

Who Guards the Guardians: Legal Implications for the Operation of International Financial Institutions in Times of Financial Crisis

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Abstract

The impact of the current global financial crisis gravely affects not only states but also International Financial Institutions (IFIs). They are international organizations addressing financial and monetary issues such as development banks or monetary institutions and typically engage in lending operations with states or regulate their monetary policies. This contribution seeks to undertake a legal analysis of available responses for IFIs to increased insolvencies of their “typical clients” from a law of international organizations perspective.

Obviously, an IFI can be exposed to the risk of dissipation of assets as a creditor, or as a debtor when it is unable to fulfil its own financial obligations. Conceivable legal responses can take the form of either purely internal character or are “external” and thus involve third parties.

Internal measures are notably budgetary decisions in reaction to financial shortcomings. The typical handling of budgetary problems by “standard” IOs applies only partially to IFIs as they typically have more extensive capital demands. These clearly cannot be satisfied by membership contributions and thus expose IFIs to volatility risks on the financial market. Accordingly, in order to remedy the crisis-induced loss of all forms of “capital claims” of IFIs, standard mechanisms for ensuring compliance with membership payments will be imperfect. In addition, in exceptional cases, Member States can successfully invoke the turmoil of international financial markets to justify the non-performance of their membership obligations.

Any measure of external scope will have to respect immunity considerations according to which the operation of an IFI may not be impeded, such as by increasing its burdens, either financially or by national law. Consequently, resources of IFIs have „international character“ and are in principle protected by immunity. Nonetheless, specifically the arguments of the UK House of Lords *In re International Tin Council* (22 January 1987, 77 ILR (1988)) support the view that IFIs can indeed be declared insolvent and that their assets can be subjected to liquidation according to national bankruptcy laws. Situations of financial stress certainly do not mitigate this tension.

A. Introduction

It is challenging to give a precise definition of International Financial Institutions (IFIs) as this notion is used with considerable variation depending on the circumstances even in the UN context.¹ In this contribution, the term IFI refers to international organizations² that are “international” since they are typically created by a treaty and usually operate on the global level to the benefit of more than one state and that are “financial” due to their mandate, which defines their activity as in particular aiming at lending operations with states or at undertaking regulative measures impacting on state’s monetary policies. IFIs are thus characterized by their specific objectives that concern financial and monetary as well as developmental issues. Even though it is correct to broadly speak of IFIs as development banks and monetary funds, there are considerable differences with regard to essential issues such as the exact focus of their activities³, purpose⁴ or membership.⁵

¹ For instance, a restrictive understanding excluding regional and sub-regional institutions can be found in GA Res. 47/191, 22 December 1992, ‘Institutional Arrangements to Follow Up the United Nations Conference on Environment and Development’ (GAOR 47th Session Supp 49 vol 1, 141) whereas GA Res. 61/187, 20 December 2006, ‘International Financial System and Development’ (GAOR 61st Session Supp 49 vol 1, 258) uses the term in a broad sense. See M. Ragazzi, ‘International Financial Institutions’, in: Max Planck Encyclopedia of Public International Law (MPEPIL) available at <http://www.mpepil.com> (last visited 5 February 2010), at 2.

² The already difficult undertaking to define IFIs is further complicated by the fact that in the field of international institutional law, no generally accepted definition of “international organizations” exists. Regularly, international organizations are referred to as legal entities of a certain permanency and vested with a minimum of organs resulting from the will of States as formulated in an instrument binding under international law. See on the attempt to conclusively define the constituent elements of international organizations: A. Reinisch, *International Organizations Before National Courts* (2000) 5; R. Bindschedler, *International Organizations, General Aspects, II EPIL* 1289 (2nd ed., 1995) (“The term international organizations denotes an association of States established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfil particular functions within the organization.”); *Restatement (Third) of the Foreign Relations Law* (1986), § 221 (“‘international organization’ means an organization that is created by an international agreement and has a membership consisting entirely or principally of states.”); ILA Committee on Accountability of International Organisations, Final Report 2004, *Report of the 71st Conference Berlin 4* (2004) (“intergovernmental organisations in the traditional sense, i.e. created under international law by an international agreement amongst States, possessing a constitution and organs separate from its member states.”).

³ For instance, some IFIs operate on the regional or sub-regional level, such as the four Regional Development Banks; namely the 1959 established Inter-American Develop-

Particularly in view of their quasi-universal membership and their impact on the global level, the *International Bank for Reconstruction and Development* (IBRD) – member of the five legal entities constituting the World Bank Group⁶ – and the *International Monetary Fund* (IMF)⁷ are the prototypes of IFIs that can be described as “guardians” of the international financial structure since they are having a considerable impact on their member states and how they deal with debt crises. Their operation therefore is in the main focus of this contribution which seeks to look into the specific elements of the legal, i.e. international law, framework in which IFIs operate in times of financial crisis.⁸

Finally, for the present purposes, the term “financial crisis” is understood broadly as an economic condition in which member states of an IFI have reached an unstable phase that is likely to result in an undesirable outcome unless quickly resolved.⁹ In particular, times of financial crises are situations when IFIs are faced with insolvencies of their typical “clients”, i.e. states, due to their inability to pay or when they are otherwise unable to comply with their financial obligations. In this situation, the ancient ques-

ment Bank (IDB), the Asian Development Bank (ADB) founded in 1966, the African Development Bank (AfDB), established in 1964, and the European Bank for Reconstruction and Development (EBRD) established in 1990.

⁴ For instance, specific funds exist that are dedicated to a special sector, such as the International Fund for Agricultural Development (IFAD). Specifically created banks serve the purpose to foster economic and social integration such as the European Investment Bank, the Council of Europe Development Bank or the Caribbean Development Bank.

⁵ For instance, the Eurasian Development Bank has a particularly low number of members: it was established by only two founding members and now has four members.

⁶ International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).

⁷ Both the IMF and the World Bank Group institutions were founded at United Nations Monetary and Financial Conference which took place from 1 July to 22 July 1944 and are commonly referred to as “Bretton Woods” institutions due to the location of the Conference in Bretton Woods, New Hampshire (USA). See for further details *Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944* (Washington, 1948).

⁸ Non-legal implications of the operation of IFIs, such as repercussions on the environmental or social level resulting from policy measures carried out in relation to IFIs measures in the debtor countries, are outside the scope of this contribution.

⁹ See H. Morais, ‘The Bretton Woods Institutions: Coping With Crises’, *ASIL Proceedings* (1996), 433.

tion of “*quis custodiet ipsos custodes*”?¹⁰ is used as a guiding interrogative pattern to generally ask for the kind of legal rules that form the normative framework for the conduct of IFI in times of financial distress.¹¹

From the perspective of the IFI, different types of measures can in principle be conceived as a reaction to the financial crisis. First, they can have purely “internal” character, i.e. taken by the IFI vis-à-vis their own member states with the aim of inducing the state to comply with their financial obligation in relation to the IFI (Part B.). Second, any measure concerning an IFI which does not only relate to member states, but either involves third parties or even addresses the IFI itself, such as for instance when domestic bankruptcy proceedings are instituted against it, are referred to as measures of “external scope” and will be described in (Part C.). These will provide evidence that legal rules applicable to the “guardians” in the broader international law context might equally result in subjecting them to particular domestic proceedings. Before discussing the alternatives in detail, a brief look on the general elements of the legal framework in which IFIs operate is merited.

B. Basic Parameters for the Operation of IFIs

For the purpose of analysing legal rules shaping the *modus operandi* of IFIs, the principal point of reference is their constituent documents, i.e. treaties establishing the IFI in question. In the majority of cases, the “Articles of Agreement” contain important parameters for the operation of IFIs as they in particular define their objectives, confer legal personality to them and specify the extent to which IFIs are exempt from domestic jurisdiction.

Yet, in addition to rules explicitly contained in agreements relating to IFIs, they are – as subjects of international law – also bound by international customary law¹², which constitutes a legal basis for the creation of legal

¹⁰ Quis Custodiet Ipsos Custodes (“But who guards the guardians?”), Decimus Junius Juvenal, Satires VI, 347.

¹¹ This understanding complements existing approaches referring to the notion of “who guards the guardians” notably in the context of (human rights) accountability of international organizations. See A. Reinisch, Securing the Accountability of International Organizations, 7 *Global Governance* (2001) 2, 131-149, at note 4, citing further literature.

¹² See for instance the statement of the International Court of Justice on the matter: “[...] International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.” *Inter-*

obligations distinct from those based on treaty law.¹³ Thus, important customary international law principles such as *pacta sunt servanda*¹⁴ and *rebus sic stantibus*¹⁵ do apply to IFIs irrespective of the actual entry into force of treaties that codify these principles, such as the 1969 Vienna Convention on the Law of Treaties (VCLT)¹⁶ and the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations.¹⁷ In the majority of cases, however, it can be argued that the more specific rules regarding the operation of IFIs are contained in treaty law, in particular in their Articles of Agreement.

In view of the fact that there exists a considerable variety of IFIs, also their constituent documents contain different purposes and functions, but principally conceive the promotion of international monetary cooperation as

pretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, 73, para 37. See also the International Law Commission's First Report on Responsibility of International Organizations, UN Doc A/CN.4/532, 26 March 2003, Art. 3 and the International Law Commission's Third Report on Responsibility of International Organizations, UN Doc A/CN.4/553, 13 May 2005, Art. 8. Generally on the extent International Organizations are bound by International Law see for instance A. Bleckmann, 'Zur Verbindlichkeit des allgemeinen Völkerrechts für Internationale Organisationen', 37 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1977) 1, 107.

¹³ See most prominently the distinction between "international conventions" and "general principles of law recognized by civilized nations" as two separate "primary" sources of international law according to Article 38 para 1 (a) and (c) Statute of the International Court of Justice.

¹⁴ According to this principle "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." See Article 26 of both the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 and the *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, 21 March 1986, 25 ILM 543.

¹⁵ This principle refers to a "fundamental change of circumstances" subsequent to the entry into a contractual obligation and justifies the non-performance of treaty obligation under specific conditions, it is thus an exception to the *pacta sunt servanda* principle, see Article 62 of both the 1969 and the 1986 Convention.

¹⁶ See *supra* note 14.

¹⁷ *The 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, see *supra* at note 14, has not yet entered into force as it has not reached the required ratification of 35 States. No IFI has become party to the 1986 Convention, but this has precluded IFI from invoking those articles that are commonly regarded as reflecting customary international law. See on this matter M. Ragazzi, *International Financial Institutions*, *supra* note 1, 22.

their main financial aim. In addition, a developmental objective is included in many treaties establishing IFIs.¹⁸

Accordingly, the constituent instruments of the most important IFIs, the World Bank Group Members, and in particular of the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD) and of the International Monetary Fund (IMF) contain the aim of mutual cooperation on the financial level along with a prominently placed mandate for post-war recovery measures.¹⁹ This reveals that they were created as a reaction to World War II as one of the most severe crises in the 20th century. Based on the understanding that more balanced economic development and stable international monetary system were means to ensure that no new wars and crises occurred, this mandate was complemented with the responsibility to promote and facilitate the balanced growth of international trade.²⁰ In this vein, the IMF is charged with overseeing the international monetary system, promoting exchange stability and orderly exchange arrangements among members so as to facilitate the exchange of goods,

¹⁸ Depending on the IFI in question, the ‘development objective’ as prescribed in the constituent document can take many forms and operational focuses, reaching from the promotion of investments to the co-ordination of development policies, the provision of technical assistance to stimulating the development of capital markets. One of the most far-reaching example is the European Bank for Reconstruction and Development that is not only mandated to operate according to sound banking principles, but also to promote private and entrepreneurial initiative in countries committed to ‘multiparty democracy, pluralism and market economics’ *Agreement establishing the European Bank for Reconstruction and Development*, 29 May 1990, Art. 1, 1646 U.N.T.S. 97.

¹⁹ See notably *Articles of Agreement of the International Bank for Reconstruction and Development*, 27 December 1945, Art. 1, 2 U.N.T.S. 134, (IBRD Articles of Agreement) which proclaims that the first objective of the IBRD is to “(i) assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war”. Further goals contained in the first paragraph are: “(ii) [t]o promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources” and “[t]o promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.”

²⁰ See for instance Art 1 (iii) IBRD Articles of Agreement, *supra* note 19.

services and capital.²¹ This also includes an assessment whether the member states comply with their obligations under the Articles of Agreement.²²

In addition, both the IMF and the IBRD are authorized to extend financial assistance to their member states by making available foreign exchange resources. This financial support is linked to member states' commitments to implement sound macroeconomic adjustment measures and to fulfil other performance criteria or conditions. The actual financial measures available differ.

In the case of the IMF, a member is entitled (under specific conditions) to draw upon the resources of the Fund by purchasing the currencies of other members in exchange for an equivalent amount of its own currency to solve a short-term balance-of-payment need.²³ The IBRD has chosen a different approach and provides loans or extends guarantees for the purpose of the accomplishment of investment, reconstruction or development projects. Thus, financial assistance is linked to certain types of measures of the

²¹ According to Article 1 of the *Articles of Agreement of the International Monetary Fund*, 27 December 1945, Art. 1, 2 U.N.T.S. 40, (IMF Articles of Agreement), the purposes of the International Monetary Fund are: (i) [t]o promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems; (ii) [t]o facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy; (iii) [t]o promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation; (iv) [t]o assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade; (v) [t]o give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.”.

²² The IMF exercises this task by “surveillance” which, in accordance with Art IV Section 3 (a) IMF Articles of Agreement, see *supra* note 21, entitled “Surveillance over exchange arrangements” comprises the obligation to “[...] oversee the international monetary system in order to ensure its effective operation, and shall oversee the compliance of each member with its obligations under Section 1 of this Article.”. The surveillance requirement also includes regular consultations (usually once a year) on the economic and financial policies of a member state which typically lead to observations and recommendations on each member state's economic and financial policy performance. See Art IV Section 3 (b) IMF Articles of Agreement, *supra* note 21.

²³ See in particular Art V IBRD Articles of Agreement on “Operations and Transactions of the Fund”, *supra* note 21.

member states, i.e. those that fulfil “productive purposes”. However, in “special circumstances” such financial assistance may be given also for other purposes.²⁴ This “special circumstances” criterion provided an important formula for addressing financial crises of the IBRD member states.²⁵

The IBRD loan agreements are not only concluded with the Member State of the Bank, but sometimes also with a public or private entity on the territory of the member.²⁶ The specific legal framework applicable to IFIs takes account of this fact, i.e. that some lending operations also involve contacts with private actors.

It thus provides for two elements necessary to deal with this kind of situations specific to IFIs, i.e. the conferral of legal personality to IFIs – and for some IFIs – a waiver of immunity for lending and borrowing activities, which is a deviation from the immunity from legal process normally enjoyed by international organizations.

With regard to the first element, typically, the constituent documents, headquarters agreements, and other treaties addressing the status of IFIs²⁷, accepted the need to ensure that IFIs are endowed with legal personality according to national law in order to enter into contracts, i.e. private law relationships for their procurement needs, and to be able to pursue their rights before national courts, such as settling their delictual claims.²⁸

²⁴ Art. 3 (vii) of the IBRD Articles of Agreement states that “Loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development”. See also *supra* note 19.

²⁵ This is because it was seen sufficient to provide loans on the “special circumstances criterion” if a debtor country had a sound financing plan and a satisfactory adjustment program, the loans were legally justified if it could be demonstrated that the debt reduction would have a material effect on the country’s investment prospects and overall development plan.

²⁶ In this case, i.e. when the borrower is not a member state, the loan must be fully guaranteed by the member state. See Art. III Section 4 (i) IBRD Articles of Agreement, *supra* note 21, entitled “Conditions on which the Bank may Guarantee or Make Loans” which states: “When the member in whose territories the project is located is not itself the borrower, the member or the central bank or some comparative agency of the member which is acceptable to the Bank, fully guarantees the repayment of the principal and the payment of the interest and other charges to the loan.”

²⁷ *Agreement between the Republic of Austria and the OPEC Fund for International Development Regarding the Headquarters of the Fund*, 21 April 1981, Art. 7, 1291 U.N.T.S. 210.

²⁸ A typical provision of such domestic legal personality can be found in the IMF and the IBRD Articles of Agreement which both provide: “The Fund/Bank shall possess full juridical personality and, in particular, the capacity: (i) to contract; (ii) to acquire and dispose of immovable and movable property; and (iii) to institute legal proceed-

Second, as regards the immunity provisions relating to IFIs, most of them do not enjoy the same broad jurisdictional immunity as other IOs. In other words their scope of immunity is limited.

According to their constituent agreements most international development banks can be sued before domestic courts by private parties but not by member states.²⁹ The rationale of this provision is obvious: international development banks finance their lending operations to a substantial part through borrowing operations on the financial markets. It is important to attract lender confidence and they thus have to ensure that private parties have access to the courts. Accordingly, international development banks usually can be sued before the national courts of member states.³⁰

By contrast, other IFIs like the International Monetary Fund enjoy the “usual” functional immunity³¹, i.e. the immunity necessary for the fulfil-

ings.” Article IX Section 2 IMF Articles of Agreement, see *supra* note 21; Article VII Section 2 IBRD Articles of Agreement) see *supra* note 19. See also Article VIII Section 2 *Articles of Agreement of the International Development Association. Approved for submission to Governments by the Executive Directors of the International Bank for Reconstruction and Development*, 26 January 1960, 439 U.N.T.S. 249 (IDA Articles of Agreement); Article XI Section 2 *Agreement establishing the Inter-American Development Bank* 389 U.N.T.S. 69 (IADB Articles of Agreement); Article 45 *Agreement Establishing the European Bank for Reconstruction and Development*, Paris, 29 May 1990, 1646 U.N.T.S. 97 (EBRD Agreement); Article 49 *Agreement Establishing the Asian Development Bank*, 571 U.N.T.S. 123 (ADB Agreement); Article 50 *Agreement Establishing the African Development Bank*, 7 May 1982, 1276 U.N.T.S. 3 (AfDB Agreement); Article 1(b) *Convention establishing the Multilateral Investment Guarantee Agency*, Seoul, 11 October 1985, 24 ILM (1985), 1605 (MIGA Convention).

²⁹ See some examples in the context of bankruptcy proceedings text accompanying *infra* note 83.

³⁰ The archetypical example is Article VII Section 3 of the IBRD Articles of Agreement which provides: “Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.” Article VII Section 3 IBRD Articles of Agreement, *supra* note 28; similarly Article 46 EBRD Agreement, *supra* note 28; Article 44 MIGA Convention, *supra* note 28.

³¹ “The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.” Article IX Section 3 IMF Articles of Agreement, *supra* note 21.

ment of their purposes.³² The waiver of domestic jurisdiction in relation to IFI, and International Organizations in general, is generally seen as a crucial element to avoid the otherwise possible interference of national courts in the affairs of IOs.³³ It practically amounts to an unqualified, hence absolute, immunity from suit.³⁴ As it is the case with the conferral of legal personality to IFIs, often this immunity is made more precise in further treaties on general privileges and immunities or headquarters agreements.

Building on these general parameters for the operation of IFIs, more specific measures responding to a situation of financial crisis exist.

C. Measures Directed Against IFI Member States to Redress the Impact of the Financial Crisis

One of the many conceivable forms of the financial crisis' impact on the financial performance of an IFI consists in member states not complying with their financial obligations towards the organization.

While IFIs do not exclusively depend on mandatory or voluntary contributions from their members and satisfy their capital demands through resources that are usually not available to other international organizations – such as borrowings from the international capital markets through global offerings and bond issues, paid-in capital or quotas, repayments from financing to their borrowers – they can also be exposed to the general problem that their Member States do not comply with their financial obligations, such as the payment of interest – a situation which is clearly exacerbated in times of financial distress.

³² See for instance Article 105(1) *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. XVI (“The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.”).

³³ See F. Kirgis, *International Organizations in their Legal Setting*, 2nd ed. (1993), 26; A. Reinisch, *International Organizations before National Courts* (2000), 234; C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (2005), 316; H. Schermers & N. Blokker, *International Institutional Law*, 2nd ed. (2003), 252.

³⁴ Cf. Article II Section 2 *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, 1 U.N.T.S. 15 (“The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”).

Possible measures available for an IFI in this situation towards the non-performing Member State share similarities to the standard responses of International Organizations to budgetary problems caused by non-payment of membership contributions. International organizations' constituent documents in this case sometimes foresee specific measures. The most prominent example is contained in Article 19 UN Charter which provides:

“A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.”³⁵

The sanction of the loss of the voting rights in the General Assembly in case of non-payment of membership contributions for two years is subject to the exercise of discretion, i.e. it is permissive rather than mandatory.³⁶ Since the budget of the UN, which is primarily comprised of obligatory contributions of the members, is also subject to a decision by this plenary organ³⁷, this measure also amounts to a deprivation of deciding on the budget *pro futuro*. Yet, a certain degree of flexibility is ensured by taking into account a waiver of the sanction when the Member State can furnish proof that non-payment was a result of circumstances that it could not influence.

³⁵ Article 19 Charter of the United Nations. A similar provision is contained in Article 13 (4) *Constitution of the ILO*, UKTS 47 (1948).

³⁶ In UN history, it has been controversial whether the loss of the right to vote occurred *ipso facto* or whether a constitutive resolution of the General Assembly was required. This controversy dates back to the mid 1960s and was unleashed by the issue of the financing of two controversial UN peace-keeping operations in the Congo and Near East (UNEF I and ONUC). The now overwhelming (Western) doctrine takes the view that the effects of Art 19 occur directly when the substantive requirements are met and that thus no implementing decision is required. Conversely, a state recovers its right to vote as soon as it makes the required payments. See C. Tomuschat, Article 19, in: B. Simma *et al* (eds.), *The Charter of the United Nations: Commentary*, at note 13 and 22, 332 *et seq.*

³⁷ See Art 17 UN Charter, *supra* at note 35, according to which the General Assembly is competent to “consider and approve the budget of the Organization” and further has the right to apportion the expenses of the Organization (“The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.”).

Similar provisions exist also for IFIs. For instance, the third amendment to the IMF Articles of Agreement³⁸ introduced rules on the suspension of voting rights and modified compulsory withdrawal from IMF membership. It now provides that

“[i]f a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the general resources of the Fund. [...]

If, after the expiration of a reasonable period following a declaration of ineligibility [...], the member persists in its failure to fulfill any of its obligations under this Agreement, the Fund may, by a seventy percent majority of the total voting power, suspend the voting rights of the member. [...].”³⁹

Thus, the IMF may refer to different measures in relation to a non-performing member: It can primarily suspend its voting rights or declare this party ineligible to use the general resources of the Fund. In contrast to the original IMF Articles of Agreement, the ineligibility to use Fund resources of a member state that does not meet its overdue financial obligations to the IMF is not automatic, but requires an affirmative decision by the Fund. Thus, in this respect, the IMF rules share similarities with the procedure foreseen for a UN member in arrears with payments associated with its membership.

Since they exclude or restrict the participation of defaulting states from the internal policy-making process, such sanctions for overdue financial obligations are of a rather severe character. These exclusionary measures⁴⁰ however, might not practically induce the debtor states to effectively pay.

This problem is of course to a certain extent mitigated by the fact that – as outlined above – the resources of IFIs do not exclusively stem from contributions of their members, but to a large extent originate from operations on the financial market and thus in principle the issue of non-payment does not put the operation of an IFI as much under pressure as other international organizations. The turmoil of the international financial markets of course will put the advantage of diversified origins of the IFI resources into perspective. Even if the risk is spread, the financial crisis’ very nature af-

³⁸ See *supra* at note 21. The third and so far latest amendment to the IMF Articles of Agreement became effective on 11 November 1992. They had been approved by the IMF Board of Governors in Resolution No. 45-3, adopted June 28, 1990.

³⁹ Art XXVI IMF Article, see *supra* at note 21.

⁴⁰ See *supra* text at note 35 and 39.

fects all sources of capital available to IFIs. Differently put, the negative effects on the financial market result in aggravated conditions affecting the IFIs' financial operation, such as through below-expectancy performance of funds or increased interest rates for borrowing activities on the international capital market as well as in the impediment of member states to comply with their obligations.

These issues are somehow softened by the fact that the IFI's enjoy a special credit ranking status due to their specific financial set-up that includes "guaranteed capital", i.e. the portion of the IFI's capital that is exclusively reserved to meet obligations incurred on borrowed or guaranteed funds. This allows IFIs to borrow from the capital market at a low cost and apply a low interest rate to their borrowers.⁴¹

However, in order to generally maintain a IFIs' financial operational capability, it is important to effectively ensure that members in financial difficulty comply with their obligations towards the organization, which is endangered by the relative ineffectiveness of "internal measures" outlined above.

Therefore, other measures could be conceived, such as vesting IFIs as creditors of sovereign states with a preferred creditor status. In doing so, they are legally given priority among individual creditors or classes of creditors in relation to the settlement of external debt.⁴² As attractive this option might appear in principle, it is only an optional standard for a specific international behaviour. Thus, without an explicit agreement or a unilateral act of the debtor, the creditor IFI will not be able to claim any preferences. This is in line with the provisions of the IMF Articles of Agreement for instance, which do not foresee such an option.⁴³ Accordingly, this alternative will presumably not be overly helpful in times of financial turmoil.

⁴¹ See M. Ragazzi, *International Financial Institutions*, *supra* at note 1, 17.

⁴² See R. Martha, 'Preferred Creditor Status under International Law: The Case of the International Monetary Fund', 39 *International & Comparative Law Quarterly* (1990), 806.

⁴³ *Id.*, 810. According to the IMF Articles of Agreement before the third Amendment, i.e. as amended by the modifications of the original Articles of Agreement approved by the IMF Board of Governors in Resolution No. 23-5, adopted on 31 May 1968 and entering into force on 28 July 1969 as well as by the modifications approved by the IMF Board of Governors in Resolution No. 31-4, adopted on 30 April 1976 and entering into force on 1 April 1978, there existed the option for the Fund to become a preferred creditor by requiring a collateral security from the purchasing member (old Art IV section 4 IMF Articles of Agreement). The IMF, however, has never used this power. See R. Martha, *supra* note 42, 814.

Of course, more severe measures exist under general international law. According to the fundamental conceptions of the international law on state responsibility for breaches of international obligations as codified in the ILC Draft Articles on State Responsibility drafted by the International Law Commission⁴⁴, it is in principle perfectly possible to hold an IFI member responsible under international law for injury caused to the IFI by a breach of the member's obligation.⁴⁵ On the background of the ILC Draft Articles, also earlier pertinent case law is relevant to clarify the status of an IFI vis-à-vis its non-performing member:

First, regarding the status of an IFI and its right to sue, the ICJ's advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* confirmed that the breach of an international obligation by the member can be brought by the international organization.⁴⁶

Further, when an international organization suffers from financial damage resulting from a breach of the member's international obligation, the organization is in principle entitled to obtain reparation, which must, as far as possible, rectify all the consequences of the breach and re-establish the situation which would in all probability have existed if that act had not been committed.⁴⁷ On this understanding of full compensation⁴⁸ rests also the entitlement to claim interest on account of delay⁴⁹, which formed the exclusive subject matter of the international dispute which led to the famous *Russian Indemnity* case⁵⁰ where the Permanent Court of International Arbitration found that the wrongfulness of Turkey's failure to meet its financial

⁴⁴ The Draft Articles on Responsibility of States for Internationally Wrongful Acts have been taken notice of by the General Assembly on 12 December 2001, see *Report of the International Law Commission on the Work of Its Fifty-third session*, UN GAOR, 56th Sess., Supp. No. 10, 43, UN Doc. A/56/10 (2001).

⁴⁵ Provided that the conditions foreseen by the ILC Draft Articles, *supra* note 44, are fulfilled, see the axiomatic conception of the provisions contained in Chapter I of Part One of the Articles. It would go too far in the present context to allude to these in detail.

⁴⁶ ICJ Advisory Opinion, ICJ Reports 1980, 73, *supra* note 12.

⁴⁷ See the famous *Case Concerning the Factory Chorzów*, PCIJ Series A, No 17 (1928), 47. See also Article 36 (2) of the ILC Draft Articles, *supra* note 44.

⁴⁸ See the reference to this principle in Article 34 of the ILC Draft Articles, *supra* note 44.

⁴⁹ See Article 38 ILC Draft Articles, *supra* note 44.

⁵⁰ *Russian Claim for Interest on Indemnities (Russia v. Turkey)*, Award of the Tribunal, 11 November 1912, IX UNRIAA (1962) 421, also in: J.B. Scott, *Hague Court Reports* (1916), 298.

obligation towards Russia was to be understood in light of the fact that Russia consented to the breach. Therefore, no interest was due.⁵¹

Another instance in which consent allows for a deviation from the general rule of international responsibility for delayed payments, i.e. in which an IFI cannot take measures against nonperforming Member States⁵² is particularly relevant in times of financial crisis, namely when the postponement of payment has been authorized by the IFI, i.e. when consent is given.⁵³ In fact, to allow debtors with present or imminent insolvency to delay the date of actual payment has become an accepted practice for IFIs.⁵⁴

Absent such agreement, debtor states will try to invoke their inability to pay based on the changed factual circumstances of economic emergency. Such arguments referring to a situation when the compliance with treaty obligations becomes overly burdensome or even impossible have been recognized in treaty law by concepts such as the *rebus sic stantibus* rule⁵⁵, as well as the reference to supervening impossibility of performance.⁵⁶ These

⁵¹ See ILC Yearbook 1979, Vol II, part 2, 111.

⁵² On the invocation of circumstances precluding wrongfulness by the debtor state see *supra* note 61.

⁵³ Differently put, in this context, the principle of *volenti non fit iniuria* applies.

⁵⁴ See R. Martha, 'Inability to Pay under International Law and under the Fund Agreement', 41 *Netherlands International Law Review* (1994) 1, 99.

⁵⁵ According to Article 62 of the Vienna Convention on the Law of Treaties, *supra* note 14, "1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty. 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty".

⁵⁶ According to Article 61 of the Vienna Convention on the Law of Treaties, *supra* note 14, "[a] party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty. 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty

considerations of justice, however, clash with the necessity to guarantee predictable treaty relations over time (such as between the IFI and a particular member state) and thus collide with other fundamental treaty law principles, i.e. the *pacta sunt servanda* rule.⁵⁷ The difficult exercise of striking a balance between these concepts will have to consider the exception-to-the-rule character of norms derogating from the general rule of compliance with treaty obligations. Thus, only in very narrow and qualified circumstances of sufficient seriousness a deviation from this standard regime is permissible.⁵⁸

But not only general treaty law or specific treaty provisions applicable to the relationship between member states and (specialized) international organizations⁵⁹ foresee the possibility to defer to changed circumstances in case of emergencies. Also according to customary law – which is applicable to subjects of international law, i.e. in particular states and international organizations⁶⁰ – a necessity defence can be invoked in case of an economic crisis, as has been most prominently done by Argentina during its financial and economic crisis in the late 1990s and early 2000s.⁶¹

if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.”

⁵⁷ See Article 26 of the Vienna Convention on the Law of Treaties, *supra* note 14, which specifies that ‘Every treaty in force is binding upon the parties and must be performed by them in good faith’.

⁵⁸ See on the relationship between Article 26 and Article 62 of the VCLT for instance M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 361 and 762.

⁵⁹ See *supra* note 12 on the applicability of international law to the operation of IFIs. In this context, it is interesting to note the importance of international law in relation to the specific credit agreements of IFIs such as the IBRD with its member states, see on this issue A. Broches, ‘International Legal Aspects of the Operations of the World Bank’, 98 *Recueil des Cours* (1959) 3, 297 and J. W. Head, ‘Evolution of the Governing Law for Loan Agreements of the World Bank and other Multilateral Development Banks’, 90 *American Journal of International Law* (1996) 2, 214. An example of a specific treaty provision which refers to (external) conditions impeding a Member State to pay its membership contributions has been already been made short reference to *supra* note 35.

⁶⁰ See *supra* note 12.

⁶¹ Following the invocation of national emergency/state of necessity by Argentine in after it had taken restructuring measures to address the economic and financial crisis at the end of the 1990s that notably disadvantaged foreign investors, around 40 cases have been brought against Argentina (see the ICSID website available at <http://icsid.worldbank.org/ICSID/Index.jsp> and the Investment Treaty Arbitration website available at <http://ita.law.uvic.ca/> (last visited 5 February 2010). Of the cases already decided, notably the following decisions have spurred intense scholarly discussion: LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v Ar-

The necessity defence under customary international law is codified restrictively in Article 25 of the ILC Draft Articles on State Responsibility drafted by the International Law Commission⁶², and regulates circumstances in which a state may rely on necessity in order to preclude the wrongfulness of an act which would otherwise constitute a violation of international law.⁶³

Yet, the invocation of Article 25 is rather difficult as all criteria⁶⁴ must be fulfilled cumulatively.⁶⁵

gentine Republic (ICSID Case No. ARB/02/1), *CMS Gas Transmission Company v. The Argentine Republic*, Decision on Liability of 3 October 2006, ICSID Case No. ARB/01/8, Award of 12 May 2005, 44 ILM (2005) 1205; *Enron Corporation Ponderosa Assets LP v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007 as well as UNCITRAL, *BG Group Plc v. Republic of Argentina* (UK-Argentina BIT), Final Award, 24 December 2007. On the invocation of necessity in this context: A. Reinisch, 'Necessity in International Investment Treaty Arbitration: An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v Argentina and LGE v Argentina', 3 *Transnational Dispute Management* (2006); M. Waibel, 'Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E', 20 *Leiden Journal of International Law* (2007) 3, 637.

⁶² See *supra* note 44.

⁶³ 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity. Article 25 Draft Articles on Responsibility of States, see *supra* note 44.

⁶⁴ The non-performance of the relevant obligation must be the only way for the State to safeguard an essential interest against a grave and imminent peril. In addition, the act must not seriously impair an essential interest of the State(s) towards which the obligation is owed, or of the international community as a whole. Further, the Reliance on necessity is precluded if excluded by the international obligation (the treaty), or if the State has contributed to the situation of necessity. Finally, reliance on necessity can never justify the derogation from peremptory norms (Article 26 of the ILC Articles). In the Argentinean example, some holdings confirmed that the requirements were met: "[...] in the first place, Claimants have not proved that Argentina has contributed to cause the severe crisis faced by the country; secondly, the attitude adopted by the Argentine Government has shown a desire to slow down by all the means available the severity of the crisis. The essential interests of the Argentine State were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace. There is no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity. In this cir-

When indeed defaulting states can in some instances successfully invoke necessity in order to preclude the wrongfulness of their non-performance, the further legal implications are not entirely clear, in particular whether this results in an entitlement to compensation under customary law on the basis of Article 27 of the ILC Draft Articles.⁶⁶

Even if this question is answered in the affirmative, the practical consequences of such establishment would likely not yield a strengthened situation of trust between the IFI and the member state in question.

Therefore, further possible responses of IFIs to sovereign debt crises of their member states could refer to their constituent documents in order to identify particular provisions on the matter. Yet, unfortunately there is no explicit mandate contained in these international legal materials which would allow them to become involved in reducing the commercial bank debts of their members. Yet, some of these international organizations engaged in such action based on an extensive interpretation of their documents. For instance, the IMF was able to justify debt related actions arguing that this was covered by Article 1 (v) of its Articles of Agreement and its mandate to help countries to deal with balance of payment problems.⁶⁷

cumstances [sic], an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed. It cannot be said that any other State's rights were seriously impaired by the measures taken by Argentina during the crisis. Finally, as addressed above, Article XI of the Treaty exempts Argentina of responsibility for measures enacted during the state of necessity.”
64 LG&E Energy Corp., see *supra* note 61, paras 256 -257.

⁶⁵ See already the statement of the ICJ in the *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgement, ICJ Reports 1997, 1. The reason for referring to this authority decided before the finalization of the ILC Draft Articles relies on the fact that Article 25 reflects customary international law which renders also historical cases on the issue of necessity relevant.

⁶⁶ Article 27 of the ILC Articles, *supra* note 44, read as follows: “Consequences of invoking a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) The question of compensation for any material loss caused by the act in question.” While this question is already unclear in “classical” investment law, yet with a favour of assuming a duty to compensate in doctrine (see for instance R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2008), 170; A. Bjorklund, ‘Emergency Exceptions: State of Necessity and Force Majeure’ in P. Muchlinski, F. Ortino & C. Schreuer (eds) *Oxford Handbook of International Investment Law* (2008), 459, 510), the issue is even more uncertain in relation to IFIs.

⁶⁷ See *supra* note 19.

D. Measures Directed Against IFIs to Redress the Impact of the Financial Crisis

While the foregoing analysis has put the focus on measures that IFIs can conceive in relation to member states, this is obviously not the only possible approach. In fact, in times of financial collapse, the discussion of establishing responsibility for acts that have caused such a situation involves both IFIs and Member States. Often, the precise attribution is rather difficult⁶⁸, and the problem can be viewed from either the IFI's or the Member State's perspective. Differently put, the intensely debated topic circles around the relationship between International Organizations and Member States for the establishment of responsibility for wrongful acts⁶⁹, and in particular – notably in the present context – around the question of a possible subsidiary or even joint or “joint and several” responsibility for private law debts.⁷⁰ Notably the domestic litigation on who should ultimately bear the

⁶⁸ See in a similar vein the discussion of the more general issue of establishing international responsibility of international organizations for wrongful acts of states provided that their involvement with the commission of these unlawful acts by states is sufficiently high, Third report on the responsibility of international organizations by G. Gaja, Special Rapporteur, ILC Fifty-Seventh Session 2005, UN Doc A/CN.4/553, at 11.

⁶⁹ It has to be clarified that the issue of “Responsibility of International Organizations” which denotes the legal consequences of non-compliance with an international obligation by conduct that is attributable to the organization (see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 77-80 (2002)*) is to be distinguished from “accountability” which is used without a clear definition in a variety of contexts, including that of non-state actors such as NGOs. Based on its practical use, “accountability” seems to refer to the need to attribute certain activities under international law to actors as a precondition for imposing on them responsibility under international law. See G. Hafner, *Can International Organizations be controlled? Accountability and Responsibility, ASIL Proceedings 2003*, 237.

⁷⁰ It needs to be stressed that it is beyond the present contribution's topic to enter into the general growing academic debate on the human rights accountability of IFIs in relation to financed projects that infringe upon human rights. See on this issue for instance C. Barry & A. Wood, *Accountability of the International Monetary Fund (2005)*; D. Bradlow, ‘Private Complaints and International Organizations: A Comparative Study on the Independent Inspection Mechanisms in International Financial Institutions’, 36 *Georgetown Journal of International Law (2005)* 2 403; M. Darrow, *Between Light and Shadow. The World Bank, the International Monetary Fund and International Human Rights Law (2003)*.

costs of the bankrupt International Tin Council has brought this issue to the fore.⁷¹

Before discussing respective details, emphasis needs to be put on the fact that such litigation is in contrast to the basic principle of functional immunity protection of IFIs.⁷² In this context reference is also made to the notion of *ne impediatur officia*.⁷³ Pursuant to this notion, the functioning of an IO may not be hindered in any way, such as by increasing its burdens, financial or other. Accordingly, resources of IOs have “international character” and are covered by immunity protection. Yet, times of financial crises might reinforce the debate on the protection of the assets of IFI. Such arguments in favour of declaring international organizations insolvent and subjecting their assets to liquidation according to national bankruptcy laws stress were also brought forward in Tin Council proceedings.

After the financial collapse of this organization active in the field of commodity, the member state’s liability for the debts of the organization was discussed before various instances. It was held that International Tin Council was an international legal person and although English insolvency law was in principle inapplicable to international organizations, it could exceptionally be applied to foreign corporations.⁷⁴ Differently stated, the exclusive responsibility of an international organization for wrongful acts

⁷¹ *In re International Tin Council*, High Court, Chancery Division, 22 January 1987; 77 ILR (1988), 18; *J H Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry*, House of Lords, 26 October 1989, [1990] 3 W.L.R. 969, 81 ILR (1990), 670.

⁷² See *supra* note 31.

⁷³ See the United Nations Conference on International Organizations (UNCIO), Report of the Rapporteur of Committee IV/2, oc. 933, IV/2/42 at page 3 stating that “[...] no Member state may hinder in any way the working of the Organization or take measures the effect of which might increase its burdens, financial or other.”

⁷⁴ See *supra* note 71. Further discussion of this case can be found at I. Cheyne, ‘The International Tin Council’, 38 *International & Comparative Law Quarterly* (1989), 417; I. Cheyne/C. Warbrick, ‘The International Tin Council’, 36 *International & Comparative Law Quarterly* (1987), 931; C.T. Ebenroth, ‘Shareholders’ Liability in International Organizations – The Settlement of the International Tin Council Case’, 4 *Leiden Journal of International Law* (1991), 171; C. Greenwood, ‘Put not Your Trust in Princes: The Tin Council Appeals’, 48 *The Cambridge Law Journal* (1989) 1, 46; C. Greenwood, ‘The Tin Council Litigation in the House of Lords’, 49 *The Cambridge Law Journal* (1990), 8; R. Sadurska & C. M. Chinkin, ‘The Collapse of the International Tin Council: A Case of State Responsibility?’ 30 *Virginia Journal of International Law* (1990), 845; I. Seidl-Hohenveldern, ‘Failure of Controls in the Sixth International Tin Agreement’, in: Blokker & Niels (eds.), *Towards More Effective Supervision by International Organizations. Essays in Honour of Henry G. Schermers* (1994), 255.

attributed to it was no longer seen “absolute” and the possibility of holding member states responsible caused intense debates on the “piercing of the corporate veil” of this organization.⁷⁵ The various decisions on the matter did however not provide for a clear-cut answer.⁷⁶ Similar issues were raised in the *Westland Helicopters* arbitration.⁷⁷

It can be inferred from this strand of case law as well as from a few specialized treaty provisions⁷⁸ that the concurrent or joint responsibility of member states for the wrongful act of an international organization is not as such inconceivable. Yet, it is clearly the exception to the general rule⁷⁹ according to which the sphere of an international (financial organization) and its member state is to be separated.

A similar issue is the question whether national law may interfere with the internal legal order of an international organization. Clearly, the common rationale is the notion that states must not interfere with the internal legal order of an international organization. This was precisely also at the issue in the *Tin Council* litigation. One of the courts stressed the general principle of non-applicability of national insolvency law, since such exercise of jurisdiction

“would constitute an interference by the Court with the ability of the executive, albeit in a limited sphere, to conduct its relations with foreign states, a function which under our constitution is reserved to the Royal Prerogative, and with the ability of other sovereign states to conduct their relations with each other. It would alter the status of the organisation charged with the function of administering the provisions of an international treaty

⁷⁵ See I. Seidl-Hohenveldern, ‘Piercing the Corporate Veil of International Organizations – The International Tin Council Case in the English Court of Appeals’, 32 *German Yearbook of International Law* (1989) 43-54.

⁷⁶ See the Report of R. Higgins to the Institut de Droit international, (1995) 66-I *Yearbook of the Institut de Droit international* I, 375.

⁷⁷ *Westland Helicopters Ltd. v. Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company*, Arbitration Award, 80 ILR (1989), 600 and 108 ILR (1998), 567. See also 18 *Revue de l'Arbitrage* (1989), 515.

⁷⁸ See Article VI of the *Treaty on Principles governing the Activity of States in the Exploration and Use of Outer Space including the Moon or Other Celestial Bodies*, 19 December 1966, 610 U.N.T.S. 205, and Article XXII of the *Convention on International Liability for Damage Caused by Space Objects*, 29 March 1972, 961 U.N.T.S. 187.

⁷⁹ See J. d’Aspremont, ‘Abuse of the Legal Personality of International Organizations and the Responsibility of Member States’, 4 *International Organizations Law Review* (2007) 91, 94.

and would be incompatible with the independence and international character of the organisation.”⁸⁰

Based on this finding, it is all the more interesting that there exist a number of cases which subject IFIs under domestic insolvency proceedings.

Sometimes IFIs are sued before national courts which stems from the considerations that the immunity of IFIs should be waived when their involvement in the activities of their “clients” subsequent to the initial agreement is sufficiently qualified.⁸¹ Of particular importance is this argument in bankruptcy proceedings where bankruptcy creditors are faced with the risk of being ultimately unable to recover assets. A few domestic cases involving IFIs in bankruptcy proceedings can be identified that subject their assets to domestic insolvency proceedings. It is likely that these will increase in numbers as the impact of the financial crisis will expand.⁸²

For instance, a bankruptcy proceeding before US courts was instituted in the *Kaiser*⁸³ case, concerning the involvement of the International Finance Corporation (IFC) subsequent to the grant of a loan for a project relating to the construction of a steel mill in the Czech Republic. In the bankruptcy proceedings initiated by Kaiser, the IFC was accused to have allowed improper draws on its letter of credit and thus to have been actively involved in the financial collapse of the project. The IFC stressed that by not immediately invoking immunity but filing a proof of claim because it sought recovery from Kaiser, it did not consent to the jurisdiction of the claim with respect to Kaiser’s accusations for the improper draw of the letter of credit. The IFC thus file a motion to dismiss the initial order of the US bankruptcy

⁸⁰ *In Re International Tin Council* [1987] 1 Ch. 419, 451.

⁸¹ An illustrative example is case *Ashford v. World Bank Group* before the U.S. District Court Northern District of Georgia, Atlanta Division, 24 March 2006; 2006 U.S. Dist. LEXIS 17286.

⁸² See R. Martha, ‘International Organizations and the Global Financial Crisis: The status of their Assets in Insolvency and Forced Liquidation Proceedings’, *6 International Organizations Law Review* (2009) 1, 117 who provides a detailed picture of domestic court involvement of IFIs depending on various factors, such as notably the different types of assets concerned.

⁸³ *In re: Kaiser Group International, Inc., IFC v. Kaiser*, U.S. District Court for the District of Delaware, 30 September 2003; 302 B.R. 814, 2003 U.S. Dist. LEXIS 23852; *In re: Kaiser Group International, Inc., IFC v. Kaiser*, U.S. District Court for the District of Delaware, 23 February 2004; 308 B.R. 666, 2004 U.S. Dist. LEXIS 3098; *In re: Kaiser Group International, Inc., IFC v. Kaiser*, U.S. Court of Appeals for the Third Circuit, 15 December 2004; 399 F.3d 588; 2005 U.S. App. LEXIS 3288; 60 Fed. R. Serv. 3d (Callaghan) 1153; Bankr.L.Rep (CCH) P80, 244; 44 Bankr. Ct. Dec. 89.

court.⁸⁴ Finally, the US Court of Appeals for the Third Circuit⁸⁵ reversed the District Court's judgment and remanded the case to the Delaware bankruptcy court for a decision on the merits.

One of the most publicly discussed bankruptcy cases in the US was at the turn of the century. The collapse of the American energy company Enron Corporation (Enron), in 2001, also involved the IFC as a bankruptcy creditor⁸⁶. While the *Enron v. IFC* decisions did not particularly consider questions of immunity of an IFI, they nonetheless serve as an example for the breadth of the involvement of IFIs in domestic (bankruptcy) proceedings.

Interestingly, in a case involving the collapse of a Uruguayan bank (Banco Montevideo SA)⁸⁷, the question was raised whether third parties could involve an IFI in disputes before national courts based on the specific relationship of an IFI to their contracting party. One of the harmed individuals by the transaction of the contracting party of the IFI invoked liability of the IFC as it had "failed to supervise the functioning of the bank and neglected to appoint a director as its investment agreement authorized it to do."⁸⁸ However, the US District Court for the Southern District of New York did not follow this reasoning, but referred to functionality considerations to emphasize the immunity of the IFC. Since Banco de Seguros did not belong to "the types of persons, and their claims are not the types of claims for which IFC has waived immunity in Article VI Section 3 of its Articles of Agreement,"⁸⁹ the IFC had to remain immune from suit.

Even though the number of cases involving IFIs in bankruptcy proceedings is relatively limited, it is clear that the attempt to bring IFIs before domestic courts will increase in times of heightened possibility of further

⁸⁴ *In re: Kaiser Group International, Inc., IFC v. Kaiser*, U.S. District Court for the District of Delaware, 30 September 2003; 302 B.R. 814, 2003 U.S. Dist. LEXIS 23852.

⁸⁵ *In re: Kaiser Group International, Inc., IFC v. Kaiser*, U.S. Court of Appeals for the Third Circuit, 15 December 2004; 399 F.3d 588; 2005 U.S. App. LEXIS 3288; 60 Fed. R. Serv. 3d (Callaghan) 1153; Bankr.L.Rep (CCH) P80, 244; 44 Bankr. Ct. Dec. 89.

⁸⁶ *Enron v. IFC*, U.S. District Court for the Southern District of New York, 2007, 9 October 2007, U.S. Dist. LEXIS 75626.

⁸⁷ *Banco de Seguros del Estado v. IFC*, U.S. District Court for the Southern District of New York, 2007, 19 September 2007, U.S. Dist. LEXIS 69741.

⁸⁸ *Banco de Seguros del Estado v. IFC*, U.S. Dist. LEXIS 69741 at 9.

⁸⁹ *Banco de Seguros del Estado v. IFC*, U.S. Dist. LEXIS 69741 at 23. The text of Article VI Section 3 IFC Articles of Agreement is identical to the wording of Article VII Section 3 of the IBRD Articles of Agreement. See *supra* note 30.

insolvencies. Also, it must be stressed that along the lines of the domestic bankruptcy model, a call for the establishment of a sovereign debt adjustment procedure has been voiced.⁹⁰ Indeed, a proposal for the development of a Sovereign Debt Renegotiation Mechanism (SDRM) has been presented to the IMF, but so far has not yet been implemented.⁹¹

In general, it is interesting to note that measures taken by the IFIs themselves that could be perceived as measures that may be interpreted as “self-guarding” or directed at reviewing their acts are a relatively recent phenomenon. One of the most prominent examples of a review mechanism allowing to re-consider the acts of an IFI on the benchmark of internal rules exist notably in the form of the World Bank Inspection Panel.⁹²

As regards more specific measures specific to the financial crisis, several developments towards an increased governance and co-ordination among IFIs merit attention, in particular the transformation of the intergovernmental forum “Financial Stability Forum”, created after the Asian economic crisis in the mid-1990s with the aim to promote the international financial system needs to be mentioned. It has recently been reorganized as the “Financial Stability Board”, along with the transformation, it has been vested with new competencies that intend strengthen co-operation with the objective to avoid regulatory failures estimated to have substantially contributed to the most recent crisis.⁹³

⁹⁰ See for instance J. Boorman, Annual Midwinter Strategic Conference of the Banker’s Association for Finance and Trade Speech, Washington 28-29 January 2003, available at: <http://www.imf.org/external/pubs/ft/survey/2003/021703.pdf> (last visited 1 March 2010).

⁹¹ See for details D. Bradlow, ‘Developing Countries Debt Crises, International Financial Institutions and International Law: Some Preliminary Thoughts’, *Washington College of Law Research Paper* No. 2009-01, 25.

⁹² The World Bank Inspection Panel was established in 1993 to provide an independent forum to private citizens who believe that they or their interest have been or could be directly harmed by project financed by the World Bank. See for details for instance R. Steinhardt, ‘Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria’, in: P. Alston (ed.) *Non-State Actors and Human Rights*, (2005), 177.

⁹³ See for details, E. R. Carrasco, ‘The Global Financial Crisis and the Financial Stability Forum: The Awakening and Transformation of an International Body’, 10 University of Iowa Legal Studies Research Paper, 101.

E. Conclusion

The attempt to answer the question of “Who guards the guardians” started from the assumption that this query could serve generally as a benchmark for rules relating to the operation of IFIs in times of financial crisis.

Starting from specific elements of the legal setting in which IFIs operate that are shaped by international law, the first category of rules that determine the operation of IFIs concerns the relation to their Member States. It was argued that times of financial crises result in a lesser degree of (financial/contractual) compliance of member states towards IFIs. Accordingly, it was investigated which measures are available to IFIs to induce state to comply with their obligations. The options range from suspending Member States from the internal decision-making process within the organization, to declaring the states ineligible to use the general resources of the IFI or vesting an IFI with a preferred creditor status. It cannot be empirically proven whether these measures will effectively result in better compliance. Yet, also according to general international law strong coercive options exist, especially according to the rules on state responsibility based on a violation of the international law obligation of the IFI member. Conceivable counter-arguments of IFI member state will include the invocation of necessity, which is however subject to the fulfilment of restrictive criteria or the reference to general principles of treaty law such as the *rebus sic stantibus* rule (changed circumstances). Some IFIs, such as the IMF engage in a direct involvement in the restructuring of their member’s commercial bank debts based on an extensive interpretation of their constituent documents.

Conversely, measures that address IFIs themselves will refer to the *Tin Council litigation* that can be invoked in order to allow for a “piercing of the corporate veil” of the organization and thus blur the principle of the strict divide between assets of the organization and that of the Member States. Another instance in which measures address IFIs directly are domestic court proceedings instigated against them, such as bankruptcy proceedings according to national law that exceptionally bypass the immunity protection of these international organisations. However, to generally state that domestic courts serve as “guardians” for the operation of IFIs in times of financial crises since their acts can be subjected to national jurisdictions is not merited as the proceedings involving IFIs in domestic courts that relate to the financial performance of IFIs is comparatively low. Yet, it would be no surprise if the current financial crisis triggered a call for a “revision” of

the scope of application of bankruptcy laws in relations to IFIs in order to hold them liable.

It is important to see the Janus-faced element of the attempt to establish domestic court's competence for acts of IFIs in times of financial crises: the gain of increased judicial review must be weighed against a decrease in the operational independence of IFIs.

In conclusion, the initial question is perhaps most promisingly answered by the attempts by the IFIs to find measures of self-regulation by themselves, which is in turn corrected by the rapidly evolving rules on responsibility and accountability of international organizations.

