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UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

SCHOOL OF LAW

FACULTY OF COMMERCE, LAW AND MANAGEMENT

Title

The International Monetary Fund and the duty to make accountable decisions.

Master of Laws by Dissertation (LLM)

October 2023

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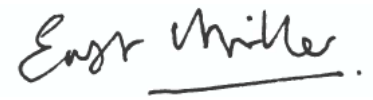
Student number: 2467392



DECLARATION

I, ERNST CHRISTIAN CHRISTOPH MÜLLER, declare that this research report is my own unaided work. It is submitted in fulfilment of the requirements for the degree of Masters of Law by Dissertation (LLM) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.



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Soli Deo Gloria.

Ernst

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CHAPTER ONE

1. THESIS

1.1 Core argument

A decision by the International Monetary Fund ("**IMF**" or "**Fund**") to reject a request for financial assistance from an emerging market or developing economy country in a crisis situation may bring about severe consequences.[1] These consequences may result in potentially long-term negative economic impacts for the country and its citizens.

In light of the potentially dire consequences, it ought not to be unreasonable to suggest that the Fund should be capable of justifying its decisions. Likewise, an applicant country ought to be able to challenge an unfavourable decision and take it on appeal or review. Neither scenario is however currently the case.

At present, the legal framework within which the IMF operates does not provide for either an appeal or review mechanism. IMF member states, as such, are left without recourse if the IMF rejects their applications for financial assistance. Citizens are likewise unable to challenge the Fund's decision where an application is rejected or when it is granted without the required safeguards being put in place to ensure that the funds are not misappropriated.

The discontentment created by the status quo is however not sufficient reason to motivate for the establishment of a dispute resolution mechanism. To successfully challenge this position, it is necessary to determine if there are any legal grounds on which countries or citizens could rely to show why the Fund ought to establish a suitable dispute resolution mechanism (such as a review or appeal mechanisms).

In this dissertation I argue that such grounds do exist by demonstrating that the IMF's organs (specifically the Board of Executive Directors) have a legal duty to act in a responsible manner and to make decisions for which they may be held accountable (**accountable decisions**). I demonstrate the existence of the duty which is imposed on the Executive Directors with reference to the framework

[1] The focus of this dissertation is on countries which qualify as emerging markets and developing economies in crisis situations. The argument could however be extrapolated to also apply to developed countries in crisis.

created under the IMF's constitutive documents. In this regard, I consider the rights, roles, duties, and responsibilities of the different organs which form part of the IMF. I also assess the nature of the relationship between the IMF, its member states, other international organisations and third-party stakeholders such as civil society organisations.

As part of my reasoning, I argue that international law may be interpreted to apply to international organisations such as the IMF and likewise imposes obligations on the IMF's organs (including the Board of Executive Directors) to make accountable decisions.

The dissertation concludes that the existence of the duty to make accountable decisions provides the legal basis and first principle on which countries and their citizens could rely to argue for the development of a mechanism which would allow parties to solve disputes which arise when the Fund grants or rejects an application for financial assistance from an emerging market or developing economy country in crisis. The ability to challenge the validity of accountable decisions is significant because it vindicates the related right to demand that the IMF's organs make accountable decisions. In the absence of a suitable dispute resolution mechanism (such as an appeal or review mechanism), the right to demand that decision-makers make accountable decisions is unenforceable. It also means that citizens' rights could be violated without recourse when the IMF fails to make accountable decisions.

1.2 Meaning of "accountability" and "accountable decisions" in this dissertation

In this dissertation, "accountability" means that a person in a position of power must take responsibility for his/her/its decisions and provide satisfactory reasons for the decision when s/he/it is called on to explain his/her/its actions and decisions (i.e. accountable decisions).

My interpretation of accountability and accountable decisions is based on and supplemented by the model developed by Ruth Grant and Robert Keohane who

argue that there are at least seven forms of accountability: hierarchical, supervisory, legal, fiscal, peer, and public reputational forms of accountability. [2]

Hierarchical accountability follows the classic model of accountability and is generally adopted by international organisations. Under this model, higher ranking organs and officials delegate powers to lower ranking positions. Following the delegation, the lower ranking positions are accountable to the higher-ranking positions. [3]

Under the *supervisory accountability* model, one group is empowered to supervise the activities of another group. [4]

The third category which Grant and Keohane identify is *fiscal accountability*. Under this model, funders are entitled to demand that recipients of the funds account to them on the way the funds which the funders provided were used. [5]

Fourth, Grant and Keohane refer to *legal accountability*. This category comprises two parts. As a premise, agents must abide by the powers which the principals vest in them under a specific set of rules. Second, the agents must identify and explain why their actions fell within the ambit of the power that vest in them, when they are called on to do so by the principals. The second step may occur in formal settings such as courts or quasi-judicial forums. In Grant and Keohane's view, this model is premised on a simple question: did the agent obey the law? [6]

The fifth category is *market accountability* and considers the relationship between investors and consumers. Through the market forces, these participants shape the way the public and private sectors perform. [7]

---

2 Ruth Grant and Robert Keohane "Accountability and Abuses of Power in World Politics" (2005) 99 *American Political Science Review* 29 last accessed from https://iilj.org/wp-content/uploads/2016/08/Grant-etal-Accountability-and-Abuses-of-Power-in-World-Politics-2004-2.pdf on 7 October 2023.

3 Grant and Keohane (2005) op. cit. note 2 at 16.

4 *Ibid.*

5 Grant and Keohane (2005) op. cit. note 2 at 17.

6 *Ibid.*

7 *Ibid.*

The penultimate category which Grant and Keohane identify is *peer accountability*. This model of accountability acknowledges that organisations which belong to the same group or category of organisations are accountable to one another.[8]

The final category is *public reputational accountability*. This cateogry includes reputation management as a subsidiary form of this type of accountability.[9]

Each category is important because it advances a specific conceptualisation of accountability.

1.3 Using the Coronavirus Disease 2019 (COVID-19) pandemic as a case study in this dissertation

To illustrate aspects of my argument, I draw on the Fund's response to the economic consequences of the pandemic that was caused by the COVID-19 pandemic. The COVID-19 pandemic is a useful recent case study of a crisis situation which drove many emerging markets and developing economy countries to request urgent financial assistance from the Fund. Different from localised national and regional financial crises, the COVID-19 pandemic had a material impact on most economies around the world as it forced one after the other country and transnational supply chain to a standstill.[10]

The circumstances surrounding the COVID-19 pandemic also serve as a useful reminder of the impact which the IMF's decisions may have on the citizens of member states' international human rights. In this context, examples of such rights include the right to health (including medical care) and life which may be compromised where an application for financial assistance is rejected.[11]

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8 Grant and Keohane (2005) op. cit. note 2 at 18.

9 *Ibid*.

10 Examples of other regional financial crises include the OPEC Oil Price Shock of 1973, the Asian Crisis of 1997, or the Financial Crisis of 2007–08. See Peter Bondarenko "5 of the World's Most Devastating Financial Crises" *Britannica* (sine anum) last accessed from https://www.britannica.com/list/5-of-the-worlds-most-devastating-financial-crises on 15 May 2022.

11 Articles 3 and 25 of the Universal Declaration of Human Rights (10 December 1948) G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), last accessed from https://www.un.org/en/about-us/universal-declaration-of-human-rights on 27 July 2022.

2. STRUCTURE OF THIS DISSERTATION

In addition to this initial chapter, this dissertation is made up of four further chapters.

2.1 Chapter Two

Chapter Two provides the background to the dissertation with regards to the IMF, its organs, the process which IMF member states must follow when they apply for financial assistance from the IMF, and the IMF's response to its member's request for financial assistance during the COVID-19 pandemic.

2.2 Chapter Three and Four

Following the background information set out in Chapter Two, the next two Chapters are dedicated to describing the legal framework which establishes the IMF, regulate its organs and their activities and operations, and impose a duty on the Executive Directors to make accountable decisions.

In Chapter Three I consider the IMF's Articles of Agreement, the IMF's rights and obligations as a UN Specialised Agency, IMF's By-Laws, Rules and Regulations, the General Administrative Orders, the Code of Conduct and further Guidelines, and internal accountability mechanisms. These sources jointly comprise the first level of the IMF's legal framework. Already at this level it is evident that the Executive Board must make accountable decisions.

In Chapter Four, I turn to the legal consequences which result from the IMF's relationship with its member states, non-members and non-state actors, civil society organisations, other international organisations and third parties. The rights and obligations which result from the IMF's actions comprise the second level of the IMF's legal framework. In light of the IMF's behaviour towards these stakeholders, I conclude that the IMF believes it has a duty to make accountable decisions.

Throughout these chapters, I identify the different sources of rights and obligations, the circumstances that give rise to specific rights and obligations, and the limitations associated with the different sources of rights and obligations. I also evaluate the specific obligations that may be imposed on the IMF and the concomitant rights that vest in the member states and international stakeholders.

2.3 **Chapter Five**

Chapter Five sets out the conclusions of the study.

It starts with a summary of the lawfulness of the IMF's decisions under international law and the duty to make accountable decisions. As part of this, I consider the consequences of the obligations imposed under the IMF's constitutive documents and the treaties to which the IMF is party.

Based on the findings in Chapters Three and Four, this Chapter also identifies why the absence of any review mechanisms has resulted in an accountability deficit and provides a basis from which IMF members and their citizens could argue for the establishment of a dispute resolution mechanism.

The dissertation concludes with the recommendation that the time has come for the IMF to develop and implement an accountability and dispute resolution mechanism given that certain stakeholders have a legitimate claim to an independent third-party appeal or review mechanism that would enable them to challenge the lawfulness and validity of the Executive Board's decisions.

CHAPTER TWO

1. INTRODUCTION

1.1 Rationale behind the IMF

As mentioned in Chapter One, the purpose of this dissertation is to prove that the IMF's organs – specifically the Executive Board – is required to make accountable decisions. The foundation of this thesis lies in the rationale behind the IMF. Different from the World Bank and other development finance institutions, the Fund does not exist to finance specific projects. Its purpose is much more nuanced and specific.

The Fund was established in 1944. Together with the World Bank, the two Bretton Woods Institutions were created to support the founding member states' efforts to rebuild their economies after the Great Depression and the Second World War.[12]

According to one of the key proponents of the IMF and the World Bank, Henry Morganthau, the "bewilderment and bitterness" which resulted from the Great Depression became "the breeders of fascism, and finally, of war". By creating the IMF and the World Bank, the forty-three founding member states sought to create international organisations which could maintain international peace and security through structured global economic interactions. According to Mr Morganthau the IMF and World Bank was intended to "[create] a dynamic world community in which the peoples of every nation will be able to *realise their potentialities in peace*."[13]

In the Fund's case, the vision espoused by Mr Morganthau and the founding member states finds expression under Article 1 of the Articles of Agreement of the

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12 International Monetary Fund "About the IMF: we are a global organization" (2022) last accessed from https://www.imf.org/en/About#:~:text=The%20IMF%20was%20established%20in,staff%20drawn%20from%20150%20nations. on 12 May 2022. Also see Bretton Woods Project " What are the Bretton Woods Institutions?" (1 January 2019) last accessed from https://www.brettonwoodsproject.org/2019/01/art-320747/#:~:text=The%20Bretton%20Woods%20Institutions%20are,to%20promote%20international%20economic%20cooperation on 12 May 2022.

13 Bretton Woods Project op. cit. note 13.

International Monetary Fund (**Articles of Agreement**). The purpose comprises six parts.

First, the Fund (which is a permanent institution) must promote international monetary cooperation. The cooperation must be achieved through mechanisms which member states can use to consult and collaborate with one another on international monetary problems.[14]

Second, the Fund must facilitate the expansion and balanced growth of international trade. As part of this objective, the IMF should contribute to the promotion and maintenance of high levels of employment and real income. It must also enable the development of the productive resources of all members as primary objectives of economic policy.[15]

Third, the Fund must promote exchange stability. Its efforts in this regard should seek to maintain orderly exchange arrangements among members. It must also pursue measures which avoid competitive exchange depreciation.[16]

Fourth, the Fund must support the development of a multilateral system of payments regarding current transactions between members. As part of this duty, the IMF must seek to ensure that foreign exchange restrictions which hamper the growth of world trade are eliminated.[17]

Fifth, the Fund must make its general resources available to members on a temporary basis. The purpose of the financial assistance must be to support member states in their efforts to correct maladjustments in their balance of payments. Ideally, the funding must prevent any need for members to have resort to other sources of funding which could be detrimental to their national (or general international) prosperity.[18]

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14 Article 1(i) of the *Articles of Agreement of the International Monetary Fund* United Nations (27 December 1945), New York 2 UNTS 39 last accessed from https://treaties.un.org/pages/showDetails.aspx?objid=0800000280165965 on 9 July 2022.

15 Article 1(ii) of the Articles of Agreement op. cit. note 14.

16 Article 1(iii) of the Articles of Agreement op. cit. note 14.

17 Article 1(iv) of the Articles of Agreement op. cit. note 14.

18 Article 1(v) of the Articles of Agreement op. cit. note 14.

Finally, the Fund must endeavour to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.[19]

The IMF therefore serves as the custodian of the global monetary system and has a duty to promote global economic stability while promoting cooperation among its members and supporting their individual economic growth. An immediate consequence of the fact that the Fund's members have entrusted it with this role is that the Fund as a whole ought to operate in an accountable manner.

2. GOVERNANCE AND THE IMF

2.1 The IMF and its purpose

The IMF is an autonomous international monetary institution and "Specialised Agency".[20]

Owing to the Fund's status as a Specialised Agency it qualifies as a supranational institution that has a working relationship with the United Nations (**UN**). It is also a permanent observer at the UN.[21]

For the reasons provided in this chapter and Chapter Three, the Fund is also an international organisation for purposes of international law.[22]

The IMF was established and is in the first instance regulated under the IMF's Articles of Agreement. The Articles of Agreement is the Fund's constitutive document and the centrepiece of the legal framework in which the IMF operates.[23]

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19 Article 1(vi) of the Articles of Agreement op. cit. note 14.

20 "Specialised Agency" means that it coordinates its work with the United Nations.

International Monetary Fund "Cooperation and reconstruction (1944–71)" last accessed from https://www.imf.org/external/about/histcoop.htm on 4 April 2021. Francois Gianviti "Decision-making in the International Monetary Fund" in *Current Developments in Monetary and Financial Law*, (1999) Vol.1, Legal Department of the IMF and the IMF Institute, Washington D.C. 31-67.

21 Bernhard Fritz-Krockow and Parmeshwar Ramlogan *International Monetary Fund Handbook : Its Functions, Policies, and Operations* (2007) at 1 last accessed from https://www.elibrary.imf.org/doc/IMF069/03766-9781589066250/03766-9781589066250/Other_formats/Source_PDF/03766-9781451932157.pdf on 22 March 2021.

22 See Chapter Three, section 3.1.2.

23 Articles of Agreement op. cit. note 14. Also see Adam Feibelman "Law in the global order: The IMF and financial regulation," (2017) 49 *New York University Journal of International Law and Politics* 687 at 702.

As an international organisation it is also regulated under international law. It is therefore bound by the treaties to which it is party, the obligations imposed under customary international law and the general principles of law recognised by civilised nations.[24]

Article I of the Articles of Agreement provides that the Fund's primary purpose is to promote international monetary stability, cooperation, and growth (including to prevent disequilibrium in the international balance of payments of the members states). To achieve this purpose, the Articles of Agreement vest broad multilateral as well as bilateral oversight responsibilities in the Fund (jointly called "surveillance"). The former is a global duty and the latter in respect of the economy of each member state. The Articles of Agreement moreover establish various mechanisms that entitle the Fund to consult and collaborate with the member states on all international monetary problems, undertake capacity development initiatives, and assist members through lending programmes when a balance of payment crisis occurs. Again, it is worth noting the custodial functions which the Fund carries out and the related need for it to act in an accountable manner.[25]

A balance of payment crisis arises when a country becomes unable to pay for the most basic imports. The crisis escalates when the country cannot service its debts as they fall due. An "urgent balance of payment need" according to the Fund is "a need that, if not addressed, would result in immediate and sever economic disruption". There may be various reasons for a balance of payment crisis arising, some of which are discussed later in this Chapter.[26]

Under the requirements imposed by Article I and Article IV of the Articles of Agreement, the Fund is entitled to undertake surveillance activities to confirm if the members comply with all the obligations imposed under the Articles of Agreement.

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24 See Article 38 of the *Statute of the International Court of Justice* United Nations (18 April 1946) 33 UNTS 993 last accessed from https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-3&chapter=1&clang=_en on 9 July 2022. Also see Chapter Four, section 4.

25 Fritz-Krockow and Ramlogan op. cit. note 21; Article 1 of the Articles of Agreement op. cit. note 14.

26 Sanjay Bulaki Borad "Balance of payment crisis" (13 June 2022) last accessed from https://efinancemanagement.com/international-financial-management/balance-of-payment-crisis on 2 July 2022. Also see section 2.3.1.5 of International Monetary Fund Finance Department "IMF financial operations 2018" (2018) last accessed from http://dx.doi.org/10.5089/9781484330876.071 on 18 April 2021.

This power enables it to monitor the members' monetary and financial system and advise members on the political and economic reform measures which the member ought to adopt where the Fund detects domestic instability. The last mentioned is normally referred to as *capacity development initiatives*.[27]

The Fund, in addition, may under Article V and XIX of the Articles of Agreement make its general resources temporarily available to member states through its various lending facilities or other transactions in Special Drawing Rights. "Special Drawing Rights" is the IMF's reserve asset (or currency in layman's terms) which is fully convertible into foreign currency. It serves as the IMF's unit of account. IMF members may acquire Special Drawing Rights through purchases with their own or other members' currency from the IMF or by exchanging Special Drawing Rights with other members.[28]

Access to the lending facilities is normally subject to adequate safeguards being implemented and may require the member in question to follow an economic adjustment programme to correct the balance of payment issues. These measures serve a dual function by protecting the Fund's own resources and preventing the destruction of national or international prosperity.[29]

Lending is considered in greater detail under section 3 of this Chapter.

Through the mechanisms and processes established under the Articles of Agreement the Fund is clothed with the ability to ensure that the international monetary and financial systems continue to function and operate properly. As part of this bundle of rights, it seems reasonable to argue that the fund must exercise its powers in a rational manner and that it should be able to explain and justify its decisions. Ultimately, it never holds Special Drawing Rights and is only the organisation which is responsible to ensure that members have access to financing through the Special Drawing Rights which they hold.[30]

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27 Ramlogan op. cit. note 23.

28 Gianviti op. cit. note 20 at 41.

29 Article XIX, Section 2(c), Articles of Agreement op. cit. note 14.

30 *Ibid.*

2.2 The different IMF organs and their functions

The IMF is organised and managed around five central bodies. These are: the Board of Governors, an Executive Board of Directors, a Managing Director (supported by three Deputy Managing Directors and the IMF's staff), the International Monetary and Financial Committee and the Development Committee.[31]

2.2.1 The Board of Governors

The Board of Governors is the IMF's apex decision-making authority. It comprises Governors and Alternate Governors from each member (who are usually the finance ministers or central bank governors of their countries).[32]

The Governors have all the residual powers which are created under the Articles of Agreement which are not specifically vested in the Executive Board or the Managing Director and her staff.[33]

Currently, the Board of Governors has delegated most of its residual powers to the Executive Board.[34]

The Articles of Agreement do not expressly provide whether this is an absolute delegation or what the consequences of the delegation are. Commentators such as Francois Gianviti, however, suggest that owing to the wording of the resolution during the first meeting of the Board of Governors in 1946, the Board of Governors have not been divested of its powers. Instead, the Governors have simply authorised the Executive Board to also exercise the delegated powers on condition that the Executive Board's decisions may not contradict the Board of Governors' earlier decisions.[35]

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31 Article XII, Section 1, Articles of Agreement op. cit. note 14. Also see Fritz-Krockow and Ramlogan op. cit. note 21 at 70.

32 Section 2(a), Article XII, Articles of Agreement op. cit. note 14.

33 *Ibid.*

34 A delegation in the broadest possible terms was made by resolution during the first meeting of the Board of Governors in 1946. Section 2(b), Article XII, Articles of Agreement op. cit. note 14 as well as section 15 of the By-Laws. International Monetary Fund *By-Laws, Rules and Regulations* (November 2022) 67th Issue last accessed from https://www.imf.org/external/pubs/ft/bl/blcon.htm on 7 October 2023.

35 Gianviti describes this as "what the Board of Governors intended to achieve by delegations was not a transfer of power but the attribution of subordinate power".

The Board of Governors however retains the right to approve quota increases and Special Drawing Right allocations, admit new members, authorise the compulsory withdrawal of members, and approve amendments to the Articles of Agreement and the *By-laws of the International Monetary Fund* (**By-laws**). The Governors may also increase or decrease the number of Executive Directors and shall have the final say on matters related to the interpretation of the Articles of Agreement.[36]

Finally, the Board of Governors may establish specific interim Committees (such as the committee mandated to consider disputes on the interpretation of the Articles of Agreement). These committees do not have any formal decision-making power and are established to advise the Board of Governors on specific issues. In this regard the committees play a very important function as they could wield significant influence over the ultimate decisions of the Board of Governors.[37]

2.2.2 **The Executive Board**

The Executive Board (currently comprising twenty-four Executive Directors representing the member states) is the principal decision-making body within the IMF and is "responsible for conducting the business of the Fund". The Executive Directors perform the Board's functions in accordance with the powers which the Articles of Agreement, By-laws, and *Rules and Regulations of the International Monetary Fund* (**Rules and Regulations**) vest in the Board. Such powers include those which the IMF's Board of Governors delegate to the Executive Board.[38]

Gianviti op. cit. note 20 at 41 to 43. Also see the Rule A-1 of the Rules and Regulations op. cit. note 34.

36 Article XII, Section 3(c) (regarding changes to the number of Executive Directors), Article II, Section 2(a) (regarding quota increases), Article XVIII (regarding special drawing rights), Article II. Section 2 (regarding the admission of new members), Article XXVI, Section 2 (regarding the compulsory withdrawal of members), and Article XXVIII (regarding the approval of amendments to the Articles of Agreement and the By-laws), and Article XXIX, Section (b) (regarding the interpretation of the provisions of the Articles of Agreement) of the Articles of Agreement op. cit. note 14.

Also see the International Monetary Fund *By-Laws, Rules and Regulations* op. cit. note 34.

37 Article XXIX, section 2(b) of the Articles of Agreement op. cit. note 14. Also see Gianviti op. cit. note 20 at 12.

38 International Monetary Fund *By-Laws, Rules and Regulations* op. cit. note 34, and Article XII, Section 3(a) of the Articles of Agreement op. cit. note 14.

Its mandate includes all aspects of the Fund's work, including the power to approve or reject applications for financial assistance by member states, annual evaluations and adopting reports on the members' economies, and making recommendations on policy issues which affect the global economy. [39]

The Executive Directors (and their staff) are also subject to a *Code of Conduct*. [40] The Board of Executive Directors are therefore required to conduct themselves in an accountable manner.

Specific examples of the powers, such as voting by the Executive Board and the decision-making process is considered below in more detail. [41]

2.2.3 **The Managing Director and the IMF staff**

The Managing Director, who is neither a Governor nor an Executive Director, is the "executive head" of the IMF. S/he is appointed by the Executive Board to chair the Board and acts under the general direction and control of the board. S/he is therefore accountable to the Executive Board.

While the Managing Director is entitled to attend the Executive Board's as well as the Board of Governors' meetings s/he is not entitled to vote, except when the Executive Board has an equal division in votes. In such instances the Managing Director shall have the casting vote. [42]

The Managing Director is also the head of the IMF's staff. Pursuant to the instructions provided by the Executive Board, the Managing Director and the staff conduct the ordinary functions of the Fund. [43]

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39 Article XII, Section 3(a) of the Articles of Agreement op. cit. note 14; Fritz-Krockow and Ramlogan op. cit. note 21 at Chapter 9 [Governance and Decision-Making]; International Monetary Fund Governance Structure (sine anum) last accessed from https://www.imf.org/external/about/govstruct.htm#:~:text=The%20Board%20of%20Governors%20is,head%20of%20the%20central%20bank on 7 October 2023.

40 International Monetary Fund *Code of conduct for the members of the Executive Board of the International Monetary Fund* formally adopted by the Executive Board on 14 July 2000, revised on 12 December 2003 and 1 August 2012 last accessed from https://www.imf.org/external/hrd/edscode.htm on 15 January 2021.

41 Voting is considered under section 2.2.2 and general decision making processes under section 2.2 of Chapter Four.

42 Gianviti op. cit. note 20 at 48, 49. Also see Article XII, Section 4(a), Articles of Agreement op. cit. note 14.

43 Section 4(b), Article XII, Articles of Agreement op. cit. note 14.

Given the relationship between the Board of Executive Directors, the Managing Director and the IMF's staff, it is clear that the latter are accountable to the Executive Board in respect of the performance of their functions.[44]

2.2.4 **Committees**

Finally, the International Monetary and Financial Committee (**IMFC**) (which comprises twenty-four Councillors) and the Development Committee act as a bridge between the Board of Governors and Executive Board and advise both Boards.[45]

The IMFC is responsible for the strategic oversight of the IMF's operations. The Councillors are appointed by the member states (or groups of member states) that are entitled to appoint an Executive Director to the Executive Board. Committee members must be central bank Governors or Ministers in the governments of member states (or persons with similar powers). Each Councillor may also appoint up to seven associates.[46]

The IMFC does not have any formal decision-making powers. Rather, its purpose is to supervise the management and adaptation of the international monetary system and advise and report to the Governors. Among other things, this general duty entails monitoring global liquidity, adjustment processes, and the developments in the transfer of real resources to developing countries. The IMFC is also mandated to consider proposals to amend the Articles of Agreement.[47]

The IMFC does not follow a voting system. The advice it prepares is based on consensus. The committee's recommendations therefore carry significant weight and are afforded great attention by the Governors and the Executive Directors.[48]

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44 See the different types of accountability as postulated by Grant and Keohane op. cit. note 2.

45 The Board of Governors established the IMFC in September 1999 to improve members' political oversight over the functions of the IMF.

46 Clause 1(a) of Schedule D [Council] of the Articles of Agreement op. cit. note 14. International Monetary Fund *An introduction to the International Monetary Fund (IMF) for civil society* (22 March 2021) last accessed from https://www.imf.org/external/mmedia/view.aspx?vid=6242691156001 on 5 August 2021.

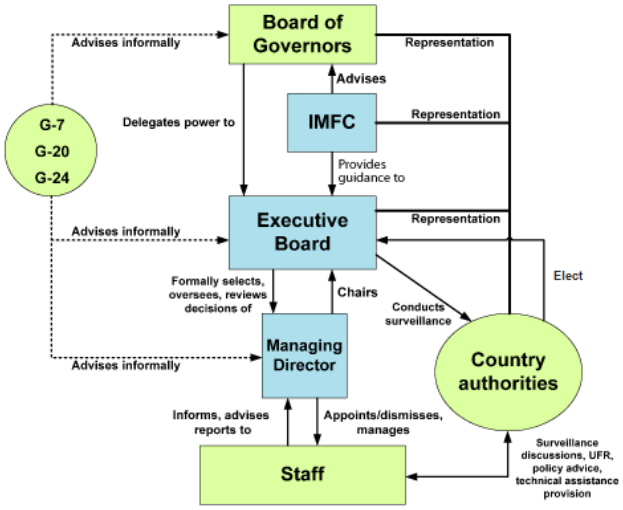
47 International Monetary Fund "A guide to committees, groups, and clubs" (16 February 2021) last accessed from https://www.imf.org/en/About/Factsheets/A-Guide-to-Committees-Groups-and-Clubs on 7 October 2023. Clause 2(a) of Schedule D [Council] of the Articles of Agreement op. cit. note 14.

48 Gianviti op. cit. note 20 at 39.

The IMFC therefore serves as an accountability watch dog when it advises and reports to the Governors.

The Development Committee also comprises twenty-four members who represent the interests of the member states. This joint committee advises the Boards of Governors of the IMF and the World Bank on all aspects of economic development in emerging and developing countries and in doing so seeks to build intergovernmental consensus on critical development issues.[49]

The relationship between the different IMF organs may be summarized as depicted in Figure 1 (below).



Summary of IMF governance structure[50]

3. APPLICATION FOR FINANCIAL ASSISTANCE

Within the context of the background to the IMF's organs and internal governance structure, the next part of Chapter Two considers the nature of the financial assistance which the IMF provides and the process that member states must follow to obtain financial assistance from the Fund.

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49 International Monetary Fund "Governance structure" op. cit. note 39.

50 Leonardo Martinez-Diaz " Executive boards in international organizations: lessons for strengthening IMF governance" (May 2008) *IEO Background Paper* BP/08/08 at 15 last accessed from https://policydialogue.org/files/events/background-materials/Martinez-Diaz_strengthening_IMF_gov.pdf on 9 July 2022.

3.1 Introduction to financial assistance

As mentioned in the introduction to this Chapter, the IMF does not provide financing for specific projects (which is the core focus of the World Bank or other development finance institutions). The IMF's aim is to support member states which experience financial crisis and assist them to restore economic stability and grow their economies. In some circumstances the IMF may also provide precautionary financing to prevent crisis from manifesting.[51]

The IMF has put in place different types of loans for which members may apply. The type of financial assistance which a member state can request will depend on the nature, extent and characteristics of the crisis, the prevailing economic and political circumstances in the country, and the applicant member's quota.

The member's quota plays an important role in this regard as it determines the extent of the members financial commitment to the IMF, the member's voting power and access to financial assistance. Each member's quota is calculated by considering the country's gross domestic product (GDP), openness to the global economy, economic variability, and international reserves. After becoming a member of the IMF, the country is required to provide financial resources which are equal to its quota to the IMF (this is described as the member's **subscription**). Up to 25 per cent of the subscription must be paid in Special Drawing Rights (or **SDRs**) or other members' currencies and the remaining 75 per cent may be paid in the new member's currency.[52]

The extent of the financial assistance which a member can request is subject it its quota. This varies from one facility to the next. For example, financial assistance under the Rapid Financing Instrument can vary from "up to 80 percent of quota per year and 183.33 percent of quota on a cumulative basis".[53]

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51 International Monetary Fund *IMF Lending* (December 2022) last accessed from https://www.imf.org/en/About/Factsheets/IMF-Lending on 13 July 2023.

52 International Monetary Fund " Quota Reform- For a more representative, modern IMF " last accessed from https://www.imf.org/external/pubs/ft/ar/2016/eng/quota.htm#:~:text=Each%20IMF%20member%20country%20is,and%20access%20to%20IMF%20financing on 13 July 2023.

53 International Monetary Fund Finance Department “IMF financial operations 2018” op. cit. note 26. International Monetary Fund "The Rapid Financing Instrument (RFI)" (March 2023) last accessed from

In this dissertation, I only focus on requests for financial assistance in the form of one of the Fund's special facilities or policies. Access to a specific facility or policy is ordinarily contingent on the member satisfying a prescribed set of requirements.[54]

The IMF in addition draws a distinction between concessional (zero interest) and non-concessional financial assistance to member states through a variety of different facilities. Examples include the Stand-By Arrangement, the Extended Fund Facility, the Extended Credit Facility, the Rapid Finance Instrument, and the Rapid Credit Facility (**IMF Lending Toolkit**).[55]

Concessional lending occurs when grants from the IMF to the member state finance the zero-interest rate on the loans to low-income member countries (**subsidy**). Through the subsidy, the low-income member country can access the financial assistance at a zero (or reduced) interest rate. Concessional financial assistance is only available to the low-income countries (which are identified by the IMF as the poorest and most vulnerable member states).[56]

“Lending” transactions are generally made on the Fund’s General Resources Account (**GRA**) and may only be concluded to supply a member, at its request, with either Special Drawing Rights or the currencies of other member states. Special Drawing Right is "an international reserve asset, created by the IMF in 1969 to supplement its member countries' official reserves".[57]

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https://www.imf.org/en/About/Factsheets/Sheets/2023/Rapid-Financing-Instrument-RFI#:~:text=The%20Rapid%20Financing%20Instrument%20(RFI)%20provides%20prompt%20financial%20assistance%20to,including%20in%20times%20of%20crisis on 13 July 2023.

54 Fritz-Krockow and Ramlogan op. cit. note 21 at 30.

55 *Ibid*. Also see Fritz-Krockow and Ramlogan op. cit. note 21 at 30.

56 Fritz-Krockow and Ramlogan op. cit. note 21 at 20.

57 The IMF’s resources are held in three different accounts: the General Resources Account, the Special Disbursement Account, and the Investment Account. Most of the transactions between the IMF and its members are made with funds which are held in the General Resources Account.

International Monetary Fund "Special Drawing Rights (SDR)" (January 2023) last accessed from https://www.imf.org/en/About/Factsheets/Sheets/2023/special-drawing-rights-sdr on 13 July 2023.

Section 2(a), Article V of the Articles of Agreement op. cit. note 14.

Where non-concessional assistance is provided, the transaction is called a "purchase". Concessional financial assistance, in turn, is called a "disbursement".[58]

The purchase-repurchase transactions are neither legally nor technically "loans". The terms of these agreements, however, are similar to the standard terms used in loan agreements and in essence perform a similar function.[59]

Financial assistance normally takes place in conjunction with an economic adjustment programme which the recipient of the financial assistance implements to resolve the balance of payment issues. The programme set out the conditions attached to the financial assistance and include adjustments to the applicant member state's economic and political policies which may be required to stabilise the economy and promote growth.[60]

In circumstances where members require emergency financial assistance, they are, however, able to obtain financial assistances under the Rapid Financing Instrument in the absence of an economic adjustment programme. For example, some of the financial assistance which the Fund provided to members during the first year of the COVID-9 pandemic. This is discussed in more detail below.[61]

These purchases (where non-concessional assistance is provided) are defined as "outright purchases" and are neither subject to phasing (where the funds are disbursed at different intervals) or performance criteria. To obtain access to such financial assistance, the applicant member state must identify the trigger event and describe the policies which it has in place to address the balance of payment issues. The application is granted if the IMF is content that the applicant member state will work with the IMF to identify and pursue measures to address the circumstances that gave rise to the financial payment crisis.[62]

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58 Fritz-Krockow and Ramlogan op. cit. note 21 op. cit. note 13 at 34.

59 International Monetary Fund Finance Department "IMF Financial Operations 2018" op. cit. note 26.

60 International Monetary Fund "IMF Conditionality" (March 2023) last accessed from https://www.imf.org/en/About/Factsheets/Sheets/2023/IMF-Conditionality on 13 July 2023.

61 International Monetary Fund "The Rapid Financing Instrument (RFI)" op. cit. note 53.

62 Fritz-Krockow and Ramlogan op. cit. note 21 op. cit. note 13 at 22.

As part of a transaction, the Fund may also render certain technical services. It will only do so if the member specifically requests the Fund's support in this regard.[63]

3.2 General conditions to access financial assistance

Members are entitled to request access to financial assistance either through an outright purchase (in the case of non-concessional financial assistance) or a disbursement (where a low-income country applies for concessional financial assistance) if the applicant country (**Applicant**) satisfies four overarching requirements. [64]

First, the Applicant must provide information on the manner in which it will use the Fund's resources. The Applicant must also confirm that after it receives the financial assistance it will abide by the requirements imposed under the Articles of Agreement and the Fund's policies on lending.[65]

Second, the Applicant must show that it is experiencing a balance of payment crisis, a crisis in respect of its foreign reserve position, or developments related to its foreign reserves.[66]

Third, the actual financial assistance that the Fund provides to the Applicant must be funds that are sourced from the Applicant's quota (i.e. a purchase of its "reserve tranche") or if it is funded from other members' quota would not result in the Fund eventually holding an amount of the Applicant's currency which is greater than 200 per cent of the Applicant's quota.[67]

Finally, the Applicant has not been declared ineligible to use the Fund's general resources. This may occur where the Fund is of the view that the Applicant used disbursed funds in a manner contrary to the purposes of the Articles of Agreement

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63 Section 2(b), Article V of the Articles of Agreement op. cit. note 14.

64 Sections 3 and 6, Article V of the Articles of Agreement op. cit. note 14.

65 Section 3(b)(i), Article V of the Articles of Agreement op. cit. note 14.

66 Section 3(b)(ii), Article V of the Articles of Agreement op. cit. note 14.

67 International Monetary Fund Finance Department "IMF Financial Operations 2018" op. cit. note 26. Also see International Monetary Fund *Classification of reserve position in the IMF* (sine anum) last accessed from https://www.imf.org/external/pubs/ft/bop/2018/pdf/Clarification0218.pdf on 7 April 2021; Article V, Section 3(b)(iii) of the Articles of Agreement op. cit. note 14.

and failed to address the Fund's concerns, or where the member failed to satisfy any of the obligations imposed under the Articles of Agreement.[68]

The third and fourth conditions may be waived. Before doing so, the Executive Board must consider the periodic and or exceptional requirements of the Applicant and its request. To bolster its case, the Applicant may also offer collateral (in the form of assets) if the Executive Board agrees to waive the conditions.[69]

The conditions, in this regard, serve a dual purpose. First, they provide safeguards to protect the general resources of the Fund. Second the conditions impose measures which seek to assist members resolve their balance of payments problems in a manner that accords with the framework created under the Articles of Agreement.[70]

3.3 **The financial assistance application process**

A formal application for financial assistance under one of the Fund's facilities commences when an IMF member state submits a request for financial support to the Managing Director. The request normally takes the form of a *letter of intent* (**Letter**) which confirms the nature of the financial assistance required as well as the undertakings which the member state would provide if the request is approved. [71]

The Letter is often accompanied by a *Memorandum on Economic and Financial Policies* and a *Technical Memorandum of Understanding*. These supporting documents provide a more comprehensive explanation of the fiscal and regulatory measures which the member would implement if its application for financial assistance is granted.[72]

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68 Article V, Sections 3(b)(iii) and 5; Article XXVI, Section 2(a) of the Articles of Agreement op. cit. note 14.

69 Article V, Section 4 of the Articles of Agreement op. cit. note 14.

70 Article V, Section 3 of the Articles of Agreement op. cit. note 14.

71 Generally, the formal application is preceded by discussions between the IMF staff and the member state regarding a potential need for financial assistances. Once the parties reach agreement on the way forward, the member state submits a formal request to the Executive Board.

Fritz-Krockow and Ramlogan op. cit. note 21 at 23. International Monetary Fund *IMF Lending* op. cit. note 51.

72 Fritz-Krockow and Ramlogan op. cit. note 21 at 23.

The Letter and accompanying documents are further supported by a report which the IMF's country team prepared after concluding the initial engagements with the member state's representatives (**Staff Report**). Among other things, the Staff Report expands on the member state's balance of payment needs and explains why access to the proposed Fund facility is an appropriate response to the stated fiscal crisis.[73]

In this context it is important to bear in mind that representatives from the Applicant and the IMF's staff consult on a regular basis. The IMF would therefore not be surprised when and Applicant submits and application as the staff would have been apprised of the prevailing economic circumstances which the Applicant was experiencing before the application is submitted. Ideally, the messaging in the Letter, memoranda, and Staff Report should be consonant.

The Staff therefore play an important role during the application process and the Staff Report is an equally important component of the application. Because the Staff Report is normally prepared as part of the Fund's ongoing monitoring activities in a member state, it ought to provide a realistic perspective on the social, political, and economic circumstances in a member state within the context of the Fund's previous observations and recommendations.[74]

Collectively, the bundle of documents is provided to the Board of Executive Directors and is the basis on which the Executive Directors make a decision whether to grant or reject the application for financial assistance. For the request to succeed, the supporting material would need to convince the Executive Board that the information provided is accurate, that the requisite financial support would be an apposite response to the balance of payment need, and that the Applicant will use the funds and implement the necessary reform measures to resolve the economic crisis.[75]

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73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

Once an application is submitted, the Executive Board will scrutinise the request to determine if the proposed transaction complies with the requirements imposed under the Articles of Agreement and the relevant IMF policies.[76]

From the outset, three principal considerations may limit a member's access to the IMF's facilities.

First, the nature and extent of the member's actual need for financial assistance. This would be counterbalanced by the member's ability to access financing through other sources. The Fund's own reserves at the time when the application is submitted would also be relevant.[77]

Second, whether the member (in the Executive Board's view) would be able to service its debts after the funds are disbursed. Normally, this is subject to the member's economic fundamentals and the proposed economic reform programme it proposes to implement if the request for assistance is approved.[78]

Finally, the Executive Board would also consider the extent of the Applicant's existing debt with the IMF (and other institutions) and its track record in repaying previous loans.[79]

The Board generally only makes a decision after the Executive Directors are thoroughly briefed on the subject matter. The briefing process comprises various stages. First, the Executive Directors are briefed through Board papers that were prepared by IMF staff members and approved by the Managing or Deputy Managing Directors. The Board papers provide an analysis of the issue at hand as well as some recommendations on how the Executive Board could proceed. The Board packs are generally issued two to three weeks in advance of any meeting. Second, the Executive Directors and their staff conduct their own research. During this process, the Executive Directors (and their staff) conduct their own research and prepare an adequate response to the subject matter addressed in the Board pack.

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76 Article V, Section 3(c) of the Articles of Agreement op. cit. note 14.

77 Fritz-Krockow and Ramlogan op. cit. note 21 at 24.

78 *Ibid*.

79 *Ibid*.

Third, the Executive Directors may present their own written or oral submissions to the Board in statements known as “grey statements”.[80]

Once the Executive Directors have had an opportunity to debate and discuss the merits of the application, the decision is put to a vote. If the application is granted, the funds are distributed in accordance with the terms agreed with the Applicant.[81]

Given the comprehensive nature of the application process, it is clear at this early stage of the enquiry that the Executive Board ought to carefully consider each application. Therefore, it is reasonable to argue that the Board ought to only make a decision which it can justify based on the information with which the Executive Directors were briefed. In other words, the Executive Directors need to able to provide a detailed explanation (i.e account for) their decision if the Applicant disagrees with the outcome of the application process. The need for the Executive Board to be able to justify its decision becomes increasingly critical where it could have significant consequences for the Applicant's citizens and their fundamental rights.

3.4 Emergency financial assistance under the Rapid Financing Instrument and Rapid Credit Facility[82]

The Rapid Financing Instrument and Rapid Credit Facility both provide rapid and low-access financial assistance to member countries that face an urgent balance of payments need. Absent such a need, a member would not qualify for financial assistance under the Rapid Financing Instrument and Rapid Credit Facility.[83]

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80 Fritz-Krockow and Ramlogan op. cit. note 21 at 73.

81 For a more comprehensive discussion of this process see “Decisions by the Executive Board” under Chapter Four, section 2.2.

82 As provided in the introduction to the dissertation, the scope of this study is limited to the financial assistance provided under the Rapid Financing Instrument and Rapid Credit Facility.

83 Section 2.3.1.5 of International Monetary Fund Finance Department “IMF Financial Operations 2018” op. cit. note 26.

Also see International Monetary Fund “Review of enhanced access limits under the Rapid Credit Facility and Rapid Financing Instrument” (5 October 2020) last accessed from https://www.elibrary.imf.org/doc/IMF007/29373-9781513558646/29373-9781513558646/Other_formats/Source_PDF/29373-9781513558677.pdf on 10 April 2021.

Where such a need does exist, the Applicant may be required to comply with the following additional requirements.

First, only low-income countries which are members of the Poverty Reduction and Growth Trust (**Poverty Trust**) are entitled to submit requests for assistance under the Rapid Credit Facility. These are the poorest and most vulnerable member states.[84]

Second, the balance of payment crisis must be temporary and capable of being resolved within one year of the funds being disbursed without the Applicant having to make significant policy adjustments. If, however, the crisis is not temporary, an application may still be granted in some circumstances if the IMF is already providing financial assistance to the Applicant, or the balance of payment need is of such an urgent nature that it would not be feasible to design and implement a new programme or complete a review of an existing programme.[85]

Third, the member must provide certain "ex ante policy undertakings". These undertakings must confirm which general policies the member will implement to resolve the balance of payment crisis. The member must also identify which policies it will refrain from implementing as these may exacerbate the balance of payment crisis.[86]

The minimum undertakings comprise a set of prescribed as well as voluntary undertakings. Under the IMF's *Review of enhanced access limits under the Rapid Credit Facility and Rapid Financing Instrument* (5 October 2021), an Applicant must commit to undertake central bank safeguards assessments, take certain government related prior actions (such as the upfront implementation of key public finance management reforms, and enforcing anti-corruption frameworks), and undertake to limit its access under the Rapid Financing Instrument/Rapid Credit Facility by only using the funds to resolve the urgent balance of payment crisis.[87]

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84 All members may request assistance under the Rapid Financing Instrument.

85 International Monetary Fund "Review of enhanced access limits under the Rapid Credit Facility and Rapid Financing Instrument" op. cit. note 83.

86 *Ibid*.

87 *Ibid*.

While the nature and characteristics of the voluntary *ex ante* policy undertakings are a question of fact that will differ from one member state to the next, they provide important additional safeguards against the potential misappropriation of the Fund's resources. Successful Applicants often do not have the necessary checks and balances in place to monitor the way state funds are used during catastrophic or emergency situations, before the funds are disbursed. The absence of strong accountability and transparency mechanisms create opportunities for corruption. To prevent acts of corruption or instances where the funds are used in illicit transactions, an Applicant must identify the governance safeguards and measures which it will implement to monitor how the funds are spent.[88]

The type of undertakings required is a question of fact. Most Applicants however agree to undertake a comprehensive audit on how the funds were spent after the crisis subsides. Applicants also often agree to publish copies of the procurement contracts concluded during the period of crisis. Subject to the domestic laws of the Applicant, it may also undertake to publish the names of the beneficiaries of the contracts and confirmation on whether the parties performed as agreed.[89]

As with the other facilities in the IMF's Lending Toolkit, the Executive Board will also evaluate the nature and extent of the balance of payment crisis, the Applicant's ability to comply with the terms of the lending arrangement (including repaying the funds), the Applicant's existing indebtedness to the Fund and other lenders, and the Applicant's past conduct.[90]

Given that the nature of the financial assistance provided in terms of the Rapid Financing Instrument and Rapid Credit Facility is to address crisis and urgent balance of payment needs, the Executive Board decide applications faster than applications for other facilities which form part of the IMF lending toolkit. This is illustrated below in the context of the relief which the IMF provided during the first year of the COVID-19 pandemic.

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88 *Ibid*.

89 *Ibid*.

90 *Ibid*.

Finally, before deciding, the Executive Board will also consider the size, origin, and temporal extent of the exogenous shock which caused the balance of payment crisis.[91]

If the limited *ex ante* undertakings are satisfied the application will be granted and the funds will be made available to the Applicant in the form of an outright purchase under the Rapid Financing Instrument or disbursement under the Rapid Credit Facility.[92]

The successful Applicant may request further (or repeated) assistance if additional exogenous shocks occur, or the member can prove a six-month track record of adequate macroeconomic policies. The latter refer to policies which enable to member state to address the urgent balance of payment crisis, stabilise the economy and create circumstances which would promote economic growth.[93]

The nature of the financial assistance provided under the Rapid Financing Instrument and the Rapid Credit Facility are similar, but there are a few material differences between the two facilities.

First, although IMF members are entitled to request financial assistance under the Rapid Financing Instrument, only low-income countries (who are members of the Poverty Trust) qualify for assistance under the Rapid Credit Facility given that the facility provides concessions to low-income countries which are not available to all IMF member states.

Second, funds provided under the Rapid Financing Instrument must be repaid within three and a quarter to five years, whereas recipients of funds under the Rapid Credit Facility are afforded five and a half to ten years to repay the loan.

Third, financing under the Rapid Credit Facility carries a zero-interest rate. The financing terms under the Rapid Financing Instrument in turn is subject to the same financing terms as the Flexible Credit Line, the Precautionary and Liquidity

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91 *Ibid*.

92 *Ibid*.

93 *Ibid*.

Line and Stand-By Arrangements and therefore could give rise to a commitment fee, a lending rate (equal to the basic rate of charge[94]) and surcharges.[95]

4. BACKGROUND: THE COVID-19 PANDEMIC AND HOW IT CHANGED THE WORLD

In the previous sections of this Chapter, I considered the structure of the IMF, the organs which comprise the international organisation, governance at the IMF and the process which member states must follow when they apply for financial assistance. With this background in mind, it is helpful to consider a recent real-world example to understand how the IMF operates in practice. The significant yet uniform impact which the COVID-19 pandemic had on emerging market and developing economies around the world serves as a useful case study to consider how the IMF responds to crisis situations. Given the impact which the pandemic had on the health and well-being of these IMF member states' citizens it is also a useful example to illustrate how the Executive Board's decision in respect of applications for financial assistance can have direct and immediate impacts on Applicants' citizens where the Board decides not to grant an application.

4.1 The economic consequences of the COVID-19 pandemic

By all counts, 2020 was an unprecedented year. Historians will likely record it as the year in which nations across the world witnessed how COVID-19 spread throughout their countries at lightning speed and were subjected to draconian government measures that sought to prevent the contagion.[96]

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94 The mechanism used by the Fund to calculate the interest and levy charges in respect of Special Drawing Rights allocations and holdings which are applied each quarter. International Monetary Fund "Rates query" (*sine anum*) last accessed from https://www.imf.org/external/np/fin/data/query.aspx#:~:text=The%20basic%20rate%20of%20charge,financial%20consequences%20of%20protracted%20arrears on 2 March 2021.

95 International Monetary Fund "IMF Stand-By Arrangement (SBA)" (11 February 2021) last accessed from https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/20/33/Stand-By-Arrangement on 2 March 2021; International Monetary Fund "IMF Flexible Credit Line (FCL)" (29 May 2020) last accessed from https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/20/40/Flexible-Credit-Line on 2 March 2021.

96 World Health Organisation "A year without precedent: WHO's COVID-19 response" last accessed from https://www.who.int/news-room/spotlight/a-year-without-precedent-who-s-covid-19-response on 2 January 2020; Anthony J. Makin & Allan Layton "The global fiscal response to COVID-19: Risks and repercussions" (2021) 69 *Economic Analysis and Policy* 340.

For many, COVID-19 became synonymous with varying degrees of lock down, curfews, border closures, domestic and international travel restrictions, the temporary closure of health and recreational facilities, and a move away from activities where people met in person (a phenomenon known as "social distancing").[97]

These measures had a significantly disruptive impact on businesses, households, financial institutions, and markets. This, in turn, affected economic output in most countries.[98]

As the different sectors of the economy are intricately connected to each other through different supply chains, the restrictions caused simultaneous supply and demand shocks. The simultaneous shocks, in turn, had upstream and downstream ripple effects throughout national economies.[99]

As supply chains connect economic activity across different countries, the pandemic also had a significant impact on the global markets and the global economy.[100]

COVID-19, therefore stunted domestic and international economic growth, reduced gross domestic product, and impeded international and domestic trade.[101]

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97 Maryla Maliszewska, Aaditya Mattoo & Dominique van der Mensbrugghe "The potential impact of COVID-19 on GDP and Trade : a preliminary assessment" (2020) *Policy Research Working Paper No. 9211 World Bank* last accessed from https://openknowledge.worldbank.org/handle/10986/33605 on 2 January 2021. Also see Thomas Hale, Noam Angrist, Emily Cameron-Blake, Laura Hallas, Beatriz Kira, Saptarshi Majumdar, Anna Petherick, Toby Phillips, Helen Tatlow, Samuel Webster *Oxford COVID-19 government response tracker* (2020) Blavatnik School of Government last accessed from https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker on 7 February 2021.

98 Anton Pichler and J. Doyne Farmer "Modelling simultaneous supply and demand shocks in input-output networks" (19 January 2021) last accessed from https://ssrn.com/abstract=3769494 on 3 February 2021. International Monetary Fund "Ensuring continuity in the production of external sector statistics during the COVID-19 lockdown" (2020) last accessed from https://www.imf.org/~/media/Files/Publications/covid19-special-notes/en-special-series-on-covid-19-ensuring-continuity-in-the-production-of-external-sector-statistics.ashx on 8 February 2021.

99 *Ibid*.

100 Andrew K Rose & Mark M Spiegel "Cross-country causes and consequences of the 2008 crisis: international linkages and American exposure" (September 2009) *Federal Reserve Bank of San Fransisco Working Paper Series* Working Paper 2009-18 last accessed from https://www.frbsf.org/economic-research/files/wp09-18bk.pdf on 3 February 2021; Nicholas K Tabor and Jeffery Y Zhang, "Capital, contagion, and financial crises: what stops a run from spreading?"(2020)2 *Columbia Business Law Review* 575.

101 Maryla Maliszewska, Aaditya Mattoo & Dominique van der Mensbrugghe op. cit. note 97.

According to the IMF, the global economy contracted by 3.1 per cent in 2020.[102]

While some emerging markets and developing economies (such as China, Turkey and Egypt) experienced positive growth rates and fared better than advanced economies (such as the United States, the European member states and Japan) others experienced deep recessions, including South Africa (-7.8 per cent), India (-9.6 per cent), and Argentina (-10.6 per cent).[103]

Global trade, likewise, came to a complete standstill during the first half of the year as countries around the world closed their borders. While the trade in goods (particularly commodities) rebounded in the second half of 2020 when borders reopened, the trade in services (particularly hospitality and tourisms) remained significantly below pre-lockdown levels. On the whole, the United States Congressional Service estimates that global trade contracted by 5.3 per cent per cent in 2020.[104]

The reduced economic activity resulted in, among other things, the rapid rise in unemployment levels with sectors such as travel and tourism being hit the hardest.[105]

To combat the virus, governments were compelled to reconsider national budgets and identify mechanisms which they could deploy to fight the virus. Obviously, this required short-, medium-, and long-term strategies each comprising a multipronged approach.

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102. International Monetary Fund *World economic outlook: rising caseloads, a disrupted recovery, and higher inflation* (January 2022) last accessed from https://www.imf.org/en/Publications/WEO/Issues/2022/01/25/world-economic-outlook-update-january-2022 on 28 February 2022.

103 On average emerging markets and developing economies (excluding China) contracted by 5 per cent. World Bank *Global economic prospects* (2021) last accessed from https://www.worldbank.org/en/publication/global-economic-prospects on 1 February 2021.

104 World Bank *Global economic prospects* op. cit. note 103; Congressional Research Service G*lobal economic effects of COVID-19* (10 November 2021) last accessed from https://crsreports.congress.gov/product/pdf/R/R46270 on 17 May 2022.

105 Hensher Martin "Covid-19, unemployment, and health: time for deeper solutions?" (2020) 371 *BMJ* 2020 last accessed from https://www.bmj.com/content/371/bmj.m3687 on 2 January 2021; United Nations World Tourism Organisation *Secretary-General's policy brief on tourism and COVID-19* last accessed from https://www.unwto.org/tourism-and-covid-19-unprecedented-economic-impacts on 2 January 2021.

In the short term, governments required immediate funding to procure the necessary personal protective equipment for health care workers, upgrade existing hospital infrastructure, and construct field hospitals to attend to persons who had contracted the virus. This placed a significant and unexpected strain on the fiscus of most countries.[106]

During the early days of the COVID-19 pandemic it was reported that there were no official continent-wide statistics on the number of ventilators in Africa. Some guestimates were however available. For example, a doctor in Zimbabwe estimated that were less than 20 in the country's public hospitals. A senior hospital administrator in Sudan suggested that the entire country had less than 80 ventilators. Nigeria, reportedly had less than 500 ventilators for a population exceeding 200 million. Only three ventilators were available in the Central African Republic. [107]

Any delay in granting an application for financial assistances could clearly have significant consequences for the citizens of these countries right to access adequate medical facilities and the right to life. Likewise, a decision to grant an application without ensuring that the required safeguards are put in place to precent the potential misappropriation of funds would likewise have a materially negative impact on the citizens.

While the total costs to date of treating and responding to the COVID-19 during 2020 has not been published, an early modelling study by Edejer *et al.* estimated that health care cost to treat and respond to COVID-19 in the seventy-three low- and middle-income countries during the period 26 June 2020 to 24 July 2020 (for example) was equal to US$ 52.45 billion (or US$ 8.60 per capita). In scenarios where the spread of the virus decreased by 50 per cent, the estimated total monthly cost for these countries may have reduced to US$ 33.08 billion. Likewise, where the

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106 The demand did not subside after the initial peak and during 2020 continued to follow the ebb and flow of the virus as it spread throughout nations.

107 Aryn Baker " Few Doctors, Fewer Ventilators: African Countries Fear They Are Defenceless Against Inevitable Spread of Coronavirus" (7 April 2020) *Time* last accessed from https://time.com/5816299/coronavirus-africa-ventilators-doctors/ 16 July 2023.

transmissions increased by 50 per cent the estimated total monthly costs may have increased to US$ 61.92 billion.[108]

Second, pursuant to the government-imposed lockdowns, border closures and related measures, governments were also required to develop and implement fiscal relief packages to assist the private sector and citizens who were detrimentally affected by the economic disruptions caused by the public health and social measures. Relief packages which formed part of these measures included higher public spending, tax cuts, cash handouts, and additional social welfare payments.[109]

In sum, the IMF estimates that government support during 2020 amounted to US$ 13 trillion.[110]

Although the economic circumstances of countries on the low-income to high-income spectrum differed greatly, most countries required medium- to long-term fiscal strategies to address the trajectories on which they were. When the pandemic hit, it served as a catalyst to bring about the perfect economic storm.[111]

While developed countries were generally able to weather the increased spending demands of the health and social welfare sectors by reallocating significant parts of the national budget. Developing countries were less fortunate. In many lower- and

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108 Tessa Tan-Torres Edejer, Odd Hanssen, Andrew Mirelman, Paul Verboom, Glenn Lolong, Oliver John Watson, Lucy Linda Boulanger, Agnès Soucat "Projected health-care resource needs for an effective response to COVID-19 in 73 low-income and middle-income countries: a modelling study" 2020(11) *The Lancet* last accessed from https://www.thelancet.com/action/showPdf?pii=S2214-109X%2820%2930383-1 on 7 February 2021.

The study accounts for approximately 93 per cent of the total population of the 32 countries which qualify as low- income countries and 109 countries which qualify as middle-income countries. The study included countries where the authors were unable to source trusted GDP or epidemiological data.

109 Anthony J. Makin & Allan Layton op. cit. note 96 at 343.

110 Independent Evaluation Office of the International Monetary Fund "The IMF's emergency response to the COVID-19 pandemic" (6 May 2021) last accessed from https://ieo.imf.org/-/media/IEO/Files/evaluations/ongoing/erp-draft-issues-paper.ashx on 23 May 2021 at 1.

111 Jonathan Wheatley "IMF prepares to bolster developing countries' finances" (5 April 2021) *Financial Times* last accessed from https://www.ft.com/content/50bbaa46-2b30-4d35-bb36-804bc82b068f?accessToken=zwAAAXihrd9wkc9Qu6pGKzBNNdO7NoBLyCrsGjw.MEYCIQDcyHhCj26rLbMJTEUzS4fggVQDr5wcynWtBNgvK-yhOwIhALRv_r_5CJxa8HtFYzV7glZ4BLasQRDzjwnfFjb2z4Qw&sharetype=gift?token=9cb023f7-327c-4958-ac03-30ee9cfaafbc on 5 April 2021; International Monetary Fund *Fiscal Monitor: Policies for the Recovery* (October 2020) last accessed from https://www.imf.org/-/media/Files/Publications/fiscal-monitor/2020/October/English/text.ashx on 8 February 2021.

middle-income countries the additional spending, tax relief measures, reduced tax revenues, and increased social support measures (which provided critical relief to citizens) meant that governments were expending more funds than they were receiving. This, in turn, gave rise to the fiscal deficits that some countries experienced.[112]

At a practical level, financial crises manifested where countries were unable to pay for essential imports or service their external debt repayments. Examples of countries who were unable to pay their debts as they fell due include Argentina, Ecuador, Lebanon, Belize, Suriname, and Zambia. Owing to the impact which the COVID-19 pandemic had on the global economy, it came as no surprise that the governments of many countries struggled to source domestic funding to pay for essential imports. Some countries were also unable to pay their debts as they fell due. It was within these circumstances where the Fund as custodian of the global economy played an important role.[113]

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[112] International Monetary Fund *Policy Responses to COVID-19* last accessed from https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19 on 15 January 2021. Also see World Bank "Global economic prospects" (2021) op. cit. note 103.

[113] International Monetary Fund *IMF Lending* op. cit. note 51; International Monetary Fund *Fiscal Monitor: Policies for the Recovery* op. cit. note 111.

FitchRatings *Sovereign Defaults Set to Hit Record in 2020* (12 May 2020) last accessed from https://www.fitchratings.com/research/sovereigns/sovereign-defaults-set-to-hit-record-in-2020-12-05-2020#:~:text=Argentina%2C%20Ecuador%20and%20Lebanon%20already,Fitch%2Drated%20sovereigns%20in%202017 on 8 February 2021; Stuart Culverhouse *Sovereign defaults in 2020: Experience and lessons* (8 December 2020) last accessed from https://tellimer.com/article/sovereign-defaults-in-2020-experience-and-les on 8 February 2021.

Andrew Berg, Eduardo Borensztein, Gian Maria Milesi-Ferretti, & Catherin Pattillo "Anticipating balance of payments crises" (1999) *International Monetary Fund Occasional Paper 186* last accessed from https://www.imf.org/external/pubs/nft/op/186/ on 15 January 2021. According to Article 1(v) of the IMF's Articles of Agreement op. cit. note 14, one of the IMF's core functions is to temporarily provide members access to the Fund's general resources to correct maladjustments in their balance of payments. The assistance must be accompanied by adequate safeguards and seek to address the balance of payment crisis through a means that promotes national or international prosperity.

Also see Financial Times *Prepare for emerging markets debt crisis, warns IMF head* (30 March 2021) last accessed from https://www.ft.com/content/487c30f4-7f21-4787-b519-dde52264d141 on 5 April 2021 and Financial Times *UN chief warns of coming debt crisis for developing world* (30 March 2021) last accessed from https://www.ft.com/content/abcd97d3-fb65-47e5-973a-598514f1fd5a on 5 April 2021.

5. RESPONSE TO THE FINANCIAL CRISIS CAUSED BY THE COVID-19 PANDEMIC

The previous sections of this Chapter considered the IMF's organs, its lending toolkit and the overall economic impact of the COVID-19 pandemic (as a recent case study). In this final section of Chapter Two, I briefly touch on the way the Fund (in collaboration with its members and other international financial institutions) responded to the economic crises caused by the COVID-19 pandemic.

In total, global financial support during 2020, including that provided by the IMF, was equal to US$ 15 trillion. The support was however the product of several mechanisms.[114]

Shortly after the World Health Organisation declared COVID-19 a global pandemic on 11 March 2020, the President of the World Bank and the Fund's Managing Director on 25 March 2020 urged the Group of Twenty (**G20**) countries to suspend bilateral debt service payments for low and lower-middle income countries for a predetermined period in an attempt to address the impending crisis.[115]

The G20 acceded to the request on 15 April 2020 and agreed to suspend the repayment of official bilateral credit for the remainder of the year. Pursuant to the arrangement the G20 also established the Debt Service Suspension Initiative on 1 May 2020.[116]

At the same time the Fund implemented various measures that would provide emergency financial assistance to countries affected by the crisis. As a premise, the Fund provided emergency finance through the Fund's emergency financing facilities: the Rapid Credit Facility and Rapid Finance Instrument. Second, it

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114 Independent Evaluation office of the International Monetary Fund "The IMF's Emergency Response to the COVID-19 Pandemic" op. cit. note 110 at 1.

115 World Health Organisation *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020* (11 March 2020) last accessed from https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 on 18 July 2023, International Monetary Fund *The IMF's response to COVID-19* (28 October 2020) last accessed from https://www.imf.org/en/About/FAQ/imf-response-to-covid-19#Q1 on 7 January 2021.

116 World Bank *COVID 19: Debt Service Suspension Initiative* (21 December 2020) last accessed from https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative on 2 January 2021. Also see Independent Evaluation Office of the International Monetary Fund "The IMF's Emergency Response to the COVID-19 Pandemic" op. cit. note 110 at 6.

provided debt relief to the twenty-nine poorest and most vulnerable member states through the Catastrophe Containment and Relief Trust (**Catastrophe Trust**). At that juncture, the grants provided under the Catastrophe Containment and Relief Trust were expected to cover debts falling due until April 2022. Third, it "expanded the toolkit of precautionary instruments" available to qualifying members by establishing a new Short-term Liquidity Line. The Short-term Liquidity Line was available to member countries with strong fiscal policies and fundamentals and adjusting existing lending arrangements. [117]

While financial assistance was contingent on member states satisfying certain minimum requirements for access to the various lending instruments, overall conditionality was limited owing to the urgent nature of the requests. The Fund's approach in this regard is critical. Under normal circumstances conditionality provides the mechanisms on which the IMF relies to ensure that the member state resolved the balance of payment crisis in an acceptable manner. In fact, authors such as Feibelman suggest that the Fund has the greatest impact on members' policies by imposing specific conditions in times of crisis where the Fund has leverage over the members. As discussed under the previous section, these conditions normally take the form of policies and actions which the member undertakes to implement to establish adequate safeguards for the use of the IMF's resources. Through this process the Fund as well as the member states give effect

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[117] To qualify for the rapid relief member states were required to implement measures that would promote accountable and transparent use of the resources. As at 21 December 2020 the Fund had provided financial assistance to eighty three members equal to approximately US$ 102,397.61 million.

International Monetary Fund *Catastrophe Containment Trust* (15 April 2020) last accessed from imf.org/en/About/Factsheets/Sheets/2016/08/01/16/49/Catastrophe-Containment-and-Relief-Trust on 3 January 2021; International Monetary Fund *The IMF and COVID-19 (corona virus)* (2020) last accessed from https://www.imf.org/en/Topics/imf-and-covid19 on 3 January 2021; International Monetary Fund *COVID-19 Financial Assistance and Debt Service Relief* (21 December 2020) last accessed from https://www.imf.org/en/Topics/imf-and-covid19/COVID-Lending-Tracker#:~:text=The%20IMF%20is%20providing%20financial,of%20the%20COVID%2D19%20pandemic.&text=Overall%2C%20the%20IMF%20is%20currently,capacity%2C%20available%20to%20member%20countries of 5 January 2021; International Monetary Fund *The IMF's response to COVID-19 op cit*. note 115; Independent Evaluation Office of the International Monetary Fund "The IMF's Emergency Response to the COVID-19 Pandemic" op. cit. note 110 at 6.

to the obligations imposed under Article V, Section 3(a) of the Articles of Agreement. This is necessary to achieve justifiable outcomes.[118]

Emergency financial assistance for developing member states was primarily provided under the Rapid Financing Instrument (which as mentioned above provides non-concessional assistance) and the corresponding Rapid Credit Facility (which is a concessional facility that is available to low-income countries). As indicated earlier in this Chapter, both lending facilities were designed to assist member states in circumstances where a comprehensive economic programme was either unnecessary or it was not possible to enter into one owing to the urgent crisis which the country faced.[119]

These facilities were therefore suitable responses to the financial crises caused by the COVID-19 pandemic as they provided rapid assistance to member states that experienced an urgent balance of payments crisis. The flexibility they offered also appealed to members as they were accessible even when a member did not have an IMF programme in place or did not wish to further extend existing facilities.[120]

As mentioned above, neither the Rapid Financing Instrument nor the Rapid Credit Facility are Fund assisted programmes: they are outright purchases/disbursements. They also do not impose after the fact policy conditions with which recipients must comply once the funds are released and are normally granted if the minimum *ex ante* or qualifying criteria are complied with. In respect of the latter, Applicants are normally required to identify the policies which they have (or intend) to implement to address the balance of payment issues. The funds are released if the Fund is satisfied that the member will endeavour to find solutions for the balance of payments crisis.[121]

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118 Feibelman op. cit. note 23 at 729, 740; Article V, Section 3(a) of the Articles of Agreement op. cit. note 14; Fritz-Krockow and Ramlogan op. cit. note 21 at 25, 32, 33.

119 International Monetary Fund *The Rapid Credit Facility* (9 April 2020) last accessed from https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/08/Rapid-Credit-Facility on 7 October 2023; International Monetary Fund "The Rapid Financing Instrument (RFI)" op. cit. note 53.

120 *Ibid*.

121 Fritz-Krockow and Ramlogan op. cit. note 21 at 22. Under Article I(v) of the Articles of Agreement op. cit. note 14, one of the IMF's purposes is to "To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity

Once the funds are disbursed, the IMF has limited enforcement tools to compel members to comply with their undertakings. Although the Articles of Agreement provide sanctions which could be invoked if a member does not comply with specific conditions, these are seldom invoked.[122]

For the better part, emergency financing under the Rapid Financing Instrument and the Rapid Credit Facility were justified during the COVID-19 pandemic. This was principally owing to the urgent balance of payment crisis which required emergency financial assistance before the Fund could provide longer term financial assistance to a member under another facility (or reviewed and revised where a facility where one was already in place).[123]

Separately, where lending arrangements were in place, qualifying member states also had the ability to request the Fund to augment these facilities. Examples of these include the Extended Credit Facilities (ECF),[124] Existing Fund Facilities (EFF),[125] or Standby Arrangement.[126] By doing so, the Fund and the member states in question were able to free up funds to procure medical supplies and equipment in the fight against COVID-19.[127]

According to the IMF, during 2020 over a hundred member states submitted requests for financial assistance to its Executive Board of which eighty-three members' requests for emergency financing was approved in 2020 members. A further nine members requested were approved during the first quarter of 2021.

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to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity". Also see International Monetary Fund *IMF Lending* op. cit. note 51.

122 Article XXIII, Section 2 of the Articles of Agreement op. cit. note 14. Also see Fritz-Krockow and Ramlogan op. cit. note 23 at 731.

123 International Monetary Fund *Review of enhanced access limits under the Rapid Credit Facility and Rapid Financing Instrument* op. cit. note 83.

124 Examples include the Islamic Republic of Afghanistan, Somalia, and the Gambia.

125 Examples include Jordan, Ecuador, Somalia, Angola, and Barbados.

126 Examples include the Arab Republic of Egypt and Ukraine.

127 International Monetary Fund *The IMF's response to COVID-19* op cit. note 115.

Through the process the Fund provided approximately US$ 108 billion in financial assistance to its members.[128]

Approximately a quarter of the initial applications in 2020 were refused. Some were however granted after further conditions were satisfied. [129]

Zambia is a salient example of a member state whose initial applications for financial assistance were rejected. The first application for a COVID-19-related Rapid Credit Facility was submitted in May 2020. Given Zambia's debt situation at the time the Fund refrained from granting Zambia's request. Some six months later, in November 2020, Zambia was the first African country to default on its international debt payments. Despite the rapidly deteriorating circumstances the IMF did not grant Zambia's request in 2020.[130]

While the IMF sought to justify its decision by referring to Zambia's spiralling debt position, the decision not to grant the application for assistance under the Rapid Credit Facility had potentially significant consequences public health. For example, according to a report which the Zambian Ministry of Health published in June 2021, only 4% of rural facilities had access to ventilators for ICU and non-invasive ventilators. During the same time nearly 55% of the population resided in rural areas. The lack of access to proper medical equipment posed a material risk to the citizen's right of access to health care facilities and ultimately their right to life.[131]

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128 International Monetary Fund *The IMF's response to COVID-19* op cit. note 115. The IMF has one hundred and ninety members. See International Monetary Fund *List of Members* (21 October 2020) last accessed from https://www.imf.org/external/np/sec/memdir/memdate.htm on 7 January 2021. Independent Evaluation office of the International Monetary Fund *The IMF's Emergency Response to the COVID-19 Pandemic* (6 May 2021) op. cit. note 110 at 1.

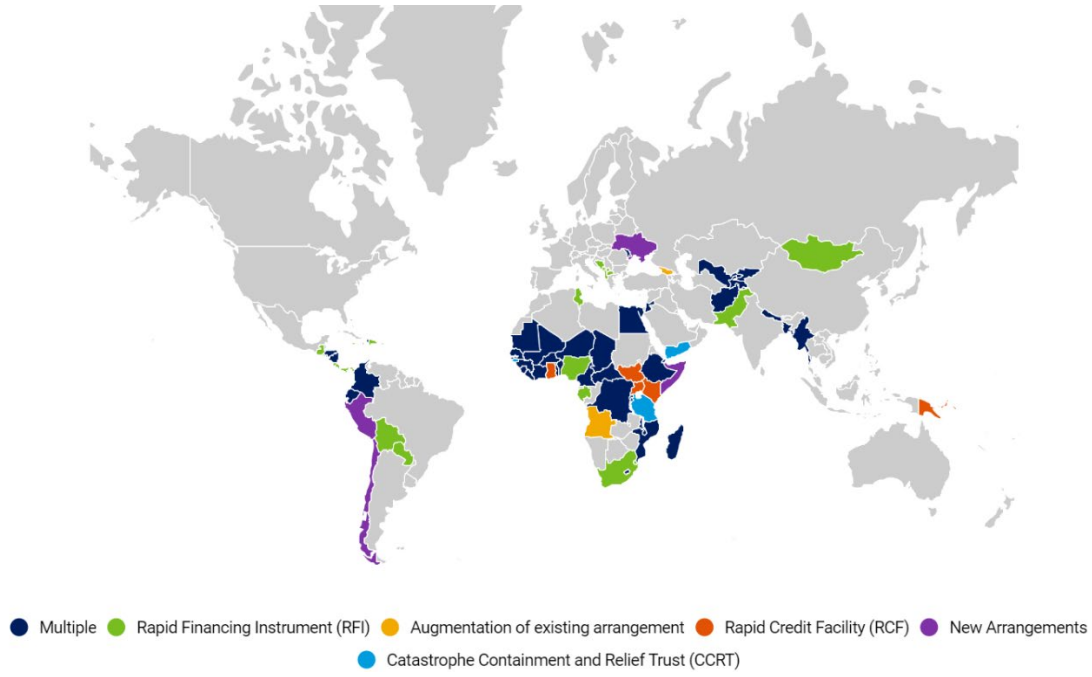
129 International Monetary Fund *IMF Executive Board Approves Immediate Debt Relief for 25 Countries* (13 April 2020) last accessed from https://www.imf.org/en/News/Articles/2020/04/13/pr20151-imf-executive-board-approves-immediate-debt-relief-for-25-countries on 3 January 2021; International Monetary Fund *The IMF's response to COVID-19* op cit. note 115.

130 Reuters *Zambia seeks IMF funding to help soften impact of coronavirus* (10 May 2020) last accessed from https://www.reuters.com/article/us-zambia-economy-idUSKBN22M0BJ on 18 July 2023; Elliot Smith "Zambia becomes Africa's first coronavirus-era default: What happens now?" (23 November 2020) *CNBC* last accessed from https://www.cnbc.com/2020/11/23/zambia-becomes-africas-first-coronavirus-era-default-what-happens-now.html on 18 July 2023.

131 Republic of Zambia Ministry of Health *Zambia Assessment on Frontline Health Service Readiness and Capacities in the Context of COVID-19 Pandemic* (June 2021) last accessed from https://www.afro.who.int/sites/default/files/2021-11/First%20Round%20Zambia%20Covid-19%20Frontline%20Capacity%20Assessment.pdf on 18 July 2023 at 27; World Bank *Rural population*

The potentially significant consequences (as illustrated by this example) reinforces the need for the IMF's Executive Board to make accountable decisions and justify the when they are called to do so.

A summary of the countries which received financial assistance from the IMF during 2020 as well as the facilities through which the assistance was provided is illustrated in Figure 2 below. [132]



Summary of the financial assistance provided by the IMF as well as the facilities through which the funding is provided.

Based on the background that was provided under this Chapter, the next three chapters consider the legal framework which regulates the actions and decisions of the IMF's Executive Directors, including decisions to grant or reject applications for financial assistance. I also identify the substantive and procedural mechanisms

(% of total population) – Zambia (2023) last accessed from https://data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=ZM on 18 July 2023.

132 International Monetary Fund *Countries Receiving Assistance and Debt Service Relief* (*sine anum*) last accessed from https://www.imf.org/en/Topics/imf-and-covid19/COVID-Lending-Tracker on 30 August 2023.

which support the argument that the IMF's Executive Directors must make accountable decisions.

CHAPTER THREE

SOURCES OF LAW AND OBLIGATIONS

1. CONTEXT SETTING:

1.1 Introduction

As mentioned in Chapter One of this dissertation, a decision by the IMF to reject a request for financial assistance from an emerging market or developing economy country in a crisis may bring about potentially long-term negative economic impacts for the country and its citizens. I illustrated this point, in Chapter Two, by referring to the impact which the COVID-19 pandemic had on the economies of emerging markets or developing economies during the first year of the pandemic. In particular, I highlighted the effect which such a decision may have had on the IMF member states' citizens' right to access health care and right to life.

Given the potentially dire consequences, I suggested in Chapters One and Two that it is not unreasonable to argue that the Fund should be able to justify its decisions when it is called on to do so.

To add more context to this argument, I considered the different organs which jointly make up the IMF, the relationship between the different organs, and the lending facilities which the IMF have developed to assist members which experience a financial crisis. This analysis was done with reference to the IMF's purpose, as set out in Article 1 of its Articles of Association. Article 1(v) of the Articles of Association is critical here. The provision provides that the Fund must make its general resources available to members on a temporary basis to support member states in their efforts to correct maladjustments in their balance of payments. Again, it must be noted that the IMF's financial support should seek to prevent any need for members to have resort to other sources of funding which could be detrimental to their national (or the general international) prosperity. To illustrate the point, I again

briefly considered how the IMF responded to the economic consequences to assist the member states.[133]

The background provided in Chapters One and Two therefore clearly demonstrate why there is a need to be able to demand that the IMF's Executive Board make accountable decisions. In Chapters Three to Five, I investigate whether such a demand can be rooted in legal argument by considering the laws which establish and regulate the IMF ("**IMF Legal Framework**"). A critical review of the IMF Legal Framework is important because, as Amelia Keene argues, the duty to make accountable decisions results from the procedural and substantive requirements imposed by the regulatory framework in which an international organisation operates. Professors Kingsbury, Kirsch and Stewart likewise acknowledge this and describe these mechanisms as "internal administrative accountability" mechanisms.[134]

By analysing the procedural and substantive requirements prescribed by the IMF Legal Framework, I demonstrate that the IMF's organs (specifically the Board of Executive Directors) have a legal duty to make accountable decisions. I do so principally with reference to the framework created under the IMF's constitutive documents. I also argue that international law may be interpreted to apply to international organisations such as the IMF and likewise imposes obligations on the IMF's organs (including the Board of Executive Directors) to make accountable decisions.

To illustrate that this overarching duty exists, I consider the rights, roles, duties, and responsibilities of the different organs which form part of the IMF in Chapter Three. I then consider the nature of the relationship between the IMF, its member states, other international organisations and third-party stakeholders such as civil society organisations in Chapter Four.

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133 Article 1(v) of the Articles of Agreement op. cit. note 14.

134 Amelia Keene "The Forgotten Potential of the Advisory Jurisdictions of International Courts and Tribunals as a Check on the Actions of International Organisations" (2016) 14(1) *New Zealand Journal of Public and International Law* 67; Benedict Kingsbury, Nico Krisch & Richard B. Stewart "The Emergence of Global Administrative Law" (2005) 68 *Law and Contemporary Problems* 15.

1.2 **Roadmap of Chapter Three**

Chapter Three is the first of two chapters which set out the legal argument that confirms that the IMF's Executive Board has a duty to make accountable decisions.[135]

To introduce the legal argument, I briefly consider potential sources of law under international law. I do so with reference to Article 38(1) of the Statute of the International Court of Justice.[136]

I then turn to consider the legal framework within which the IMF operates. The description of the legal framework commences with a discussion of the Articles of Agreement (being the IMF's constitutive document), the IMF as a UN Specialised Agency, the IMF's By-Laws, its Rules and Regulations, the General Administrative Orders by the Managing Director, the Code of Conduct, and further Guidelines. As part of the analysis, I consider the nature and characteristics of the IMF's international legal personality, the IMF's powers and the legal consequences of its actions, and the nature and extent of the IMF's immunity against lawsuits.

Having established the nature and extent of the legal framework created under the IMF's constituent documents, I identify the specific accountability mechanisms which are prescribed under the IMF's legal framework. The mechanisms which I consider include the members' right to representation at the Executive Board meetings, record keeping by the Executive Directors, transparency obligations, and the rights of access to information. The discussion on internal accountability mechanisms concludes with an analysis of the IMF's Independent Evaluation Office's powers and its ability to investigate the IMF Executive Directors' decision (including the consequences of the fact that these powers are significantly limited).

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135 Accountable decisions, as defined in Chapter One, refers to the legal duty to act in a responsible manner and to make decisions for which the IMF's Executive Board of Directors may be held accountable. This means the Executive Directors must make rational and reasonable decisions which they can justify and explain with reference to the IMF's purpose.

136 Statute of the International Court of Justice op. cit. note 24.

2. INTRODUCTION TO SOURCES OF LAW UNDER INTERNATIONAL LAW

2.1 The IMF is a subject of international law

To establish if the IMF owes a legal duty to make accountable decisions to its 190 odd members (as well as other international stakeholders) the starting point must be to identify which branches of the law (if any) regulate the conduct of the IMF's constituting organs (in particular, those of its Executive Board).

While the Fund sometimes operates at a domestic level, it is quintessentially an international organisation. This contention is supported by Article 1 of the Articles of Agreement, which provides that the Fund was established to "promote *international* monetary cooperation" (my emphasis). It is further demonstrated by the fact that the Fund is one of the UN's designated "Special Agencies". It is therefore reasonable to conclude that the IMF is a subject of international law and subject to the obligations imposed under the different sources of international law.[137]

Despite qualifying as a subject of international law, the IMF (as an international institution) does not possess a general competence to exercise all and any powers under international law.[138] In the International Court of Justice's (**ICJ**) *Advisory opinion on the Legality on the Use by a State of Nuclear Weapons in Armed Conflict* (***Nuclear Weapons in Armed Conflict***) the court explained the position of international organisations as follow:

> the constituent instruments of international organizations are […] treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals.[139]
>
> (My emphasis)

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137 Karen Hudes, Sabine Schlemmer-Schulte, "Accountability in Bretton Woods," *ILSA Journal of International & Comparative Law* 15, no. 2 (Spring 2009): 501-532; Articles of Agreement op. cit. note 14; Fritz-Krockow and Ramlogan op. cit. note 21 at 1.

138 James Crawford *Brownlie's Principles of Public International Law* (2019) 9ed at 173; John Dugard, Max du Plessis, Tiyanjana Maluwa and Dire Tladi *Dugard's international law: A South African perspective* (2020) 5ed at 444.

139 *Legality on the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep 66 at 75 (***Nuclear Weapons in Armed Conflict***).

International organisations (such as the IMF) are therefore subjects of international law which are established under their respective treaties. The content of the treaties (such as the Article of Agreement) in turn dictates the nature and characteristics of the organisation, its objectives and mandate, and the factors which determine the way the organisation exercises its powers and performs its function.[140]

The relationship between the international organisation and its members play an important role in this regard. As the ICJ explained in *Nuclear Weapons in Armed Conflict*, international organisations are subject to the 'principle of speciality'. This means that the member states vest specific powers in in the organisations when they establish them. The limits of an international organisation's powers are thus dependent on the functions which the states entrust to them.[141]

The one qualification in this regard is that in specific circumstances the powers which constitutive documents vests in international organisations may be implied. These are subsidiary powers which are not expressly provided for in the constitutive documents under which the organisations are established. Implied powers exist where "the necessities of international life may point to the need for [the organisation to have such a power] in order to achieve its objectives." According to the ICJ, an international organisation is deemed to have certain implied powers under international law where the powers are *essential* for the organisation to perform its duties.[142]

According to Professor James Crawford, states initially empower an international organisation through an act of delegation which occurs when a state joins the organisation. Through this process the state consents in advance to the institutional aspects of the organisation and that its actions may create legally binding obligations for the members. Notwithstanding the binding nature of the obligation, the state's sovereignty is not compromised as the obligation arises from the state's

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140 *Ibid*.

141 *Ibid* at 78.

142 *Nuclear Weapons in Armed Conflict* op. cit. at 139; *Reparation for Injuries Suffered in the Service of the United Nations*, 1949, Advisory Opinion, International Court of Justice (ICJ) 174 at 182, 183 (***Reparation for Injuries***).

membership and prior consent to being bound by the organisation's lawful decisions.[143]

Anne Peters summarises the position by stating that international organisations (such as the IMF) are subject to international law in three respects. First, as discussed under the previous section, they are established under treaties. Second, international organisations use legal instruments to govern their internal processes. Third, international organisations are subject to the rule of law. International law accordingly creates, enables, and constrains international organisations.[144]

International organisations therefore do not have a general competence under international law to act and do as they please. This principle supports the argument advanced in this dissertation that international law imposes a general obligation on international organisations (such as the IMF) to make accountable decisions.[145]

Based on these principles, the IMF exists and has the power to perform certain functions because the member states have "clothed" it with these powers. The powers are made up of specific rights and duties. The suites of rights and duties serve a specific purpose: they enable the IMF to fulfil the mandate which the Articles of Agreement vests in it. For example, the Articles of Agreement empower the IMF (through the Executive Board) to promote international monetary cooperation and to give confidence to members by making the general resources of the Fund temporarily available to them in times of crisis.[146]

Through this process, the IMF has acquired a separate juristic personality and ability to conclude legal acts in the international arena. The Fund's degree of

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143 Crawford op cit. note 138 at 111, 436.

144 Anne Peters "International Organizations and International Law" in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* " (2016) online edition.

145 *Ibid.* Also see *Jurisdiction of the European Commission of the Danube Between Galatz and Braila, France and ors v Romania,* Advisory Opinion, (1927) PCIJ Series B no 14.

146 Article 1(i) and 1(v) of the Articles of Agreement op. cit. note 14.

It is worth mentioning that legal scholars such as Professor Dugard *et al.* do not postulate the same theory and simply indicate that the powers which vest in international organisations arise from their constituent documents or from the fact that they are recognised as enjoying a separate legal personality.

Crawford op cit. note 138 at 111; Dugard *et al* op. cit. note 138 at 444, 445.

independence as well as the powers afforded to, and concomitant duties expected from, it therefore depends on the legal powers which the member states vest in it under the Articles of Agreement.[147]

3. THE LEGAL FRAMEWORK WITHIN WHICH THE IMF OPERATES

The Fund is a supranational treaty-based institution. It therefore derives its legal personality (including the rights which vest in and obligations which are imposed on the Fund) in the first place from the Fund's Articles of Agreement.[148]

To determine the nature and extent of the rights which vest in and duties which are imposed on an international organisation, the ICJ in *Nuclear Weapons in Armed Conflict* had regard the customary rule of interpretation as expressed in to Article 31 of the 1969 Vienna Convention on the Law of Treaties. In terms of this rule, the provisions of the Articles of Agreement should be interpreted "in their context and in the light of [the Treaty's] object and purpose". The interpretation should in addition be informed by the manner in which the provision in question has subsequently been applied.[149]

It is also important to bear in mind that the Fund is one of the UN's *Specialised Agencies.* This is significant because the status vests further rights in and imposes additional obligations on the Fund.[150]

The Fund is also party to various treaties (such as the agreements with the UN and World Trade Organisation discussed under section 4.1 in Chapter Four) which vest additional rights in and obligations on the IMF. The Fund's ability to conclude treaties is however circumscribed.[151]

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147 Crawford op cit. note 138 at 111; Dugard *et al* op. cit. note 138 at 444, 445.

148 Introductory Article (i), Articles of Agreement op. cit. note 3; Anne-Marie Slaughter *A New World Order* (2004) at 23.

149 *Nuclear Weapons in Armed Conflict* op. cit. note 139 at 75. Vienna Convention on the Law of Treaties (23 May 1969) 1155 U.N.T.S. 331.

150 Article I, section 1(e) of the *Convention on the Privileges and Immunities of the Specialized Agencies* United Nations (21 November 1947) New York 33 UNTS 261 last accessed from https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-2&chapter=3&clang=_en#1 on 7 June 2021.

151 Article X of the Article of Agreement (op. cit. note 14) provides that the IMF may cooperate with other international organisations "within the terms of [the] Agreement". Where the Fund wishes to conclude an

Collectively, the rights and obligations create the IMF Legal Framework within which the Fund must operate. The next subsections of Chapter Three consider the different sources of the IMF's rights and duties.[152]

3.1 Articles of Agreement and the IMF as a UN Specialised Agency

3.1.1 Introduction

A duty to make accountable decisions may arise where a provision in the Fund's Articles of Agreement, By-Laws, Rules and Regulation, or policy documents directly impose such a duty on the Executive Directors. It may, however, also arise indirectly as an obligation which is naturally associated with a specific right.

In this section of the dissertation, I show why and how the Articles of Agreement, By-Laws, Rules and Regulation impose the primary duty on the Board of Executive Directors to make accountable decisions.

As mentioned under the previous section, according to the ICJ's decision in *Nuclear Weapons in Armed Conflict* the powers vested in an international organisation (such as the IMF) may be determined by considering the provisions of the organisation's constitutive documents and the manner in which the provisions are applied. The latter can be observed by considering the international organisation's resolutions, the conduct of the international organisation's various organs, any opinions issued by the organ's general counsel, and advisory opinions on the international organ's conduct by the ICJ.

If this approach is applied to the IMF, the Fund is principally regulated under the Articles of Agreement (which must be interpreted in accordance with the rules on the interpretation of treaties). The conduct of the IMF's different organs is further regulated under the suite of subordinate by-laws, rules, regulations, codes and

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agreement that would alter any of the provisions of the Articles of Agreement, it may only do so after the provisions under the Agreement have been amended in accordance with the mechanism prescribed under Article XXVIII of the Articles of Agreement.

[152] The designations "Specialist Agency" does not mean that the Fund is an organ of the UN. Rather, the designation confirms that the IMF is part of the UN's system of international agencies. The IMF therefore remains an independent organisation and is not subordinate to the UN.

See Gianviti op. cit. note 20 at 32.

administrative orders which are adopted by the Fund's organs. Important examples include, the IMF's By-Laws, its Rules and Regulations, the General Administrative Orders by the Managing Director, and the Code of Conduct for the Members of the Executive Board of the International Monetary Fund.[153]

As a UN Specialised Agency, the Fund is also subject to the rights and obligations imposed under the *Agreement Between the United Nations and the International Monetary Fund*, 1947 as well as the *Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations* (**Specialised Agencies Convention**).[154]

3.1.2 International legal personality

Section 1 of Article IX of the Articles of Agreement as well as section 3 of Article II of the Specialised Agencies Convention confirm that the IMF (as a Specialised Agency) has legal personality under international law. As a consequence, the Fund qualifies as a subject under international law.[155]

It is also worth mentioning that the IMF also satisfies the test which the ICJ set out in *Reparation for Injuries* to determine if an international organisation possesses international legal personality. There are three requirements. First, that the organisation must comprise a permanent association of states, established to pursue lawful objects through its organs. Second, there must be a clear distinction between the organisation and its members. Again, the IMF satisfies this requirement. Third, the organisation is able to exercise powers on a global level, as

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153 See Jose E. Alvarez, "International Organisations and the Rule of Law," (June 2016) *New Zealand Journal of Public and International Law* 3 at 31; Yan Liu "The Rule of Law in the International Monetary Fund: Past, Present and Future" (2018) *AIIB Yearbook of International Law* 40 at 43; Gianviti op. cit. note 20 at 31. International Monetary Fund *Code of Conduct for Members of the Executive Board* op. cit. note 40. Also see Gianviti op. cit. note 20 at 31.

154 The Agreement Between the United Nations and the International Monetary Fund, 1947 does not impose any specific obligations on the Fund that have a direct impact on the subject matter considered in this dissertation.

Agreement between the United Nations and the International Monetary Fund, 1947 last accessed from https://www.elibrary.imf.org/downloadpdf/book/9781451972511/ch009.xml on 19 August 2023. Also available in International Monetary Fund *Selected Decisions and Selected Documents of the IMF* (31 July 2020) Forty-First Issue last accessed from https://www.imf.org/en/Publications/Selected-Decisions/selected-decisions-list on 25 July 2022. (**UN/IMF Agreement**)

155 Convention on the Privileges and Immunities of the Specialized Agencies op. cit. 150.

opposed to the municipal systems of its members. Clearly the IMF satisfies all three requirements given that it was established to realise its purpose (as set out on Article 1 of the Articles of Agreement) in the interest of its members.[156]

As a subject of international law, the IMF can possess international rights and obligations and can invoke the rights by bringing international claims (subject to its actions complying with the restrictions imposed under the Articles of Agreement).

3.1.3 **Sources of the Executive Board's powers.**

As an incidence of its international legal personality the Fund can perform any act which falls within its mandate. Such powers include those specifically provided for under its constitutive documents (such as the Articles of Agreement) as well as those which are "conferred upon it by necessary implication as being essential to the performance of its duties". The latter may be evidenced by a pattern of institutional practice.[157]

While it is easy to determine the nature and extent of the Executive Board's powers which are expressly provided for under the Articles of Agreement, the same cannot be said for the Board's implied powers. Niels M Blokker in this regard suggests that international organisations' implied powers are circumscribed by four factors. As a premise, the implied power must be essential for the international organisation to function properly. Second, it must complement the powers which the constituent documents vest in the organisation. Third, it may not conflict with fundamental principles and rules of international law. Finally, it may not alter the relationship or distribution of power between the different organs that comprise the international organisation.[158]

As the conduct of the Executive Board is not subject to external checks and balances, commentators such as Gianviti have argued that it is unlikely that certain

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156 *Reparation for injuries* op. cit. note 142; Articles of Agreement op. cit. note 14.

157 See Niels M Blokker "International Organizations or Institutions, Implied Powers" *Max Planck Encyclopaedia of Public International Law* last accessed from https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e467?prd=EPIL on 21 June 2021. Also see Alvarez op. cit. note 154 at 32.

158 *Ibid.*

implied powers vest in the Executive Board. This is so because a decision to vest additional powers in the Board may infringe on the sovereignty of the members who expressly vested specific powers in it.[159]

It is, however, not entirely impossible for the Executive Board to acquire implied powers where such powers are necessary to achieve the Fund's purposes. In *Reparations for Injuries* the ICJ recognised that an international organisation is capable of exercising powers "though not expressly provided for in the [constituent documents] [but which] are conferred upon [the organisation] by necessary implication *as being essential to the performance of its duties*".[160]

The ICJ adopted a similar approach in the *Effect of awards of compensation made by the UN Administrative Tribunal*, Advisory Opinion.[161]

Nonetheless, given the Board of Governors' and Executive Board's past conduct, it is reasonable to infer that both IMF organs would tread lightly in this domain and may seek to amend the Articles of Agreement to incorporate an express power before inferring an implied power. If, however, either Board wishes to act on an implied power, naturally the power it invokes may not contradict any of the powers expressly provided for under the Articles of Agreement (including the conditions associated with specific conditions). The Boards should also refrain from seeking to vest powers in either organ which had been the subject of previous debates and which the Board of Governors specifically decided should not vest in the Board of Governors or the Executive Board.[162]

With this in mind, I however believe it is possible to determine the Board's obligations by assessing the Executive Board's powers (both expressly provided for and implied). As mentioned above, the view accords with the position adopted by scholars such as Amelia Keene, Benedict Kingsbury, Nico Krisch and Richard B.

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159 The IMF followed a similarly cautious approach in 1989 when it considered whether or not the Fund has the implied ability to impose sanctions on members that fil to comply with the requirements imposed under the Articles of Agreement. See Gianviti op. cit. note 20 at 60, 61.

160 *Reparation for Injuries* op. cit. note 142.

161 *Effect of awards of compensation made by the UN Administrative Tribunal*, Advisory Opinion, [1954] ICJ Rep 47.

162 Gianviti op. cit. note 20 at 61.

Stewart. This is because individually and as a collective, the express and implied powers, rights and entitlements which are vested in the Executive Board give rise to legal obligations and consequences which are naturally associated with a specific right and which is established through the Executive Board's conduct.

As mentioned in the introduction to this section, a duty to make accountable decisions may arise where a provision in the Fund's Articles of Agreement, By-Laws, Rules and Regulation, or policy documents directly impose such a duty on the Executive Directors. It may, however, also arise indirectly if it satisfies the requirements proposed by Niels Blokker. For example, the right to assess and grant or reject an application for financial assistance gives rise to a duty to make a decision which is rational, reasonable and arguably justifiable.[163]

Any analysis of this nature must therefore commence by considering the purpose for which the Fund was established. The *purpose*, in this regard, identifies the framework within which the Fund may operate (i.e. its agreed mandate) and imposes the minimum threshold requirements with which the Executive Board's decisions must comply. Alternatively put, a decision by the Executive Board which falls outside the framework of the IMF's mandate or fails to vindicate at least one of the purposes for which the Fund was established, ought to be vulnerable to challenge.

Article I identifies six primary purposes. These are listed in section 2.1 in Chapter Two. It is however worth repeating the fifth and sixth purposes because they relate directly to the subject matter of this dissertation. The fifth provides that the Fund must make its general resources available to members on a temporary basis to support member states in their efforts to correct maladjustments in their balance of payments. The sixth, in turn, states that the Fund must shorten the duration of and lessen the degree of disequilibrium in the international balance of payments of members.[164]

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163 Articles of Agreement op. cit. note 14. Also see Keene op. cit. note 134 and Kingsbury *et al*. op. cit. note 134.

164 Articles I(v) and I(vi) of the Articles of Agreement op. cit. note 14.

As a collective, the obligations imposed under Article I of the Articles of Agreement stipulate the minimum threshold requirements which the decisions of the Executive Board must *always* satisfy. Should the Executive Directors fail to do so, their actions will be a breach of the duties which they owe to the Fund and its members.[165] The relationship between the Executive Board and the members and the consequences of the Board's decisions are discussed in greater detail under sections 2.1 and 2.2 in Chapter Four.

In light of the framework created under Article I of the Articles of Agreement, it seems reasonable to submit that the Executive Board's decisions would be presumptively lawful and reasonable if they promote the purposes of the Fund. Likewise, where the Executive Board makes decisions which do not meet the thresholds imposed under this provision, these decisions are presumptively unlawful and invalid.[166]

3.1.4 The IMF's By-Laws, its Rules and Regulations, the General Administrative Orders by the Managing Director, the Code Of Conduct and further Guidelines.

The By-Laws, Regulations, Administrative Orders, Code of Conduct and Guidelines supplement the rights which vest in and obligations that are imposed on the IMF under the Articles of Agreement.[167]

While these legal instruments do not stipulate any mechanisms which would assist members who would like to challenge a decision of the Executive Broad, they do

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165 Commentators such as Santor contend that the duties imposed on the Executive Directors are not well defined. While this may be the case, it is clear that after an Executive Director is appointed her/his primary duty is to promote the interests of the Fund and not the member states who s/he represent. The Fund's interests can be equated to its purposes as stipulated under Article I of the Articles of Agreement. Therefore, while the exact nature and extent of the Executive Directors' duties may be the subject of some debate, it must be accepted that the Executive Directors must always make decisions which seek to promote the Fund's purpose. Likewise, where the Executive Directors act in a manner that will prevent the Fund from achieving these purposes, the Executive Directors are in breach of the duties which they owe the Fund and its members.

See Eric Santor, 2006. "Governance and the IMF: Does the Fund Follow Corporate Best Practice?" *Staff Working Papers* 06-32, Bank of Canada last accessed from https://ideas.repec.org/p/bca/bocawp/06-32.html on 14 July 2021.

166 *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)* Advisory Opinion, [1962] ICJ Rep 151 at 168; also see James R Crawford Brownlie's Principles of Public International Law 8 ed (2012) at 185. Crawford op. cit. note 138 at 174.

167 See Preamble to the By-Laws op. cit. note 34.

provide certain safeguards that may promote the likelihood of the Executive Board making accountable decisions.

In respect of the Board of Governors, the By-Laws prescribe three important safeguards:

First, certain "observers" may on invitation from the Chair of the Board of Governors attend the Board of Governors' meetings.[168]

Second, the Board of Governors are required to "keep a summary record of the proceedings" (i.e. the minutes of the meetings) which must be made available to all members.[169]

Finally, the Executive Board is obliged to prepare and submit an annual report to the Governors. Among other things, the report must provide information on the Fund's policies and activities as well as the "conduct of the business of the General Department and of the Specials Drawing Rights Department, as well as the performance of financial services by the Fund."[170]

The By-Laws also impose certain safeguards in respect of the conduct of the Executive Board. As considered in more detail below, members are entitled to send representatives to attend the meetings of the Executive Board when the Board is due to consider a matter which affects the member, or the member specifically requests to have a representative at the meeting. The Executive Board however has the final discretion to determine whether a member is entitled to send a representative to the meeting. If the Executive Board decides that the member is entitled to send a representative, the representative may present the member's views to the Board during the meeting.[171]

Whether or not these mechanisms give rise to the Board of Governors actually overseeing the conduct of the Executive Board is a question of fact. At the very

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168 See Section 5(b) of By-Laws op. cit. note 34.

169 See Section 9 of the By-Laws o op. cit. note 34.

170 See Section 10 of the By-Laws op. cit. note 34. Also see Rule J-5 of the Rules and Regulations op. cit. note 34.

171 See Section 19 of the By-Laws op. cit. note 34.

least, however, it creates a framework within which the Executive Board may be called on to account for it actions to the Board of Governors.

The Rules and Regulations, which supplement the Articles of Agreement and By-Laws, provide that the Executive Board is required to prepare minutes (described as "a summary record of the proceedings of the Executive Board").[172] The minutes are prepared under the direction of the Managing Director and her team. The draft minutes are circulated among the Executive Directors after the meeting, who are then afforded an opportunity to review and comment on the draft before it is finally approved and published. In addition to the minutes, if the Chair of the Executive Board or an Executive Director makes a specific request, verbatim records of a meeting may be kept and stored in the Fund's archives.[173]

Finally, the various organs of the IMF are subject to Administrative Orders, Codes of Conduct and Guidelines. These documents tend to regulate matters related to the internal actions of the Executive Directors and the IMF's Staff. In the context of this study it is however worth briefly referring to the *Code of Conduct for the Members of the Executive Board of the International Monetary Fund* (**Code of Conduct**).[174]

The Code of Conduct provides that the:

> Executive Directors of the Fund are entrusted by the member countries that have selected them with responsibilities for ensuring that the Fund carries out the mandate prescribed in its Articles of Agreement. The office of Executive Director of the Fund requires personal and professional conduct that meets the highest standards. The Board of Governors has adopted certain resolutions with respect to the conduct of Executive Directors. In addition, Executive Directors have adopted the following Code of Conduct, which is intended to provide guidance on ethical standards in connection with, or having a bearing on, their status and responsibilities in the Fund.[175]

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172 Again, this is considered below on more detail.

173 See Rules C-14, C-15, and C-16 of the Rules and Regulations op. cit. note 34.

174 International Monetary Fund *Code of Conduct for the Members of the Executive Board of the International Monetary Fund* op. cit. note 40.

175 See clause 1 of the International Monetary Fund *Code of Conduct for the Members of the Executive Board of the International Monetary Fund* op. cit. note 40.

(My emphasis)

By *entrusting* the Executive Directors with these powers, the members at the same time impose a duty on the Board to act in a responsible manner. This results in the members expecting that the Board must only make decisions which results in the Fund achieving the purposes set out in the Articles of Agreement. By qualifying the powers which vest in the Executive Board, I believe the Code of Conduct also demonstrates that the Executive Directors are required to make accountable decisions – they must be able to explain why a decision vindicates the Fund's objectives, if they are called on to do so.

To promote compliance with the requirements imposed under the Code of Conduct, it provides that the Executive Directors are *expected* to perform their duties "to the best of their ability and judgement". In doing so, they must maintain the highest standards of integrity. In carrying out their functions, the Executive Directors are required to protect the security of any confidential information which they receive or that their office generates and disclose any conflicts of interest.[176]

Finally, to promote compliance with the requirements imposed under these Codes, the Fund established a confidential Integrity Hotline to receive information on allegations of staff misconduct. The information may be provided verbally by calling the Hotline or by reporting it online. Both IMF staff and third parties are entitled to report misconduct. Once a report is submitted, the Office of Internal Investigations is required to investigate an allegation.[177]

Collectively, all these mechanisms reinforce the contention that the Executive Board is required to make accountable decisions.

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[176] See clauses 1, 4, 12, 15 of the International Monetary Fund *Code of Conduct for the Members of the Executive Board of the International Monetary Fund* op. cit. note 40.

[177] International Monetary Fund *IMF Integrity Hotline* (17 June 2008) last accessed from https://www.imf.org/external/hrd/integrity/ on 2 August 2021.

3.1.5 **Substantive requirements**

The substantive requirements with which the Executive Board's decisions must comply are provided under the IMF Legal Framework. All decisions are subject to three specific requirements. These are considered below.[178]

3.1.5.1 A decision must be consonant with the requirements imposed under the Articles of Agreement.

Fundamentally, this means that every decision must seek to promote the purpose of the IMF as stipulated under Article I of the Articles of Agreement. Among other things, Article I provides that the Fund is required to make its general resources "temporarily available to [members] under adequate safeguards, to provide them with an opportunity to correct maladjustments in their balance of payment without resorting to measures destructive of [their] national … prosperity". The provision also provides that the Fund should make decisions which seek "to shorten the duration and lessen the degree of disequilibrium in the international balance of payments of members."[179]

In respect of the Fund's duty to provide financial assistance, Article V, Section 3(a) of the Articles of Agreement provides that the Fund shall:

> …adopt policies on the use of its general resources, including policies and similar arrangements, and may adopt special policies for special balance of payment problems, that will assist members to solve their balance of payment problems in a manner consistent with the [Articles of] Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund.[180]

"Consistent with the provisions of this Agreement" in this context, has been interpreted to mean "consistent with both the provisions of the [Articles of Agreement] and the purposes of the Fund contained in Article I". Antithetically, the Fund (including the Board of Executive Directors) is precluded from making decisions which overlap with the jurisdiction of other international intuitions. Key

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178 See Gianviti op. cit. note 20 at 54. Also see Rule A-1 of the Rules and Regulations op. cit. note 29.

179 Article 1(vi) and (v) of the Articles of Agreement op. cit. note 14.

180 Articles of Agreement op. cit. note 14.

examples include other Specialised Agencies such as the World Trade Organisation or the World Health Organisation.[181]

Some commentators suggest general principles may also be inferred from the provisions of the Articles of Agreement. The most important example in this regard is the duty to treat members equally.[182]

An example of where the principle of uniform treatment plays an important role is Article V, Section 3(b) of the Articles of Agreement which provides that members are entitled to access to the Fund's general resources if they satisfy the requirements imposed under the provision. While the Fund retains the ability to make general changes to the requirements by adopting new policies, the policies must apply equally to all members.[183]

Based on this principle, where a member satisfies the requirements, the Fund may not refuse to grant the member access to the Fund's general resources. If the Executive Board discriminates between members on grounds which are not stipulated under its policies, the Board's actions will be unlawful.

3.1.5.2 The decisions of subordinate organs must align with the decisions of superior organs.

The decisions of the Executive Board cannot contradict the resolutions adopted by the Board of Governors. Likewise, the Managing Director's (and IMF staff's) decisions may not conflict with the decisions of the Executive Board or the Board of Governors.[184]

3.1.5.3 The decisions must accord with the decision-making organ's policies and regulations.

This concerns the consistency of an organ's (such as the Executive Board's) decisions which must follow the rule of law. Consistency in this regard is very important as the Executive Board as well as the Managing Director both create their

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181 See Gianviti op. cit. note 20 at 56.

182 This may be regarded as a principle of the law of the IMF. See for example Gianviti op. cit. note 20 at 58, 59.

183 See Article V, Section 3(b)(i) of the Articles of Agreement op. cit. note 14.

184 See for example RuleA-1 and Rule N-13 of the Rules and Regulations op. cit. note 34.

internal policies which guide their decision-making processes. As the authors of the policies, it is not unforeseeable that Executive Board or the Managing Director may wish to waive specific requirements under certain circumstances to accommodate select members' requests. Under the rule of law their ability to do so will however be materially circumscribed: once a rule is established it ought to be complied with.[185]

The Executive Board's ability to deviate from its internal policies may nonetheless be subject to two exceptions. First, the manner in which the policy is formulated. The use of generic terms such as "normally" or "generally" may allow the Board to deviate from the norm in circumstances where it is reasonable to do so. Second, the Board may create an exception to the rule that would be available to other members faced with similar circumstances in the future.[186]

The substantive requirements again confirm that the Executive Board is required to make accountable decisions.

3.1.6 **Legal actions**

In the previous section I identified that the IMF's powers include those specifically provided for under its constitutive documents as well as those which are implied because they are essential for the performance of its duties. Building on that argument, in this section I demonstrate how this works in practice. In particular, I identify the circumstances under which specific rights give rise to a concomitant duty to make accountable decisions.

As indicated under section 3.1.2 of this Chapter, because the IMF is a subject of international law it can possess international rights and obligations. Akin to other international organisations, Article IX, section 2 of the Articles of Agreement stipulates that the IMF has the *capacity* to conclude contracts, acquire and dispose of property, and institute legal proceeding.[187]

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185 Gianviti op. cit. note 20 at 63.

186 *Ibid.*

187 Article II section 3 of the Convention on the Privileges and Immunities of the Specialized Agencies op. cit. 150.

The provisions do not go into any detail on the nature and extent of the IMF's capacity in this regard. To determine the full extent of the IMF's powers it is necessary to determine if a specific action is necessary to achieve the Fund's purposes. If so, the Fund has the implied power to undertake a specific activity.[188]

The powers which are vested in the IMF's bodies serve a practical purpose: without them, the Fund would be unable to operate or achieve its purpose. For example, they enable the Fund to appoint employees and rent or purchase property to establish offices in member states.[189]

These are obviously only some of the actions which the IMF organs may carry out which will give rise to legally binding consequences. A further significant example, is the ability to provide financial assistance to its members. These arrangements are created within a framework which includes contractual and quasi-contractual undertakings by the Fund and the member state. The legal nature of the financial assistance which the Fund provides to member states is considered below.

3.1.6.1 Financial assistance under one of the Fund's lending facilities

As indicated under section 3 of Chapter Two, the Fund does not have carte blanche to grant (or reject) applications for financial assistance.

To qualify for assistance under one of the Fund's arrangements, instruments or facilities, the Applicant/member must satisfy a predetermined set of criteria which is published by the IMF on its website. The requirements to qualify for assistance under the Rapid Financing Instrument and Rapid Credit Facility are considered in detail under section 3.4 of Chapter Two. However, by way of summary, to qualify for assistance under the Rapid Financing Instrument, the Applicant must satisfy two general criteria. First, the Applicant must experience a temporary balance of payment crisis which is normally capable of being resolved within one year of the funds being disbursed without the Applicant having to make significant policy adjustments. Second, the Applicant must provide certain prescribed as well as

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188 See section 3.1.4 where I explain in detail how implied powers may be determined. Also see *Certain expenses of the United Nations* op. cit. note 166.

189 See for example Section 1 of the By-Laws (op. cit. note 34) which provides that the Executive Board may establish and maintain agencies or branch offices in the territories of the different member states whenever it is necessary to facilitate the business of the Fund.

voluntary “ex ante policy undertakings” (including those which the Applicant will implement to resolve the balance of payment crisis).[190] Applicants who wish to apply for assistance under the Rapid Credit Facility must satisfy the requirements for assistance under the Rapid Financing Instrument requirements and also be a member of the Poverty Reduction and Growth Trust (**Poverty Trust**).

In addition to satisfying certain specific conditions, the Articles of Agreement also provide that the Applicant must not have been declared *ineligible* from accessing the Fund's resources.[191]

If the general and specific requirements are satisfied, the Executive Board may proceed to consider and vote on a specific member's application. By providing for this, the Articles of Agreement vest a bundle of express rights and obligations in the Executive Board. In respect of the former, the Executive Board has the power to decide whether to grant an application. The power is however circumscribed by the fact that the Board must give effect to the Fund's purposes when it makes the decision. Sections (v) and (vi) of Article I of the Articles of Agreement in this regard provides that the Executive Board must among other things:

- give confidence to Applicant by making the general resources of the Fund temporarily available to it;[192]
- impose adequate safeguards to protect the Fund's resources;
- give the Applicant an opportunity to correct maladjustments in its balance of payments without resorting to measures destructive of national or international prosperity; and
- shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

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190 Under the IMF’s *Review of enhanced access limits under the Rapid Credit Facility and Rapid Financing Instrument* op. cit. note 83, an Applicant must commit to undertake central bank safeguards assessments, take certain government related prior actions (such as the upfront implementation of key public finance management reforms, and enforcing anti-corruption frameworks), and undertake to limit its access under the Rapid Financing Instrument/ Rapid Credit Facility.

191 See Article V, Section 5; Article VI, Section 1; or Article XXVI, Section 2(a) of the Articles of Agreement op. cit. note 14.

192 Article I, Section (v) of the Articles of Agreement op. cit. note 14.

The Board's ability to make a decision in respect of an application is therefore circumscribed. If it proceeds to grant an application where the Applicant has failed to satisfy the criteria, the Executive Board will act presumptively unlawful. Based on this, one can conclude that it ought to be possible to require the Executive Board to provide reasons for its decisions. This reinforced the argument that the Board is required to make accountable decisions.[193]

3.1.6.2 Legal status of the application for financial assistance and the documents which comprise the lending facility

The legal status of the letter of intent, memoranda, and supporting documents which precede a decision by the Executive Board to grant an Applicant's request for financial assistance is ambiguous. According to Anders, these documents and the technical assistance which the Fund undertakes to provide according to their terms "inhabit a grey area in the interstices of soft law, technical norms, public international law, and international private law."[194]

The position in respect of the lending facilities is however different because the specific arrangement creates legally binding consequences for the IMF and a successful applicant. In particular, both parties have a duty to comply with the general requirements imposed under the arrangement, instrument or facility. Obvious examples include satisfying certain policy conditions, releasing the *purchases* or *disbursements* at predetermined intervals, and repaying the loan. If the member persistently fails to comply with the agreed undertakings, the IMF may invoke increasingly severe sanctions. Examples of such sanctions include suspending the member's voting and representation rights or ultimately compulsory withdrawal of the member from the IMF. The latter will however only be required if the member is deemed to be non-cooperating with the IMF and remains non-cooperating. The lending facility as a whole therefore entails more than just legally non-binding *soft law* principles.[195]

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193 This presumption is considered in greater detail in Chapter Four.

194 Gerhard Anders "The Normativity of Numbers: World Bank and IMF Conditionality" (2008) 31(2) *PoLAR: The Political and Legal Anthropology Review* 187 at 189.

195 Anders op. cit. note 194; and Fritz-Krockow and Ramlogan op. cit. note 21 at 21, 27.

This being said, it is important to bear in mind that the nature of the financial assistance which the IMF provides is *sui generis* and should not be seen as akin to a loan from a bank. The arrangement between the member state and the IMF does not amount to an international agreement. Rather, the arrangement serves as a safeguard to protect the IMF's resources (in accordance with the terms stipulated under Article I of the Articles of Agreement).

In the circumstances, if the IMF decides to not release specific purchases or disbursements because the member failed to satisfy certain criteria, the IMF's actions should not immediately be seen as sanctions but a response to re-evaluate the member's position. The IMF's first response to a potential breach of the conditions under a specific lending facility will be to work with the member to implement remedial measures. Likewise, where a member fails to satisfy a specific policy condition, the "breach" does not vest an actionable right in the IMF to compel the member to tender the "agreed performance". Thus, while the arrangements have a legal character, they are fundamentally non-contractual in nature.[196]

As a consequence, the policy conditions agreed between the IMF and member during the programme design phase do not amount to contractual obligations as these are considered in the private law sense. According to the IMF, conditions which are self-imposed are not legally binding. This is because the conditions are offered by the government which requests the Fund's financial and technical assistance and concern matters which fall outside the IMF's jurisdiction. Examples of such conditions include those which concern governance, human rights, and non-fiscal law reform processes.[197]

Mandatory macro-economic undertakings are the exception to the rule and do give rise to "hard conditions". Examples of hard conditions include reductions in

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196 Jozeph Gold "On the Difficulties of Defining International Agreements: Some Illustrations of Defining International Agreements: Some Illustrations for the Experience of the Fund" in *Legal & Institutional Aspects of the International Monetary System: Selected Essays* (1979) 463 at 463-64; Lorry S. Conrad, "The Legal Nature and Social Effects of IMF Stand-by Arrangements" (1988) 7(2) *Wisconsin International Law Journal* 407 at 414.

197 Gerhard Anders op. cit. note 194; and Fritz-Krockow and Ramlogan op. cit. note 21 at 21, 27.

government spending, establishing specialised government agencies and enacting legislation to better regulate certain fiscal issues.[198]

The IMF therefore cannot demand specific performance if the member fails to implement specific measures. The IMF may, however, hold back future disbursements until the member satisfies the predetermined conditions, propose remedial measure which the member should implement in accordance with a specific timetable, or revoke the member's voting and participating rights if the member refuses to implement the predetermined measures.[199]

Even in this regard, it is important to note that the IMF is required to engage with the members to ensure that the purposes of the Fund are realised. The IMF must therefore act in an accountable manner and must be able to justify its decisions. It cannot simply terminate an arrangement (as one would cancel a contract) where a member fails to comply with the policy conditions. In fact, it must proactively engage such members to resolve the issues which prevent the member from complying.

3.1.6.3 Legal relationship between an Applicant and the Executive Board (as the principal decision-making body within the IMF)

As mentioned under Chapter Two section 2.2.2, the Executive Board is the principal decision-making body within the IMF and is "responsible for conducting the business of the Fund". It does not have a separate legal personality. Instead, the actions of the Executive Directors are ascribed to the Fund. There therefore is no legal relationship between the Applicant and the Executive Board and the legal relationship remains between the Applicant and the Fund. In these circumstances, the Executive Board is the organ through which the Fund acts and its actions give rise to legal consequences for the Fund and the Applicant.

In the context of this dissertation, the Articles of Agreement and policy documents which further regulate a specific arrangement, facility or instrument are the primary sources of law which impose specific legal duties on the Executive Board. For example, the Board must consider an application for financial assistance under the Rapid Financing Instrument or Rapid Credit Facility and must grant the application

198 *Ibid*.

199 Fritz-Krockow and Ramlogan op. cit. note 21 at 21, 27.

if the prescribed requirements are met (unless there are specific grounds on which it should reject the application).

Likewise, if a member misrepresented its position but nonetheless received financial assistance under one of the Fund's facilities, the Board has a duty to hold the member accountable and instruct it to remedy the misrepresentation.[200]

A non-compliant purchase (or disbursement) normally arises where the information on which the Executive Board relied when it made the decision, turns out to be incorrect. This could include information which was provided before the Fund granted the member's request for financial assistance or facts of which the Executive Board subsequently became aware. The discovery is often made by the Fund's staff during the annual Article IV consultations.

According to the *Guidelines on Corrective Action*, where a misrepresentation occurred and part of the Funds must still be released to the member, the Executive Board may request the member to take specific corrective actions to address the "noncomplying purchase" before the outstanding funds are released. Generally, the member can remedy the misrepresentation by repurchasing its currency or by using its currency in the transactions and operations of the Fund. An exception to this would be where the Executive Board decides that notwithstanding the misrepresentation, the circumstances justify the member's continued use of the purchased resources. The Executive Board would normally only allow the member to continue using the purchased (or disbursed) resources where the breach of the condition was minor, temporary, and/or the member implemented policy measures which seek to achieve the objective in question after the application for financial assistance was granted. The Fund may also impose additional reporting requirements on the non-compliant member to improve the accuracy and completeness of the information which the applicant is required to submit to the

[200] International Monetary Fund *Misreporting and noncomplying purchases in the general resources account—Guidelines on corrective action* Decision No. 7842-(84/165), 16 November 1984, as amended by Decision Nos. 12249-(00/77), 27 July 2000, and 13849-(06/108), 20 December 2006 last accessed from https://www.imf.org/external/SelectedDecisions/Description.aspx?decision=7842-(84/165) on 31 July 2021.

Fund. The appropriate response is generally agreed in consultation with the member.[201]

If a member fails to address the breach in a manner which satisfies the requirements that the Executive Board imposed, the Executive Board may declare the member ineligible to use the general resources of the Fund, suspend the member's voting rights or ultimately request the member to withdraw from membership in the Fund.[202]

Throughout this period the Executive Directors must act in a rational and reasonable way and should be able to justify their actions and decisions if they are called on to do so. They are therefore required to make accountable decisions.

3.1.6.4 The Fund's legal standing

A further consequence of the Fund's international legal personality is the capacity to institute legal proceedings. In principle, this ability affords the Fund standing to bring claims before courts and tribunals. It also entitles the IMF to institute proceedings in the domestic courts of its members, when necessary.[203]

The ability to institute legal proceedings is significant. If the IMF has the capacity to institute legal proceedings, it must also have the capacity to defend legal proceedings. While the immunity which the Articles of Agreement grant the IMF (discussed under the next section) may protect it from proceedings in the courts of its members, the IMF's legal capacity makes it possible for the IMF to be party to legal proceedings either if it waives the immunity or the courts decide to consider the claim despite the immunity (this is discussed further under the next section). [204]

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201 *Ibid*.

202 *Ibid.* Article XXVI of the Articles of Agreement op. cit. note 14.

203 This right must off course be considered in the context of the immunity afforded to the Fund, which would ordinarily prevent the member states from bringing legal proceedings against the IMF (or its staff) in the domestic courts. See the discussion under Chapter Three, section 3.1.7.

204 Article II section 3 of the Convention on the Privileges and Immunities of the Specialized Agencies op. cit. 150. Also see *Reparation for injuries* op. cit. note at 142. Also see Gianviti op. cit. note 20 at 32.

At an international level, the Fund's ability to institute legal proceedings before international courts and tribunals however appears to be limited to two specific scenarios.

First, Article VII Section 24 as read with Article IX Section 32 of the Specialised Agencies Convention provide that the IMF and the states which are party to the convention may approach the ICJ for an advisory opinion on matters governed under the Convention.[205]

An exception to the mechanism created under the Specialised Agencies Convention is the Fund's treatment of disputes which concern the interpretation of the provisions of the Articles of Agreement. This category of disputes falls outside the jurisdiction of the ICJ.[206]

Article XXIX of the Articles of Agreement in this regard stipulates that IMF member states that dispute the interpretation of a specific provision of the Articles of Agreement must refer the matter to the Executive Board. If the member(s) disagree with the Executive Board's decision, they may request the Executive Board to refer the matter to the Board of Governors. The Board of Governors' decision shall be final.[207]

The second scenario, regulated under Article XXIX(c) of the Articles of Agreement, is where a dispute arises between the Fund and a member which has withdrawn its membership or a member when the Fund is in liquidation. In these circumstances, either party may refer the dispute to an arbitral tribunal of three arbitrators.[208]

Notwithstanding the Fund's ability to institute legal proceedings, with the exception of these two mechanisms, neither the Articles of Agreement, nor the By-laws or the Rules and Regulations indicate how disputes between the Fund and members should be resolved. In a select number of instances where a decision by the Executive Board may have an adverse impact on the member, the Board may invite

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205 Convention on the Privileges and Immunities of the Specialized Agencies United Nations op. cit. note 150.

206 Article XXIX of the Articles of Agreement op. cit. note 14.

207 Article XXIX(a) and (b) of the Articles of Agreement op. cit. note 14.

208 Articles of Agreement op. cit. note 14.

the member to make written and oral representations to the Fund (including the Executive Board and Board of Governors) before the decision is made. Examples include where the Executive Board intends to publish a report on a member's "monetary or economic conditions and developments which directly tend to produce a serious disequilibrium in the international balance of payments of members", or where the Fund intends to sanction a member for failure to comply with a specific requirement imposed under the Articles of Agreement (including instances of compulsory withdrawal).[209]

These provisions however do not afford members a right of recourse to an independent tribunal or court where it disagrees with or fails to conform to the Executive Board's requirements. The ability to refer a dispute to arbitration is reserved for former members that have terminated their participation in the Special Drawing Rights Department or a member which has withdrawn from the Fund.[210]

The Articles of Agreement, moreover, do not expressly stipulate how disputes between the Fund and a member should be resolved in circumstances where the Executive Board refuses to grant an application for financial assistance under one of the IMF's arrangements, facilities and instruments, or where a member fails to comply with the requirements imposed under the Articles of Agreement. The former, as mentioned in the Chapter Two, may have a significant impact on vulnerable members' economic prospects of recovery following an unforeseen disaster. The latter could result in the member being sanctioned.[211]

The sanction mechanism is particularly interesting. The Articles of Agreement and Rules and Regulations envisage two types of violations that may lead to investigations which may result in a member being sanctioned. First, an aggrieved member may lodge a complaint with the Executive Board, which may then proceed to investigate the matter. Second, the Managing Director may on own volition report

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209 See for example Article XIII, Section 8, Article XV, Section 3, or Article XIX, Section 2(d) of the Articles of Agreement op. cit. note 14. Also see Section 22 of the By-Laws op. cit. note 34.

210 See Articles XXI(d) and XXIX(c) of the Articles of Agreement op. cit. note 14 as read with Section 23 of the By-Laws op. cit. note 34.

211 Article XXVI, Section 2 of the Articles of Agreement (op. cit. note 14) provides that a member may be sanctioned if it fails to comply with the obligations imposed under the Articles. Also see Gianviti op. cit. note 20 at 34.

a member to the Executive Board, where s/he is of the view that the member is in breach of any of the obligations imposed under the Articles of Agreement. In both instances, the Executive Board will inform the member of the complaint and afford it an opportunity to make representations. Once the written (or oral) representations are made, either the Executive Board or Board of Governors (subject to the nature of the alleged breach) will adjudicate the claim, make a finding, and sanction the member. As mentioned above potential sanctions include suspending a member's voting rights or access to the Fund's resources. The Fund will only lift the suspension after the member has satisfied the specific conditions which the Executive Board imposes on the member.[212]

While the Articles of Agreement compel the Fund to follow due process before imposing a sanction, the Fund still has the power to act as complainant (when the Managing Director refers a complaint to the Executive Board), judge (when either the Executive Board or Board of Governors adjudicate the claim and make a finding) and executioner (when the Executive Board or Board of Governors impose a sanction).

As discussed under section 3.1.7 below, it is possible that international and domestic courts may in due course consider claims against the IMF where a decision not to do so could result in a denial of justice or where the claim will not impede the international organisation's ability to continue exercising its core functions or fulfilling its purpose.

Again, this reinforces the need for the Executive Board to make accountable decisions.

3.1.7 **Immunity**

Immunity is a legal privilege which protects international legal persons – such as the IMF – against legal proceedings in domestic courts. It is therefore a mechanism which shields the international organisation from the need to account for its actions and decisions at a domestic level.

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[212] See Rules K and S of the Rules and Regulations (op. cit. note 34) as read with Article XXIII, Section 2, of the Articles of Agreement op. cit. note 14.

Immunity is an important concept in this dissertation. While it does not sterilise the duty placed on the IMF to make accountable decisions, it qualifies the circumstances under which an aggrieved party may call on the IMF to account for its decisions and the forum in which the IMF would be required to do so.

The IMF's general immunity from domestic court proceedings is provided for under Article III, section 4 of the Specialised Agencies Convention as well as Article IX of the Fund's Articles of Agreement. Both provisions provide that the IMF enjoys immunity from "every form of legal process" unless it has expressly waived this right in a specific instance.[213]

According to the Articles of Agreement, the purpose of the immunities and privileges which the Articles vest in the Fund and its staff is to enable the Fund to effectively conduct the functions entrusted to it. This affords the Fund and its staff the necessary freedom and legal security to undertake the Fund's work without fear of being prosecuted for their actions.[214]

The immunity afforded to the IMF is the same as the immunity which protects the actions of the UN but is different from the immunity granted to the other Bretton Woods institutions. This is explained below.

The absolute nature of the IMF's immunity can be justified in terms of the doctrine of functional necessity, which suggests that international organisations require the immunity to ensure that their operations function properly and are not hamstrung by unnecessary legal challenges.[215]

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213 Article III, section 4 of the Convention on the Privileges and Immunities of the Specialized Agencies op. cit. 150.

214 Article IX, sections 1 and 3 of the Articles of Agreement op. cit. note 14.

215 See for example Christian Dominicé, "L'immunité de juridiction et d'exécution des organisations internationals" (1984) 187 *Recueil des Cours de l'Académie de Droit International* 145, 161; Niels Blokker, "International Organizations: The Untouchables?' in N Blokker, N Schrijver (eds), *Immunity of International Organizations* (2015) 1, 2, 14; see Antonio Morelli, "International Financial Institutions and Their Human Rights Silent Agenda: A Forward-Looking View on the "Protect, Respect and Remedy" Model in Development Finance," (2020) 36(1) *American University International Law Review* 51 at 94; Michael Singer, "Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns," (1995) 36(1) *Virginia Journal of International Law* 53.

The blanket immunity may also prevent the courts in different jurisdictions from making conflicting findings in similar cases.[216]

In the IMF's context, the immunity gives rise to several different legal consequences.[217]

First, the Fund's archives as well as its buildings are generally "inviolable". This means that persons who are aggrieved by the Executive Board's decision do not have automatic access to the documents which support the decision. The Fund is however able to waive the immunity where it believes it would be appropriate to do so.[218]

Second, the immunity also extends to the IMF's Executive Directors, the IMF's Managing Director, and the IMF's staff. Under Article IX Section 8 of the Articles of Agreement, the Executive Directors (among other IMF officials) will be immune "from any legal process with respect of the acts performed by them in their official capacity *except when the Fund waives this immunity*."[219]

An obvious consequence of the immunity bestowed on the Executive Directors is that their day-to-day decisions, including the decision to grant financial assistance to low-income countries in crisis situations under one of the Fund's rapid relief programmes, are not subject to any domestic judicial checks or balances. The

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216 Ernestine E. Meijer, "The International Institutions of the Clean Development Mechanism Brought before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice," (2007) 39(4) *New York University Journal of International Law and Politics* 873 at 901; Hugh McKinnon Wood "Legal Relations Between Individuals and a World Organization of States" (1962) 30 *Transactions of the Grotius Society* 141, 144.

217 In addition to inviolability of the Fund's premises and archives, the Fund also has immunity from taxation (see Article IX, Section 9 of the Articles of Agreement), its assets are free from restrictions to the extent that the assets are necessary to carry out the IMF's purpose (see Article IX, Section 6). The IMF's communications are also privileged (see Article IX, Section 7 of the Articles of Agreement). Articles of Agreement op. cit. note 14. Also see Crawford op. cit. note 166 at 176.

218 Article IX, section 5 of the Fund's Articles of Agreement op. cit. note 14. Also see Article III, section 6 of and Article III, section 5 of the Convention on the Privileges and Immunities of the Specialized Agencies op. cit. 150.

Notably, even this right is not absolute and the Fund is able to waive it. See for example *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd (No 2)* [1988] 1 All ER 116 which concerned the inviolability of the International Tin Council's (**ITC**) records under Article 7(1) of the International Tin Council (Immunities and Privileges) Order 1972 which provided that the ITC "shall have the like inviolability of official archives as in accordance with the 1961 Convention Articles is accorded in respect of the official archives of a diplomatic mission."

219 Article IX Section 8(i) of the Articles of Agreement op. cit. note 14.

exception to this rule would be if the Fund agreed to waive the immunity in respect of a specific decision.[220]

The privileges and immunities afforded to the IMF are however potentially not absolute. According to Article VII of the Specialised Agencies Convention, for example, if the Fund (as Specialised Agency) abuses the immunity which the Convention vests in it, the aggrieved state party and the Fund must consult one another to determine if the abuse had occurred. If it is found that the IMF (in its capacity as Specialised Agency) abused its immunity, it must ensure that no repetition occurs. If, after an attempt at consultation, the Fund and the state party are unable to "achieve a satisfactory result", the matter must be referred to the ICJ under section 32 of the Specialised Agencies Convention. The ICJ will be the ultimate arbiter in the matter. If it rules in the aggrieved state party's favour, the IMF will not be entitled to invoke the immunity (which it abused) to protect its actions from scrutiny by a third-party adjudicator.[221]

According to publicly available information, it appears that the mechanism established under section 32 of the Specialised Agencies Convention has not been invoked to challenge the lawfulness of the IMF's conduct. The exception created under Article VII of the Specialised Agencies Convention, however provides a clear signpost that the immunity is not absolute and that the Fund could be required to account for its decisions in certain circumstances. It therefore supports the argument put forward in this dissertation.

It is also worth mentioning that the Articles of Agreement do not contain a similar provision. It therefore remains to be seen under which circumstances an aggrieved state party could invoke section 32 of the Specialised Agencies Convention to challenge the immunity which the convention and the Articles of Agreement vest in the Fund. A decision would obviously be informed by the economic circumstances in the country which may be reluctant to pursue any litigation which would be costly and could harm its relationship with the IMF and other member states.

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220 Alvarez op. cit. note 154 at 10.

221 Also see Article VII, section 24 of the Convention on the Privileges and Immunities of the Specialized Agencies op. cit. 150.

Notwithstanding the blanket immunity generally afforded to International Organisations, some legal commentators believe that the jurisprudence in this regard is evolving towards a more dynamic approach.[222]

On the one hand, some commentators argue that domestic courts are increasingly willing to deny international organisations' blanket immunity and hear claims founded in a denial of justice. They do so regardless of what is provided in the international organisations' constitutive documents.[223]

The courts' willingness to disregard an international organisation's immunity may also be supported by other supervening principles of international law. In *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany* for example, the European Court of Human Rights indicated that a two-pronged test should be applied to determine whether the international institution's immunity must be upheld. First, the court should consider if an international right has potentially been violated by the international organisation. If not, then this would be the end of the inquiry. Second, if the applicants have other reasonable means to protect the right in question. If not, a local court may have jurisdiction to hear the matter.[224]

In another matter, *Stichting Mothers of Srebrenica and Others*, the European Court of Human Right held that the absence of an alternative remedy does not automatically mean that the injured party's right of access to court is also breached. Subject to the matter at hand, more may be required to prove such a breach.[225]

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222 Crawford at 166.

223 A "denial of justice claim" is ordinarily defined as "any gross miscarriage of justice by domestic courts resulting from the ill-functioning of the State's judicial system which affect a foreign national". The claim may arise from a variety of factors such as the decision of a domestic court or the actions of the legislature and or executive which interfere with the court processes. See Carlo Focarelli "Denial of Justice" (October 2013) *Max Planck Encyclopedia of Public International Law* last accessed from https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e775 on 19 June 2021. In essence, it comprises a "refusal to grant foreigners free access to courts… [where] nationals of the state would be entitled to free access". It is therefore a claim which arises from the denial of the benefits which ordinarily result from the due process of law. Also see Clyde Eagleton "Denial of Justice in International Law" (July 1928) 22(3) *American Journal of International Law* at 538, 540; Crawford op. cit. note 166 at 175; Crawford op. cit. note 138 at 165.

224 *Waite and Kennedy v Germany* [1999] ECHR 13*; Beer and Regan v. Germany* [1999] ECHR 6.

225 *Stichting Mothers of Srebrenica and Others v. the. Netherlands* ILDC 1760 (NL 2012) at para 164.

In all three matters, the European Court of Human Rights considered whether the immunity granted to the international organisation deprived the applicants of the right to a fair trial provided for under Article 6 of the European Convention on Human Rights (**ECHR**). Although these examples concern breaches of Article 6 of the ECHR, for purposes of this dissertation it does not matter that the ECHR was the source of the law. What does matter, is that the decisions demonstrate that *it should in principle be possible* to apply the same approach whenever a claimant's *fundamental human rights* (such as the right to life) are breached and the claimant does not have other reasonable means to protect the right in question.

This argument is critical in the context of this dissertation given the IMF's general immunity. As mentioned above, accountability and immunity are two sides of the same coin. If the IMF successfully invokes the immunity which Article IX of the Articles of Agreement vest in its organs and employees, it arguably repels the duty imposed on the IMF to account for its actions and decisions in the context of domestic court processes. However, given the exception created by the European Court of Human Rights, the immunity does not mean that the IMF does not need to take accountable decisions. Rather, in terms of the current status of the law, in specific circumstances (such as where claimants have a denial of justice claim) it may be possible to challenge the IMF's decisions in domestic courts.

For example, a court may be willing to consider a claim against the IMF if a decision by the IMF to reject an application from a least developed country in crisis results in the member being unable to correct maladjustments in their balance of payments and therefore resorting to measures destructive of national prosperity which results in the member being unable to give effect to its citizens' fundamental human rights. The inability to provide access to proper medical care facilities and the consequences for the right to life may be a practical example of this.[226]

The test developed by the European Court of Human Rights also shows the need for claimants to consider other fora to raise concerns about the IMF's conduct. A

[226] See Article I(v) of the Articles of Agreement op. cit. note 14.

key example in this regard may be during the annual Spring meetings when the Board of Governors meet.

A second group of commentators suggest that domestic courts are increasingly inclined to use a "functional necessity approach to immunity for international organisations." In terms of this test, a court may consider a claim against an international organisation where the claim will not impede the international organisation's ability to continue exercising its core functions or fulfilling its purpose. This has also been described as "immunity for official activities".[227]

Again, this approach reinforces the argument that a court should be inclined to hear cases (and require international organisations to account for their actions and decisions) as long as this would not prevent the organisations from performing their functions.

Finally, it is worth noting that provisions in the constitutive documents of the International Bank for Reconstruction and Development, Articles of Agreement of the International Development Association, Articles of Agreement of the International Finance Corporation and the Multilateral Investment Guarantee Agency (four of the five entities which comprise the World Bank Group) create mechanisms that entitle private entities to institute legal proceedings against the organs in national courts. For example, Section 3 of Article VII of the Articles of Agreement of the International Bank for Reconstruction and Development (World Bank) provides that actions may be brought against the Bank on condition that the action is instituted out of 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. The waiver however excludes legal proceedings instituted by members, but creates a mechanism for other stakeholders (such as injured citizens).[228]

Provisions such as Section 3 of Article VII indicate that unless a constitutive document expressly empowers member states or private entities to institute

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227 Meijer op. cit. note 216 at 901.

228 Articles of Agreement of the International Bank for Reconstruction and Development (27 December 1945) New York 2 UNTS 134.

proceedings against international organisations, the doctrine of jurisdictional immunity may act as a bar to such proceedings. The fact that the constitutive documents include these provisions however signal that there is clearly a need for third parties to be able to challenge the decisions of international organisations even where these decisions fall within the core functions or purposes of the organisation in question.[229]

The absolute immunity which the Articles of Agreement bestow on the IMF and its organs, and which can only be withdrawn by express waiver, is a significant exception to the approach followed by the other members of the Bretton Woods Institutions. A conservative interpretation of the Articles of Agreement would allow the IMF to withstand efforts by third parties who would like the IMF to account for its decisions in domestic courts. However, in light of the developing jurisprudence in this area (as discussed above) as well as the different approach adopted in the other members of the Bretton Woods Institutions' constitutive documents, the time has come to rethink the IMF's immunity. Given the importance which the IMF places on accountability and transparency, the Article of Agreement ought to be amended to include a provision which resembles Section 3 of Article VII of the Articles of Agreement of the International Bank for Reconstruction and Development [230]

Finally, it is worth repeating that the immunity against legal proceedings in *domestic courts* does not mean that the IMF is not required to make accountable decision or to potentially be called to account on its decisions at an international level. In fact, as discussed in the next section, it is clear from the obligations imposed on the IMF under the Articles of Agreement that *through its conduct it must demonstrate its commitment to act in an accountable manner*.

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229 See Article 7 of the Articles of Agreement of the International Bank for Reconstruction and Development Article 7 op. cit. note 228; Article 8 of the Articles of Agreement of the International Development Association (26 January 1960) 439 UNTS 249; Section 6 of the Articles of Agreement of the International Finance Corporation (20 July 1956) 264 UNTS 117; Article 44 of the Convention Establishing the Multilateral Investment Guarantee Agency (11 October 1985) 1508 UNTS. 99. For further examples see Article 9 of the Agreement Establishing the Inter-American Development Bank (8 April 1959) 389 UNTS 69; Article 50(1) of the Agreement Establishing the Asian Development Bank (4 December 1965) 571 UNTS 123; and Article 52 of the Agreement Establishing the African Development Bank (4 August 1963) 510 UNTS 3.

Also see Meijer op. cit. note 216 at 906.

230 See Article 9, section 3 of the Articles of Agreement op. cit. note 14.

3.1.8 **Brief summation**

In this section, I have demonstrated that it is reasonable to conclude that the IMF's Executive Board has an implied duty to make accountable decisions given the rights which vest in and obligations which are imposed on the Board by the Articles of Agreement, the Convention on the Privileges and Immunities of the Specialized Agencies, the By-Laws, Regulations, Administrative Orders, Code of Conduct and Guidelines supplement.

First, individually and as a collective, the express and implied powers, rights and entitlements which are vested in the Executive Board give rise to legal obligations and consequences which are naturally associated with a specific right and which is established through the Executive Board's conduct. The duty to act in an accountable manner is rooted in Article I and Section 3 of Article XII of the Articles of Agreement. The former sets out the Fund's purposes and provide the minimum threshold requirements which the decisions of the Executive Board must *always* satisfy.

Article I both vests a power in the Executive Directors to act on the Fund's behalf, but also places an obligation on them to do so in a manner which gives effect to the Fund's purposes. The absolute nature of the obligation and limitation which Article I impose on the Executive Directors qualifies every power which vest in the Executive Board. Because the Directors do not have carte blanche to do as they please, I believe the limitation places a duty on them to be able to show that their actions always promote the Fund's purpose. This, in turn, means that they must make accountable decisions.

Second, given the framework mentioned above, the right to assess and grant or reject an application for financial assistance gives rise to a duty to make a decision which is rational and reasonable. At the very least, this means that the Executive Board ought to grant an application if the member satisfies the general and specific requirements for a lending facility such as the Rapid Credit Facility or Rapid Finance Instrument.

Third, once an application is granted, the Executive Board must support the member and help develop corrective action mechanisms if the member fails to satisfy specific

policy conditions. Again, the Executive Board must ensure that the purposes of the Fund are realised.

Four, the Fund has legal standing (capacity) to institute proceedings. While the immunity which the Articles of Agreement grant the IMF may protect it from proceedings in the courts of its members, the IMF's legal capacity makes it possible for the IMF to be party to legal proceedings either if it waives the immunity or the courts decide to consider the claim despite the immunity.

Finally, the Articles of Agreement stipulate specific internal due process steps which the Executive Board must follow before it makes a decision which could give rise to adverse consequences for the member.

In the circumstances, it is clear that while the Articles of Agreement do not expressly provide that the Executive Directors must act in an accountable manner, this is a general implied duty: the Board must always make decisions which promote the achievement of the Funds purposes. This restriction on their powers means that the Executive Directors must be able to show how their actions satisfy this requirement, which in turn means that they must make accountable decisions.

3.2 Internal accountability mechanisms prescribed under the IMF legal framework

International organisations (such as the Fund) are generally not subject to a variety of stringent external accountability obligations. Their decision-making processes are however subject to internal vertical structures which are created inside the organisation. In the case of the Fund this relationship structure is illustrated with reference to the relationship between the IMF's Managing Director and Staff, the Executive Board and the Board of Governors.

Article XXIX of the Articles, for example, provides that any questions regarding the interpretation of the provisions of the Articles of Agreement are decided by the Executive Board. If a member is aggrieved by the Executive Board's *interpretation of a specific provision* of the Articles of Agreement, it may take the matter on appeal to the Board of Governors. After receiving the request, the Board of Governors will establish a Committee on Interpretation, which will consider the appeal. The

Committee's decision will be final, unless eighty-five per cent of the Board of Governors decides otherwise.[231]

The Fund is subject to limited internal requirements and mechanisms which collectively reinforce the fact that the IMF Legal Framework imposes an implied duty on the Executive Directors to make accountable decisions. The mechanisms – which are discussed one at a time below - are: members' right to representation and attend meetings, record keeping, transparency and access to information, and the independent limited evaluations by the Independent Evaluation Office.

Given the limitations associated with these internal mechanisms and the absence of a general dispute resolution process, it appears that the Fund lacks the checks and balances or oversight mechanisms which are normally associated with government or quasi-government international organisations that operate in democratic societies. For example, in the context of states, the different branches of government in well-functioning democracies are governed under the doctrine of the separation of powers. Under this doctrine, each of the three branches of government (the Executive, Legislature, and Judiciary) are afforded specific powers that enables each branch to regulate the exercise of power by the other two branches.[232]

According to Karen Hudes and Sabine Schlemmer-Schulte the accountability void within the IMF is a product of the organisational structure of the IMF which is premised on the internal hierarchy between the constituting organs. [233]

Similarly, while the structure of the IMF is reminiscent of a traditional corporate entity (i.e. shareholders, board of directors, management, and staff) it lacks the checks and balances which are generally prescribed under domestic corporate law, such as specific directors fiduciary duties. In fact, once a member (or group of members)

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231 Article XIXX, section (a) of the Articles of Agreement op. cit. note 14. Also see Hudes and Schlemmer-Schulte op. cit. note 137 at 506.

232 Legal Information Institute, Cornell Law School *Separation of powers* (sine annum) last accessed from https://www.law.cornell.edu/wex/separation_of_powers#:~:text=Separation%20of%20powers%20is%20a,and%20balance%20the%20other%20branches on 18 July 2022.

233 Hudes and Schlemmer-Schulte op. cit. note 137 at 506.

appoints an Executive Director, the person in question is expected to act in the interest of the Fund (as opposed to the member(s) who appointed him or her).[234]

3.2.1 **Representation**

Section 19(1) of the By-Laws provides a member may send a representative to attend *any meeting* of the Executive Board if the Board is due to consider either a request from the member or a matter which affects the member. The Executive Board will have the final right to determine whether the matter under consideration affects the member.[235]

If a matter affects a member, the Executive Board shall notify the member of the matter which the Board intends to discuss. To protect the member's interests in the matter, the Board may not take any final action in respect of the matter (or submit a report or recommendation to the Board of Governors on it) until the member's representative presented the member's views to the Board or the member waived the right to participate in the meeting. [236]

Where the Board is due to consider a request from the member, the member may present its views during the meeting. To invoke this right, the member must notify the Board of its desire to do so and designate a representative for this purpose. The designated person must be available to attend the meeting at the Fund.[237]

The position in respect of meetings held during executive sessions however appears to be different. Section C-3(b) of the Rules and Regulations in this regard provides that meetings of the Executive Board during executive sessions may only be attended by the Executive Directors, the Managing Director, and the Deputy Managing Director. Under specific circumstances, the Secretary or a specific member of the IMF staff may also attend the meeting. Such staff include the Senior Advisors or Advisors to the Executive Directors.

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234 Hudes and Schlemmer-Schulte op. cit. note 137 at 506, 507.

235 Section 19(1)(a) and (c) of the By-laws op. cit. note 34.

236 Section 19(1) (c) of the By-laws op. cit. note 34.

237 Section 19(1)(b) of the By-laws op. cit. note 34.

Notwithstanding the restrictions imposed under section C-3(b) of the Rules and Regulations, the right to representation therefore ensures that members retain some oversight over the Executive Board's actions. This reinforces the position that the Board must only make decisions that promote the achievement of the Fund's purposes, which underscores the duty to make accountable decisions.

3.2.2 **Record keeping (summings up)**

Proper record keeping is an essential part of good governance and accountability.[238]

The same principle applies to the actions and decisions of the IMF's organs. Comprehensive, clear and accurate records play a critical role in providing insight into the Executive Board's decision-making process and holding it accountable for its decisions.

Under the direction of the Managing Director, the Secretary of the IMF must prepare a summary record of each meeting of the Executive Board whenever the Executive Directors consider or debate Article IV reports as well as when the Fund's resources are used. These records are known as "summings up".[239]

According to Gianviti, a summings up is "a literary genre combining a recapitulation of the issues discussed and the views expressed during the discussion." However, the individual views of the Executive Directors are not ordinarily reflected in the summing up. Rather, such views are provided in the Board minutes which constitute a more comprehensive and complete record of Board meetings. [240]

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238 Alistair Tough "Record keeping and accountability. Why the distinction between probity and responsibility matters" (2007) 1 *Archives & Social Studies: A Journal of Interdisciplinary Research* 655 at 655.

239 Section C-14 of the Rules and Regulations op. cit. note 34. Summings up are not prepared for standalone discussions on misreporting or repurchase expectations. Jeff Chelsky "Summarizing the Views of the IMF Executive Board" (2008) *IEO Background Paper (BP/08/05)* Washington, DC: Independent Evaluation Office of the International Monetary Fund 208 at 212 last accessed from https://ieo.imf.org/~/media/IEO/Files/Publications/Books/studies-of-imf-governance/studies-of-imf-governance-chapter-8.ashx on 3 May 2021.

240 See Gianviti op. cit. note 20 at 53.

A draft summings up is prepared prior to the Board meeting and is drafted on the assumption that the Executive Directors will generally agree with the staff's report on the matter in question.

Prior to finalising the draft, the staff are afforded three further opportunities to amend it. First, they may do so before to the Executive Board's meeting when they receive the Executive Director's grey statements. The purpose of this exercise is to incorporate the Executive Directors' views in the draft. Second, the Secretary (under direction of the Chair) may do so during the meeting to reflect the Executive Directors' oral representations. Third, at the end of the meeting when the Chair reads out the draft summings up and invites the Executive Directors to voice any concerns and confirm if they agree that the draft provides a true reflection of the discussion.[241]

After the draft summings up is finalised, it is issued as a formal Fund document. The summings up is also entered into the record of the meetings. In some instances, sections of the summings up are also released as part of a public information notice.[242]

Where a formal decision is made during a meeting, the summings up provides an overview of the discussion as well as the background to the decision. In a select number of instances, the summing up may also record minority views. The summing up is issued by the IMF after the Executive Director representing the member state referred to in the document signs off on the content. The summings up are therefore particularly important where the Executive Board's decisions are not unanimous as it identifies the areas of discord as well as the causes of the disagreement.[243]

In circumstances where the Board follows the informal voting process (discussed under section 2.2.2 of Chapter Four), the summings up may also carry evidentiary

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241 International Monetary Fund *Qualifiers used in summings up of executive board meetings* July 28, 2017 last accessed from https://www.imf.org/external/np/sec/misc/qualifiers.htm on 10 May 2021. Chelsky op. cit. note 230 at 214.

242 *Ibid*.

243 Chelsky op. cit. note 239 at 209. Also see Fritz-Krockow and Ramlogan op. cit. note 21 at 74.

legal weight, especially where no formal text was put forward for approval. In such circumstances it may carry the same weight as a formal decision.[244]

Both a formal decision and the summing up form part of the formal minutes of the meeting. The minutes, in turn, are the official record of the meeting.[245]

Where formal and informal decisions contain contradicting provisions the last decision in time (whether formal or informal) will be the binding decision. The exception to the rule will be decisions in respect of financial assistance. In these circumstances the terms of the arrangement will be binding as well as authoritative.[246]

The summings up process is however not without criticism. Jeff Chelsky (Senior Economist at Independent Evaluation Office of the IMF), for example, found that if one compares the wording of a staff report with the draft and final summings up for a specific member in any specific year, the wording used in the final summings up is often more positive that the draft summings up or the staff report. Staff reports, according to Chelsky, are often more frank. The draft and final summings up, in turn, frequently contained softer language and weaker adjectives in comparison to the staff reports.[247]

Chelsky also found that summings up seldom referred to dissenting views, that criticism from Executive Directors were often excluded or their views diluted and that the summings up generally focussed on the positive achievements of the matter at hand.[248]

In addition, a quantitative analysis by Dr Liam Clegg found that the summings up generally reflected the Executive Directors with the greater voting powers' views.[249]

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244 Chelsky op. cit. note 239 at 216.

245 Fritz-Krockow and Ramlogan op. cit. note 13 at 74.

246 See Gianviti op. cit. note 20 at 54.

247 Chelsky op. cit. note 239 at 214, 218.

248 Chelsky op. cit. note 239 at 224, 225.

249 Liam S Clegg "Global governance behind closed doors: the IMF Boardroom, the Enhanced Structural Adjustment Facility, and the intersection of material power and norm changes in global politics" (2012) *Review of international organisations* 285. Also see Chelsky op. cit. note 239 at 209 to 212.

The differences in wording (and nuance) become particularly important when one considers the order in which the documents are published. The position may be exacerbated by code words. If, for example, the wording of the summings up is softer than the staff report, this may suggest that the Executive Board adopted a less critical view of a member's economic position than the IMF's staff. If not, this raises questions on the accuracy of the summings up and whether it provides a true reflection of the Executive Directors' views. To the extent that the Executive Board disagrees with the country team, this may give rise to questions for which the Executive Board (including the Chair) may need to account.[250]

In addition to summings up, Board decisions are also often summarised in *Chairman's concluding remarks* and *Chairman's statements.* The former reflects the Chair's (i.e. Managing Director's) decisions and therefore do not constitute a formal record of the Board's decisions. The publication however provides a useful record of the status of policy discussions, areas of preliminary consensus and remaining issues that require further debate. The latter are published after the Board makes a decision in respect of an application for financial assistance. Different from the summings up, Chairman's statements do not provide a comprehensive record of the Board's deliberations. They are significantly shorter and only reflect the few points which the Board wishes to emphasise.[251]

Verbatim records of the proceedings may also be kept. The verbatim records are normally prepared to assist the Secretary when s/he prepares the summary reports and are destroyed after a reasonable time. They may, however, be kept in the Fund’s archives if the Chairperson of the Board or an Executive Director submits a specific request to this effect.[252]

Other important records of the Executive Board's deliberations include the *Select Decisions and Documents* depository and minutes of the Executive Board's meetings. The former is a codification of the Fund's decisions. The ordinarily

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250 International Monetary Fund *Qualifiers Used in Summings Up of Executive Board Meetings* op. cit. note 241.

251 Chelsky op. cit. note 239 at 213.

252 Section C-15 of the Rules and Regulations op. cit. note 34.

provides a compilation of the Executive Board's as well as the Board of Governor's decisions, interpretations, and resolutions. It may also include copies of specific documents where these are frequently referred to by either of the IMF bodies.[253]

The duty to prepare the different records confirms the fact that the Executive Board is required to make decisions which are rational, reasonable and ultimately justifiable. This, in turn, confirms that the Executive Directors must make accountable decisions.

3.2.3 **Transparency and access to information**

Requirements in respect of record keeping go hand in hand with the duty to act in a transparent manner and provide access to information. According to Article IX, section 5 of the Articles of Agreement, the Fund's archives are "inviolable". The Executive Board's interpretation of the provision is however less absolute and the Fund generally appreciates the importance of transparency. In my view, this in and of itself suggests the Board's appreciation of the need to make accountable decisions.[254]

The Fund's willingness to publish information is, however, subject to three conditions. First, the Fund will not publish information about a member unless the member confirms that it may do so. Second, the Fund will safeguard confidential information. Third, the Fund will publish information without a member's consent if the member's monetary or economic conditions and developments directly tend to produce a serious disequilibrium in the international balance of payments of members and the members who jointly hold seventy per cent of the voting power decide in favour of publishing the report.[255]

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253 International Monetary Fund *Selected Decisions and Selected Documents of the IMF, Fortieth Issue* (30 April 2019) last accessed from https://www.imf.org/external/SelectedDecisions/DecisionsList.aspx on 15 May 2021.

254 International Monetary Fund *2018-19 Review of the Fund's transparency policy* Decision No. 15420-(13/61), June 24, 2013, as amended by Decision No.15805-(15/62), June 22, 2015, 16231-(17/62), July 14, 2017, 16519-(19/42), May 24, 2019, and Decision D in 16747-(20/43), April 15, 2020 last accessed from https://www.imf.org/en/Publications/Selected-Decisions/description?decision=15420-(13/61) on 9 August 2021.

255 *Ibid*. Also see Article XII, Section 8 of the Articles of Agreement op. cit. note 14.

The rules regulating the publishing of new documents are provided in the Fund's *2018-19 Review of the Fund's Transparency Policy.* For example, paragraph I(1) of the report provides that the Managing Director is mandated to issue instructions for the publication of "Country Documents, Fund Policy Documents and Multicounty Documents" but must do so in accordance with the principles stipulated under the policy.

Country Documents may only be published if the member confirms that the document in question may be published. Consent is, however, normally presumed unless a member expressly objects to the publication of certain documents (or information). Members must object to the publication of the document (or parts thereof) before the conclusion of the Executive Board's meeting where the document was considered or the expiration date in respect of the process in which the Fund and the member are engaged. In some instances, consent is a precondition to a member obtaining access to a specific arrangement, facility or instrument or to be eligible for further or future assistance.[256]

Under normal circumstances, the Executive Board will endeavour to keep its members and the public apprised of decisions in respect of specific members. Where the Executive Board is unable to do so because it is yet to reach a decision (or agreement with the government of the member) the board will publish a press release to this effect. Such a press release will take the form of a brief factual statement. Again, I argue that this demonstrates the Board's appreciation of the need to make accountable decisions.[257]

Where a dispute on the content of the document arises between the Managing Director and a member, the matter must be referred to the Board of Executive Directors. The Board will then decide whether the document should be published.[258]

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256 There are, however, quite a few exceptions which concern specific documents under specific circumstances. International Monetary Fund *2018-19 Review of the Fund's transparency policy* op. cit. note 254. Also see Article XII, Section 8 of the Articles of Agreement op. cit. note 14.

257 *Ibid*.

258 *Ibid*.

Fund Policy Documents, in turn, may only be published if the Executive Board consents to this. Again, unless the Board decides otherwise, it shall be presumed that the staff report under consideration and or the associated Press Release pertaining to the issue at hand will be published. Examples of such documents include Codes of Conduct for IMF staff and Executive Directors, recruitment policies, and procurement guidelines.[259]

Multi-Country Documents require the consents of all members who are subjects of the document or the Executive Board. The Secretary's covering memorandum which accompanies the document might also impose additional requirements which must be satisfied before the document may be published. Finally, documents which are co-authored by the World Bank may only be published if the Bank agrees to their publication.[260]

Under the Fund's *Transparency Policy—Archives Policy* the public is allowed access to the Fund's archives if the person requesting the information meets certain requirements. As a principle, the IMF undertakes that it will disclose documents and information after a predetermined period of time unless there are specific reasons why certain documents or categories of documents should not be disclosed.[261]

First, generally archived documents must be at least three years old. This includes BUFF Statements by the Managing Director or Fund Staff to the Executive Board, BUFF/EDs, Gray Documents, and Green Documents.[262]

If, however, the person is requesting minutes of meetings where the Executive Board considered a member's use of the Fund's resources, a Policy Support Instrument, and the Policy Coordination Instrument, the request will only be granted if the document is older than five years. The same period applies to the actual Policy

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259 *Ibid*.

260 International Monetary Fund *2018-19 Review of the Fund's transparency policy* op. cit. note 254.

261 International Monetary Fund *Selected Decisions and Selected Documents of the IMF, Fortieth Issue* op. cit. note 253; International Monetary Fund *Transparency at the IMF* (17 March 2021) last accessed from https://www.imf.org/en/About/Factsheets/Sheets/2016/07/27/15/35/Transparency-at-the-IMF on 16 May 2021.

262 International Monetary Fund *Selected Decisions and Selected Documents of the IMF, Fortieth Issue* op. cit. note 253.

Support Instrument or the Policy Coordination Instrument. The IMF also imposes a five-year waiting period for summaries of Executive Board Meetings, Executive Board Seminars Agendas and Minutes, Secretary's Journal of Executive Board Informal Sessions Minutes, and Executive Board Committee Minutes. Finally, where the Fund does not stipulate a specific waiting period for a specific document a 20-year waiting period will apply.[263]

Second, where a person requests access to documents or information which is classified as "Secret" or "Strictly Confidential", the documents will not be released unless the Managing Director consents to their declassification. The Managing Director would generally do so unless the material remains highly confidential or sensitive.[264]

Third, the public is not entitled to receive copies of the following documents: privileged documents (including those protected under attorney-client privilege); confidential documents which third parties provided to the Fund, including member countries; personnel files and medical or other records; and documents that are produced by or have been referred to the Grievance Committee.[265]

Fourth, the Executive Board may provide ad hoc consent for exceptions to the policy where the information is requested by external researchers.

The *Staff Operational Guidelines on Dissemination of Technical Assistance Information* (published in June 2020) (**Guidelines**) seems to suggest that the Board is moving towards a system where the barriers to access to non-confidential information are being removed. As part of this process, the Fund seeks to implement new procedures to allow for wider dissemination, of Technical Assistance

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263 International Monetary Fund *Selected Decisions and Selected Documents of the IMF, Fortieth Issue* op. cit. note 253.

264 International Monetary Fund *Selected Decisions and Selected Documents of the IMF, Fortieth Issue* op. cit. note 253. Some confidential documents will be automatically declassified. Examples include those considered under the exemptions provided in the Executive Board's Decision No. 15420-(13/61), adopted June 24, 2013, on the Fund's Transparency Policy.

265 The third party which provided the information may waive the confidentiality which attaches to the document. International Monetary Fund *Selected Decisions and Selected Documents of the IMF, Fortieth Issue* op. cit. note 253.

information (including through encouraging publication) where the information is not confidential to various stakeholders, including the public.[266]

These documents are normally those which are fit for immediate disclosure. Examples of such documents include those that were prepared to assist the Executive Board. These documents are described as either "voluntary but presumed" or "stronger presumption", meaning that there is a presumption that the information would be published unless the member (who is the subject of the document) objects to its publication. Consent is obtained if the member does not object to the publication of the information.[267]

For example, the Fund publishes and regularly updates information on the members' financial position as well as information on its own activities on its website.[268]

The increased emphasis on transparency and access to information promotes accountability. The Board's approach therefore demonstrates that the Executive Directors believe they have a duty to act in an accountable manner and make accountable decisions.

3.2.4 **The IMF's Independent Evaluation Office (IEO)**

The final internal accountability mechanism is the independent evaluations which are conducted by the IEO. While the IMF's operations and policies could all hypothetically be the subject matter of an evaluation, the IOE's investigative and evaluation powers are *highly circumscribed*.

The IEO was established in 2001 to:

> conduct objective and independent evaluations on issues, and on the basis of criteria, of relevance to the mandate of the Fund.[269]

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266 International Monetary Fund *Staff Operational Guidelines On Dissemination of Technical Assistance Information* (June 2020) last accessed from https://www.imf.org/~/media/Files/Publications/PP/2020/English/PPEA2020031.ashx on 16 May 2020 at 6.

267 *Ibid.*

268 *Ibid.*

269 Independent Evaluation Office *Terms of reference* (3 September 2015) last accessed from https://ieo.imf.org/en/our-mandate/Terms-of-Reference on 16 May 2021.

Among other things, the IEO seeks to support the Executive Board's institutional governance and oversight responsibilities. To achieve this, it is mandated to review and examine how the Fund responds to specific financial crises as well as the quality of the Fund's economic forecasts.[270] This is considered in more detail below.

While the IEO forms part of the IMF, it is independent from the Fund's management. It likewise operates at arms' length from the Executive Board. It is headed by a Director who is appointed by the Executive Board for a non-renewable term of six years. Once the Director is appointed s/he ceases to be an IMF staff member.[271]

The Director, in turn, must appoint the IOE personnel. The personnel must be independent and highly-qualified and most of the appointees must not be current Fund employees. The terms and conditions of the IOE personnel's appointment is determined by *the Executive Board*.[272]

The Director of the IOE is responsible to prepare the Work Programme in terms of which the IOE will undertake its activities. While the Director is afforded a wide discretion, the Work Programme should concentrate on matters which are important to the members and which are relevant to the IMF's mandate. The Work Programme is prepared in consultation with the Board of Executive Directors and the IMF's managing director. The IOE's Director may also consider requests provided by interested and affected parties which do not form part of the IMF's bodies.[273]

Once the Work Programme is prepared, the IOE's Director must submit it to the Executive Board to be reviewed. If the Work Programme is approved by the Executive Board it must be made public. In undertaking its mandate, the IOE is free to consults with any person or group of persons. This includes IMF staff as well as members of the public. The IOE's Director specifically has the right to consult with and provide information to external persons, organisations, and the public. This

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270 *Ibid*.

271 *Ibid*.

272 *Ibid*.

273 Independent Evaluation Office *2021 Work Progamme* (10 February 2021) last accessed from https://ieo.imf.org/-/media/IEO/Files/evaluations/future/wp-2021-ieo-work-program.ashx on 9 September 2023. Independent Evaluation Office *Terms of reference* op. cit. note 269.

includes information on the IEO's activities, findings and conclusion on condition that the Director complies with the IMF's policies on the treatment of confidential information and the IOE's *Terms of Reference*.[274]

As part of implementing the Work Programme, the IOE Director is expected to regularly report on the IOE's activities and findings to the Executive Board and the IMFC. Where appropriate, specific individuals, the IMF's staff (including management), and member states will be afforded an opportunity to comment on the IOE's findings. In my view, this demonstrates the need for the Executive Board to make accountable decisions.[275]

Once a report is finalised there is a "strong presumption" that it will be published, unless the Executive Directors decide that it should not be made public. Again, this must be done in compliance with the standard rules for publication agreed between the IOE's Director and the Executive Directors. Where the reports concern specific members, management, IMF staff or the like, these persons will be afforded an opportunity to comment on the report and their comments will be published with the report.[276]

Consonant with the questions raised in this dissertation, the IEO on 6 May 2021 launched a new enquiry into *The IMF's Emergency Response to the COVID-19 Pandemic*. The findings of the enquiry were published in an *Evaluation Report* on 20 March 2023.[277]

Through the enquiry the IOE, among other things, sought to investigate if the Fund successfully adapted the "lending framework and processes for economic

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274 The IOE's *2021 Work Programme* (*Ibid*) indicated that the IOE intended to "launch a new evaluation on the IMF's emergency response to the COVID-19 pandemic". According to the programme the IOE planed to conclude the evaluation during 2022 (which it did).

Independent Evaluation Office *Terms of reference* op. cit. note 269.

275 Independent Evaluation Office *Terms of reference* op. cit. note 269.

276 Independent Evaluation Office *Terms of reference* op. cit. note 269.

277 Independent Evaluation Office of the International Monetary Fund *The IMF's Emergency Response to the COVID-19 Pandemic: Evaluation Report 2023* (20 March 2023) last accessed from https://ieo.imf.org/en/our-work/Evaluations/Completed/2023-0313-imfs-emergency-response-to-the-covid-19-pandemic on 28 May 2023.

assessment and policy advice to help countries during the early emergency phase of an unprecedented global shock".[278]

The IOE found that that Fund deserved great credit for implementing an agile and effective response to the financial crisis caused by the pandemic. It however also observed that the IEA's lending toolkit was sometimes found lacking owing to the speed at which the Fund had to respond to members' requests. Key concerns which the IEO flagged here included limited consultation with members on the emergency strategy at the start of the pandemic, limited uptake of the precautionary facilities, and the additional risks which the Fund took on.[279]

The IEO was also of the view that the Fund's staff responded with the required speed when they revised the global economic outlook in 2020. With the exception of two examples, the staff's forecasts were accurate. The first error concerned the pessimistic view that was published in June 2020. The IEO ascribes the staff's overly pessimistic forecast to the information which was available at the time. The staff also erred by not anticipating the surge in inflation in 2021. This time around, the IEO suggested that the staff's error resulted from the fact that they paid undue deference to the views expressed by major central banks.[280]

In respect of providing access to financing, the IOE found that the Fund tried to balance risk and rewards. While the Fund assisted a record number of countries during the first year of the pandemic (including 62 within the first three months of the start of the pandemic) some members' applications were unsuccessful owing to concerns regarding debt sustainability, governance issues, or policy choices. This suggests that the Fund was willing to make difficult decisions based on associated risks.[281]

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278 Independent Evaluation Office of the International Monetary Fund *The IMF's Emergency Response to the COVID-19 Pandemic: Evaluation Report 2023* op. cit. note 277.

279 Independent Evaluation Office of the International Monetary Fund *The IMF's Emergency Response to the COVID-19 Pandemic: Evaluation Report 2023* op. cit. note 277 at 2.

280 Independent Evaluation Office of the International Monetary Fund *The IMF's Emergency Response to the COVID-19 Pandemic: Evaluation Report 2023* op. cit. note 277 at 2, 3.

281 Independent Evaluation Office of the International Monetary Fund *The IMF's Emergency Response to the COVID-19 Pandemic: Evaluation Report 2023* op. cit. note 277 at 3.

While access to emergency funding increased during the pandemic, the IOE has not been able to determine if the arrangements had a lasting impact on the members or global economy and if so if the impacts were positive or negative. By 2022 the number of members with longer term financial arrangements were the same as in 2020. Access to emergency funding therefore did not promote or discourage access to longer term lending.[282]

The Fund mostly followed a binary approach to providing emergency financing and applicants either received full access or their applications were rejected. This, according to the IOE, showed that the Fund did not tailor arrangements in response to an applicant's specific needs (including the access to health care needs of the citizenry) or the IMF staff's forecast of the impact which the pandemic may have on the applicant. In sum 25 of the 28 countries that received funding under the Rapid Credit Facility exhausted the maximum amount available.[283]

The position was slightly different where applicants submitted blended requests for support under the Rapid Credit Facility and another longer-term lending instrument. In these circumstances the Fund appeared to have taken greater account of the applicant's specific financial needs as well as its policy and governance framework and ability to repay the loan.[284]

The IEO regrettably also found that the Fund could have followed a more bespoke approach when it considered applications from smaller countries which had particularly large financial needs. For them, the Fund often did not provide sufficient funding which resulted in these applicants seeking recourse from other sources. Ultimately, however, the IOE found that the Fund acted in an even-handed manner when it considered applications and generally gave applicants the benefit of the doubt. In exceptional circumstances, the lack of even-handedness resulted in some delays or limited a member's access to funding. The existence of even the

282 *Ibid.*

283 Independent Evaluation office of the International Monetary Fund *The IMF's Emergency Response to the COVID-19 Pandemic: Evaluation Report 2023* op. cit. note 277 at 3, 41.

284 *Ibid.*

exceptional cases in the IEO's view presents reputational risks to the Fund. This could also bring into question whether the Fund acted in an accountable manner.[285]

Finally, the IOE observed that the Fund implemented some additional governance safeguards in response to calls from the Executive Board and civil society. By May-2020, most requests for financing required applicants to commit to specific governance measures, such as to undertake an independent audit of COVID-related spending. To prevent the misuse of financing, the Board endorsed guidance on governance safeguards in October 2020. [286]

It remains to be seen if the countries met their specific governance commitments. The IEO's initial findings suggest that many countries have held up their end of the bargain. Some however failed because the requirements may have been too onerous. The IEO however believes that the lessons learnt during the pandemic demonstrate why it remains important to build up country capacity to implement governance safeguards. This accords with the Funds general approach to governance.[287]

In conclusion the IEO stated that while the Fund performed well under difficult circumstances, the existing lending toolkit and policies were not able to deal with the full effect of the global crisis. To prevent future similar mistakes, the Fund should review parts of the policies and procedures. [288]

4. CONCLUSION

In Chapters One and Two I demonstrated why there is a need to be able to demand that the IMF's Executive Board must make accountable decisions. In Chapter Three I proceeded to investigate whether such a demand can be rooted in legal argument by considering the laws which establish and regulate the IMF (i.e. the IMF Legal Framework).

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285 Independent Evaluation office of the International Monetary Fund *The IMF's Emergency Response to the COVID-19 Pandemic: Evaluation Report 2023* op. cit. note 277 at 4.

286 *Ibid*.

287 Independent Evaluation office of the International Monetary Fund *The IMF's Emergency Response to the COVID-19 Pandemic: Evaluation Report 2023* op. cit. note 277 at 5.

288 *Ibid*.

It is clear from the information provided in this Chapter that the IMF Legal Framework grants numerous powers to the Executive Directors. The Executive Directors must however exercise the powers within the restrictions imposed under the IMF's constitutive documents – specifically the duty to realise the IMF's purposes. This duty imposes a related obligation on the Executive Directors, being to make decisions which are rationally and reasonably related to the achievement of the purposes.

While the IMF Legal Framework does not entitle members or third parties to challenge the Executive Directors' decisions through formal dispute resolution processes, it established several internal safeguards which promote accountability. These mechanisms are important because members or third parties may use them to hold the Executive Board accountable either before a decision is made (given the right to representation), while a decision is being made (through transparency and access to information) or after the fact (if the Executive Directors authorise the IOE to evaluate its performance in respect of a specific matter).

In light of these findings, the next chapter focusses on the relationship between the IMF, its member states, other international organisations and third-party stakeholders such as civil society organisations. The purpose of this inquiry is to investigate if the relationship between the parties further demonstrates the existence of the Executive Board's duty to make accountable decisions.

CHAPTER FOUR

THE NATURE OF THE IMF'S RELATIONSHIP WITH ITS MEMBER STATES, NON-MEMBERS AND NON-STATE ACTORS UNDER INTERNATIONAL LAW

1. INTRODUCTION

1.1 Context

In Chapter Three I considered the IMF Legal Framework to identify the powers which it vests in the Executive Directors. As part of the discussion, I showed that the powers are not absolute and that they are limited through prescribed procedural and substantive qualifications. The most important qualification in this regard is that the Executive Board's actions must always seek to promote the Fund's purpose.

By qualifying the IMF's powers, I believe that the IMF Legal Framework compels the Executive Directors to make decisions which are rational and reasonable and which they should be able to justify if they are called on to do so. This requirement means that the Executive Board has a duty to make accountable decisions.

In this Chapter, I take the enquiry further and consider the nature of the IMF's relationship with its member states, non-members, and non-state actors under international law. The purpose of the enquiry is to demonstrate how the IMF's relationship with the stakeholders shows that it has a duty to make accountable decisions.

1.2 Roadmap to Chapter Four

Chapter Four comprises three parts. First, I consider the nature and legal consequences of the relationship between the IMF and its members. Here I show that by empowering the Executive Directors to realise the Fund's purposes, the members also impose a duty on the Directors to make accountable decisions.[289]

Second, I consider the relationship between the IMF and Civil Society Organisations. The purpose of this enquiry is to show that the accountability duties

[289] Accountable decisions, as defined in Chapter One, refers to the legal duty to act in a responsible manner and to make decisions for which the IMF's Executive Board of Directors may be held accountable. This means the Executive Directors must make rational and reasonable decisions which they can justify and explain with reference to the IMF's purpose.

imposed on the IMF (including the Executive Directors) extends beyond engagements with its members.

Finally, I discuss the nature of the relationship between the IMF and other international organisations. Again, I show that the Executive Directors do not have carte blanche to do as they please and also owe a limited duty to other international organisations to act in an accountable manner.

2. MEMBERSHIP AND THE CONSEQUENCES OF BECOMING A MEMBER

In the *Nuclear Weapons in Armed Conflict case* the ICJ held that there are a variety of factors which come into play during the process of determining an international organisation's rights and obligations. These, among others, include:

> the very nature of the organisation created, the objectives which have been assigned to it by the founders, the imperatives associated with the effective performance of its functions, as well as its own practice.[290]

In the previous chapter I demonstrated why this exercise must be conducted within the context of the rights and obligations that will enable the international organisation to achieve its goals in an effective manner. I now turn to show that a further part of this analysis concerns the relationship which arises from the rights which vest in and obligations which are imposed on an international organisation and its members.[291]

At the IMF, membership is open to all countries which comply with the terms prescribed by the Board of Governors. To qualify, an applicant must be a country which is in control of its foreign affairs and able to comply the requirements which result from it being a member. [292]

Once an application is granted, the new member is assigned a quota. The quota is expressed in Special Drawing Rights. A member's quota is very important as it represents the member's subscription as well as its voting powers at the level of the

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290 *Nuclear Weapons in Armed Conflict* see note 139 above at 74 and 75.

291 Malcom D Evans *International Law* (2018) 5ed at 252 and 263.

292 Article II, Section 2 of the Articles of Agreement op. cit. note 14. Also see Section 21 of the By-Laws as well as Part D of the Rules and Regulations op. cit. note 34. Fritz-Krockow and Ramlogan op. cit. note 21 at 4.

Executive Board. The quota as such represents the "voice" which is formally afforded to the member.[293]

Once a country becomes a member it is entitled to appoint one Governor and one Alternate Governor to the Board of Governors. In addition, subject to the member's quota it may either appoint its own Executive Director (if its subscription is sufficiently large to justify this) or jointly elect an Executive Director with other members. Smaller members may decide which constituency they wish to join and jointly appoint an Executive Director.[294]

2.1 Relationship between the member and the Executive Directors

While an Executive Director is appointed by a member (or group of members) and will ordinarily represent the member'(s) interest(s), after being appointed the Executive Director's principal duty is *owed to the Fund* and to ensure that the Fund's purposes are achieved. As a collective, the Board of Executive Director are legally compelled to always pursue the interests of the Fund and make decisions which accord with the Articles of Agreement as well as resolutions adopted by the Board of Governors. Executive Directors who fail to perform their duties in this manner breach the fiduciary duties owed to the Fund. [295]

Within the context of this study, Article V, Section 3(a) of the Articles of Agreement provides that the Fund (therefore the Executive Directors) shall adopt policies:

> that will assist members to solve their balance of payment problems in a manner consistent with the provisions of the [Articles of] Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund.[296]

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293 Article III, Section 1 of the Articles of Agreement op. cit. note 14. International Monetary Fund *IMF Members' Quotas and Voting Power, and IMF Board of Governors* (3 September 2023) last accessed from https://www.imf.org/external/np/sec/memdir/members.aspx on 4 September 2021.

294 The Board of Governors are entitled to prescribe the number of Executive Directors. Article XII, Sections, 2(a) and 3 of the Articles of Agreement op. cit. note 14. Also see Fritz-Krockow and Ramlogan op. cit. note 21 at 72.

295 International Monetary Fund "Review of Institutional Safeguards" (30 Jun 2022) *IMF Policy Paper* last accessed from https://www.imf.org/-/media/Files/Publications/PP/2022/English/PPEA2022032.ashx on 4 September 2023 at 5. Article XII, Section 3(a) of the Articles of Agreement op. cit. note 14. Also see Gianviti op. cit. note 20 at 47.

296 Article V, Section 3(a) of the Articles of Agreement op. cit. note 14.

The formulation of this provision is important. Clearly it imposes an obligation on the Board to create policies that will assist members that are experiencing temporary balance of payment crisis to resolve these issues. The duty is however qualified. The obligation imposed on the Board will only be discharged if the Executive Directors develop policies which are consonant with the other provision of the Articles of Agreement and which establish adequate safeguards to protect the Fund's general resources. Gianviti suggests that this is a particular fiduciary duty which is imposed on the Executive Directors which confirms that the Executive Directors are accountable to the Fund and not to the members who appointed (or elected them).[297]

Despite the Executive Director's fiduciary duties, s/he remains entitled to share the views of the members who they represent with the Board before a decision is made. The Executive Director may do so even in circumstances where s/he disagrees with the position adopted by a specific member.[298]

Through the Board of Governors and the Board of Executive Directors, members gain access to a forum where they collaborate and consult one another on matters related to the international monetary and financial systems. As part of this process, the members can work with other multilateral institutions (such as the World Bank) to create rules and governance processes that would guide how international monetary problems are resolved.[299]

The only restriction on members' rights come into play when the Board of Executive Directors make a formal decision on a specific matter. In these instances, the Executive Director is compelled to exercise his/her powers in accordance with the requirements imposed under the Articles of Agreement (and in the best interest of the Fund).

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297 See Gianviti op. cit. note 20 at 47.

298 See Gianviti op. cit. note 20 at 48.

299 Fritz-Krockow and Ramlogan op. cit. note 21 at 2.

2.2 Decisions by the Executive Board which affect members

2.2.1 Administrative action

As identified in Chapter Two, the IMF has three decision-making organs: the Board of Governors, the Board of Executive Directors, and the Managing Director. The Articles of Agreement vest specific powers (and duties) in each body. Where one of these bodies makes a decision which falls outside the ambit of its power, such a decision will be presumptively unlawful.[300]

A decision by the Executive Board will arguably only be lawful if it meets three requirements. First, the Executive Board must be the competent IMF organ to make the specific decision. Second, the Executive Directors must have followed the process prescribed under the IMF Legal Framework when it made the decision (procedural requirements). Finally, the decision must be consonant with the provisions of the Articles of Agreement and the IMF's policies (substantive requirements).[301]

Significantly, the Articles of Agreement do not create any mechanisms that would allow a member to directly challenge a decision by the Board of Governors, the Executive Board, or the Managing Director. As discussed in the previous chapter, to strengthen the internal governance systems the IMF has, however, established certain safeguards and watch guard institutions, such as the IEO.[302]

2.2.2 Voting by the Board of Executive Directors

The Executive Board makes decisions during meetings through a process of voting. The outcome of the decision is normally made based on the majority of the votes that are cast during the meeting. When the board votes, an abstention is counted as a vote against the proposal or application.[303]

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300 See Chapter Two, section 2 and Chapter Three, section 3.1.5.

301 Gianviti op. cit. note 20 at 50.

302 Fritz-Krockow and Ramlogan op. cit. note 21 at *Chapter 9*.

303 See for example Article XII, Section 5(c) of the Articles of Agreement op. cit. note 14. Also see Gianviti op. cit. note 20 at 52.

Meetings may take place during ordinary or executive sessions and may be formal or informal. Informal meetings provide an opportunity for Executive Directors to receive briefings on sensitive matters related to specific members, exchange thoughts on policies and programmes, or to debate matters which are not yet ripe for a decision.[304]

Decisions which affect member states are subsequently made during formal meetings.[305]

Although Article XII Section 5 of the Articles of Agreement as well as Rule C-10 of the By-laws prescribe a formal voting mechanism which the Board could follow, it is seldom used. Instead, the Board generally follows a more informal process based on consensus.[306]

Where the prescribed voting process is followed, the weight afforded to the different Executive Directors' individual votes will depend on the quota of the members who they represent. Article XII Section 5(a) of the Articles of Agreement in this regard provides that "each member shall have two hundred and fifty votes (i.e. the basic votes) plus one additional vote for each part of its quota equivalent to one hundred thousand special drawing rights." Voting power is therefore directly equivalent to a member's contribution to the Fund's resources.[307]

Again, it is important to bear in mind that the Executive Directors are not representatives of the members: they are officials of the Fund. Owing to this, while the Executive Directors' voting powers accord with the members' (who they represent) interest, they do not act at the members' behest or on their instructions.[308]

The point is easily illustrated if the position of an Executive Director who represents more than one members' position is considered. In circumstances where members

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304 Fritz-Krockow and Ramlogan op. cit. note 21 at 73.

305 *Ibid*.

306 *Ibid.*

307 Fritz-Krockow and Ramlogan op. cit. note 21 at 75.

308 Gianviti op. cit. note 20 at 46.

have different views on a specific position, the Executive Directors is not entitled to split his/her vote to follow the members' divergent views. Rather, the Executive Director must cast the votes in a manner that would promote the interests of the IMF irrespective of the members' instructions.

In accordance with this formula, the Executive Directors for the United States were entitled to cast the biggest percentage of votes during the first year of the COVID-19 pandemic, followed by the Executive Directors for Japan, China, and Germany. Collectively, these countries accounted for more than a third of the voting powers. This is significant when the voting power is compared to Africa's strongest economies such as South Africa, Angola, Nigeria and Egypt which jointly accounted for slightly more than 1.5% of the votes.[309]

By comparison, the informal process envisaged under Rule C-10 of the By-laws follows a consensus-based approach. This is the process which the Board follows under normal circumstances.[310]

According to the Rule, the Chairperson of the Board may determine the "sense of the meeting" before the decision is put to a formal vote. The "sense" is generally contingent on the position which the Executive Directors with the majority of the voting powers have adopted. It is however unclear how the "sense of the meeting" is established as well as whether it preceded by a process of arguing or bargaining.[311]

In contrast to the formal voting mechanism, the informal process promotes a cooperative approach which may favour developing member states whose voices would be silenced if the formal weighted voting process is followed. As no formal vote is taken, individual voting positions are not recorded. Executive Directors are, however, not precluded from including their views in the record. Where such a

309 International Monetary Fund *IMF Members' Quotas and Voting Power, and IMF Board of Governors* op cit note 293.

310 See Gianviti op. cit. note 20 at 46. Also see Rule C-10 of the By-laws (op. cit. note 34) which provides that "The Chairman [of the Board] shall ordinarily ascertain the sense of the meeting in lieu of a formal vote".

311 See Fritz-Krockow and Ramlogan op. cit. note 21 at 74; and Clegg op. cit. note 249.

request is made, the Executive Director in question's views are recorded in the minutes of the meeting.[312]

While the consensus-based approach does suggest a more equal system, authors such as Clegg argue that because the "sense" is distilled from the opinion held by the Executive Directors with the greatest voting powers, the voices of smaller member states may yet again be supressed. According to Clegg, the Executive Directors may rely heavily on game theory and focus on achieving optimal outcomes for the members which they represent. If this theory is correct, Executive Directors will attempt to wield their power and influence to maximise personal payoffs. Under these circumstances the most powerful Executive Directors' preferences are again adopted to the detriment of the Executive Directors with weaker voting powers.[313]

Irrespective of the approach followed, given the record keeping duties which the IMF Framework Imposes on the Executive Directors and the Fund (discussed under Chapter Three), the Directors remain required to make decisions which are rational and reasonable and for which they should be able to account.[314]

2.3 **Additional consequences of becoming a member of the IMF.**

By becoming a member, a country indicates that it supports the Fund's objectives and undertakes to implement measures that will assist the Fund achieve these. Through this process, the member acquiesces to the fact that it will need to accede to the Fund's demands to gain access to the Fund's technical and financial resources. Concomitantly, by doing so, the member becomes entitled to call on the Fund's support where it experiences monetary and economic difficulties.

As part of this undertaking, members are obliged to pursue economic policies which accord with the IMF's internal policies. To ensure compliance, the IMF may investigate and evaluate the members' economic activities and advise members on

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312 *Ibid.* Also see International Monetary Fund *Accountability* last accessed from https://www.imf.org/en/About/Factsheets/Sheets/2022/IMF-accountability#:~:text=Who%20oversees%20the%20IMF%3F,management%20tools%2C%20and%20independent%20evaluations on 12 September 2023. See Gianviti op. cit. note 20 at 51.

313 Clegg op. cit. note 249.

314 See Chapter Three, section 3.2.2.

how they should adapt their economic policies where they fall short of the IMF's requirements.[315]

To assist members, the IMF offers technical assistance through training programmes that focus on core areas of IMF expertise. The objective of the training programmes is to support members and help them develop sound economic policies that seek to improve their local economies.[316]

As considered in Chapter Two of the dissertation (section 3), members are also entitled to request access to the Fund's financial support facilities where they are experiencing a temporary balance of payment crisis. This includes concessional loans to assist low-income countries combat poverty. In this instance, the IMF's staff act as the member's intercessor and agent. The agency relationship is however restricted. While the staff will seek to advance the member's application, their motivation will be subject to the Fund's internal policy goals (and bureaucratic incentives). Where a member's application fails to satisfy the requirements to gain access to a specific financial instrument, the IMF's staff will be precluded from motivating why the application should be granted.[317]

As mentioned above under Chapter Three section 3.1.5.2, the Executive Directors are subject to the same internal restrictions when formal decisions are made.

Through their engagements and consultations with the Executive Board, the motivation provided by the IMF's country team will be one of the key determinants in the process which culminates in the Executive Board granting or rejecting the member's application for financial assistance.[318]

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315 Fritz-Krockow and Ramlogan op. cit. note 21 at 2.

316 *Ibid*.

317 This raises a variety of interesting questions. Mark S. Copelovitch argues that the decision to grant or reject an application for financial assistance rests on a combination of technocratic and bureaucratic factors. Technocratic factors, according to Copelovitch, refer to the conditions which the Fund's staff developed and which seek to advance the Fund's purposes. The bureaucratic considerations, in turn, are influenced by the bureaucratic considerations of the strongest economies (generally those represented by their own Executive Directors).

Mark S. Copelovitch "Master or Servant? Common Agency and the Political Economy of IMF Lending" (1 March 2010) 54(1) *International Studies Quarterly* 49 last accessed from https://doi.org/10.1111/j.1468-2478.2009.00577.x on 25 June 2021.

318 *Ibid*.

Importantly, I believe that the level of engagement between the Fund and its members demonstrate the level of commitment which the Fund must provide to the members. This, in turn, confirms that the Fund must act in an accountable manner.

2.4 **Actual nature of the relationship between the Fund and the members.**

Any suggestion that the Fund simply acts as a monitor and convening authority is a significant misconceptualisation of its mandate and role. By exercising the rights and performing the obligations which are imposed on the Fund under the Articles of Agreement, the IMF regulates the international financial system. It performs this function at the time when the policies are designed, as well as when it examines and expresses a view on the global economy and the national economies of its members.

At a more granular level, the Fund serves a function akin to the World Trade Organisation and the International Criminal Court by enforcing state-level obligations and commitments that arise from the undertakings which its members provided under the specific financial arrangements, facilities, or instruments. The IMF as international financial regulator therefore is not an example of a system based on decisions by diplomats or ministers.[319]

The impact of the Fund's role becomes even more pronounced when it seeks to compel a specific member to comply with the obligations imposed under the Articles of Agreement, through one of the Funds policy instruments or pursuant to the terms of a specific financial instrument. [320]

While the Executive Directors and IMF country staff are entitled to share the member's views with and present the member's case to the Executive Board, their ultimate duty (as mentioned above) is owed to the Fund. Irrespective of the circumstances which prompted a member to approach the Fund, the IMF officials' treatment of the response will only be lawful if their conduct is consonant with the obligations imposed under the Articles of Agreement and the IMF's policies.

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319 Fritz-Krockow and Ramlogan op. cit. note 21 at 738.

320 *Ibid*.

Likewise, an Executive Director will not be acting unlawfully if s/he fails to act in accordance with a request from the member who s/he represents.[321]

3. THE IMF'S RELATIONSHIP WITH CIVIL SOCIETY ORGANISATIONS (CSOs).[322]

According to Jan Aart Scholte "it is to the intrinsic good of human dignity that people should have a say in the politics that shape their lives, including through global governance".[323]

If so, then it is intrinsically good (as much as critically important) for the IMF to engage not only with the governments of member and non-member states but also other representatives of the citizenry from these states.

CSOs may be described as representatives of general public interest. They therefore play a central role by raising questions which speak to economic and social justice. In addition, they create a platform from where individuals (as opposed to governments) could question and concomitantly contribute towards the rules which govern the international economic system.[324]

During the last three decades, the IMF has been continuously compelled to reflect on how and with which CSOs it ought to engage. In its view, there are a great variety of CSOs, with varying degrees of legitimacy, which are established to achieve a plethora of objectives which often differ from one country to the next as well as the IMF's own mandate. It would therefore be unwise (or impossible) to attempt to establish relations with all of them. Empirical evidence however suggests that the

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321 Gianviti op. cit. note 20 at 48.

322 Generally see International Monetary Fund *Civil Society and the IMF* (2021) last accessed from https://www.imf.org/en/About/Partners/civil-society on 12 September 2023. Also see International Monetary Fund *An introduction to the International Monetary Fund (IMF) for civil society* op. cit. note 38.

323 Jan Aart Scholte, "A More Inclusive Global Governance: The IMF and Civil Society in Africa," (2012) 18(2) *Global Governance* 185 at 186.

324 Thomas C Dawson and Gita Bhatt "The IMF and Civil Society Organisations: Striking a Balance" (September 2001) *IMF Policy Discussion Paper* published by the External Relations Department and Policy Development and Review Department at 2 last accessed from https://ideas.repec.org/p/imf/imfpdp/2001-002.html on 24 July 2022.

IMF has been in closer contact with members of civil society through CSOs since the early 1990s.[325]

The IMF's hand has however on occasion been forced to engage with specific organisations. For example, in 1989 *Friends of the Earth-US* and the *Environmental Policy Institute* (among other institutions) demanded that the IMF disclose information in respect of specific issues which centred on the social and environmental impact of IMF conditionality imposed under IMF programmes. Pursuant to these CSOs' lobbying efforts, the US Congress passed legislation which forced the IMF to implement certain reform measures.[326]

Similar patterns of CSO lobbying efforts have since been seen during periods of international crises, including the global financial crises which occurred during the 1990s and 2000s. These campaigns have often centred around debt relief or cancellation, structural adjustment programmes, and the manner in which global finance is regulated.[327]

In a 2001 paper by Thomas C Dawson and Gita Bhatt they suggest that CSOs can be divided into three groups: those whose objectives and policies accord with the IMF's approach to formulating policy (such as the Brookings Institution), those who accept that there is a need for the IMF, but would like the institution and its mechanisms reformed (such as most NGOs and labour organisations), and those which are opposed to the IMF and its operations and would like the Fund to be dissolved.[328]

The interactions between the IMF and the CSOs provide a clear signal of the nature of the relationship between the Fund, CSOs, and the governments of member states. First, while the Fund ought to afford CSOs an opportunity to voice their concerns, it is not legally compelled to do so. Second, where the IMF fails to acknowledge and or implement measures in response to the CSOs' requests, the

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325 Scholte op. cit. note 323 at 187.

326 Dawson and Bhatt op. cit. note 324 at 4, 7.

327 Dawson and Bhatt op. cit. note 324 at 8, 12.

328 Dawson and Bhatt op. cit. note 324 at 8, 9.

CSOs are required to lobby or petition the governments of member states to take up their cause. Third, the Fund may respond in response to requests from member states but is not compelled to do so unless it falls within the ambit of the purpose for which the IMF was established.

Notwithstanding the categories and the variety of organisations and the absence of a clear legal duty, the IMF acknowledges the need to engage CSOs and proclaims that it is committed to explaining its actions and decisions to those who are affected by it. This, in my view, is a clear acknowledgement by the IMF of the fact that it is required to make accountable decisions.

Pursuant to the duty to make accountable decisions, the IMF indicates that it regularly engages with a "strategic and diverse" range of CSOs, elected representatives from member states, think tanks, and youth leaders on general IMF policy or country specific concerns in an attempt to ensure that all relevant interests are heard. The engagements are "more open, genuinely inclusive and timely" and should be seen as part of the Fund's ongoing work in the countries of member states.[329]

Its engagements comprise a process of dialogue, consultations, and information sharing which occurs at a national and international level. Topics which the IMF indicate fall within the scope of these engagements include "broad questions on IMF conditionality, as well as policies such as inequality, subsidy reform, debt relief, capital account liberalisation, poverty reduction strategies, availability of public data and country papers, and governance at the IMF."[330]

The engagements take place in a variety of different forums and on several different platforms. A key forum in this regard is the Civil Society Policy Forum Working

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329 International Monetary Fund *2015 Staff Guidelines on IMF Staff Engagement with Civil Society Organizations* (2015) last accessed from https://www.imf.org/external/np/exr/consult/2015/civilsociety/pdf/CSOs_Guidelines.pdf on 23 August 2021 at paragraph 6, 10, and 13.

330 International Monetary Fund *Civil Society and the IMF* op. cit. note 322. Also see International Monetary Fund *2015 Staff Guidelines on IMF Staff Engagement with Civil Society Organizations* (2015) op. cit. note 329 at paragraphs 11 and 13.

Group, which is held during the World Bank's and IMF's Spring and Annual meetings.[331]

The Civil Society Policy Forum creates a platform where CSOs are afforded an opportunity to engage with IMF staff (among others) and discuss specific issues. Despite the significance of the forum, only a limited number of topics are selected from the proposals submitted by the CSOs that wish to participate in the process. The topics are identified in the lead up to the annual meetings.

The Civil Society Policy Forum as such is a structured process which affords the IMF and the World Bank the right to decide which topics deserve attention. Examples of topics discussed during the 2020 meetings included *COVID-19 and Debt: Going beyond debt suspension towards a systemic response to debt crises*; *Investing in our Future: Nurturing Human Capital in a COVID complex world;* and *Building a fossil-free and just recovery.*[332]

In addition to submitting proposals, CSOs may nominate representatives to become members of the Civil Society Policy Forum Working Group. Persons who wish to be appointed must meet specific criteria and are elected though a voting process. Once elected, the working group members will serve a two-year term.[333]

Separate from the Civil Society Policy Forum Working Group, the IMF also hosted other workshops, seminars, and conferences during the period under consideration where the IMF staff engaged CSOs from specific members or groups of members. Examples of such meetings included workshops in Nigeria (November 2019), the Maghreb region (November 2019), and the CEMAC region (March 2019). Critics of the IMF's operations however suggest that these engagements are viewed by Fund staff as an opportunity to educate and correct members of participating CSOs as

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331 The 2020 meetings were held from 28 September to 9 October. See The World Bank *Civil Society Policy Forum* last accessed from https://www.worldbank.org/en/events/2020/10/16/civil-society-policy-forum on 12 August 2021. The 2021 meetings were scheduled for 27 September to 8 October. Also see Also see International Monetary Fund *2015 Staff Guidelines on IMF Staff Engagement with Civil Society Organizations* op. cit. note 329 at paragraphs 24, 25.

332 The World Bank *Civil Society Policy Forum* op. cit. note 331.

333 The World Bank *Civil Society Policy Forum* op. cit note 331.

opposed to actual consultation and the IMF being apprised of the prevailing circumstances in the participating member states.[334]

Third, the IMF guidelines provides for public consultation and targeted consultation processes. The nature of the process is subject to the topics which will be considered during the consultation process. Targeted consultation processes tend to be followed where the subject matter in question is sensitive. While the IMF's *2015 Staff Guidelines on IMF Staff Engagement with Civil Society Organizations* provides guidance on the processes which the IMF's staff could follow, the guidelines are not binding and are generally couched as recommendations.[335]

Finally, the Fund also engages with CSOs during the Article IV consultations to afford them an opportunity to voice their concerns in respect of the social, economic, and political circumstances in the member state. The IMF Staff may also engage with specific CSOs during other staff visits, technical assistance missions, Financial Sector Assessment Program missions, or by appointment at the IMF's headquarters. According to the IMF's *2015 Staff Guidelines on IMF Staff Engagement with Civil Society Organizations* these consultations should generally occur within the framework created under the guidelines and with the knowledge of the IMF's Communications Department.[336]

While the guidelines do not impose binding obligations, they identify the nature and extent of the engagements which is expected from IMF Staff (including IMF resident representatives). For example, where the IMF contemplates significant policy changes, it *ought* to include a public consultation process as part of the policy reform procedure.[337]

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334 International Monetary Fund *Civil Society and the IMF* op. cit. note 322. Also see Dawson and Bhatt op. cit. note 324 at 9, 22; International Monetary Fund *2015 Staff Guidelines on IMF Staff Engagement with Civil Society Organizations* op. cit. note 329 at paragraph 26.

335 Also see International Monetary Fund *2015 Staff Guidelines on IMF Staff Engagement with Civil Society Organizations* op. cit. note 329 paragraphs 31 and 32.

336 Also see International Monetary Fund *2015 Staff Guidelines on IMF Staff Engagement with Civil Society Organizations* op. cit. note 329 at paragraphs 8, 9 as well as "II. Country-Level, Regional, and Global Engagement with CSOs" at page 9.

337 Also see International Monetary Fund 2*015 Staff Guidelines on IMF Staff Engagement with Civil Society Organizations* op. cit. note 329 at paragraph 29.

The IMF Staff should also follow best practice processes when it engages CSOs. Examples of the practices identified in the Staff Guidelines include: that engagement must seek to complement and not alienate national authorities, the IMF should refrain from engaging with specific CSOs where the governments are opposed to the interactions, the engagements must take place at different levels of the IMF (including through resident representatives and mission chiefs), the staff should refrain from sharing confidential and market sensitive information with the CSOs, and the IMF Staff should keep a record of the key points that arose during the engagement which could be incorporated into the periodic or mission reports.[338]

Engagements with CSOs in this regard serve several important functions. As a premise, the information provided by CSOs may play a critical role in identifying viable programmes and policy options. Once a progamme is identified, the information may also improve programme design by adapting programmes to local realities. Finally, by working with CSOs, the IMF garners local support for the advice provided by the Fund and promotes local ownership of programmes.[339]

While it is encouraging that some CSOs are afforded a voice, and that the views expressed by these CSOs are often heard and given effect to, the process still suffers from several ailments.

First, the IMF Staff and the Executive Board retain the discretion whether they will take the CSOs concerns into consideration before making a decision in respect of an application for financial assistance (or a similar decision which affects a specific member state). If the IMF decides to ignore specific concerns, the CSOs are not entitled to request reasons and they are left without any recourse. Should they wish to elevate the status of their concerns, they are forced to enter the realm of realpolitik and request the governments of member states to intercede on their behalf. Even in these circumstances, the governments could only request the Executive Board to reconsider a specific issue. Moreover, once the Executive Board has made a decision in respect of a specific application, the matter will be viewed as finalised,

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338 Also see International Monetary Fund *2015 Staff Guidelines on IMF Staff Engagement with Civil Society Organizations* op. cit. note 329 at paragraphs 20, 21.

339 International Monetary Fund 2015 *Staff Guidelines on IMF Staff Engagement with Civil Society Organizations* op. cit. note 329 at paragraph 5, 27.

and neither the CSOs nor the member states will be able to challenge or change the outcome.[340]

Second, the IMF Staff decide which CSOs they will engage and under what circumstances. This, according to empirical studies conducted by Scholte, results in a perpetuation of existing power disparities between the global North and South as well as developed and developing countries. Generally, the IMF tends to more frequently engage with CSOs from the Global North. The position is furthermore exacerbated as local CSOs that represent members from vulnerable communities (rural areas, poorer members of society, woman, and "people living outside modern rationalist culture") tend to be poorly resourced which limits the extent to which they can engage with the IMF. Simple examples include a lack of funding, electricity or access to the internet. Consequently, these CSOs play a smaller role in the IMF-CSO dialogue.[341]

The imbalance in the nature and extent of engagements between the IMF and CSOs from the global North on the one hand and global South on the other, has reproduced and potentially deepened the geopolitical hierarchies that also manifest in the IMF's voting powers. It also brings into question the effectiveness of the IMF's policies, where these are formulated without the benefit of meaningfully engaging with vulnerable communities. This requires collective reflection and possibly attempts to implement corrective measures to the IMF's CSO engagement policy.[342]

In the context of this study, the framework for CSO-IMF engagement highlights three important factors.

As a premise, CSOs have a limited ability to directly influence the decisions of the Executive Board. They fulfil this role through the seminars and workshops, during the Article IV consultations or through direct engagements. While their contribution in this regard may be significant, the IMF Staff act as gate keepers and

340 See for example Dawson and Bhatt op. cit. note 324 at 14,15.

341 Scholte op. cit. note 323 at 187.

342 Scholte op. cit. note 323 at 187, 189.

retain the ability to decide whether a CSO will be afforded an opportunity to engage directly with the IMF.

Second, they fulfil an important watchdog function and add an essential layer of checks and balances to the international system. It is clear from past practice that CSOs do not shy away from airing their views where they disagree with the IMF's policies, decisions, or specific financial assistance programmes. By scrutinising the Executive Board's decisions, they contribute to the process of ensuring that the Board continuously makes accountable decisions. [343]

Third, and perhaps most importantly, through their lobbying and engagements with the Fund's staff, they promote policy reform and shape the way the Fund's policies are refined. A salient example includes the CSOs' demand for transparency which contributed to the Fund's existing policies on the disclosure of non-confidential information. [344]

In light of this, IMF-CSO engagement ought to be seen as a necessary but not as a sufficient condition for engagement with the citizenry of the different member states, particularly for developed members where the CSOs are less formal and do not always conform to a western conceptualisation of what a CSO ought to comprise. The IMF's general approach to CSOs however demonstrates an acknowledgment of the fact that the IMF must seek input from CSOs and use the information provided to make accountable decisions.

4. RELATIONS WITH OTHER INTERNATIONAL ORGANISATIONS AND THIRD PARTIES

In the final part of this Chapter, I demonstrate why the Fund owes a limited duty to specific international organisations to make accountable decisions. As a member of the international community, the Fund regularly engages and collaborates with other international organisations. The engagements are either regulated in

343 Dawson and Bhatt op. cit. note 324 at 24.

344 Dawson and Bhatt op. cit. note 324 at 18 and 19.

accordance with the terms of a treaty to which both organisations are party or informally where no treaty exists.[345]

Article X of the Articles of Agreement provides that the IMF's ability to conclude treaties is limited and it may only do so when the terms and the purpose of the treaty in question accords with those of the Articles of Agreement. Where a potential conflict exists, the Fund must amend the relevant provisions in the Articles of Agreement (in accordance with the mechanism prescribed under Article XXVIII) before it may become party to the treaty.[346]

To date the Fund has only concluded a limited number of significant treaties. Key among these are the 1947 agreement with the United Nations under which the Fund qualifies as a Special Agency, and the 1996 agreement with the World Trade Organisation.[347]

4.1 Formal arrangements between the IMF and other international organisations

4.1.1 Agreement between the UN and the IMF (1947)[348]

The Agreement confirms that the Fund (notwithstanding its designation as a Specialised Agency of the UN) is an independent international organisation. By acknowledging the legal personality of both institutions, it vests specific reciprocal powers in the IMF and the UN. These reciprocal powers at the same time impose a duty on both organisations to make accountable decisions.[349]

As a premise, the UN is entitled to attend the meetings of the IMF's Board of Governors and the IMF is entitled to attend the meetings of the UN's General

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345 Informal engagements include the relationship between the IMF and the Financial Stability Board. See for example International Monetary Fund *The IMF and the World Bank* (2022) last accessed from https://www.imf.org/en/About/Factsheets/Sheets/2022/IMF-World-Bank-New on 25 July 2022; International Monetary Fund *IMF and the World Trade Organization* (17 March 2021) last accessed from https://www.imf.org/en/About/Factsheets/The-IMF-and-the-World-Trade-Organization on 25 July 2022.

346 Articles of Agreement op. cit. note 14.

347 Gianviti op. cit. note 20 at 32.

348 UN/IMF Agreement op. cit. note 154.

349 UN/IMF Agreement op. cit. note 154.

Assembly. IMF representatives are also entitled to attend meetings of the committees of the General Assembly, meetings of the Economic and Social Council, of the Trusteeship Council and of their respective subsidiary bodies, dealing with matters in which the Fund has an interest. As part of this right, the representatives of either organisation are entitled to propose specific agenda items which must be considered at the meetings.[350]

Second the organisations may consult one another on areas which fall within their competence and make recommendations on matters of mutual interest. Recommendations may, however, only be provided after the one organisation has consulted the other on the specific matter. In this regard, the organisations must exchange information and prepare reports and studies where these are specifically requested.[351]

Third, where specific countries are members of the IMF as well as the UN, the IMF should not implement measures which would prevent members from complying with the decisions of the UN Security Council.[352]

Fourth, as a Specialised Agency the Fund may request advisory opinions from the ICJ on any legal questions arising within the scope of the Fund's activities other than questions relating to the relationship between the Fund and the United Nations or any Specialised agency.[353]

Finally, the organisations agreed to cooperate effectively with one another and to implement the required measures to promote the proper functioning of their relationship.[354]

The monitoring powers which vest in both organisations and restrictions imposed on the IMF's powers, demonstrate that the Fund owes a duty to the UN to make accountable decisions which give effect to the legal relationship between the parties.

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350 Articles II and III of the UN/IMF Agreement op. cit. note 154.

351 Articles IV and V of the UN/IMF Agreement op. cit. note 154.

352 Article VII of the UN/IMF Agreement op. cit. note 154.

353 Article VIII of the UN/IMF Agreement op. cit. note 154.

354 Articles XII and XIII of the UN/IMF Agreement op. cit. note 145.

4.1.2 **The IMF and the WTO**

The purposes of the IMF and the WTO overlap in many respects. For example, both institutions are mandated to development and implement processes which promote a greater coherence in global economic policymaking.[355]

To exploit the synergies between the organisations, and to prevent any conflicts from arising, the parties under paragraph 1 of the Agreement between the IMF and the WTO (1996) (**WTO/IMF Agreement**) undertook to cooperate in the discharge of their respective mandates. Generally, this will require that the IMF and WTO consult each other to achieve greater coherence in global economic policymaking.[356]

To achieve the objectives, the WTO/IMF Agreement imposes various obligations on the Fund.

As a premise, the Fund must inform the WTO of any decisions that will have an impact on matters which fall under the WTO's jurisdiction. In addition, the IMF must consult the WTO on decisions regarding matters related to balance of payments. The Fund must also allow a WTO representative to attend the Executive Board's meetings where the Board considers general and regional trade policies or other matters of common interest.[357]

In return, the IMF is entitled to send a representative to observe the meetings of the Ministerial Conference, General Council, Trade Policy Review Body, the three sectoral councils, Committee on Trade and Development, Committee on Regional Trade Agreements, Committee on Trade-Related Investment Measures, and Committee on Trade and the Environment and their subsidiary bodies.[358]

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355 See Article X of the Articles of Agreement op. cit. note 14; Article III.5 of the WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1867 U.N.T.S. 154.

356 Paragraph 2 of the Agreement between the IMF and the WTO (1996) which is available in International Monetary Fund *Selected Decisions and Selected Documents of the IMF* op. cit. note 154 (**WTO/IMF Agreement**).

357 Paragraphs 3, 4 and 5 of International Monetary Fund *Selected Decisions and Selected Documents of the IMF* op. cit. note 154.

358 Paragraph 6 of International Monetary Fund *Selected Decisions and Selected Documents of the IMF* op. cit. note 154.

Both organisations are entitled to receive information on the subject matter which will be discussed during the meetings in advance of the meetings and to share their views in writing. The submissions will become part of the official record of the meeting.[359]

Finally, the staff of both organisations shall cooperate with one another to promote the mutual objectives of both organisations. Where necessary the staff may exchange confidential information on the terms which they deem appropriate. Where the staff become aware of any inconsistencies between the measures contemplated between the organisations, the Fund staff shall consult the WTO Secretariat and attempt to resolve the inconsistency.[360]

It is clear that – in comparison with the relationship between the IMF and the UN - the IMF owes an even greater duty to the WTO to make accountable decisions and act in an accountable manner.

4.2 Informal arrangements between the IMF and other international organisations.

Owing to its purpose, the IMF regularly collaborates with other international and financial institutions on matters which concern the regulation of the global economy. An example is the Fund's interactions with the International Labour Organisation (**ILO**). While the relationship between the parties is not regulated under and specific treaty, the organisations continue to work together owing to their shared values and objective of creating stable economies and jobs.[361]

The need for these engagements becomes particularly important where the IMF intends to impose specific conditions on a member state as part of a financial assistance programme which fall within the jurisdiction of another international organisation. The ILO, again, serves as a useful example. While one of the IMF's

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359 Paragraphs 7 and 8 of International Monetary Fund *Selected Decisions and Selected Documents of the IMF* op. cit. note 154.

360 Paragraphs 9 to 13 of International Monetary Fund *Selected Decisions and Selected Documents of the IMF* op. cit. note 154.

361 International Labour Organisation *ILO and the International Monetary Fund* (*sine anum*) last accessed from https://www.ilo.org/washington/areas/multilateral-initiatives/ilo-and-imf-collaboration/lang--en/index.htm on 31 August 2021.

objects is to promote and maintain high levels of employment and real income through the expansion and balanced growth of international trade, the IMF ought to collaborate with the ILO when it wishes to impose specific labour market policies as these are not a core area of IMF's expertise. The need for collaboration in my view also imposes a duty on the IMF to make accountable decisions.

As part of the IMF's endeavours to achieve its purpose, the Fund is also frequently a member, observer, or supervisor of certain financial organisations. Important examples in this regard include the Financial Stability Board (a treaty-based organisation) and other standard-setting bodies such as the Basel Committee on Banking Supervision and the International Association of Insurance Supervisors.[362]

As observer, the IMF's rights are however circumscribed. For example, by participating as an observer at Basel Committee on Banking Supervision, the Fund is only entitled to attend the organisation's meetings and contribute to the organisation's policy development work.[363]

In the alternative, where the IMF is a member of a specific organisation (such as the International Association of Insurance Supervisors) its powers will generally be the same as other members.[364]

Given the impact which the IMF's decisions could have on the proper functioning of these organisations, it owes these organisations a duty to make accountable decisions and act in an accountable manner. The duty is however limited in comparison to the implied duty which arises under the agreements between the IMF and the UN and WTO respectively.

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362 Financial Stability Board *Members of the FSB* (27 August 2021) last accessed from https://www.fsb.org/about/organisation-and-governance/members-of-the-financial-stability-board/ on 31 August 2021; Bank for International Settlements Basel Committee *Membership* (30 December 2016) last accessed from https://www.bis.org/bcbs/membership.htm?m=3%7C14%7C573%7C71 on 31 August 2021; International Association of Insurance Supervisors *IAIS Members* (2021) last accessed from https://www.iaisweb.org/page/about-the-iais/iais-members on 31 August 2021.

363 See for example Article 15.3 of the *Basel Committee Charter* (5 June 2018) last accessed from https://www.bis.org/bcbs/charter.htm on 31 August 2021.

364 *By-laws of the International Association of Insurance Supervisors* last accessed from https://www.iaisweb.org/category/by-laws-policies-and-procedures/ 25 July 2022. I say "generally" as I did not undertake a comprehensive review of constitutive documents of every organisation to which the IMF is party.

4.3 Conclusion on the relations with other international organisations and third parties

The nature of the IMF's relationship with other international organisations in many respects resembles its relationship with its members and CSOs: when it engages with third parties it must do so to promote its purposes.

For the reasons provided above, I believe it is clear that the Fund owes a duty to its members, CSO and select international organisations to make decisions which are rational, reasonable and justifiable. While the nature and extent of the duty to make accountable decisions may vary among the three categories of stakeholders, it is incontestable that this duty exists.

CHAPTER FIVE

CONCLUSION

1. INTRODUCTION

The purpose of this dissertation was to answer one very specific question:

> Does the International Monetary Fund, specifically the Board of Executive Directors, have a legal duty to make accountable decisions?

To provide context to what would otherwise be an abstract question, I suggested that the question should be considered against the backdrop of the consequences of a decision by the IMF to reject a request for financial assistance from an emerging market or developing economy country in a crisis situation. The circumstances surrounding the first year of the COVID-19 pandemic provided a useful recent case study for this given the impact which the IMF's decisions may have had on the citizens of member states' international human rights (such as the right to life and access to adequate medical care).

The simple answer to my question is: yes, the IMF, specifically the Board of Executive Directors, have a legal duty to make accountable decisions.

Throughout the dissertation I argued that the IMF's organs (specifically the Board of Executive Directors) have a legal duty to act in a responsible manner and to make decisions for which they may be held accountable. These I defined as "accountable decisions". In support of my argument, I showed that the duty to make accountable decisions is imposed on the Executive Directors through the procedural and substantive requirements prescribed by the IMF Legal Framework comprising among other the IMF's constitutive documents. I also demonstrated that international law may be interpreted to apply to international organisations such as the IMF and likewise impose obligations on the IMF's organs (including the Board of Executive Directors) to make accountable decisions.

The reasons in support of my conclusion are summarised in the sections below.

2. THE LAWFULNESS OF THE IMF'S DECISIONS UNDER INTERNATIONAL LAW AND THE DUTY TO MAKE ACCOUNTABLE DECISIONS

From the analysis conducted in Chapters Three and Four I have shown that the IMF's actions (including the actions of the Executive Board) are not regulated under a single discrete body of law. Rather, the IMF and its constituent organs are subject to the requirements imposed under the various sources of law comprising the IMF Legal Framework. These include: the IMF's Articles of Agreement, the IMF's Rules, Regulations and By-laws, the treaties to which the IMF is a party, and in certain instances generally accepted legal principles.

In my view, the IMF Legal Framework should be seen as a regulatory framework which comprises at least three different layers.

2.1 First and second layer: IMF-specific legal instruments

In accordance with the *principle of speciality,* the Articles of Agreement is the foundation of the IMF legal framework.[365]

As noted under Chapter Three, the Articles of Agreement provide that the IMF has legal personality and qualifies as a subject of international law. Owing to its legal personality, the IMF can (among other things) participate in legal proceedings.[366] The IMF, however, has general immunity against legal proceedings which third parties institute in domestic courts to challenge the lawfulness of the IMF's conduct.[367] The immunity also extends to the IMF's Executive Directors, the IMF's Managing Director, and the IMF's staff. The immunity can be waived.[368]

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365 *Nuclear Weapons in Armed Conflict* op. cit. note 139 at 66 at 78. Also see Introductory Article (i), Articles of Agreement op. cit. note 14.

366 See Chapter Three, section 3.1.5.4.

367 See Chapter Three, section 3.1.7.

368 The general immunity from court proceedings is provided for under Article III, section 4 of the New York Convention as well as Article IX [Status, Immunities, and Privileges] of the Fund's Articles of Agreement.

Article II section 3 of the Convention on the Privileges and Immunities of the Specialized Agencies op. cit. 150.

The immunity granted to the Board of Executive Directors however does not entitle the Board of Executive Directors to do as they please. To the contrary, the provisions of the Articles of Agreement, as well as the IMF's By-Laws, Regulations, Administrative Orders, Code of Conduct and Guidelines, and internal policies (which constitute the second layer in my proposed IMF legal framework) collectively describe the powers which vest in the Executive Directors and the concomitant obligations which are imposed on them.[369] The *true north* and starting point in this regard is set out under Article I of the Articles of Agreement. Owing to the requirements imposed under this Article the Executive Board must *always* make decisions which promote the Fund's purpose. Actions which fall within the ambit of the framework created under Article I (i.e. the Fund's mandate) are presumptively lawful. This duty gives rise to the general implied right that the Executive Board 's decision must be rationally and reasonably related to the Fund purposes and that the Directors ought to be able to justify their decisions with reference to these purposes. Such actions must qualify as accountable decisions.[370]

The IMF-specific instruments moreover establish a very special relationship between the organisation and its members.

On an individual level, when a country becomes a member of the IMF it indicates that it supports the Fund's objectives and undertakes to implement measures that will assist the Fund achieve these. Through this process, the member acquiesces to the fact that it will need to accede to the Fund's demands to gain access the Fund's technical and financial resources. Concomitantly, by doing so, the member becomes entitled to call on the Fund's technical and financial support when it experiences monetary and economic difficulties.[371]

On an organisation-wide level, the members mandate the Fund to play a central role in regulating the international monetary system. This mandate includes the duty to among other things promote international monetary cooperation, consultation and

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369 See Chapter Three, section 3.1.

370 Article I [Purposes] of the Articles of Agreement op. cit. note 14. Also see *Certain expenses of the United Nations* op. cit. note 166 at 168; Crawford (2012) op. cit. note 166 at 185; Crawford (2019) op. cit. note 138 at 174.

371 Fritz-Krockow and Ramlogan op. cit. note 21 at 2. Also see Chapter Four, section 2.

collaboration on international monetary problems, exchange stability, and to make the Fund's resources temporarily available to correct maladjustments in the members' balance of payments.[372]

Quintessentially the relationship between the IMF and its members must be based on trust. Trust, in turn, can only be cultivated in circumstances where the Executive Board (the heart of the IMF) makes accountable decisions.

While the IMF-specific instruments do not expressly impose a duty on the Executive Directors to make accountable decisions when it comes to matters related to the members, the duty is implied and its existence is illustrated with reference to at least three categories of examples.

First, the Fund (including the Executive Board) does not have carte blanche to grant (or reject) applications for financial assistance under any circumstances. At the most basic level, the Executive Board may only grant a request if it promotes the purpose for which the Fund was established. This means that the Executive Board may only grant a member's application for financial assistance subject to "adequate safeguards, [with a view] to provide [the member] with an opportunity to correct maladjustments in [its] balance of payment without resorting to measures destructive of national … prosperity". Moreover, the Fund should only grant applications which seek "to shorten the duration and lessen the degree of disequilibrium in the international balance of payments of members."[373]

In addition, it may only do so if it complies with the substantive and procedural requirements imposed under the specific IMF's lending instruments, such as the Rapid Credit Facility or Rapid Financing Instrument. To ensure that the Board makes valid and lawful (i.e. accountable) decisions, the Fund has developed a set of policies and guidelines to supplement the requirements imposed under the Articles of Agreement, the By-laws, and the Rules and Regulations. As indicated above, different policies and guidelines have been developed for the different financial instruments. Each provides context specific minimum qualifying criteria. If

372 Article I of the Articles of Agreement op. cit. note 14.

373 Articles 1(v) and (vi) of the Articles of Agreement op. cit. note 14. Also see Chapter Two, section 3; Chapter Three, section 3.1.5.1; Chapter Four, section 2.2

these criteria are not satisfied, the Executive Board ought not to grant the application for financial assistance.[374]

If the Executive Board grants an application for financial assistance in circumstances where it relied on incorrect facts, it may direct the member to implement certain "corrective measures". The appropriate response is generally agreed in consultation with the member. Members who fail to satisfactorily implement the "corrective measures" may be sanctioned in accordance with the mechanisms imposed under the Articles of Agreement.[375]

The Guidelines on Corrective Action accordingly confirm that invalid or unlawful actions ought (under normal circumstances) not to be countenanced. The policy also confirms that whenever the Executive Board realises that it has made the wrong decision, it ought to take steps and implement measures to correct the impugned decision.[376]

The second example concerns the members' *right to representation* at specific meetings and the comprehensive *record keeping obligations* which are imposed on the Executive Board as well as the IMF's staff and the Fund's policies on *transparency* and *access to information*. [377]

In respect of representation, a member may send a representative to attend any meeting of the Executive Board if the Board is due to consider either a request from the member or a matter which affects the member. While in attendance, the member is allowed to make representations on the country's position and why the application ought to be granted.[378]

The compulsory record keeping duties imposed on the Fund are even more important for purposes of this dissertation because they promote good governance and accountability. As set out in Chapter Three these include the duty to prepare

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374 See Chapter Two, Section 3.

375 International Monetary Fund *Misreporting And Noncomplying Purchases In The General Resources Account—Guidelines On Corrective Action* op. cit. note 200. Also see discussion under Chapter Three, section 3.1.6.3.

376 *Ibid.*

377 See Chapter Three, sections 3.2.1, 3.2.2,

378 See Chapter Three, section 3.2.1.

minutes of meetings, *summings up*, verbatim records of meetings, Chairman's concluding remarks, Chairman's statements, public notices, staff reports (including Country Documents, Fund Policy Documents, and Multi-Country Documents), and the *Select Decisions and Documents* depository.[379]

The record keeping duty is complemented by the duty imposed on the Fund to act in a transparent manner and provide access to information. In addition to the records identified above, the Fund is also required to provide access to documents such as BUFF Statements by the Managing Director or Fund Staff to the Executive Board, BUFF/EDs, Gray Documents, Green Documents, Policy Support Instruments and the Policy Coordination Instruments.[380]

Although the Fund is allowed to refuse public access to certain documents under specific circumstances, this body of information is generally publicly available. The transparency created by the IMF enables the public to scrutinize (and criticize) the Executive Board's decisions.

Third, the internal accountability mechanisms which the IMF established. These mechanisms confirm the premium which it as an organisation places on the need to make accountable decisions. This could be illustrated with reference to several internal processes.

The most obvious example is the creation of the office of the Independent Evaluations Office (IEO) which is mandated to monitor and report on aspects of the Fund's activities. As part of its core functions, it must review and examine how the Fund responds to specific financial crises as well as the quality of the Fund's economic forecasts.[381]

The ambit of these investigations is, however, strictly limited and focus only on the topics set out in the current Work Programme (which the Executive Board must review before it is finalised). Likewise, the Independent Evaluations Office's findings may only be published with the Executive Directors' consent. However, and as

379 See Chapter Three, section 3.2.2.

380 See Chapter Three, section 3.2.3. Also see International Monetary Fund *Transparency at the IMF* op. cit. note 261.

381 See Chapter Three, section 3.2.4.

considered in greater detail under Chapter Three, consonant with the subject-matter of this dissertation, the IEO on 6 May 2021 launched a new enquiry entitled *The IMF's Emergency Response to the COVID-19 Pandemic*. The findings of this investigation were set out in the *The IMF's Emergency Response to the COVID-19 Pandemic: Evaluation Report 2023.* In summary, the investigation found that although the Fund performed well under difficult circumstances, the existing lending toolkit and policies were not able to deal with the full effect of the global crisis. To prevent history from repeating itself, the IEO recommended that the Fund should review parts of the policies and procedures.[382]

Another, perhaps more nuanced example, is the Fund's internal hierarchical structure which results in a duty on certain IMF organs (such as the Executive Board) to report (i.e. account) on their actions and decisions to other IMF organs (such as the Board of Governors) which have an oversight function over the first organ.[383]

In this regard it is important to bear in mind that the Executive Directors are legally compelled to always pursue the interests of the Fund. They must do so by making decisions which accord with the Articles of Agreement as well as resolutions adopted by the Board of Governors.[384]

Executive Directors who fail to perform their duties in accordance with the requirements imposed under the IMF legal framework (including making decisions which promote the purposes of the Fund) breach the fiduciary duties which they owe to the Fund.[385]

Outside the framework stipulated under the Articles of Agreement, the Executive Directors do not owe any duty to the member states which they represent.

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382 See Chapter Three, section 3.2.4.

383 See Chapter Two, section 2.

384 Article XII, Section 3(a) of the Articles of Agreement op. cit. note 14.

385 Gianviti op. cit. note 20 at 47. See Chapter Three, section 3.2 and Chapter Four, section 2.1.

2.2 Level three: relationship with third parties

The additional treaties to which the IMF is a party and the less formalised relationships between the IMF and third party international organisation and CSOs form the third layer of the IMF Legal Framework. Treaties generally play a role where the IMF (as a member of the international community) engages with other international organisations.[386]

To date the Fund has only become party to a limited number of significant treaties. Key among these is the 1947 agreement with the United Nations under which the Fund qualifies as a Special Agency, and the 1996 agreement with the World Trade Organisation.[387]

The framework created under the treaties is generally premised on a system of comity and deference. Both parties must allow representatives of the other international organisations to attend important meetings, consult one another on specific issues where their mandates overlap, and make/accept representations on matters of mutual interest.

As a Specialised Agency, the Fund may request advisory opinions from the ICJ on any legal questions arising within the scope of the Fund's activities other than requesting the court to express a view on the meaning of a provision in the Articles of Agreement or questions relating to the relationship between the Fund and the United Nations or any other Specialised agency.[388]

The treaties, however, do not entitle the international organisation or the IMF to refer a matter to a third-party adjudicator where a dispute arises between the two organisations. Moreover, if the IMF decides to ignore a specific submission or request from another international organisation, the latter will not be able to challenge the validity or lawfulness of the IMF's decision. Where a disputes arises, it will have to be resolved through negotiations and diplomacy.

386 See Chapter Four, section 4.

387 Gianviti op. cit. note 20 at 32. Also see Chapter Four, sections 4.1.1 and 4.1.2.

388 Article VIII of the UN/IMF Agreement op. cit. note 154.

The IMF's duty to make accountable decisions extends beyond the treaties. For example, even where the relationship between the IMF and a third party organisation is not regulated under a treaty (such as the position regarding the relationship between the ILO and IMF), the IMF will collaborate with the organisation where the subject matter in question falls within the mandate of both organisations. The willingness to collaborate demonstrates that the IMF appreciates that it has a duty to make accountable decisions.[389]

The nature of the IMF's relationship with other international organisations in many respects resembles its relationship with CSOs: while CSOs should be consulted and their views considered, the IMF is not bound by their views or compelled to give effect to their requests. History has however showed that the views of specific CSOs may have a pronounced impact on the Executive Board's decision-making processes. The IMF's engagements with the *Friends of the Earth-US and the Environmental Policy Institute* and lobbying campaigns during periods of international crises, including the global financial crises which occurred during the 1990s and 2000s, are salient examples of this.[390]

While the IMF does not have a legal duty to consult CSOs, it acknowledges the need to engage with them and has made it clear that the Fund is committed to explaining its actions and decisions to those who are affected by it. This, in my view, is a clear acknowledgement by the IMF of the fact that it is required to make accountable decisions given that it regularly explains (i.e. accounts) for its decisions to select CSOs. To give effect to this undertaking, the Fund attempts to regularly engage with a "strategic and diverse" range of CSOs, elected representatives from member states, think tanks, and youth leaders on general IMF policy or country specific concerns to ensure that all relevant interests are heard. It engages these stakeholders on a range of different topics in national and international fora and platforms, including the Civil Society Policy Forum Working Group.[391]

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389 See Chapter Four, section 4.2.

390 See Chapter Four, section 3.

391 *Ibid*.

2.3 **Duty to make accountable decisions**

In light of the requirements imposed under the different layers of the IMF Legal Framework, it is clear that the Board of Executive Directors must make accountable decisions.

What, however, does the "duty to make accountable decisions" mean? As set out in Chapter One, accountability in its simplest form means that a person/entity in a position of power must take responsibility for its decisions and provide satisfactory reasons for the decision when s/he/it is called on to explain his/her/its actions. The IMF's duty to make accountable decisions can by demonstrated with reference to the seven forms of accountability identified by Grant and Keohane as follow:[392]

1. *Hierarchical accountability* (the classic model of accountability) where higher ranking organs and officials delegate powers to lower ranking positions. Following the delegation, the lower ranking positions are accountable to the higher-ranking positions. The relationship between the IMF's Board of Governors and the Executive Board is a salient example of where this model is prescribed by the Articles of Agreement.
2. *Supervisory accountability* (one group is empowered to supervise the activities of another group). Again, the relationship between the Board of Governors and the Executive Board is a salient example. Grant and Keohane however suggest that the relationship between the IMF and its member states (as principals) is a further example.
3. *Fiscal accountability* (funders are entitled to demand that recipients of the funds account to them on the way the funds which the funders provided were used). The relationship between the IMF and the member states is a salient example. In this instance, the accountability mechanism works in the opposite direction. When the Fund grants an application for financial assistance to a member under one of the facilities, the member is required to report back to the Fund at specific intervals to explain how the Funds were used.

[392] Grant and Keohane op. cit. note 2.

4. *Legal accountability* (agents must abide by the powers which the principals vest in them under a specific set of rules and when necessary must identify and explain why their actions fell within the ambit of the power that vest in them). In Grant and Keohane's view, this model is premised on a simple question: did the agent obey the law? The relationship between the Board of Governors and Board of Executive Directors is a salient example of this form of accountability. However, notwithstanding the legal relationship between the IMF and its members, the absence of a dispute resolution which members could invoke to challenge the Executive Directors' decisions, means that while the Fund is legally accountable to the members, the legal obligation is unenforceable.
5. *Market accountability* (considers the relationship between investors and consumers). Through the market forces, these participants shape the manner in which the public and private sectors perform. This form of accountability is not applicable in this dissertation.
6. *Peer accountability* (organisations which belong to the same group or category of organisations are accountable to one another). As indicated under Chapter Four, the relationship between the IMF and the World Bank, WTO and the UN are examples of where the model is applied. While these organisations do not have the ability to change the IMF's decisions, they are entitled to participate in the Executive Board's meetings. They also have the right to request information and make submissions on specific issues. Collectively these powers enable the World Bank, WTO and UN to influence the outcome of certain decisions. These powers potentially also allow these entities to request the IMF to account to them on certain decisions (i.e. explain and justify), where the decision diverged with the submissions.
7. *Public reputational accountability*. In this regard it may be helpful to reflect on the relationship between the IMF and CSOs. While the IMF is not obliged to afford all CSOs an opportunity to make submissions to the IMF staff and influence the Executive Board's decisions or to account to CSOs on its decisions, if the IMF ignores CSOs, this may have a material impact on the

IMF's operations. As mentioned under Chapter Four and above, the lobbying efforts of CSOs may have a significant impact on the governments of member states. This may, in turn, affect the decisions of the Board of Governors (the ultimate decision-making body at the IMF). Reputation management, as such, is also a form of accountability.[393]

Each category is important because it advances a specific conceptualisation of accountability.

The model is helpful because it confirms that the circumstances under which different groups of persons who may call on the decision-makers to account for decisions can vary. For example, as the IMF's largest shareholder and contributor, the United States (**US**) through its Treasury and Congress is well positioned to call on the Executive Board to explain specific decisions (*fiscal accountability*). Developing nations' ability to issue a similar instruction to the Executive Board is significantly less powerful in comparison to the US, however they would still be entitled to do so as members of the Board of Governors (*supervisory accountability*). At the bottom end of the spectrum (and without even considering questions relating to standing) one could expect to find requests by the citizens of developing nations or CSOs. While it seems unlikely that CSOs and citizens of member states will have access to the mechanisms envisaged under the *legal, hierarchical, or supervisory accountability models*, history has shown that they have successfully relied on the mechanisms created under the *public reputational* or *market accountability* mechanism.[394]

When the IMF legal framework is measured against the model, it is clear that the Executive Board's decisions are subject to at least six of the seven types of accountability mechanisms.

Legal accountability is again the exception. This is unfortunate as it is the only form of accountability which takes the form of a mechanism which third parties can use to invoke and give effect to their rights.

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393 *Ibid*.

394 Alvarez op. cit. note 148 at 14.

The categories in some respects resonate with the first level of the International Law Association's Committee on the Accountability of International Organisation's 2004 Report which provides that an international organisation (such as the IMF) ought to be subject to "forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility" under their constituent documents.[395]

2 FUTURE RESEARCH PROJECTS

On the strength of this dissertation's hypothesis, it becomes clear that the different sources of law impose a duty on the IMF (including the Executive Board) to account for its decisions. What exactly "accounting" entails may differ from one scenario to the next. According to Grant's and Keohane's model (with which I agree), an accountability mechanism ought to comprise six parts. If the model is applied to the subject of this dissertation when considered in the context of the IMF Legal Framework, the following becomes clear:[396]

1. *the conduct* (or decision) in question: within the context of this study it would be the decisions of the Board of Executive Directors to grant or reject and application for financial assistance under the Rapid Financing Instrument or Rapid Credit Facility;
2. the party exercising a power (*the actor*): the Board of Executive Directors
3. *the norms* against which the use of powers may be considered: an obligation which is imposed on the Board of Executive Directors under the IMF Legal Framework;
4. *the party who challenges* the actor's conduct (the affected party): the member state, or another international stakeholder such as another international organisation or CSO;
5. the party which is entitled to consider whether the exercise of power accords with the norms (*the adjudicator*): the IMF Legal Framework does not stipulate

395 Committee on Accountability of International Organisations *Final Conference Report Berlin 2004* (2004). Also see Ved P. Nanda "Accountability of International Organizations: Some Observations" (2005) 33 *Denver Journal of International Law & Policy* 379 at 387.

396 This model is premised on the arguments espoused by Grant and Keohane op. cit. note 2.

a mechanism under which a third party may review the decision. The Board of Executive Directors are however required to report on the board's decision to the Board of Governors; and

6. an *appropriate sanction* where the conduct violated the nature and extent of the powers which are vested in those wielding the power: the IMF legal framework does not identify any sanctions, however *the Guidelines on Corrective Action* could be instructive in this regard.

As the model illustrates, the framework created under the IMF Legal Framework already includes four (perhaps five) of the components that Grant and Keohane postulate. The two exceptions are a mechanism under which an *affected party* can challenge the *decision* of *the actor* and *sanctions* which an *adjudicator* would have been entitled to impose if s/he finds that the *conduct* is invalid or unlawful.

The two missing pieces currently render the duty imposed on the Executive Directors to make accountable decisions somewhat toothless. At a practical level this may give rise to an accountability deficit.

As such, despite the attractiveness of Grant and Keohane's models, some commentators (such as Jose E Alvarez) question the utility of the seven categories of accountability in circumstances where aggrieved parties are still deprived of access to judicial forums which could overturn specific decision. Alvarez also questions the utility of mechanisms which are more readily available to powerful developed nations who, through their relationship with institutions such as the IMF would be able to demand accountability in the absence of any specific mechanisms. This, Alvarez suggests, simply exacerbates existing power imbalances.[397]

In contrast, Chris Brummer argues that the accountability mechanisms established under the IMF Legal Framework may be more effective than conventional modes of hard law owing to the manner in which they are applied. Such mechanisms include

[397] Alvarez op. cit. note 148 at 16.

conditional lending, strategic disparagement, actions against private actors for certain jurisdictions, or threats to suspend or revoke membership.[398]

The question (particularly in the context of Alvarez's criticism) therefore is: what does this mean if third parties cannot use these mechanisms to protect and enforce their rights?

The absence of a formal review mechanism creates a discordance between the different objectives of the rule of law at an international level. While the Executive Board and members must comply with the requirements imposed under the lending regime before the Board may grant a member's application for financial assistance, the regime does not stipulate any mechanisms under which members or other international stakeholders can dispute the validity and lawfulness of the decision after it is made.

Future research should focus on developing a fit for purpose dispute resolution model for the IMF.

3 CONCLUSION

This dissertation confirmed the thesis of scholars such as Anne-Marie Slaughter, David Zaring, and Chris Brummer who contend that the international financial system (at least from the IMF's perspective) is administered through an intricate system of horizontal and vertical networks which are established through the engagements of different government organisations and supranational institutions.[399]

It also confirmed that the international monetary system is not regulated under a single all-encompassing treaty. Rather, the IMF framework manifests in the form of

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398 Chris Brummer *Soft law and the Global Financial System: Rule making in the 21st century* (2012) at 147 to 156; also see Feibelman op. cit. note 16 at 701.

399 Slaughter *op. cit.* note 148 at 13, 20 to 22; David T. Zaring ”Finding Legal Principle in Global Financial Regulation” (2013) *Virginia Journal of International Law* 52:3 683 last accessed from https://ssrn.com/abstract=2282060 on 4 April 2021; Chris Brummer *Soft law and the Global Financial System: Rule making in the 21st century* (2012). Also see Feibelman op. cit. note 16 at 698

international cooperation through a network of constitutive documents, treaties, governance arrangements and soft law.[400]

The requirements imposed under the IMF Legal Framework likewise confirm the duty imposed on the Board of Executive Directors to make accountable decisions. The discordance between the duty to make accountable decisions (to the benefit of member states and their citizens) and the absence of mechanisms to uphold and enforce this duty however currently results in an overall "accountability deficit".

On the strengths of the findings of this dissertation, I recommend that future research consider whether the time has come for the IMF to establish a bespoke third-party mechanism which would allow members (and potentially other international stakeholders) to subject the Executive Directors' decision to a review by an independent body.

[400] Slaughter op. cit. note 450 at 5. Also see Feibelman op. cit. note 16 at 701.

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