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Draft Paper –

The World Bank’s Engagement with Fragile States
– Law in the Service of Development?

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I. Introduction

If “The End of ODA” is near, than it is not with regards to fragile states.¹ While the relative importance of traditional Official Development Assistance (ODA) as a means for addressing the amplifying global policy challenges of our times is rapidly declining, for fragile states, ODA transfers remain the single largest incoming

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¹ Jean-Michel Severino and Olivier Ray, “The End of ODA: Death and Rebirth of a Global Public Policy,” ed. Center for Global Development (Washington, D.C.: Center for Global Development 2009). Severino and Ray argue that ODA is becoming irrelevant with regards to the rapidly growing number and diversity of actors and instruments used to attain the amplifying global policy challenges. In a similar vein, Kevin Davis argues for approaching the field of development finance holistically, looking beyond the traditional conception of ODA and the terms that govern its provision. Kevin Davis, ”‘Financing Development’ as a Field of Practice, Study and Innovation," Acta Juridica (2009). In contrast, Philipp Dann defines the law of development cooperation as the law governing the transfer of ODA, a definition and research focus that is also adopted for the purposes of the present paper. See Philipp Dann, The Law of Development Cooperation (Cambridge: CUP, forthcoming 2013).
resource flow.\textsuperscript{2} Fragile states are typically characterized by weak institutional capacity and poor governance, and often trapped in extreme poverty and endemic conflict.\textsuperscript{3} It is estimated that more poor people are living in fragile states than in non-fragile states already today, and according to a projection of Kharas and Rogerson, poverty will continue to concentrate in low-income fragile states by 2025.\textsuperscript{4}

Aiding fragile states is not only particularly urgent, however, but also particularly difficult – in the words of former World Bank President Robert Zoellick, they constitute “the toughest development challenge of our era”.\textsuperscript{5} The combination of weak capacity and governance, insecurity and political instability render fragile and conflict-affected states an extremely challenging environment for development cooperation, one where traditional business models and state-centered development paradigms often remain ineffective. Fragile states bring to light a fantastic disconnect between the underlying assumptions of established concepts such as good governance and ownership, and the empirical circumstance in these countries.

The according lack of progress in states where development appears most needed has sparked a surge of research and innovations regarding the strategies and instruments, and ultimately the governance of traditional ODA in fragile states. Starting with the adoption of the OECD principles for engagement with fragile states in 2007, virtually all bilateral and multilateral donor agencies have reconsidered some of their basic assumptions and approaches in these environments, and remodeled their policies and instruments in response.\textsuperscript{6} In other words, we are witnessing a surge of innovations in the governance of “old school” ODA in light of the “new kid on the block”, fragile states.

The World Bank, traditionally a very risk-averse and demanding donor agency, has been at the forefront of these innovations. Reacting to its poor track record in conflict-affected and fragile states, the Bank is not only developing new approaches and

\textsuperscript{2} OECD DAC, "Fragile States 2013. Resource Flows and Trends in a Shifting World," (Paris: OECD, 2013). Figure 2.1 While fragile states are increasingly able to collect taxes and thus to raise domestic resources for development, apart from ODA, other external flows e.g. from remittances, FDI and trade remain comparatively low and highly concentrated on a few countries.

\textsuperscript{3} The OECD defines fragile states as follows “A fragile region or state has weak capacity to carry out basic governance functions, and lacks the ability to develop mutually constructive relations with society. Fragile states are also more vulnerable to internal or external shocks such as economic crises or natural disasters.” OECD, Development: Aid to developing countries falls because of global recession” (2012). For an overview of different definitions, see ###


instruments. Committed to “put law in the service of development” as it is, the organization is also adapting the rules and procedures that govern the allocation and implementation of ODA vis-à-vis fragile states. These legal innovations are having considerable material implications for highly aid-dependent countries, where Bank engagement can sustain and legitimize a government, with often catalytic effects for the wider donor community. Moreover, they can have significant normative implications, in that they concern how the Bank engages with the governments of fragile states, and what rights and obligations they are accorded in the process of development cooperation.

How does the World Bank “innovate” itself to facilitate engagement with fragile states, and what are the implications of such innovations for the governance of ODA in fragile states? Why does the Bank innovate, and whose interests does it serve? And finally, what role can law play not just as an instrument of innovation, but also possibly as a normative yardstick for assessing its processes and consequences?

This paper argues that innovations in the governance of traditional ODA are often necessary to adapt state-centered development paradigms, risk-averse business models, and overly rigid rules and regulations to the unstable, weak-capacity environments of fragile states. To implement or consolidate such innovations in law comes with the promise of transparency, consistency, and predictability. Yet considering the ambivalent nature of the notion of fragile states, which is as much a social construction of Western security interest as an overly generalizing catchphrase for the severe development challenges of extremely heterogeneous states, attention turns to the pathologies and pitfalls of such innovations, and their consolidation in law. “Innovations” appear as selectively applied measures to facilitate and legitimize involvement in fragile states where the World Bank’s most influential shareholders support it. The role of law in separating the wheat from the chaff may be limited, but not entirely negligible: law can provide a normative yardstick for the processes and procedures through which innovation occurs, and for judging the equity of its consequences.

To illustrate this argument, this paper will proceed by analyzing two examples of legal innovations in the World Bank’s engagement with fragile states (II.1), drawing attention to their wider implications for the governance of ODA vis-à-vis fragile states (II.2). Revisiting the causes of such innovations in light of the ambivalent “fragile states” notion and agenda, the paper suggests a more cautious and critical reading of how the World Bank is putting law in the service of development (III.1). On this basis, it is argued that the role of law regarding such legal innovations consists primarily in enhancing transparency and ensuring non-discrimination in the relevant decision-making processes (III.2).

II. The World Bank’s Engagement with Fragile States

1. An Innovative Response

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The World Bank is the world’s largest and most influential development organization, both in terms of financial capacities and knowledge. Within the World Bank Group, the International Development Association (IDA) was given the mandate to assist developing countries that are not necessarily credit-worthy by providing them with financing on highly concessional terms. The IDA is thus the World Bank’s main source of financing for fragile and conflict-affected countries, and in 2010, constituted the third largest provider of ODA to fragile states.

Since fragile states are understood to pose a development challenge not only of a different degree, but of a different kind, the organization has committed to a major reform effort to adapt its operational and legal framework – “initially developed for more stable and higher-capacity countries” – to fragile states environments. More precisely, the Bank has sought to enhance, simplify, and adjust the rules and procedures that govern how resources are allocated and projects planned and implemented in fragile and conflict-affected states.

Whereas the subsequent surge of innovations has permeated virtually all areas of the Bank’s work – from human resources to inter-agency relations – and affected the strategies, approaches, and instruments of aid delivery, the focus of the present paper is on legal innovations, i.e. reforms that concern the Bank’s mandate or internal law. It is thereby important to note that innovations do not necessarily address fragile states explicitly. The Bank has a very formalized process of classifying fragile states based on its Country Policy and Institutional Assessment (CPIA), but this indicator-

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9 # IDA Articles, … “to promote economic development, increase productivity and thus raise standards of living”. In the following, reference to the World Bank or Bank will indeed refer to the IDA.

10 Of the 81 countries and territories eligible for IDA assistance in 2012, 33 are considered fragile. Lending eligibility, and terms of repayment are laid out in Annex D of OP 3.10, last updated in July 2011###.

11 OECD, Figure 2.2., whereby the IDA provided USD 4.441 Million to fragile states in 2010, only slightly less than the EU institutions with USD 4.988 Million, but far less than the USA, which comes first in the ranking of Net ODA Receipts by Donor with USD 12.854 Million. Although the focus on fragile states has made its way into other institutions that are members of the World Bank Group, like IFC, the IDA...


13 Meanwhile, other innovations to the strategies and instruments used vis-à-vis fragile states may appear less formalized, but can still have considerable material effects. For instance… #

14 The Country Policy and Institutional Assessment (CPIA) is an indicator-based diagnostic tool used to assess a country’s policies and institutional arrangements. The World Bank officially defines fragility or “fragile situations” as having either a composite World Bank, African Development Bank (AfDB) and Asian Development Bank (ADB) CPIA rating of 3.2 (out of 6) or less, or the presence of a United Nations and/or regional peace-keeping or peace-building mission during the past three years, not including border monitoring missions. ### In 2007, the World Bank, the AfDB and the ADB agreed to use a “harmonized average” of their individual CPIA processes and rankings, which usually generate only slightly different scores. Report of the MDB Working Group: Toward a More Harmonized Approach to MDB Engagement in Fragile Situations (2007), para. 8. At the same meeting, the MDBs agreed to adopt “fragile situations” as the most appropriate term. For a legal reconstruction of the Bank’s CPIA, see Riegner #
based classification serves predominantly heuristic purposes. It does not act as a regime-specific legal definition of fragile states, or as a trigger for different rules or procedures concerning the governance of ODA at the Bank. Rather, legal innovations emerge in response to different situations often associated with state fragility, and the resulting picture is not always coherent, in particular since the process of operationalizing and formalizing the Bank’s response to fragile states is still ongoing.

Broadly speaking, some patterns are nonetheless beginning to show, which suggest a modification of the terms on which ODA is provided to fragile states along two lines. On the one hand, national ownership of recipient governments is qualified on the basis of the government’s effectiveness, and at times trumped by concerns of the international (or for that matter, donor) community. On the other hand, there is an effort to better take into account present limitations on a state’s capacity to fulfill certain obligations and respond, for instance, through differential treatment. These patterns shall be retraced with regards to two examples of how the Bank innovates to deal with fragile states, and to accommodate state fragility.

a. Operational Policy on Development Cooperation an Conflict – Or: The Primacy of Community Interests

The World Bank has a legal framework premised on the primacy of the sovereign state. Only states can become members and thus access the Bank’s resources, and the World Bank is required to engage with member states only through their governments. Any engagement with entities or stakeholders outside of the government is usually subject to the government’s consent. Consent of the government is the basic requirement for any Bank engagement in its territory. Moreover, in dealing with government counterparts, the World Bank is explicitly prohibited to “interfere in the political affairs of any member”, or to “be influenced in [its] decisions by the political character of the member”. The political prohibition clause in its mandate sets clear limits on the extent to which the Bank can consider,

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15 IBRD Articles, Art. II Sect. 1 (Membership) in combination with Art. III Sect. 1 (a) “The resources and the facilities of the Bank shall be used exclusively for the benefit of members”. See also IDA Articles, Art. II Sect. 1 and Art. V Sect. 1 (a) “The Association shall provide financing to further development in the less-developed areas of the world included within the Association's membership.”

16 For this purpose, member states are requested to designate the governmental agencies for the Bank to deal with. For the IBRD, the responsible governmental agency is usually the “Treasury, central bank, a stabilization fund or other similar fiscal agency.” IBRD Articles, Art. III Sect. 2. In case of the IDA, the Articles only foresee the designation of an “appropriate authority” as “channel of communication” for the Association. IDA Articles, Art. VI Sect. 10. The explicit requirement of the Bank to deal with a country’s executive branch is also owed to the fact only an agreement between the Bank and a member government qualifies as treaty under international law, and would therefore be subject to executive and legislative control within the country and more easily be insulated from domestic law. Ibrahim F. I. Shihata, The World Bank Legal Papers (The Hague: Kluwer Law Internat., 2000). Chapter 16: The Requirement of a Governmental Guarantee of Bank Loans to Entities other than a Member Country, p. 126-127.

17 IDA Articles #

18 IBRD Articles Art. IV Sect. 10 and IDA Articles Art. V Sect. 6. However, the Bank has long recognized that political circumstances within a member country, perhaps rather than its “political character" per se, can become relevant for their direct economic effect. For a detailed legal analysis of the political prohibition clause, see Stefanie Killinger, The World Bank's Non-Political Mandate (Köln ; Berlin ; München: Heymanns, 2003).
for instance, the regime type or quality of a government, unless directly linked to necessary analysis of economy or efficiency in the context of the Bank’s activities.

Apart from these basic rules of the Bank’s mandate, a dense set of internal rules further determine the roles and responsibilities of the recipient state in initiating, planning, implementing, and monitoring Bank-financed development projects and programs. Though the participation of stakeholders outside of the government, civil society organizations, and individuals affected by Bank-financed projects in the project cycle has expanded over the last two decades, governments remain by far the most important counterparts for the World Bank.

At the World Bank, the formal primacy of the sovereign state thus translates into the way that development assistance is planned, agreed, and implemented. The Bank’s legal framework thereby does not only seek to protect the formal sovereignty of its member states, it is equally premised on the existence of effective government in recipient states. More particularly, it is based on the assumption that governments are in principle capable of serving as a counterpart for the Bank, and of fulfilling their rights and obligations in the development process. This implies not just that they have the legal personality and capacity to act required to express consent and to legally commit the country. It implies also that they have the minimum capacities required to take the lead in planning and implementing development projects and policy reforms, in line with environmental and social standards, and on the basis of a comprehensive, broadly-owned national development strategy, or that they maintain the institutions required to ensure the transparent and accountable use of public resources. Arguably, in the Bank’s legal framework, the basic normative assumption of “effective government” has become increasingly charged with an array of requirements that determine the effectiveness and quality of a government for the purposes of development. The Bank increasingly requires “good” government, for instance in terms of sound public resource management and institutions abiding to the rule of law, not just “effective government”.

Yet since the end of the Cold War, the World Bank has been increasingly faced with situations that posed a challenge to its formalistic, state-centered premises and approach – even before the label “fragile states” became en vogue. The growing number of protracted crises and outright civil wars that concerned the international community in the 1990s often entailed the breakdown of government authority. From the West Bank and Gaza to Bosnia, from Somalia to Afghanistan, it emerged that the temporary or persisting lack of an effective government counterpart in post-conflict situations or situations of state collapse can complicate Bank engagement at times when it appeared most needed. Government breakdowns were not always as complete and permanent as in Somalia, the paradigmatic case of “state failure”. More frequently, the Bank had to deal with the temporary absence of government after

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20 This is reflected in the still more far-reaching and formalized rights to participation of recipient governments in the development process as compared to other stakeholders, which have no automatic right to be heard or otherwise participate in the process of development cooperation. #
conflict, sometimes replaced by UN-mandated international transitional administrations.\textsuperscript{21} Even where a government was still in place or had newly emerged that could be identified as the de jure authority of the country, it was often characterized by extremely weak institutional and administrative capacities, and struggling to maintain effective control over all parts of the territory.

Seeking a way of working around the obvious constraints posed by its mandate in such situations, the Bank has responded with an innovation to its legal framework, namely the adoption of the Operational Policy on Development Cooperation and Conflict (OP 2.30) and the corresponding Bank Procedures (BP 2.30).\textsuperscript{22} OP/BP 2.30 set out the basic principles and procedures for Bank engagement in the context of conflict, and introduces specific instruments and considerations for planning and programming in countries affected by or in transition from conflict. Operational Policies are internal laws adopted by the Bank’s Management that are binding on its staff, and that typically “establish the parameters for the conduct of operations”.\textsuperscript{23} They are crafted in a structured process wherein the Executive Directors determine the broad outlines and the organization is responsible for the details. Bank Procedures (BPs) contain the according procedural requirements and are equally binding on staff members.\textsuperscript{24}

Two provisions in OP 2.30 deserve special attention as they redefine on what grounds the Bank deals with fragile states. The first legal innovation in this regard concerns situations where there is no government in power. Although OP 2.30 reaffirms that “the Bank does not operate in the territory of a member without the approval of that member”, and that operations are initiated upon “request of the government in power”,\textsuperscript{25} it introduces a noteworthy exception to this fundamental rule of the Bank’s mandate. Namely, if there is no government in power, “Bank assistance may be initiated by requests from the international community, as properly represented (e.g., by UN agencies), and subject in each case to the prior approval of the Executive Directors.”\textsuperscript{26} Such a request could substitute for government consent and hence furnish the necessary legal basis for Bank assistance, though only in the form of non-

\textsuperscript{21} For instance, Timor L’Este had no sovereign government while it was under UN administration from 1999-2002; Afghanistan had no internationally recognized government in 2001 prior to the establishment of the Afghan Interim Authority; Iraq was lacking a government prior to the establishment of the Iraqi Interim Council, or arguably of the Iraqi Interim Government in June 2004.

\textsuperscript{22} Operational Policy on Development Cooperation and Conflict (OP 2.30), January 2001.


\textsuperscript{24} BPs “explain how Bank staff carries out the policies set out in the OPs”, in that “[t]hey spell out the procedures and documentation required to ensure Bank-wide consistency and quality.” Ibid.

\textsuperscript{25} The two cases of West Bank and Gaza in 1994, and Bosnia in 1995, constitute the decisive precedents on the basis of which the Bank subsequently developed a standard approach to situations when the organization, its membership, or its most powerful stakeholders had an interest in lending to non-member countries.

\textsuperscript{26} OP 2.30, para. 3 lit. (b).
refundable grants or non-financial engagement.\footnote{27 OP 2.30 \# Considerations as to a country’s creditworthiness and willingness to reimburse the Bank that are regularly central to the creditor organization are therefore not relevant. Meanwhile, the requirement to pay “due attention to considerations of economy and efficiency” still applies. IDA Articles, Art. V Sect. 1 lit (g).} Second, OP 2.30 establishes that Bank engagement outside the territory of member states is admissible – despite the contrary provision in its Articles of Agreement\footnote{28 IDA Articles, Art. 1 (Purposes), stating that “the Association “shall provide financing to further development in the less-developed areas of the world included within the Association’s membership” and also Art. V Sect. 1 lit. a). The IBRD’s Articles further state that its resources are to be used “exclusively for the benefit of members.” IBRD Articles, Art. III Sect. 1 lit. a).} – if it was found to be “beneficial to the Bank and its members”.\footnote{29 OP 2.30, para. 3 lit. c).} The provision has so far always been applied in countries or territories regarded by the Bank as fragile, e.g. the West Bank and Gaza (in light of its unresolved legal status), in Bosnia, Kosovo, East Timor and South Sudan (prior to becoming member states).\footnote{30 \# Access to Information Policy \# see below}

Notably, neither OP 2.30 nor the respective BP 2.30 make any further specifications as to what constitutes a “request”, or who is authorized to represent the “international community” apart from “UN agencies”, the example given in the Policy. It is certainly not restricted to a binding Resolution of the UN Security Council. Similarly, OP 2.30 does not establish what factors are taken into consideration when deciding whether engagement in non-member states is considered “beneficial” to the Bank and its members. There are also no procedural requirements concerning these provisions in OP 2.30 or BP 2.30, for instance regarding participation in the decision-making process.

The only requirement in both cases is a prior approval of the Executive Directors.\footnote{31 It is notable that an earlier formulation of the Bank’s evolving practice in its 1998 Report on Post-Conflict Reconstruction had foreseen that the Board of Governors needed to approve Bank operations in such cases, not the Executive Board. Unlike the Executive Board, the Board of Governors assembles representatives from all member states, with the same weight given to each vote. See The World Bank, “Post-Conflict Reconstruction. The Role of the World Bank..,” (Washington, D.C.1998).p. 30, requiring “prior approval of the Board, where all Bank members are represented.”} The Executive Board, a body of selected member state representatives dominated by the five largest donors since voting occurs on the basis of a system of weighted voting.\footnote{32 IDA Articles of Agreement \#} They enjoy relatively large discretion in deciding about the applicability and application of these provisions, due to the absence of objective decision-making criteria or procedural requirements, as well as the fact that their deliberations in this regard would likely remain secret.\footnote{33 Access to Information Policy \# see below}

The fact that approval of the Executive Directors is required in each case reflects that as a legal basis for engagement in countries with no government in power or non-member states, the Bank does not consider the respective provisions in its internal law, OP 2.30, but an interpretation of the Bank’s founding treaties. Every Operational Policy must be in accordance with the primary law of the organization, but the Executive Directors are competent to render authoritative interpretations of the
Bank’s founding treaties.\textsuperscript{34} Whereas such an interpretation has occurred with regards to the provision that engagement must be “beneficial to the Bank and its members”,\textsuperscript{35} substituting the consent requirement with a request from the international community finds no basis in the Articles of Agreement, and no interpretation has been submitted to that effect.

In any case, such an interpretation would have raised questions as regards the limits of interpretation as a means for legal innovations to the founding treaties of an international organization. Rutsel Martha, General Counsel of IFAD, has argued “that interpretation should not be used in a manner that would undermine the amendment provisions in the constituent instrument.”\textsuperscript{36} An amendment of the Articles of Agreement would have required a qualified majority in the Board of Governors, the collective organ of the Bank representing all member states.\textsuperscript{37} This is a higher threshold than an approval of the Board of Executive Directors, which represents only 25 member states and continues to be dominated by the Bank’s major shareholders.

In sum, the significance of these innovations should not be underestimated. The adoption of OP/BP 2.30 amounts to a \textit{de facto}, informal amendment and expansion of the Bank’s mandate, in that it modifies the legal basis for engagement. The replacement of the sovereign right to consent with a request from the international community clearly infringes upon the state’s sovereign right as stipulated in the Articles of Agreement.\textsuperscript{38} Meanwhile, engagement outside the territories of member states could raise difficult legal issues since the respective states or entities have not signed the Articles of Agreement.

Meanwhile, from a less legalistic standpoint, should the Bank be prevented from offering its resources and services because a formal legal basis cannot be construed under exceptional circumstances? Should the temporary absence of a government capable of expressing consent prevent the Bank from delivering urgent assistance to the people in a country? The Bank responds to a situation where basic assumptions of its legal mandate do not correspond to realities on the ground. It is remarkable that the organization has decided not to respond to such situations \textit{ad hoc} and on the basis of an exceptional authorization by the Executive Board, but formalized its response in the form of an internal law.

On a more abstract note, it seems that in both cases, the Bank’s legal reasoning is guided by a notion of community interest, which trumps other conditions that the Articles of Agreement require for Bank engagement. Arguably, the Bank’s legal innovations thereby reflect the fact that assisting fragile states is increasingly seen as a global public good.\textsuperscript{39} For this purpose, the World Bank is putting law in the service of

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\textsuperscript{34} IDA Articles Art. X lit. a). In practice, the World Bank’s Legal Department has rendered an interpretation of the Bank’s Articles of Agreement to justify engagement, and these interpretations were then authorized through a Resolution of the Executive Board.


\textsuperscript{37} IDA Articles, Art. IX lit. a.

\textsuperscript{38} IDA Articles, Art. # and supra #

\textsuperscript{39} E.g. Kharas and Rogerson, "Horizon 2025. Creative Destruction in the Aid Industry." #
development. Such a reasoning is very well encapsulated in a quote by Hassane Cissé, the Bank’s Deputy General Counsel, concerning the Bank’s OP 7.30 on dealing with de facto governments: “the Bank has developed an approach that allows it to take into account a number of factors that might seem to go beyond its obligation to evaluate only economic considerations but are consistent with the Bank’s will to act as a good and responsible international citizen.”40

b. Emergency Policy and Procedures – Or: Flexibilizing Standards in Weak Capacity-Environments

The second innovation that shall be discussed here concerns not how the Bank circumvents the legal requirement to engage only with the governments of member states, but how it seeks to accommodate state fragility – understood in terms of extremely weak state capacities – in its internal law.

In principle, the World Bank must ensure that its resources are used to effectively further sustainable development.41 Therefore, in order to qualify for assistance, developing countries must usually meet a large number of fiduciary, accountability (i.e. reporting, monitoring and evaluation), and also environmental and social standards.42 A complex and dense regime of procedural and substantive requirements for implementation results from the Articles of Agreement, the financing agreement concluded between the Bank and a recipient state, the Bank’s secondary law, as well as Bank-internal law.43 The regime is structured by the dual objective of ensuring the purposeful, effective and efficient use of its resources, while “assisting member countries to achieve their development objectives on a sustainable basis”.44

41 The Articles of Agreement not only require the IDA to ensure that projects contribute to the purpose of development, but also that they are economically justified. The provision that requires the organization to make “arrangements to ensure that the proceeds of any financing are used only for the purposes for which the financing was provided” constitutes the backbone of its approach to ex ante and ex post conditionalities. See IDA Articles Art. I and Art. V Sect. 1 lit. a) and b). Article V Sect. 1 contains also negative conditions for financing, for instance that the Association is not influenced by “political or other non-economic” considerations (lit. g)).
42 The detailed environmental and social standards set forth in the safeguard policies that now expand the substantive conditions for Bank assistance were not required by the organization’s founding treaties. They were first elaborated by the Bank in the 1980s, in response to legitimate criticism that Bank-financed project were causing environmental harm and contributing to displacements or the violation of indigenous peoples’ rights. The safeguard policies are aimed at preventing and mitigating potential harm to collective goods and individual rights.
43 Although formally binding only on the Bank’s staff, as a substantial part of the procedural regime whereby projects are approved, Bank internal law such as the safeguard policies must in practice be respected by any recipient seeking financing from the Bank. Moreover, since safeguards are regularly incorporated in the financing agreements concluded between the Bank and recipient countries, they can create direct obligations under international law on recipients concerning the implementation of the approved projects. See also Laurent Boisson de Chazournes, “Policy Guidance and Compliance: The World Bank's Operational Standards,” in Commitment and Compliance, ed. Dinah Shelton (2000), pp. 289-90, and Dann, The Law of Development Cooperation. #
44 The dual objective explicitly instructs OP 13.05 on Project Supervision (para. 1).
For fragile states, the requirements imposed on recipients under the Bank’s project lending regime can be particularly intensive and cumbersome.\textsuperscript{45} Conducting the thorough assessments required ex ante to qualify for Bank assistance is likely to put a further strain on the state’s already scarce institutional capacities and resources. Physical insecurity and political instability that characterize the typically high-risk environment of fragile states make it difficult to plan and implement projects in accordance with the Bank’s standards of effectiveness and environmental and social sustainability. The accumulated requirements on recipients seeking Bank assistance (and on the Bank’s staff) can thus create stumbling blocks for effective aid to fragile states. They have often proven unrealistic, and procedures too cumbersome, in the weak capacity environments of fragile states. Consequently, development assistance ends up being delayed, suspended, or discontinued, resulting in the high level of aid volatility that is commonly identified as a major problem for fragile states.\textsuperscript{46}

At the same time, ex ante control measures may appear particularly warranted where national environmental or social standards are low or remain unenforced, be it due to a lack of capacity or insufficient commitment. Similarly, where public resource management is fraught with corruption and the risk that ODA resources are misappropriated is high, mechanisms to ensure the effective and accountable use of resources are expedient. Indeed, just as the safeguard policies were introduced in response to criticism that Bank-financed projects violated environmental and social standards, mechanisms for the supervision and evaluation of implementation were enhanced after the Bank was criticized for approving loans too easily, without paying sufficient attention to their timely and effective implementation according to relevant material requirements.\textsuperscript{47}

In order to facilitate engagement and avoid delay or suspensions of aid in fragile states where a swift and effective response was needed most, the World Bank regularly recours to its emergency policies and procedures, namely OP/BP 8.00 on Rapid Response to Crises and Emergencies.\textsuperscript{48} The policy was first adopted in 1985 for a project-based response to natural disasters, and has since been reformed several times to support the Bank’s evolving role and objectives in response to emergencies beyond natural disaster.\textsuperscript{49} With the Bank’s increasing engagement in post-conflict


\textsuperscript{46} OECD, Fragile States 2013, Figure #.

\textsuperscript{47} Ex ante assessments and ongoing supervision of Bank-financed projects were increased in response to the Wapenhans Report of 1992, which found that Bank staff often approved loans without paying proper attention to their supervision and timely implementation (‘approval culture’). Ibrahim F. I. Shihata, The World Bank in a Changing World, vol. 3 (The Hague/London/Boston: Nijhoff, 2000).pp. 106-108. See also Dann, The Law of Development Cooperation. #


\textsuperscript{49} On the changing circumstances and needs that required the Bank to reform its approach to emergencies, see The World Bank, Strengthening the World Bank’s Rapid Response and Long-term
situations, the policy has gradually become its preferred tool for avoiding the procedural and material requirements of normal lending operations. For some fragile states, the entire project portfolio consists of emergency operations.

OP 8.00 establishes two criteria of applicability. First, it requires a “request for urgent assistance” of the recipient, and second, it applies only to “an event that has caused, or is likely to imminently cause, a major adverse and/or social impact associated with natural or man-made crises or disasters.” The criteria are deliberately broad and include subjective elements (“likely to imminently cause”), to allow the Bank to apply the Policy beyond immediate natural disasters. World Bank staff regularly argue that conflict-affected or post-conflict countries suffer from severe social and economic distortions that need to be addressed under emergency operations. OP 2.30 on Development Cooperation and Conflict makes this link explicit by means of reference to OP 8.00.

Once triggered, OP 8.00 allows the Bank to engage more rapidly by reducing the ex-ante requirements for project approval, modifying fiduciary and safeguard requirements to facilitate implementation, and allowing for “accelerated, consolidated, and simplified procedures.” Enhancing “speed, flexibility, and simplicity” is the principal objective of the policy in situations of crises and emergency. BP 8.00 and internal Procedural Guidelines establish in relative detail modified processes and procedures for the entire project cycle from appraisal to approval and implementation. # Material standards are generally not lifted, but the Policy introduces simplified procedures for ensuring they are met. In return for

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Engagement in Fragile States, SecM2007-001 S (January 19, 2007) and The World Bank, Toward a New Framework for Rapid Bank Response to Crises and Emergencies. OPCS (March, 2007), accompanying the last change to the Bank’s emergency policy, from OP 8.50 on Emergency Recovery Assistance to OP 8.00.


51 # World Bank website… # Procedural Guidelines note 5 (ISN)

52 OP 8.00 para. 2. Under the previous OP 8.50, emergency operations were only allowed when a country was “struck by an emergency that seriously dislocates its economy and calls for a quick response from the government and the Bank.” (OP 8.50, para 1). Further, in contrast to OP 8.50, crisis, disaster or emergency are nowhere defined in the policy.

53 OP 2.30, therein note 1.

54 OP 8.00 para. 7 (“Risk and Design Considerations”). Some other OPs, in referring to the Emergency Policy OP 8.00, contain more detailed provisions on reduced requirements in such circumstances. For instance, OP 4.01 on Environmental Assessments states that “when compliance with any requirement of this policy would prevent the effective and timely achievement of the objectives of an emergency operation, the Bank may exempt the project from such a requirement.” (para.12).

55 Besides the modification of material and procedural requirements, the policy establishes important principles and objectives that must guide any operation under OP 8.00, outlining the permissible form and scope of engagement in response to crises and emergencies to ensure the Bank remains focused on its core development mandate and according competencies. See OP 8.00 para. 1 lit b).

56 For instance, BP 8.00 provides for streamlined appraisal of emergency operations by combining identification, preparation and appraisal of projects by Bank staff in one mission and eliminating the need for sequential clearance from various Bank departments responsible for fiduciary management and safeguards. (para. 4). Upon Board approval, legal agreements can be signed and become effective more quickly (para. 6). BP 8.00 further outlines the streamlined procedures for project implementation, in particular regarding financial management, procurement and disbursement (para. 7). Processing steps for emergency operations are also elaborated in the Procedural Guidelines.

57 Procedural Guidelines, para. 34 on safeguards.
reduced requirements for approval and implementation of emergency operations, staff are required to exercise more intense supervision,\textsuperscript{58} thus shifting the balance between (reduced) ex ante requirements and (enhanced) ex post control. Equally in response to the (temporary or intrinsic) capacity deficits in crisis-affected states, emergency operations should avoid as far as possible including conditions.\textsuperscript{59}

Not only are requirements reduced for Bank staff and recipients, but # internal guidelines also foresee that the World Bank provides more active support to government counterparts in fulfilling the various steps of the process.\textsuperscript{60} Moreover, OP 8.00 provides the basis for different implementation arrangements where the recipient’s capacity is insufficient to carry out the start-up activities to respond to crisis or emergency.\textsuperscript{61} This includes that the Bank can execute projects itself.\textsuperscript{62} To avoid diluting the role of the affected state in emergency projects through bypassing state institutions, such alternatives are to be limited in time and accompanied by capacity-building measures. They are only permitted at the request of the affected state.

This time, the Bank’s legal innovation does not consist in the adoption of a new internal law, which consolidates and codifies an operational practice that emerged in response to a number of precedents. Rather, it concerns the extended application and gradual adaptation of an internal law designed for different circumstances to the conditions of fragile states. OP 8.00 was crafted for single-event emergencies rather than protracted situations of crisis or state fragility. Against this background, the current approach faces a number of constraints. What does it imply to treat possibly permanent conditions – the intrinsically weak capacities of fragile states – like exceptional circumstances associated with emergencies? Practically, the repeated invocation of OP 8.00 over prolonged periods of time requires staff to justify the continued existence of an “emergency”, since a situation of fragility itself does not trigger the application. Moreover, the policy permits to temporarily shift requirements from ex ante to ex post, but not to adjust requirements to the fact that “business as usual” may not be returned to in the medium-term. In more abstract terms, the current approach embedded in OP 8.00 reflects an outdated understanding of state fragility as an exceptional deviation from a normal condition, which can be returned to once (short-term) crisis has ceased.

Since the World Bank has endorsed aiding fragile states as a key priority and prepared the grounds for a new surge of innovations to its operational and legal framework, it is probable that the current approach will be revisited. The World Development Report 2011, concerned with development in situations of conflict and fragility, has found that engagement in fragile states requires the adaptation of ex ante requirements for project approval in order to allow more effective and rapid assistance. It recommends that demanding procedures for project supervision and procurement be

\textsuperscript{58} OP 8.00 para. 1 lit d) and BP 8.00 para 7: “The risk associated with the need for greater speed in the processing and implementation of emergency operations are addressed through more intensive supervision on the part of task teams.”

\textsuperscript{59} OP 8.00 para. 6.

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\textsuperscript{61} OP 8.00, para. 9.

\textsuperscript{62} OP 8.00, para. 10.
“distilled to the simplest level of due process”, and that fiduciary safeguards should be revised to avoid that disbursements be automatically suspended or terminated in case of delays or failures. As part of an ongoing process of operationalizing these findings, a reform of OP 8.00 could include “fragility” as an additional trigger for the Policy’s application, and thus provide for mechanisms to deal with intrinsic capacity deficits of fragile states.

In sum, the World Bank responds to the legal and operational constraints faced in weak capacity-environments of fragile states by “flexibilizing”, that is by postponing or lifting some of the material and procedural requirements of its legal framework. The current approach embedded in OP 8.00, as well as further innovations envisaged by the latest research findings on fragility, feature two themes. On the one hand, it is the need to reduce or flexibilize requirements on recipient states with weak capacities. On the other hand, it is the need to consider alternatives, namely to fulfill some tasks on behalf of the recipient and to strengthen involvement of non-state actors in implementing projects.

2. Wider Implications

As the two previous examples serve to illustrate, the World Bank has formalized practices that remodel fundamental principles of Bank involvement when engaging in fragile states. Broadly speaking, fragile states are granted easier access to the Bank’s resources, but sometimes at the cost of a qualification of national ownership.

Access to the Bank’s resources is facilitated through a flexibilization of the legal grounds upon which the Bank can engage on the one hand, and by lifting or postponing certain procedural and material requirements that recipient governments are expected to fulfill in order to qualify for aid. From the perspective of the World Bank, these measures entail an expansion of the World Bank’s mandate and area of engagement, as the Bank bypasses legal constraints that have prevented it from engaging outside of the territories of its member states, in often highly politicized contexts of conflict, or alongside humanitarian actors in complex emergencies. For potential recipient countries, the result is a sort of differential treatment of fragile states to accommodate their weak capacities. The Bank’s innovations have thereby profound material implications, in that they remodel the terms and conditions governing access to the Bank’s resources, as well as their allocation. Moreover,

64 On the Operationalization of the WDR 2011, see Development Committee, Operationalizing the 2011 World Development Report: Conflict, Security, Development, DC2011-0003 (April 4, 2011), para. 42, recommending to “Undertake interim policy and procedure updates to widen the definition of Bank engagement in FCS and ensure that Bank reforms reflect the needs of countries facing fragility, conflict, and violence.” The recommendations explicitly propose to update OP 2.30 and OP 8.00 to reflect the lessons of the World Development Report.
66 Looking beyond the examples mentioned here, the Bank has also introduced a number of exceptions to IDA’s highly formalized system of performance-based allocations (PBA). By definition, fragile states would receive a comparatively smaller share of the IDA’s resources, since the idea of the PBA is that resources go to those countries where they are most likely to effectively reduce poverty based on...
whether and how the Bank engages with a country has often catalytic effects for the wider donor community.  

At the same time, national ownership is at times qualified, at least in the short term. The omission of state consent as a legal basis for engagement in OP 2.30 is certainly an exceptional case, and the Bank has only relied on it in extreme cases where the temporary absence of a government was not in doubt. Nonetheless, the idea that in fragile states, the principle of ownership regularly and perhaps necessarily turns into an objective to be reached, or a capacity-building tool, rather than a right or entitlement that stems from state sovereignty, can be retraced throughout the Bank’s engagement with fragile states. Moreover, operations under OP 8.00 usually foresee a greater role for the Bank or other actors in the implementation of assistance. This is in line with the understanding that in the absence of capable government counterparts, external actors need to assume a more proactive role and pursue a more “hands-on” approach. # In this regard, the Bank’s legal innovations have also wider normative implications, and could even be seen as vivid examples of a general trend in the international legal order. Sovereign statehood is thereby moving towards a conception where sovereign rights are made conditional on the fulfillment of certain responsibilities, and the international community is increasingly ready to substitute for these sovereign responsibilities where states are found unable or unwilling to assume them.

III. Law in the Service of Development? On the Limits of Innovation and the Role of Law

1. Revisiting the Causes of Innovation

Why does the World Bank innovate, and whose interests does it serve? Innovations are justified on the grounds that they respond to a new and different challenge, which

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an assessment of the country’s policy and institutional framework. In order to reduce the resulting gap in fragile states between high needs and a low level of resources allocated based on performance, the Bank has introduced a number of exceptions that benefit some, but not all fragile states. Exceptions currently apply for a number different situations that do not currently refer to fragility but are likely to occur in states that meet the Bank’s fragile state definition, such as post-conflict countries, countries “re-engaging” after a long period of no IDA operations, or countries in arrears to the Bank. See IDA16: Delivering Development Results, Annex 2, para. 8.

67 The Bank itself has acknowledged the catalytic effect of Bank involvement in mobilizing resources from other donors, for instance in Cambodia, Lebanon, Somalia, the West Bank and Gaza or Bosnia and Herzegovina. See The World Bank, "Post-Conflict Reconstruction."36.

68 # Principle of ownership has always involved some development euphemisms and been difficult to realize…

69 The relevant provision of OP 2.30 was relied on in Somalia, for instance, and briefly in post-war Iraq prior to the establishment of a national government or interim authority. #

70 # For instance, rather than understanding PRSP process whereby the Bank plans its interventions on the basis of a nationally-owned development strategy as a “default option” as in other IDA-eligible countries, its practice vis-à-vis fragile states reveals that the Bank claims a certain discretion in requesting governments to prepare a PRSP or not, depending on certain minimum requirements of government effectiveness.

71 See above #

72 # World Bank

73 #### R2P etc…. and very recently Ramos: Changing Norms through Actions: The Evolution of Sovereignty OUP 2013
consists in a combination of weak capacities and poor governance, of insecurity and political instability in fragile states. It can be doubted, however, that these are altogether new phenomena. While the end of the Cold War came with a surge in internal conflict and instability in many parts of the world, the “fragile state” is as much a construction of the Western political and academic discourse. Two, often intertwined, narratives accordingly explain and influence the fragile states discourse and agenda. One is concerned with the empirical phenomenon of states trapped in a cycle of chronic underdevelopment and endemic violence. The other is that of a subjective construction of deficient statehood as a threat to Western security interests, whereby a number of extremely heterogeneous states are grouped together and distinguished from an ideal notion of statehood.

These narratives also explain how fragile states became such a key priority at the World Bank, and inform how the organization innovates in response. For although IDA has always been mandated to assist the world’s poorest and most needy countries, the pronounced focus on fragile states as a discrete group of states with specific development problems emerged rather recently. It needs to be understood, first, in the context of the Bank’s evolving thinking on the role of the state in development, whereby the structure and performance of state institutions, their effectiveness and eventually their legitimacy gradually came into focus. Second, since the end of the Cold War, the World Bank was coming under pressure to demonstrate its continued relevance in light of shifting global policy challenges and priorities, and the international community’s growing concern with humanitarian emergencies, post-conflict settings, protracted crises, and ultimately fragile situations. Third, the terrorist attacks on the United States on September 11, 2001, proved particularly influential in lifting the topic on top of the World Bank’s agenda. Weak or illegitimate statehood was subsequently understood as a major threat to Western security interests. Prompted by the policy shifts of its most important shareholder, the USA, the World Bank quickly followed suit with the establishment of a task force to examine the

74 For a compelling argument of how even as a social construct, the classification of “fragile states” can impact on reality, see Nehal Bhuta, “Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order,” in Governance by Indicators. Global Power through Quantification and Rankings, ed. Kevin E. Davis, et al. (Oxford: Oxford University Press, 2012). and Edward Newman, “Failed States and International Order: Constructing a Post-Westphalian World,” Contemporary Security Policy 90, no. 3 (2009). who finds that “[f]ailed states clearly display a range of pathologies which have a significant negative impact upon the welfare of their citizens and upon international – possibly even global – peace and security”, but “the securitization of failed states in political and academic discourse […] also reflects a subjective (Western) construction of international security threats.” ibid., at 437.

75 Bhuta


77 See The National Security Strategy of the United States of America, September 2002, stating that “The events of September 11, 2001, taught us that weak states, like Afghanistan, can pose as great a danger to our national interests as strong states. “ Security Strategy of the United States of America. The events of September 11, 2001, taught us that weak states, like Afghanistan, can pose as great a danger to our national interests as strong states.”
particular problems of “Low-Income Countries under Stress” (LICUS).\textsuperscript{78} Just over ten years later, assisting fragile states has been formally endorsed as a key priority for the Bank.\textsuperscript{79}

Accordingly, and in line with its two underlying narratives, legal innovations in response to the challenge of fragile states invite two different readings. Innovations are welcome if we acknowledge that empirical circumstances in many fragile states do not correspond to the assumptions in terms of state capacity and “good governance”, in terms of time horizons and calculated risks, on which traditional business models and development paradigms rest. The comparatively poor track record of development cooperation in countries affected by conflict or fragility speaks for the need to reconsider unrealistic premises and to better adapt to capacity constraints. Factual evidence is plenty: for instance, none of the MDGs is likely to be reached in fragile states.\textsuperscript{80}

A more cautious perspective is warranted if we acknowledge that the notion of fragile states is as much a social construction, informed by the security concerns and according priorities of selected donor countries. Insofar as the uniform categorization as “fragile state” fails to capture the immense diversity of causes, symptoms, and consequences of instability and underdevelopment in these countries, it does not lend itself as a basis for policy-making or legal adaptation.\textsuperscript{81} Factual evidence comes from the high volatility of aid to fragile states, and the concentration of ODA flows in very few countries.\textsuperscript{82}

The two examples of World Bank innovations discussed previously serve to illustrate some of the potentials and perils of innovations along these lines. Perhaps an evolution rather than an innovation, the extension of OP 8.00 to situations of protracted fragility permits the Bank not just to apply different risk calculations and time horizons, but also to respond to the capacity constraints in fragile states. In this regard, it has the potential of being developed into a model approach for dealing with situations of fragility, as the need to flexibilize or adapt overly demanding requirements to weak government capacities has emerged as a common understanding among donor institutions.\textsuperscript{83} In contrast, OP 2.30 on Development Cooperation and Conflict emerged from \textit{ad hoc} solutions found when legal constraints complicated engagement in the West Bank and Gaza, in Bosnia, Kosovo, or Somalia – all cases where the Bank’s most powerful shareholders had a demonstrable interest in building

\begin{footnotesize}
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\item The World Bank, LICUS Task Force Report, 2002. The testimony was clear: “aid does not work well in these [LICUS] environments because governments lack the capacity or inclination to use finance effectively for poverty reduction.” (p. 1).
\item The fragile states agenda received the highest-level endorsement by the IDAs Executive Directors with the adoption of “Supporting Fragile and Conflict Affected Countries” as one of four Special Themes at the Sixteenth IDA Replenishment meeting in 2011.
\item World Bank website #
\item E.g. Newman or Call, who finds that the social construction of fragile states has often involved throwing “a monolithic cloak over disparate problems that require tailored solutions”, and inspired intrusive and paternalistic policy prescriptions. Charles T. Call, "The Fallacy of the ‘Failed State’,” \textit{Third World Quarterly} 29, no. 8 (2008).1495.
\item OECD, Fragile States 2013. Resource Flows and Trends in a Shifting World. Figure 2.7.
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or reconstructing capable and legitimate state institutions.\textsuperscript{84} The innovations accordingly crafted to permit Bank engagement despite obvious mandate constraints were authorized through Resolutions of the Board of Executive Directors, the organ dominated by the five largest shareholders of the Bank. The subsequent codification of the organizational practice developed in response to these situations in the Bank’s internal law, OP 2.30, entrenches the Executive Directors’ decisive role in this regard. The peril therefore remains that legal innovations are merely a formal disguise for political selectivity, informed by the security concerns of powerful shareholders, rather than the unique challenges and needs of fragile states.

The pathologies and pitfalls of innovations in the governance of ODA vis-à-vis fragile states are thus rooted in the ambiguous nature of the notion of fragile states. The fragile states agenda has directed attention to the specific needs of an often marginalized group of states. Overt time, it has even begun to foster a growing sensitivity for alternative \textit{loci} and modes of governance in fragile states, casting doubts on the merits of universalizing a particular model of statehood and “good governance” in development cooperation. Yet, it remains nearly impossible to de-politicize the notion of fragile states, or for that matter, to arrive at a practicable definition.\textsuperscript{85} Accordingly, innovations are often justified in response to a declaredly new and exceptional challenge of state fragility, while their selective application casts doubt as to the true intention of addressing that challenge comprehensively. In light of such inextricable pathologies and pitfalls, what role can law serve as a normative yardstick?

2. \textbf{Transparency and Non-Discrimination – A Role for Law}

As a normative yardstick for determining whether and how the World Bank should innovate to more effectively deal with fragile states, or for assessing the outcomes of innovation, the role of law is generally limited.\textsuperscript{86} Not only does it provide no answer to the overarching question whether fragile states indeed constitute a challenge of a different kind, one that warrants specifically tailored innovations in the governance of ODA. Law also provides little guidance on questions like how do define fragile states or situations for the purpose of adaptation; where to draw the line between a necessary flexibilization of legal requirements and the abolishment of established standards across the board; or how to realize national ownership where governments lack the capacities required to meaningfully affect the course of events.

Yet where innovations in the governance of ODA vis-à-vis fragile states occur and are implemented in the Bank’s internal law, they must conform to certain procedural and material requirements stimulated not least in its Articles of Agreement. Assuming that some of the pathologies and pitfalls of legal innovations are rooted in their current stage of “half-way legalization”,\textsuperscript{87} law holds a role in ensuring that their adoption and

\textsuperscript{85} Davis, "'Financing Development' as a Field of Practice, Study and Innovation." 183: “In fact, it might be most fruitful for scholars to focus their attention on the processes by which the law of financing development adapts and innovates, rather than on specific outcomes of that process.”
\textsuperscript{87} Alexandros Yannis, "The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics," \textit{European Journal of International Law} 13, no. 5 (2002). At #.
application conforms to minimum procedural requirements of transparency, consistency, and predictability. Moreover, law holds the promise of ensuring that legal innovations are applied indiscriminately, thereby reducing the likelihood of political selectivity.

First, the Bank’s legal framework contains procedural safeguards concerning the processes through which legal innovations are adopted, and on the transparency of decision-making concerning the application of the relevant rules. Legal innovations that fundamentally remodel basic rules of the Bank’s mandate, and which can no longer be justified on the basis of a purposive interpretation, should take the form of an amendment, with the according requirements established in the Articles of Agreement.\(^88\) Assuming that legal innovations are justified on the basis of an interpretation in each case of the Bank’s mandate, their subsequent formalization in the Bank’s internally binding law, the OPs/BPs, promises to add transparency and predictability to relevant organizational practices. \(^90\) For this purpose, however, a more precise formulation, the inclusion of at least some decision-making criteria, or the duty to provide reasons concerning the application of the relevant OPs/BPs would have been preferable.\(^91\) For instance, the Bank’s Access to Information Policy recognizes the fundamental importance of transparency and accountability in decision-making, and provides for the publication of “any information in its possession that is not on a list of exceptions.”\(^89\) Considerations related to the application of OP 2.30, however, are frequently considered as “deliberative information” and hence fall under such an exception.\(^91\)

Second, it could be argued that where legal innovations are introduced in order to permit the Bank to more effectively and rapidly assist fragile states, they should be applied without undue discrimination among them. The underlying ratio is the principle that like cases should be treated alike.\(^92\) Such a principle cannot be inferred directly from the Bank’s legal framework, and the requirement of equal treatment of all member states is not expressed as clearly as in Art. 2 (1) of the UN Charter.\(^93\) Yet the Bank’s mandate explicitly prohibits the organization from being “influenced in their decisions by the political character” of member states – more particularly, it provides that its “considerations shall be weighed impartially in order to achieve the

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\(^{88}\) IDA, Articles of Agreement, Art. IX and above #


\(^{90}\) World Bank Access to Information Policy, July 2010, para. 6…### Accountability: requires clear division of responsibility; IP review not suitable since focus is on infringement of beneficiary right…

\(^{91}\) Access to Information Policy, para. 16.


\(^{93}\) Art. 2 (1) UNCh states that “The Organization is based on the principle of the sovereign equality of all its Members.” The principle of sovereign equality plays only a limited role with regards to the decision-making structures of international organizations, where it is often trumped by functionality. Ibid. and # Efraim, Sovereign (In)equality.
purposes stated in this Agreement." Accordingly, legal innovations concerning the Bank’s engagement with fragile states should not be applied in a partial manner, or discriminate on political grounds.

IV. Conclusion

The concern with fragile states in development cooperation rests on a vastly ambiguous concept, and an intricate political agenda. On this basis, legal innovations that remodel the rules and procedures of ODA delivery in fragile states are necessarily fraught with pathologies and pitfalls, not least the risk of cementing a second-class status of statehood. Perhaps it is thus preferable to refrain from adapting the Bank’s legal framework in this regard. Perhaps it is preferable to avoid the appearance that decisions concerning whether and how the Bank relates to ineffective or illegitimate governments in fragile states could ever be anything else than political. And perhaps all this holds even more true in light of the World Bank’s governance structure, which allows the organization to be captured by the political interests of its largest shareholders.

Yet such a view would ultimately imply treating development cooperation merely as an act of charity. If we acknowledge that the transfer of ODA is governed by rules and regulations at least to some extent, then their adoption and application – as well as their adaptation through innovation – are subject to certain normative constraints. And there is a strong case to be made for making rules and regulations more adapt to social and economic realities in different countries, which is the objective of differential treatment. Differential treatment at the level of obligations, e.g. through less demanding ex ante requirements for project approval, or at the implementation level, e.g. through implementation assistance, could be seen as a means for making the governance of traditional ODA more responsive to different capacities and local circumstances found in different developing countries, calling them “fragile” or not.

Finally, the success of the notion of “fragile state” in development and security circles already reflects an increasing concern of the international community with weak statehood as a root cause for multiple problems. Tackling state fragility (or indeed: state-building) is increasingly seen as a global public good, not just because fragile states are perceived as an obstacle to human development and as a risk to international security. The international legal order requires states that are capable of effectively implementing its norms. If tackling state fragility (perhaps more than

\[94\] Articles of Agreement, Art. V, Sect. 6 (emphasis added).

\[95\] On the objectives and means of differential treatment in international law, see Philippe Cullet, *Differential Treatment in International Environmental Law* (Ashgate, 2003). Also Philippe Cullet, "Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations," *European Journal of International Law* 10, no. 3 (1999). 558, arguing that “[w]hile aid is motivated (at least in part) by charity and is based on discretionary motives of the donor, differential treatment seeks to find firmer bases for redistributive measures whose eventual aim is the empowerment of weaker actors.” At the European Union, for instance, a “principle of differentiation” has already made its way into the legal framework governing development cooperation with ACP and non-ACP states #. Moreover, the soft law OECD Principles of Good International Engagement with Fragile States (2007) start off with “Take context as a starting point” as the first principle.

\[96\] It is important to note that differential treatment would not need to be based on a definition of “fragile state”, but could be much more fine-tuned to the particular capacities or circumstances of a country.
Development *per se* constitutes a global public good, as in other fields of global governance, legal innovations like differential treatment that foster more effective collective action become more likely – and thus the chance that law will be put in the service of development.

**LITERATURE**


