council of the European Union, ‘European Consensus on Development,’ Brussels, 19 May 2017, 9459/17 DEVGEN 110.

David Craig & Doug Porter, *Development Beyond Neoliberalism? Governance, Poverty Reduction and Political Economy* (London & New York, Routledge: 2006).

Mariano Croce & Andrea Salvatore, *The Legal Theory of Carl Schmitt,* (Routledge online, 2013).

Pepper D. Culpepper, “Structural power and political science in the post-crisis era,” (2015) 17 Bus Polit 391.

Philipp Dann, “Institutional Law and Development Governance: An Introduction,” (2019) 12 L & Dev Rev 537.

Philipp Dann, ‘The Global Administrative Law of development cooperation,’ in Sabino Cassese, (ed) *Research Handbook on Global Administrative Law* (Edward Elgar online, 2016) at 415-416.

Philip Dann, *The Law of Development Cooperation, A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press, 2013).

Philipp Dann & Michael Riegner, “The World Bank’s Environmental and Social Safeguards and the evolution of global order,” (2019) Leiden J of Int Law.

Joseph E. Davies, Memorandum on Foreign Policy Memorandum No. 221 by the Chairman of the President’s War Relief Control Board (Davies), Washington, July 3, 1945. Foreign Relations of the United States: Diplomatic Papers, The Conference of Berlin (The Potsdam Conference), 1945, Volume I. Available at https://history.state.gov/historicaldocuments/frus1945Berlinv01/d221

GF Davis & Suntae Kim, ‘Financialization of the Economy’ (2015) 41 Ann Rev Soc 203.

Kevin Davis, Sally Engle Merry, and Benedict Kinsbury, *The quiet power of indicators: measuring governance, corruption and rule of law* (Cambridge University Press, 2015).

Kevin E. Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Merry (eds), *Governance by Indicators: Global Power Through Quantification and Rankings*, (Oxford: Oxford University Press, 2012).

Kevin E. Davis, ‘”Financing Development” as a Field of Practice, Study and Innovation’ New York University Institute for International Law and Justice Working Paper 2008/10.

Kevin E. Davis and Michael Trebilcock, “The Relationship between Law and Development: Optimists versus Skeptics,” (2008) 56 Am J Comp L 85.

Mitchell Dean, *Governmentality: Power and Rule in Modern Society* 2nd ed (London: Sage, 2010).

Maksymilian Del Mar, “Legality as Relative Institutionalisation: MacCormick’s Diffusionism and Transnational Legal Theory.” (2014) 5 TLT 177.

Jolle Demmers, Alex E. Fernández Jilberto & Barbara Hogenboom, “Good Governance and democracy in a world of neoliberal regimes,” in Jolle Demmers, Alex E. Fernández Jilberto & Barbara Hogenboom (eds), *Good governance in the era of global neoliberalism: conflict and depolitisation in Latin America, Eastern Europe, Asia, and Africa,* (London, New York: Routledge, 2004).

Jacques Derrida, *Limited Inc., (*trans. Samuel Weber) (Northwest University Press, 1998).

Jacque Derrida, ‘Force de Loi : Le « Fondement Mystique de L’Autorité’ »’Force of Law : The “Mystical Foundation of Authority”’ (1989-1990) 11 Cardozo L Rev 920.

Teun A. Van Dijk, “Principles of critical discourse analysis,” (1993) 4 Discourse & Soc 249.

Georgios Dimitropoulos, “Compliance through Collegiality: Peer Review in International Law,” Max Planck Institute Luxembourg for International European and Regulatory Procedural Law Working Paper Series, WPILux Working Paper 3 (2014).

Artif Dirlik, “Developmentalism – A Critique.” (2014) 16 Interventions 30-31.

Shaunnagh Dorsett & Shaun McVeigh, “Questions of Jurisdiction,” in Shaunnagh Dorsett & Shaun McVeigh (eds), *Jurisprudence of Jurisdiction*, (Abingdon, Oxon: Routeledge-Cavendish, 2007), 3.

Shaunnagh Dorsett & Shaun McVeigh, *Jurisdiction* (Abington, Oxon: Routeledge-Cavendish, 2012).

Costas Douzinas, “The metaphysics of jurisdiction,” in Shaunnagh Dorsett & Shaun McVeigh (eds), *Jurisprudence of Jurisdiction*, (Abingdon, Oxon: Routeledge-Cavendish, 2007), 21.

Costas Douzinas, “Violence, Justice, Deconstruction,” (2005) 6 German L J 171.

Costas Douzinas, “The End(s) of Human Rights,” 2002 26 Melbourne UL Rev 445.

Maria Drakopoulou, “Of the founding of law’s jurisdiction and the politics of sexual difference. The case of Roman law,” in Shaunnagh Dorsett & Shaun McVeigh (eds), *Jurisprudence of Jurisdiction*, (Abingdon, Oxon: Routeledge-Cavendish, 2007), 33.

Axel Dreher, Valentin Lang, Katharina Richert, “The political economy of International Finance Corporation lending,” (2019) J Dev Ec (accepted manuscript available online from J Dev Ec).

William Easterley, *The White Man’s Burden: why the West’s efforts to aid the rest have done so much ill and so little good.* (Penguin Press: New York, 2006).

William Easterley, “Can Foreign Aid Buy Growth?” (2003) 17 J Ec Perspectives 23,

Máiréad Enright, “’No, I won’t go back’ National time, trauma and legacies of symphysiotomy in Ireland,” in Sian Beynon-Jones & Emily Grabham (eds) *Law and Time,* (London: Routledge, 2018), 43.

GA Epstein, *Financialization and the World Economy*. (Cheltenham, UK: Edward Elgar, 2006).

Arturo Escobar, *Encountering Development: The making and unmaking of the Third World,* (Princeton, NJ: Princeton University Press, 1995).

Luis Eslava, Michael Fakhri & Vasuki Nesiah (eds), *Bandung, Global History, and International Law : Critical Pasts and Pending Futures,* (Cambridge: Cambridge University Press, 2017).

European Commission, Republic of Uganda – European Community, Country Strategy Paper and National Indicative Programme 2008 -2013.

European Commission, *Tools and Methods Series Working Document: Budget Support Guidelines. Programming, Design and Management – A modern approach to Budget Support*, September 2012. (Brussels: EuropeAid DevCo, 2012) and Updated (2018).

European Commission, Common Framework for Country Strategy Papers (document based on the Common Framework adopted in April 2006) (undated).

European Consensus on Development, Joint Declaration European Parliament, Council, European Commission, The new European Consensus on Development ‘Our World, Our Dignity, Our Future,’ 30/6/2017, C 210/1.

EEAS, “Annex 3 – Template for the Analysis of National Development Plans (undated).” On file with author.

EEAS, “EU Statement at the Trade Policy Review of the East African Community (EAC),” 20th March 2019, Geneva. Available at https://eeas.europa.eu/delegations/world-trade-organization-wto/59932/eu-statement-trade-policy-review-east-african-community-eac-20-march-2019_en

European Parliament, ‘The European Council and EU Official Development Assistance,’ December 2015.

European Parliamentary Research Service, ‘New European consensus on development. Will it be fit for purpose?’ European Parliament Briefing, April 2017.

European Union European External Action Service, ‘EU-Libya Relations,’ Brussels 9/12/2018 available at https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations.

European Union, Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus on Development’ (2006/C 46/01), available at https://ec.europa.eu/europeaid/policies/european-development-policy_en.

Brad Evans & Julian Reid, “Dangerously exposed: the life and death of the resilient subject,” (2013) 1 Resilience, 83.

Diana Farrell, “The Hidden Dangers of the Informal Economy,” (2004) 3 McKinsey Q 27.

Julio Faundez, “Douglass North’s Theory of Institutions: Lessons for Law and Development,” (2016)8 Hague J on Rule of L 373.

Raphaëlle Faure, Annalisa Prizzon & Andrew Rogerson, *Multilateral Development Banks – a short guide,* ODI, December 2015.

Lucien Febvre in Jacques Rancière, “The Concept of Anachronism and the Historian’s Truth,”’ (English Translation), (2015) 3 InPrint 21.

James Ferguson, *The anti-politics machine: "development," depoliticization, and bureaucratic power in Lesotho, (*Minneapolis: University of Minnesota Press, 1994).

Alfredo Saad-Filho, “Life beyond the Washington Consensus: An Introduction to Pro-poor Macroeconomic Policies,” (2007) 19 Rev Pol Econ 513.

Ben Fine, ““Economic Imperialism” A view from the Periphery,” (2002) 34 Rev Rad Pol Econ 187.

Michel Foucault, ‘Governmentality’ in G. Burchell, C. Gordon, and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality*, (Harvester Wheatsheaf and University of Chicago Press, 1991), 87– 104.

Benjamin Fox, “EU waits for Tanzania to back up change of heart on stalled trade deal,” EURACTIV March 25th, 2019.

Katja Freistein & Bettina Mahlert, The potential for tackling inequality in the Sustainable Development Goals,” (2016) 37 TWQ 2139.

Abigail Friendly, Participatory Budgeting: The Practice and the Potential, IMFG Forum. No. 6, 2016.

Joseph Fry, 'Review: The Monroe Doctrine: Empire and Nation in Nineteenth-Century America. By Jay Sexton (2011), (2011) 98 J Am Hist 828.

Helmut Führer, *The Story of Official Development Assistance – A History of the Development Assistance Committee and the Development Co-operation Directorate in Dates, Names and Figures,* (Paris: OECD, 1996).

Lon Fuller, *The Morality of Law*, (Revised Edition), (Yale University Press, 1969).

Clive Gabay & Carl Death, "Building States and Civil Societies in Africa: Liberal Interventions and Global Governmentality," (2012) 6 J Intervention & Statebuilding 1.

Andrew Gamble, "Two Faces of Neo-liberalism," in Richard Robison (ed.), *The Neo-Liberal Revolution: Forging the Market State,* (London: Palgrave, 2006).

James Thuo Gathii, "Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes between Markets and States," (2000) 45 Vill. L. Rev. 971.

Benjamin Gerig, *The Open Door and Mandates System – A Study of Economic Equality before and since the establishment of the Mandates System,* (London: Allen & Unwin, 1930).

Neil Gilbert, "The "Enabling State?" from public to private responsibility for social protection: Pathways and pitfalls" OECD Social, Employment and Migration Working Papers No. 26 (2005).

Neil Gilbert, *Transformation of the Welfare State: Work and Insecurity Under the Triumph of Capitalism*, (New York: Oxford University Press, 2002).

Neil Gilbert & Barbara Gilbert, *The Enabling State : Modern Welfare Capitalism in America* (Oxford University Press online, 1989).

Stephen R. Gill & David Law, "Global Hegemony and the Structural Power of Capital," (1989) 33 Int St Qty 475.

Anique H.M. van Ginneken, *Historical Dictionary of the League of Nations*, (Scarecrow Press, 2006) online edition. Entry "Mandates System."

Rachel M. Gisselquist, "Developing and evaluating governance indexes: 10 questions," (2014) 35 Policy Studies 513.

Matthias Goldmann, "A matter of perspective: Global governance and the distinction between public and private authority (and not law)," (2016) 5 Global Constitutionalism 48.

Government of Ireland, A Better World – Ireland's Policy for International Development, (Dublin: Dept of Foreign Affairs & Trade, 2019).

Government of Tanzania, Five Year Medium-Term Strategic Plan for the Public Finance Management Reform Programme (PFMRP) Phase V (2017/18 – 2021/22). Ministry for Finance and Planning, Tanzania, September 2017. On file with author.

William Graf, “The State in the Third World” in *The Socialist register 1995: Why Not Capitalism?* (London: L. Panitch, Merlin Press, 1995).

John P. Grant & J. Craig Barker (eds) *Encyclopaedic Dictionary of International Law (*Oxford University Press, 2009).

Andrew McGregor, Edward Challies, John Overton & Lee Sentes, “Developmentalities and Donor–NGO Relations: Contesting Foreign Aid Policies in New Zealand/Aotearoa,” (2013) 45 Antipode 1232.

David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism, (2014)* 77 Law & Contemp Probs 1.

Siba N’Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (Minneapolis: University of Minnesota Press, 1996).

Isebill V. Gruhn, “The Commission for Technical Co-operation in Africa, 1950-65,” (1971) 4 J Mod Af St 459.

Andrew Gunnot & Paul Gellert, ‘Financialization, Shareholder Value, and the Transformation of Timberland Ownership in the US,’ (2011) 37 Crit Sociology 265.

Arpita Gupta “Law and development: a history in three moments,” in Ugo Mattei & John D. Haskell (ed) *Research Handbook on Political Economy and Law*, (Edward Elgar Publishing 2017) at 327.

José Manuel Velázquez-Gutiérrez, “Constitucionalismo verde en Ecuador: Derechos de la Madre Tierra y Buen Vivir,” (2014) 10 Entramado 220.

Stefano Guzzini, ‘The Ambivalent Diffusion of Power in Global Governance’ in Stefano Guzzini and Iver B. Neumann, *The Diffusion of Power in Global Governance – International Political Economy Meets Foucault* (New York: Palgrave, 2012).

Carol Harlow, “Global Administrative Law: The Quest for Principles and Values,” (2006) 17 EJIL 187

David Harvey, ‘Neoliberalism as creative destruction’ (2007) 610 Annals AAPSS 22.

David Harvey, ‘The New Imperialism: Accumulation by Dispossession’ (2004) Socialist Register 63.

Virginia Haufler, “Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World,” (2010) 10 Gl Env Pol 53.

Gerry K. Helleiner, Tony Killick, Nguyuru Lipumba, Benno J. Ndulu, & Knud Erik Svendsen, “Development Co-operation Issues between Tanzania and its Aid Donors. Report of the Group of Independent Advisors.” June 1995. (Print copy with author).

Martin Herberg, “Global Governance and Conflict of Laws from Foucauldian Perspective: the Power/Knowledge Nexus Revisited,” (2011) 2 Trans L Th 243.

Paul J Hibbeln, *“A Sacred Trust of Civilisation:” The B Mandates under Britain, France, and the League of Nations Permanent Mandates Commission, 1919-1939*, (Unpublished doctoral dissertation), (Ohio State University, 2002).

Meredith Hindley, *How the Marshall Plan Came About.* (Marshall Foundation, 1998). Available at http://marshallfoundation.org/library/documents/marshall-plan-came/.

Michael Hitchcock, "The Marshall Plan and the creation of the West" in Melvyn P. Leffler & Odd Arne Westad, *The Cambridge History of the Cold War* (Cambridge: Cambridge University Press, 2010).

HM Treasury and Department for International Development, *UK Aid: Tackling Global Challenges in the National Interest* (November 2015).

Paul Hodge, "'Governed freedom' in Oceania: AusAID, subjectivation and the practice of critique in studies of governmentality," (2014) 55 Asia Pacific Viewpoint 29.

Joseph M. Hodge, *Triumph of the Expert: Agrarian Doctrines of Development and the Legacies of British Colonialism.* (Athens, OH: Ohio University Press, 2007).

Joseph M. Hodge and Gerard Hödl, 'Introduction' in Joseph M. Hodge, Gerard Hödl, and Martina Kopf, *Developing Africa: Concepts and practices in twentieth-century colonialism*, (Manchester: Manchester University Press, 2014).

Florian F. Hoffmann, 'Review Essay: Twin Siblings: Fresh perspectives on Law and Development (and *Vice Versa*),' (2017) 30 Leiden J Int'l L 267.

Florian Hoffmann, "Revolution or Regression? Retracing the Turn to Rights in 'Law and Development'," (2016) Finnish Yearbook of International Law 45.

Michael J. Hogan, "American Marshall Planners and the Search for a European Neocapitalism," (1985) 90 Am Hist Rev 44.

Axel Honneth, *Pathologies of Reason: On the Legacy of Critical Theory* (Frankfurt: Columbia University Press, 2009).

Christopher Hood, "The "New Public Management" in the 1980s: Variations on a Theme," (1995) 20 Acc Org & Soc 93.

Jongen Hortense, "The authority of peer reviews among states in the global governance of corruption," (2018) 25 Rev Int Pol Econ 909.

Bert F Hoselitz, "Four Reports on Economic Aid to Europe," (1948) 56 J Pol Econ 103.

Rudie Hulst, Wilhelm Mafuru & Deogratias Mpenzi, "Fifteen years after decentralisation by devolution: political-administrative relations in Tanzanian local government," (2015) 35 Public Admin Dev 360.

Human Rights Watch, *No Escape from Hell - EU Policies Contribute to Abuse of Migrants in Libya*, (New York: HRW, 2019) available at https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya.

Terry Hutchinson, "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law," (2015) 3 Erasmus L Rev 130.

Ronald Hyam, "Bureaucracy and 'Trusteeship' in the British Empire," in Judith Brown (ed), *The Oxford History of the British Empire : Volume IV: The Twentieth Century*, (Oxford University Press, 1999), 255.

William Hynes & Simon Scott, *The Evolution of Official Development Assistance: Achievements, Criticisms and a Way Forward*, OECD Development Co-operation Working Paper, December 2013.

H Ouidare Idowu, "Assimilation in 19th century Senegal," (1969) Cahiers d'Etudes Africanes 194.

Independent Doing Business Report Review Panel, "Independent Panel Review of the Doing Business report," June 2013, (New York, World Bank).

Independent Evaluation Office of the IMF, 'Structural Conditionality in IMF-Supported Programs,' (Independent Evaluation Office of the IMF, 2007)

ITUC, "World Bank should scrap ideologically-driven business regulation ratings," (22nd January, 2018) at https://www.ituc-csi.org/world-bank-should-scrap.

Heiner Janus, Stephan Klingebiel & Sebastian Paulo, 'Beyond Aid: A Conceptual Perspective on the Transformation of Development Cooperation,' (2015) 27 J Int Dev 155.

Fleur Johns, "On Failing Forward: Neoliberal Legality in the Mekong River Basin," (2015) 48 Cornell Int L J 348.

Giedre Jokubauskaite, "The World Bank Environmental and Social Framework in a wider realm of public international law," (2019) Leiden J Int Law.

Giedre Jokubauskaite, 'Book Review,' (2014) 25 EJIL 599.

Obonye Jonas, "Reflections on the Practices and Experiences of African States in the African Peer Review Mechanism (APRM) and the Universal Periodic Review Mechanism (UPR): A Human Rights Perspective," (2012) 45 Comp & Int'l L J S Afr 428.

Branwen Gruffydd Jones, ''Good governance' and 'state failure': genealogies of imperial discourse,' (2013) 26 Cambridge Rev Int Aff 49.

Marianne Jørgensen & Louise J. Phillips, "Field of Discourse Analysis" in Marianne Jørgensen & Louise J. Phillips, *Discourse Analysis as Theory and Method,* (Sage Publications online, 2011)

Jonathan Joseph, *The social in the global: social theory, governmentality and global politics* (Cambridge, UK: Cambridge University Press, 2012).

Johnathan Joseph, "The limits of governmentality: Social theory and the international," (2010) 16 EJIR 223.

Jonathan Joseph, "Governmentality of what? Populations, States and International Organizations," (2009) 23 Global Soc 413.

Nanak Kakwani, Pro-poor Growth: Concepts and Measurement with Country Case tudies, UNDP International Poverty Centre, Working Paper No. 1, August 2004.

U. Kalpagam, "The colonial state and statistical knowledge," (2000) 13 His Human Sci 37

Jörg Kammerhofer, "Taking the Rules of Interpretation Seriously, but not Literally? A Theoretical Reconstruction of Orthodox Dogma," (2017) 86 Nordic J Int Law 125.

Susan L Kang, “Labor and the Bank: Investigating the Politics of the World Bank’s Employing Workers Index,” (2009) 14 J Workplace Rights 481.

Sonny Kapoor, “Billions to Trillions – A Reality Check,” Re-DEFINE Policy Brief for Stamp Out Poverty, March 2019.

Daniel Kauffman, Aart Kray & Massimo Matruzzi, ‘Worldwide Governance Indicators Project: Answering the Critics,’ World Bank Policy Research Paper No 4149, (2016). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=965077.

Robert Keil, “The Urban Politics of Roll With It Neoliberalisation,” (2009) 13 City 231.

Mark GE Kelly, “Foucault, Subjectivity and Technologies of the Self,” in Christopher Falzon, Timothy O’Leary & Jane Sawicki, *A Companion to Foucault*, (Blackwell Publishing, 2013).

Antonie Riddel & Martin van der Linde, Impact of Ending Aid – Tanzania Country Study, (Netherlands Ministry of Foreign Affairs, 2016).

David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press, 2016).

David Kennedy, “Law and Development Economics: Toward a New Alliance,” in David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics Institutions for Promoting Development in the Twenty-First Century* (Oxford: Oxford University Press, 2012).

Eva Kernbauer, “Anachronic concepts, art historical containers and historiographical practices in contemporary art,” (2017) 16 J Art Historiography 1.

Mary Keyes & Brooke Adele Marshall, “Jurisdiction Agreements; Exclusive, Optional and Asymmetrical,” (2015) 11 J Int Pr Law 345.

Homi Kharas and Rita Perakis, Measuring the Quality of Aid: QuODA Second Edition (Brief for the Fourth High-Level Forum on Aid Effectiveness, Busan, South Korea). Centre for Global Development, November 14, 2011.

John S. Kihamba, “New Public Management Issues in Tanzania,” in Benon C. Basheka, Lukamba-Muhiya. Tshombe (eds), *New Public Management in Africa, Emerging Issues and Lessons*, (New York: Routledge, 2017), 149.

Tony Killick, “Policy Autonomy and the History of British Aid to Africa,” 2005 23 Dev Pol Rev 665.

Shannon Kindornay & Fraser Reilly-King, “Promotion and partnership: bilateral donor approaches to the private sector,” (2013) 34 Can J Dev St 533.

Catherine Kingfisher & Jeff Maskovsky, “Introduction: The Limits of Neoliberalism,” (2008) 28 Critique Anthr 115.

Benedict Kingsbury, Nico Krisch & Richard B. Stewart, “The Emergence of Global Administrative Law,” (2005-2006) 68 L & Contemp Problems 16.

Jan Klabbers (ed), *International Organisations,* (London: Routledge online, 2016).

Stephen Klasen, 'Determinants of Pro-Poor Growth,' IFPR 2020 Focus Brief (International Food Policy Research Institute, 2007.

Stephen Klasen, 'In Search of the Holy Grail: How to Achieve Pro-Poor Growth?' in B. Tungodden, N. Stern and I. Kolstad (eds), *Toward Pro Poor Policies-Aid, Institutions, and Globalisation,* (New York: OUP, 2004) at 64.

Samuel Knafo, Sahil Jai Dutta, Richard Lane & Steffan Wyn-Jones, "The Managerial Lineages of Neoliberalism," (2019) 24 New Pol Econ 235.

Bernard Knoll, *The Legal Status of Territories Subject to Administration by International Organisations,* (Cambridge: Cambridge University Press, 2008).

Tor Krever, "Law, development and political closure under neoliberalism," in Honor Brabazon, Neoliberal Legality: Understanding the role of law in the neoliberal project, (Abingdon, Oxon: Routledge, 2017), 22.

Tor Krevor, "Quantifying Law: legal indicator projects and the reproduction of neoliberal common sense," (2013) 34 Third W Qtly 131.

Stefan Kroll, "The legal justification of international intervention. Theories of community and admissibility," in Fabian Klose (ed), *The Emergence of Humanitarian Intervention. Ideas and Practice from the Nineteenth Century to the Present,* (Cambridge: Cambridge University Press, 2015), 73.

J. A. Krug, National Resources and Foreign Aid (report of October 9th, 1947), (Washington: U.S. Government Printing Office, I947).

KPMG, Unlocking the Power of Partnership – A Framework for Effective Cross-Sector Collaboration to Advance the Global Goals for Sustainable Development, (KPMG, 2016).

Friedrich V. Kratochwil, *Rules, norms, and decisions On the conditions of practical and legal reasoning in international relations and domestic affairs.* (Cambridge: Cambridge University Press, 1989).

Josef L. Kuntz, "The Status of Occupied Germany under International Law: A Legal Dilemma." (1950) 3 Western Pol Q 538.

F. Lammersen & M. Roberts, "Aid for trade 10 years on: Keeping it effective," (OECD Publishing, Paris; OECD Development Policy Papers No. 1, 2015). Available at http://dx.doi.org/10.1787/5jrqc6q4xxr5-en.

Mark Langan, "Private sector development as poverty and strategic discourse: PSD in the political economy of EU-Africa trade relations," (2011) 49 J Mod African St 83.

Siobhan McInerney-Lankford & Hans-Otto Sano, *Human Rights Indicators in Development: An Introduction*, (World Bank, 2010). Available at https://www.openknowledge.worldbank.org/handle/10986/2529

Wendy Larner & William Walters (eds), *Global Governmentality: Governing International Spaces* (London: Routeledge, 2004)

Miguel de Larrinaga, Marc G. Doucet (eds), *Security and Global Governmentality: Globalization, Governance and the State,* (New York: Routeledge, 2010).

William Lazonick & Mary O'Sullivan, "Maximising shareholder value: a new ideology for corporate governance," (2000) 29 Econ & Soc 13.

Maria Dos Santos Lee, "The Law of Law" (1998) 4 L Text Cult 153.

Jörn Leonhard, "1917-1920 and the Global Revolution of Rising Expectations," in Stefan Rinke & Michael Wildt (eds), *Revolutions and Counter-revolutions : 1917 and its Aftermath from a Global Perspective*, (Frankfurt : Campus Verlag, 2017).

John E. Lewis, "The Ruling Compassions of the Late Colonial State: Welfare versus Force, Kenya, 1945–1952," (2001) 2 J Colonialism & Col Hist HTML version viewed online at https://muse-jhu-edu.proxy.bib.uottawa.ca/journal/29.

Jon Harald Sande Lie, "Developmentality: indirect governance in the World Bank-Uganda partnership," (2015) 36 T W Quarterly 723.

Rayford W. Logan, "The Operation of the Mandate System in Africa," (1928) 13 Journal of Negro History 423.

James Lorimer, *The institutes of the law of nations a treatise of the jural relations of separate political communities*, Volume 1 (Edinburgh & London: W. Blackwood and Sons, 1883).

Martin Loughlin, *Foundations of Public Law*, (Oxford Scholarship Online, 2010).

Niklas Luhmann, David Roberts, "The Medium of Art," (1987) 18-19 Thesis Eleven 101.

Samuel Lubell, "The Untold Tragedy of Potsdam." Saturday Evening Post. 12/8/1945, Vol. 218 Issue 23, pg14-51.

Gene Martin Lyons, *The Uneasy Partnership Social Science and the Federal Government in the Twentieth Century* (Russell Sage Foundation: New York, 1969).

Raymond Lyons, 'The OECD Mediterranean Regional Project,' (1964/1965) 8 Am Economist 11.

Yahya M. Madra & Fikret Adaman, "Neoliberal Reason and Its Forms: De-Politicisation Through Economisation," (2014) 46 Antipode 691.

Kerstin Martens & Anja Jakobi, *Mechanisms of OECD Governance: International Incentives for National Policy-Making? (*Oxford Scholarship online, 2010).

George C. Marshall, Remarks by the Secretary of State at Harvard University on June 5th 1947. Available at http://marshallfoundation.org/library/wp-content/uploads/sites/16/2014/06/Marshall_Plan_Speech_Complete.pdf.

Edward S Mason & Robert E Asher, *The Word Bank Since Bretton Woods,* (Washington, Brookings Institution 1973).

Andrea Mayr, 'Institutional Discourse' in Deborah Tannen, Heidi E. Hamilton, and Deborah Schiffrin (eds), *The Handbook of Discourse Analysis,* (John Wiley & Sons, 2015), 755.

Robert M Maxon, "The Devonshire Declaration: The Myth of Missionary Intervention," (1991) 18 History in Africa 259.

Simon Maxwell & Tim Conway, 'Perspectives on Partnership' OED Working Paper Series NO 6, Summer 2000, World Bank Operations Evaluation Department. Available at www.worldbank.org/html/oed

Stacy May, "Measuring the Marshall Plan," (1948) 26 For Aff 447.

Benoit Mayer, 'Book Review' (2016) Indian J Int'l L (online, article unassigned).

Andrea Mayr, "Institutional Discourse," in Deborah Tannen, Heidi E. Hamilton, and Deborah Schiffrin (eds), *The Handbook of Discourse Analysis,* (John Wiley & Sons, 2015), 755.

Dimitri Van Den Meerssche, "International Organizations and the Performativity of Measuring States," (2018) 15 Int Org L Rev 168.

Memorandum on Foreign Policy Memorandum No. 221 by the Chairman of the President's War Relief Control Board (Davies), Washington, July 3, 1945. Foreign Relations of the United States: Diplomatic Papers, The Conference of Berlin (The Potsdam Conference), 1945, Volume I. Available at https://history.state.gov/historicaldocuments/frus1945Berlinv01/d221.

Avid Meredith, "The British Government and Colonial Economic Policy, 1919-1939," (1975) 28 Ec His Rev 484.

Michael Merlingen, "From Governance to Governmentality in CDSP: Towards a Foucauldian Research Agenda," (2011) 49 JCMS 149.

Sally Engle Merry, '"Measuring the World: Indicators, Human Rights, and Global Governance' (2011) 52 Current Anthrop 588.

Julia Metz,"Introduction," in Julia Metz (ed), *The European Commission, Expert Groups, and the Policy Process*. (London, Palgrave Macmillan, 2015).

Ralf Michaels, "Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law." (2009) 57 A J Comp L 765.

Philip McMichael, *Development and Social Change – A Global Perspective,* (Los Angeles: Sage, 2012).

Millennium Challenge Corporation (2017), 'Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in Fiscal Year 2017' https://www.mcc.gov/resources/doc/report-selection-criteria-and-methodology-fy17

Margaret McMillan, *Paris 1919: Six Months that Changed the World*, (Toronto: Random House, 2002).

David Hunter Miller, 'The Origin of the Mandates System' (1928) 6 For Affairs 277.

Peter Miller & Nikolas Rose, *Governing the present: administering economic, social and personal life*, (Cambridge: Polity Press, 2008).

Jennifer Milliken, "The Study of Discourse in International Relations: A Critique of Research and Methods," (1999) 5 EJIL 225.

Alex Mills, "Rethinking Jurisdiction in International Law," (2014) 84 Brit Y Int Law 197.

Alex Mills, “Connecting Public and Private International Law,” in Veronica Ruiz Abou-Nigm, Kasey McCall-Smith & Duncan French (eds), *Linkages and Boundaries in Private and Public International Law,* (Oxford: Hart Publishing, 2018).

Alan S. Milward, *The Reconstruction of Western Europe 1945-1951.* (London & New York: Routledge, 1984).

James H. Mittelman, “What is Critical Globalization Studies?” (2004) Int St Perspectives 219.

Kaori Miyamoto and Emilio Chiofalo, *Official Development Finance for Infrastructure With a Special Focus on Multilateral Development Banks*, OECD Development Co-operation Working Paper 30, (Paris: OECD, 2016).

Kinda Mohammadieh*, ‘*A WTO Treaty on Trade Facilitation? Regulatory, Institutional, Legislative, and Cost Challenges for Developing Countries’, South Bulletin 75, 7th October 2013.

Ban Ki Moon, Secretary-General's remarks at Summit for the Adoption of the Post-2015 Development Agenda, 25 September 2015, available at https://www.un.org/sg/en/content/sg/statement/2015-09-25/secretary-generals-remarks-summit-adoption-post-2015-development

Dambisa Moyo, *Dead aid: why aid is not working and how there is another way for Africa.* (London: Allen Lane, 2009).

Richard Mullender, “Review ‘The Legal Theory of Carl Schmitt,” by Mariano Croce and Andrea Salvatore,’ (2013) 40 J L & Soc 681.

Makau Mutua, “What is TWAIL?” (2000) 94 ASIL Proceedings 31.

Guy Blaise Nkamleu & Bernadette Dia Kamgnia, ‘Uses and Abuses of Per-diems in Africa: A Political Economy of Travel Allowances,’ African Development Bank Working Paper Series No. 196 – February, 2014.

Gregor Noll, “Theorizing Jurisdiction,” in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law,* (OUP, 2016).

P.A. Nollkaemper & Deirdre Curtin, “Conceptualising Accountability in International and European Law,” (2005) 36 Netherlands Y Int’l Law 3.

Douglass C. North, *Institutions, Institutional Change, and Economic Performance*, (New York: Cambridge University Press, 1990.

Nathan Nunn, “The Long-term Effects of Africa’s Slave Trades,” (2008) 123 Qty J Ec 139.

Bertil Odén & Lennart Wohlgemuth,”Where is the Paris agenda heading? Changing relations in Tanzania, Zambia and Mozambique,” ECPDM briefing note 21, (Maastricht: European Centre for Development Policy Management, 2011).

Louiza Odysseos, ‘Human Rights, Liberal Ontogenesis and Freedom: Producing a Subject for Neoliberalism?’ (2010) 38 Millennium J Int Studies 747.

OECD, *Private Philanthropy for Development, The Development Dimension*, (Paris: OECD Publishing, 2018).

OECD, *TOSSD Compendium For Public Consultation*, (Paris: OECD, 2016).

OECD, *Canada – Development Assistance Committee Peer Review 2012* (Paris: OECD, 2012).

OECD *Global Strategy on Development* (OECD, 2012), at 3, available at http://www.oecd.org/development/oecd-strategy-on-development.htm.

OECD, *DAC Guidelines and Reference Series: Harmonising Donor Practices for Effective Aid Delivery Vol.1*, (Paris: OECD, 2003).

OECD, *DAC Guidelines and Reference Series: Harmonising Donor Practices for Effective Aid Delivery Vol.2*, (Paris: OECD, 2006).

OECD, *Promoting Pro-Poor Growth: Policy Guidance for Donors* DAC Guidelines and Reference Series (Paris: OECD, 2007).

OECD, *Poverty Reduction – DAC Guidelines,* (Paris: OECD, 2001).

OECD, *DAC Blended Finance Principles for Unlocking Commercial Finance for the Sustainable Development Goals*, (Paris: OECD, 2017), available at http://www.oecd.org/dac/financing-sustainable-development/development-finance-topics/blended-finance.htm.

OECD, *Development Co-operation Report 2016 – The Sustainable Development Goals as Business Opportunities*, (Paris: OECD, 2016) available at http://www.oecd.org/dac/development-co-operation-report-2016.htm.

OECD*, Development Co-operation Report (2015): Making Partnerships Effective Coalitions for Action*, (Paris: OECD 2015)

OECD, *Boosting Productivity to Meet the Middle-Income Challenge*, Perspectives on Global Development 2014, (Paris: OECD, 2014).

OECD, Canada – Development Assistance Committee Peer Review 2012 (Paris: OECD, 2012).

OECD, *Better Aid Managing Aid Practices of DAC Member Countries,* (Paris: OECD, 2009).

OECD*, Effective Aid Management: Twelve Lessons from DAC Peer Reviews,* (Paris: OECD, 2008).

OECD DAC, Information Note on the DAC Peer Review Process, DCD/DAC(2019)15 15th April 2019.

OECD DAC, DAC Peer Review Reference Guide, 2019-20, DCD/DAC(2019)3/FINAL, 13th March 2019.

OECD DAC, *Shaping the 21st Century – The Contribution of Development Co-operation*, (Paris: OECD, 1996).

OECD-DAC, TOSSD Task Force Final Terms of Reference, 7 December 2017. Available at http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/tossd-task-force.htm

OECD Development Co-operation Directorate, Development Assistance Committee, *Converged Statistical Reporting Directives for the Creditor Reporting System (CRS) and the annual DAC questionnaire. Chapters 1-6*. DCD/DAC (2016)3/FINAL.

OECD Development Co-operation Directorate - Development Assistance Committee, Converged Statistical Reporting Directives for the Creditor Reporting System (CRS) and the Annual DAC questionnaire - Addendum 1 annexes - Modules A, B and C. DCD/DAC(2016)3/ADD1/FINAL.

OECD Development Co-operation Directorate - Development Assistance Committee, Converged Statistical Reporting Directives for the Creditor Reporting System (CRS) and the Annual DAC questionnaire - Addendum 1 annexes – Modules D & E, DCD/DAC(2016)3/ADD2/FINAL

OECD Development Co-operation Directorate, Development Assistance Committee, *Converged Statistical Reporting Directives for the Creditor Reporting System (CRS) and the Annual DAC Questionnaire, Addendum 2, Annexes - modules D and E*. DCD/DAC(2013)15/ADD2/FINAL. (Paris: OECD, 2013)

OECD, 'Joining the Development Assistance Committee (DAC)' at http://www.oecd.org/dac/joining-the-development-assistance-committee.htm (undated).

OECD, Blended Finance initiative at http://www.oecd.org/dac/financing-sustainable-development/development-finance-topics/blended-finance.htm, (undated).

OECD, 'Decision making in an environment of uncertainty and change,' Meeting of Senior Officials from Centres of Government, Tokyo, 26-27 October 2017.

OECD Ministerial Council, *Final NAEC Synthesis New Approaches to Economic Challenges* (OECD: 2015).

OECD Ministerial Council, 'OECD 50th Anniversary Vision Statement' C/MIN (2011) 6, Meeting of the OECD Council at Ministerial Level, Paris, 25-26 May 2011.

OECD Ministerial Declaration on Policy Coherence for Development, C/MIN(2008)2/FINAL, Meeting of the Council at Ministerial Level, 4-5 June 2008.

OECD's Recommendation of the Council on a Policy Framework for Effective and Efficient Financial Regulation (2009) 26 November 2009 - C(2009)125.

OECD DAC, Recommendation on Terms and Conditions of Aid, OECD/LEGAL/5006, Adopted on 28/02/1978.

OECD, OECD Regulatory Policy Outlook 2015 (Paris: OECD, 2015).

Archives historiques des Communautés européennes, Florence, Villa Il Poggiolo. Dépôts, DEP. Organisation de coopération et de dévelopement économiques, OECD. Committee for European Economic Co-operation, CEEC. CEEC 03. Available at http://www.cvce.eu/en/obj/french_proposal_concerning_the_establishment_of_a_questionnaire_paris_15_july_1947-en-391ea26e-4d94-44df-bc41-bf995fbf53c0.html.

Goran Ohlin, 'The Organisation for Economic Co-operation and Development,' (1968) 22 Int'l Org 231.

Anne Orford, “International Law and the Limits of History,” in Wouter Werner, Marieke de Hoon, Alexis Galan, *The Law of International Lawyers – Reading Martii Koskenniemi,’* (Cambridge: Cambridge University Press, 2017) 297.

Anne Orford, *International Authority and the Responsibilty to Protect,* (Cambridge: Cambridge University Press, 2011).

Anne Orford, “Trade, human rights and the economy of sacrifice,” in Anne Orford (ed), *International Law and its Others,* (Cambridge: Cambridge University Press, 2006), 156.

Peter Ove, “Governmentality and the Analytics of Development,” (2013) 12 Perspectives on Global Dev & Tech 310.

François Pacquement, “How Development Assistance from France and the United Kingdom has Evolved: Fifty Years on from Decolonisation,” (2010) 1 Int Dev Policy 51.

Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality,* (Cambridge: Cambridge University Press, 2011).

Fabrizio Pagani, Peer Review: A Tool for Co-operation and Change. An Analysis of an OECD Working Method, SG/LEG(2002)1, (Paris: OECD Publishing, 2002).

Jane L. Parpart & Henry Veltmeyer, “The Development Project in Theory and Practice: A Review of its Shifting Dynamics.” (2004) 25 CJDS 39.

Lester Pearson et al., *Partners in Development. Report of the Commission on International Development*, (New York, 1969).

Geoff Pearson & Michael Salter, “Getting Public Law Back into a Critical Condition: The Rule of Law as a Source for Immanent Critique,” (1999) 8 Soc & Legal St 483.

Jamie Peck, *Constructions of Neoliberal Reason,* (Oxford: Oxford University Press, 2010).

Jamie Peck & Adam Tickell, “Conceptualizing neoliberalism,” (2002) 34 Antipode 380.

Susan Pedersen, *The Guardians of the Empire,* (Oxford Scholarship online, 2015).

PEFA, *Framework for assessing public financial management*, (Washington DC: PEFA, 2016).

Allen Pellet, ‘The Definition of Responsibility in International Law’ in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (eds), *The International Law of Responsibility* (Oxford: Oxford University Press, 2010).

Javier Pereira, *Blended Finance - What it is, how it works and how it is used*. Eurodad & Oxfam International (February 2017), Available at http://www.eurodad.org/Entries/view/1546703/2017/02/13/Blended-Finance-What-it-is-how-it-works-and-how-it-is-used

Anne Peters, “Are we Moving towards Constitutionalization of the World Community?” in Antonio Cassese (ed), *Realizing Utopia. The Future of International Law*, (OUP 2012) at 118.

Raymond Plant, *The Neo-liberal State* (Oxford Scholarship Online, 2010).

J.A. Pocock, Foundations and Moments,' in Annabel S. Brett, James Tully & Holly Hamilton-Bleakley, *Rethinking the foundations of modern political thought,* (Cambridge UK: Cambridge University Press, 2006), 37.

Rafael La Porta & Andrei Shleifer, 'Informality and Development,' (2014) 28 J Ec Pers 109.

Tony Porter (ed), *Transnational Regulation after the Crisis,* (London, Routeledge, 2014).

Tony Porter & Michael Webb, " The Role of the OECD in the Orchestration of Global Knowledge Networks," in Stephen McBride & Rianne McMahon, *The OECD and Transnational Governance* (Vancouver: UBC Press, 2008), 43.

Richard Posner, "The Present Situation in Legal Scholarship," University of Chicago Law School Chicago Unbound 1980 (90) Yale L J 1113.

Léonardo Puppeto, 'The new rules for Official Development Assistance loans: what's at stake?' Trésor Economics, No. 161 March 2016. Ministère des Finances et des Comptes Publics, Paris. Available at https://www.tresor.economie.gouv.fr/.

Asif H Qureshi & Andreas R Ziegler, *International Economic Law* (London, Sweet & Maxwell, 2011).

Raghuram G. Rajan & Arvind Subramanian, "Aid and Growth: What does the cross-country evidence really show?" National Bureau of Economic Research Working Paper 11513, August 2005.

Ben Ramalingham, *Aid on the edge of chaos: rethinking international cooperation in a complex world* (Oxford, England: Oxford University Press, 2013).

W.E. Rappard, "The Practical Working of the Mandates System, Address given on June 16th, 1925," (1925) 4 J Brit Inst Int'l Aff 205.

James E. Rauch, 'Modeling the Informal Sector Formally,' (1991) 35 J Dev Ec 33.

Reuters Business News, "World Bank economist Paul Romer quits after Chile comments," Reuters Business News (25th January 2018) at https://www.reuters.com/article/us-worldbank-economist-romer/world-bank-economist-paul-romer-quits-after-chile-comments-idUSKBN1FD38Y.

Roger C. Riddel, *Does Foreign Aid Really Work?* (Oxford, New York: Oxford University Press, 2007).

Annelise Riles, "Managing Regulatory Arbitrage: A Conflict of Laws Approach," (2014) 47 Cornell Int L J 63

Gilbert Rist, *The history of development: from Western origins to global faith,* (London: Zed Books, 2008).

David Roodman, *Straightening the Measuring Stick: A 14-Point Plan for Reforming the Definition of Official Development Assistance (ODA*), Centre for Global Development Policy Paper 044 June 2014.

Davide Rodogno, "Humanitarian Intervention in the Nineteenth Century," in Alex J. Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect*, (Oxford Handbooks Online, 2016), 25.

Nickolas Rose and Peter Miller, “Political Power beyond the State: Problematics of Government,” (1992) 43 British J of Soc 173.

Arne Ruckert, ‘Making Neo-Gramscian Sense of the Development Assistance Committee: Towards an Inclusive Neoliberal World Development Order,‘ in Rianne Mahon & Stephen McBride, *The OECD in Transnational Governance* (Vancouver: UBC Press, 2008), 96.

Edward Rupert, “Producing Hegemony: State/Society Relations and the Politics of Productivity in the United States,” (1990) 34 Int Studies Qly 427.

Cedric Ryngaert, “The concept of jurisdiction in international law,” Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law*, (Edward Elgar online, 2015), 50 at 55.

Cedric Ryngaert, *Jurisdiction in International Law,* (Oxford: Oxford University Press, 2015).

Rudolph C. Ryser, “International Trusteeships, the Unfinished Responsibility,” (2013) 12 Fourth W J 99.

Edward Said, *Orientalism* (New York: Vintage Books, 1978).

Louis Salaun, *Colonies Francaises*, (Institut Français de l’Éducation: undated) available at http://www.inrp.fr/edition-electronique/lodel/dictionnaire-ferdinand-buisson/document.php?id=2374.

James Salzman, “Decentralised administrative law in the Organisation for Economic Co-operation and Development,” (2005) 68 Law & Cont Problems 189.

Rumu Sarkar, *International Development Law: Rule of Law, Human Rights and Global Finance* (Oxford Scholarship online, 2009).

Gregory Schaffer, “Theorising Transnational Legal Ordering,” (2016) 12 Annu Rev L & Soc Sci 231.

Matthias Schmelzer, *The Hegemony of Growth*, (Cambridge University Press online, 2016).

Matthias Schmelzer, “A Club of the Rich to Help the Poor? The OECD, “Development”, and the Hegemony of Donor Countries,” in Sönke Kunkel; Corinna R. Unger; Marc Frey, international Organizations and Development, 1945-100-, (Palgrave Macmillan, 2015), 171.

Matthias Schmelzer, “The crisis before the crisis: the ‘problems of modern society’ and the OECD, 1968-74,” (2012) 19 European Rev Hist 999.

Carl Schmitt, *Political Theology Four Chapters on the Concept of Sovereignty Translated and with an Introduction by George Schwab With a new Foreword by Tracy B. Strong* (Chicago: University of Chicago Press, 2005).

Bas Schotel, “Multiple legalities and international criminal tribunals: juridical versus political legality,” in Nicholas M. Rajkovic, Tanja E. Aalberts and Thomas Gammeltoft-Hansen, The Power of Legality: Practices of International Law and Their Politics (Cambridge: Cambridge University Press, 2016).

Bas Schotel, “Legislation, Empirical Research and Juridical Law,” (2013) 1 Theory & Practice Leg 501

Frans J Schuurman, “Critical Development Theory: moving out of the twilight zone.” (2009) 30 TWQ 831.

Salman Shaheen, 'Saint-Amans defends OECD's CRS despite loopholes identified by TJN,' (2014) 25 Int'l Tax Rev 16.

Scott J Shapiro, *Legality,* (Cambridge MA: Belknap Press of Harvard University Press, 2011).

Malcolm Shaw, "The League of Nations Mandate System and the Palestine Mandate: What does it say about international law and what does it say about Palestine?" (2016) 49 Israel L Rev Review 287.

Jan Selby, "Engaging Foucault: Discourse, Liberal Governance and the Limits of Foucauldian IR," (2007) 21 Int Rel 326.

William H Sewell, JR, "The temporalities of capitalism," (2008) 6 Soc-Ec Rev 517.

Rick Shreurs, 'A Marshall Plan for Africa? The Overseas Territories Committee and the Origins of European Co-operation in Africa,' in Richard T. Griffiths (ed), *Explorations in OEEC History,* (Paris: OECD, 1997) 87.

Anne Marie Slaughter, *A New World Order*, (Princeton, NJ: Princeton University Press, 2004).

Phoebe Smith, "Mount Taranaki: will the New Zealand peak's 'living person' status bring respect?" The Guardian 5th June, 2018.

Fredrik Söderbaum, "Swedish Development Cooperation and Ownership of African Regional Organizations," (2017) 44 Forum Dev Studies 357.

Morten Søndergaard, 'The Politics of Big Data Aesthetics,' (2015) 31 MedieKultur: J Media & Comm Res 1.

Seng Sothan, "Foreign aid and economic growth: evidence from Cambodia," (2017) 27 J Int T 7 Ed Dev 168 at 169-172.

Gayatri C Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present,* (Cambridge, MA: Harvard University Press 1999).

Maria Stern & Joakim Öjendal, "Mapping the Security-Development Nexus: Conflict, Complexity, Cacophony, Convergence?" (2010) 41 Security Dialogue 5.

Casey Stevens & Norichika Kanie, "The transformative potential of the Sustainable Development Goals (SDGs)," (2016) 16 Int Env Agreement: Pol L & Ec 393.

Englebert Stockhammer, *Financialisation and the Global Economy*, Political Economy Research Institute Working Paper No. 240, November 2010. University of Massachusetts, Amherst).

Ellery C. Stowell, *Intervention in International Law,* (Washington DC: John Byrne & Co, 1920).

James D. Le Sueur, *The Decolonization Reader* (New York and London: Routledge, 2003).

Dan Jerker B Svantesson, "The Hypocritical Hype about 'Hypothesis' – Why legal research needs to shed this relic," (2014) 39 Alt L J 259.

Natascha van der Swan, "Making sense of financialisation," (2014) 12 Soc Ec Rev 99.

Celine Tan, *Governance Through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States,* (Hoboken Taylor & Francis online and New York: Routledge, 2011).

Chantal Thomas, "Law and Neoclassical Economic Development in Theory and in Practice: Toward an Institutionalist Critique of Institutionalism," (2010-2011) 96 Cornell L Rev 967.

Christopher A. Thomas, "The Uses and Abuses of Legitimacy in international Law," (2014) 34 Oxford J L St 729.

Martin Thomas, *The French Empire Between the Wars: Imperialism Politics and Society* (Manchester: Manchester University Press, 2005.

Neils Thygesen, "Comparative aspects of peer review: OECD, IMF, and the European Union," in K. Tanaka (ed) *Shaping policy reform and peer review in Southeast Asia: Integrating economies amid diversity, (*Paris: OECD, 2008).

Brian Tomlinson (ed) *Aid and the Private Sector: Catalysing Poverty Reduction and Development?* Reality of Aid 2012 Report*,* (Quezon City, Mexico: IBON Books, 2012).

Michael Trebilcock, "Between universalism and relativism: reflections on the evolution of law and development studies," (2016) 66 UTLJ 330.

Michael J Trebilcock, & Mariana Mota Prado, *Advanced introduction to law and development* (Cheltenham, England: Edward Elgar, 2014).

David M. Trubek & Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006).

Former US Pres Harry Truman, Inaugural Address, January 20th, 1949 available at https://www.trumanlibrary.org/whistlestop/50yr_archive/inagural20jan1949.htm.

President Truman's address to Congress, Recommending Assistance to Greece and Turkey, March 12th 1947. Available at http://www.trumanlibrary.org/whistlestop/study_collections/doctrine/large/documents/index.php?pagenumber=1&documentdate=1947-03-12&documentid=5-9

Taina Tuori, *From League of Nations Mandate to Decolonisation: A History of the Language of Rights in International Law,"* unpublished doctoral dissertation, (Faculty of Law, University of Helsinki, 2016).

United Kingdon DFID, "Doing Business in Tanzania: Tanzania Trade and Export Guide," 26th February 2019 at https://www.gov.uk/government/publications/exporting-to-tanzania/exporting-to-tanzania.

United Kingdom DFID, "'Business Case Summary Sheet – Strengthening Public Financial Management in Tanzania (2018 – 2023)," Available at https://devtracker.dfid.gov.uk/projects/GB-GOV-1-300379/documents.

UK Statement of Policy on Colonial Development and Welfare, 1940. Available at http://www2.warwick.ac.uk/fac/arts/cas/undergraduate/modules/am217/syllabus/radicalism/policy_on_colonial_development__welfare.pdf.

United Kingdom HM Treasury & Department for International Development, *UK aid: tackling global challenges in the national interest,* November 2015. Available at https://www.gov.uk/government/publications/uk-aid-tackling-global-challenges-in-the-national-interest.

United Nations Conference on Trade and Development fourteenth session July 2016 (UNCTAD XIV) Outcome Documents - the Nairobi Azimio (TD/519/Add.1) and the Nairobi Maafikiano (TD/519/Add.2 and Corr.1).

United Nations Development Programme, *From Old Public Administration to the New Public Service – Implications for Public Sector Reform in Developing Countries,* (Global Centre for Public Service Excellence, Singapore: UNDP, 2015).

United Nations Economic Commission for Africa, Fiscal Policy for Financing Sustainable Development in Africa. Economic Report on Africa (2019) (Addis Ababa, Ethiopia: United Nations ECA, 2019).

United Nations General Assembly,"Situation of Human Rights Defenders." Report of the Special Rapporteur on the situation of human rights defenders, Michael Forst. 23 July 2018, A/73/215.

United Nations General Assembly, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), 17 August 2015, A/RES/69/313.

United Nations General Assembly (2014), Report of the Intergovernmental Committee of Experts on Sustainable Development Finance. Section E, pp35. Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/69/315&Lang=E

United Nations Human Rights Council, Canada – National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 3 April 2018, A/HRC/WG.6/30/CAN/1.

United Nations Human Rights Council, Ireland National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 9 February 2016, A/HRC/WG.6/25/IRL/1.

United Nations, Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2019, (*United Nations: New York, 2019).

United Republic of Tanzania Ministry for Finance and Planning, Public Financial Management Reform Programme (PFMRP) (2017/18 – 2021/22), September 2017. Available at http://www.mof.go.tz/index.php/public-financial-management-reform-programme-pfmrp

United Republic of Tanzania, *National Five-Year Development Plan 2016/2017 – 2020/2021: "Nurturing Industrialisation for Economic Transformation and Human Development,"* Ministry of Finance and Planning, June 2016.

United Republic of Tanzania, *The Tanzania Five Year Development Plan 2011/2012 – 2015/2016: "Unleashing Tanzania's Latent Growth Potentials*," President's Office, Planning Commission (Dar es Salaam: 2012).

United Republic of Tanzania, Joint Assistance Strategy for Tanzania (JAST), December 2006.

United States of America (US) Department of State, *Committee of European Economic Co-operation Vol. 1 Paris, September 21st 1947*. Available at http://marshallfoundation.org/library/wp-content/uploads/sites/16/2014/04/Committee_of_European_Economic_Co-operation_General_Report_1947.pdf.

US Committee on European Economic Co-operation, Vol 1 General Report September 21st 1947, Paris, US Department of State.

Report by the US President's Committee on Foreign Aid, European Recovery and American Aid, November 7th, I947, (Washington: U.S. Government Printing Office, 1947), (known as the Harriman Report).

US Memorandum on Foreign Policy, Memorandum No. 221 by the Chairman of the President's War Relief Control Board (Davies), Washington, July 3, 1945. Foreign Relations of the United States: Diplomatic Papers, The Conference of Berlin (The Potsdam Conference), 1945, Volume I. Available at https://history.state.gov/historicaldocuments/frus1945Berlinv01/d221

(Author unknown) "Windows of Freedom," (1918) 9 Round Table 1.

Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance,* (Abingdon & New York: Routledge, 2014).

Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory," (2008) 18 Soc & Leg St 139.

Joren Verschaeve & Jan Orbie, "Once a member, always a member? Assessing the importance of time in the relationship between the European Union and the Development Assistance Committee," (2016) 29 Cambridge Rev Int'l Aff 512.

Mark E Villiger, "The Rules on Interpretation; Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission," in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: OUP, 2011) 105.

Adelaide H. Villmoare & Peter G. Stillman, "The Neoliberal State's Janus Faces of Law," (2014) 65 St in Law, Pol & Soc 31.

Wanda Vrasti, 'Universal but not truly global: governmentality, economic liberalism, and the international,' (2013) 39 Rev Int Studies 49.

David Waldner, "What makes process tracing good? Causal mechanisms, causal inference, and the completeness standard in comparative politics,"' In Andrew Bennett & Jeffrey T. Checkel (eds), *Process Tracing - From Metaphor to Analytic Tool,* (Cambridge University Press, 2014)

Jason Weidner, "Governmentality, Capitalism and Subjectivity," (2009) 23 Global Soc 387.

Nicholas J. White, "Reconstructing Europe through Rejuvenating Empire: the British, French and Dutch Experiences Compared," (2011) 6 Past & Present 211.

Gary Wilder, *The French Imperial Nation-State,* (Chicago: University of Chicago Press, 2005).

John H. Williams, 'Europe After 1952 – The Long Term Recovery Problem," (1948-49) 27 For Aff 426.

Beth Williford, “Buen Vivir as Policy: Challenging Neoliberalism or Consolidating State Power in Ecuador,” (2018) 24 J World Sys Res 97.

David E Winickoff & Matthieu Mondou, “The problem of epistemic jurisdiction in global governance: The case of sustainability standards for biofuels,” (2017) 47 Soc St Sci 7.

Woodrow Wilson, President Woodrow Wilson's Fourteen Points, 8th January 1918, available at http://avalon.law.yale.edu/20th_century/wilson14.asp.

Nicola Woodroffe, Matt Genasci and Thomas Scurfield, “Tanzania’s New Natural Resources Legislation: What Will Change?” Natural Resource Governance Institute, August 2017.

Richard Woodward, ‘The OECD and Economic Governance” Invisibility and Impotence?’ in Kerstin Martens & Anja P. Jakobi (eds), Mechanisms of OECD Governance: International Incentives for National Policy-Making? (Oxford University Press, 2010), 54.

Richard Woodward, *The Organisation for Economic Co-operation and Development* (Oxon: Routledge, 2009).

Leonard S. Woolf, “*Empire and Commerce in Africa*” in Allan Bullock & F. W. Deakin, *The British Political Tradition Book Six The Concept of Empire Burke to Attlee 1774 – 1947.* Edited by George Bennett. (London: Adam & Charles Black, 1962), 384-385.

World Bank, World Bank Group’s ‘Country Partnership Framework for the United Republic of Tanzania for the period FY18-FY22,’ February 14th 2018, Report No. 121790-TZ. Available at http://documents.worldbank.org/curated/en/669801521338458808/Tanzania-Country-partnership-framework-for-the-period-FY18-FY22.

World Bank, World Bank Group Directive Country Engagement, July 1, 2014 Catalogue Number OPCS 5.01-Dir.01.

World Bank, Interim Guidelines for Systematic Country Diagnostic (SCD) updated February 21, 2014.

World Bank, Review of World Bank Conditionality, World Bank Operations Policy and Country Services, September 9th 2005.

World Bank, *World Development Report 2017 Governance and the Law*, available at http://www.worldbank.org/en/publication/wdr2017.

World Bank, *World Development Report 2002: Building Institutions for Markets,* available at https://openknowledge.worldbank.org/handle/10986/5984.

Development Committee of the World Bank. Note from the President of the World Bank (Prague, DC2000-21, September 18, 2000).

James Wolfensohn, A Proposal for Comprehensive development Framework, January 21, 1999 available at http://web.worldbank.org/archive/website01013/WEB/0__CO-87.HTM.

Leonard S. Woolf, *Empire and Commerce in Africa* in Allan Bullock & F. W. Deakin, *The British Political Tradition Book Six The Concept of Empire Burke to Attlee 1774 – 1947. Edited by George Bennett.* (London: Adam & Charles Black, 1962), 384.

Matthew Wright, *The Pearson Commission, Aid Diplomacy and the Rise of the World Bank, 1966-1970*, (unpublished PhD thesis, 2017) Durham theses, Durham University. Available at Durham E-Theses Online: http://etheses.dur.ac.uk/11986/.

Quincy Wright, *Mandates Under the League of Nations*, (Chicago: University of Chicago Press, 1930 online).

Murat Yülek, 'Revisiting National Economic Planning and Industrial Policy: Concepts, Experiences and the Ecosystem,' in M. Yülek (ed.) *Economic Planning and Industrial Policy in the Globalizing Economy*, (Geneva Switzerland: Springer International Publishing, 2015), 3.

Stephen Young, "Judith Butler: Performativity," Website Critical Legal Thinking, 14th November 2016, available at http://criticallegalthinking.com/2016/11/14/judith-butlers-performativity/.

Edward N. Zalta (ed), "Colonialism" in *The Stanford Encyclopedia of Philosophy*, (2012) at https://plato.stanford.edu/entries/colonialism/.

Laura Zanotti, "Governmentality, Ontology, Methodology: Re-thinking Political Agency in the Global World," (2013) 38 Alternatives 288.

Aram Ziai, "Post-development 25 years after The Development Dictionary," (2017) 38 Third W Q 2547.

Felix Zimmermann & Kimberly Smith, "More Actors, More Money, More Ideas for International Development Co-operation," (2011) 23 J Int Dev 722.

Alfred Zimmern, *The League of Nations and the Rule of Law 1918 – 1985,* (London: Macmillan And Co., Limited, 1936).

Gabriel Zucman (trans. Teresa Lavender Fagan), *The Hidden Wealth of Nations* (Chicago: Chicago University Press, 2015).