International Financial Institutions and Labour Standards
A Legal Study of the Role of These Institutions in the Promotion
and Implementation of Freedom of Association and Collective
Bargaining

Mpoki Mwakagali

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Abstract
This dissertation examines the legal implications of the operations of international financial institutions (IFIs) on
international labour standards on freedom of association and collective bargaining. International financial institutions
provide financial assistance to member states for development activities and attach conditionality to their lending. These
conditionals require recipient states to carry out policy reforms, which in some cases include labour market reforms,
thereby affecting labour standards in recipient states. In addition, the IFIs provide other forms of support such as policy
advice and technical assistance. On basis of their ability to affect labour policy, the dissertation explores the role that these
institutions play to promote and implement these labour rights. A number of cases are included in the study to show the
practices of the IFIs and the effects of their operations on labour rights. Using the International Labour Organisation (ILO)
fundamental conventions on freedom of association and collective bargaining as the point of reference, the study assesses
the legal consequences of development finance on these fundamental labour rights.

Keywords: international financial institutions, international labour standards, freedom of association and collective
bargaining, conditionality, international law, human rights, development.

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Mpoki Mwakagali
To Harold, Tully and Timothy

and to Tully and Gwakisa

Mwakagali
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Although this journey has ended, a new journey begins. Wherever my path takes me, I will see you again!

Mpoki Mwakagali

Stockholm, March 2018
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<tr>
<td>ACHPR</td>
<td>African Convention on Human and People’s Rights</td>
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<tr>
<td>ACHR</td>
<td>African Commission on Human Rights</td>
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<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<tr>
<td>ADB</td>
<td>Asian Development Bank</td>
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<tr>
<td>AfDB</td>
<td>African Development Bank</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>BWI</td>
<td>Bretton Wood Institutions</td>
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<tr>
<td>CDF</td>
<td>Comprehensive Development Framework</td>
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<tr>
<td>CEACR</td>
<td>Committee of Experts on the application of Conventions and Recommendations</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All forms of Discrimination Against Women</td>
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<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>CFA</td>
<td>Committee on Freedom of Association</td>
</tr>
<tr>
<td>CIL</td>
<td>Customary International Law</td>
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<tr>
<td>CLS</td>
<td>Core Labour Standards</td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of a Child</td>
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<tr>
<td>CSO</td>
<td>Civil Society Organisation</td>
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<tr>
<td>EBRD</td>
<td>European Bank for Reconstruction and Development</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECOSOC</td>
<td>Economic and Social Council</td>
</tr>
<tr>
<td>ESC</td>
<td>European Social Charter</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organisation</td>
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<tr>
<td>GNP</td>
<td>Gross National Product</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>IACHR</td>
<td>Inter-American Convention on Human Rights</td>
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<td>IBRD</td>
<td>International Bank for Reconstruction and Development</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>IDA</td>
<td>International Development Association</td>
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<td>IDB</td>
<td>Inter-American Development Bank</td>
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<tr>
<td>IFC</td>
<td>International Finance Corporation</td>
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<td>IFIs</td>
<td>International Financial Institutions</td>
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<td>ILCn</td>
<td>International Law Commission</td>
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<tr>
<td>ILC</td>
<td>ILO International Labour Conference</td>
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<td>International Labour Organisation</td>
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<td>ILS</td>
<td>International Labour Standards</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<td>IOs</td>
<td>International Organisations</td>
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<tr>
<td>ITUC</td>
<td>International Trade Union Confederation</td>
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<td>MDGs</td>
<td>Millenium Development Goals</td>
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<tr>
<td>MoU</td>
<td>Memorandum of Understanding</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>PPP</td>
<td>Public Private Partnership</td>
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<tr>
<td>PRGF</td>
<td>Poverty Reduction Growth Facility</td>
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<tr>
<td>PRSP</td>
<td>Poverty Reduction Strategy Paper</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organisation</td>
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<tr>
<td>Abbreviation</td>
<td>Full Name</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<tr>
<td>WB</td>
<td>World Bank</td>
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<tr>
<td>WBG</td>
<td>World Bank Group</td>
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<tr>
<td>WHO</td>
<td>World Health Organisation</td>
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1. Introduction

1.1 Background

The creation of the International Labour Organisation (ILO) in 1919 marked the start of a crucial period in history as far as labour rights are concerned. The Peace Treaty of Versailles, which established the ILO, declared that “conditions of labour exist involving such injustice, hardship, and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required…recognition of the principle of freedom of association…and other measures”1. Since then, the ILO has generated and developed a system of international labour standards (ILS)2 aimed at promoting decent and productive work in conditions of freedom, equity, security, and dignity while aspiring for social justice and an international labour framework where the growth of the global economy provides benefits to all.3 As legal instruments that define basic minimum standards in the world of work, international labour standards are adopted by governments and social partners, are crucial in avoiding the lowering of labour standards by countries for various reasons such as comparative advantage in international trade or attracting investment, and facilitate equalisation of levels of social protection among countries.4 International labour standards have been generally accepted by the international community to be a means to improve the conditions of employment and labour worldwide.5

Freedom of association is one of the fundamental ILO principles, enshrined in the Constitution and further elaborated in the Freedom of Association Convention, 1948 (No.87) and the Right to Organise and Collective Bargaining Convention, 1949 (No.98). The adoption of the Declaration on Fundamental Principles and Rights at Work6 brought these rights into the ambit of core labour standards, creating obligations on member states, regardless of ratification. This unusual aspect, particularly in international law, where states are bound by these human

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1 Section I, Part XIII, The Peace Treaty of Versailles, 28th June 1919. Part XIII of the Treaty covering Articles 387-399, is on the establishment of the ILO.
2 These consist of conventions (Binding legal instruments) and recommendations (non-binding guidelines to complement conventions). Further details in Chapter 4.5.2 herein.
rights instruments whether or not they have ratified them demonstrates the weight
given to the principle. Indeed, it has been argued that this principle, as well as
the other core labour standards collectively, have attained an elevated status in
international law as ‘fundamental international norms’ which provide a
minimum set of global rules for labour in the global economy.

Today, labour rights stand at a crossroads. The traditional stance where labour
law and regulation rested in the state as the lawmaker, enforcer and implementer,
with international labour standards as the minimum standards, has, with time,
been hampered by the activities of other actors, such as multinational
corporations, international non-governmental organisations, paramilitary groups,
international financial institutions (IFIs) and international organisations, that
have inadvertently had an impact on labour standards and their governance.
Here, the boundaries between domestic and international are increasingly blurred
as issues which were once solely under the purview of domestic law and politics,
such as environmental standards and labour regulation, are influenced and
affected by such actors. In recent years, scholarship on such actors that affect
international labour standards through their practice and policies has come to
include, among others, international financial institutions (IFIs).

The creation and rise of IFIs was initially for the purpose of providing funds,
through loans, financial assistance and technical support for economic
development, beginning with the reconstruction of Europe after WWII,
continuing to the post-colonial era of newly independent states and funding
economic development for countries in crisis as well as those in developmental

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7 Collin Fenwick, “Minimum Obligations with Respect to Article 8 of the International Covenant on Economic,
Social and Cultural Rights” in Audrey Chapman and Sage Russel (eds.) Core Obligations: Building a Framework
8 Philip Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime”
15:3 European Journal of International Law (2004), 459; Lisa Rodgers, “The Regulation of Vulnerable Workers
and Precarious Work: A Liberal Framework?” in Tayo Fashoyin et al. (eds.) Vulnerable Workers and Precarious
Working (UK: Cambridge Scholars Publishing, 2013), 16; Kofi Addo, Core Labour Standards and International
Trade (Heidelberg: Springer, 2015), 268; Tsai-Yu Lin, “Enhancing Labour Protection through TPP Labour and
Investment Chapters” in Julien Chaisse, Henry Gao and Chang-fa Lo (eds.) Paradigm Shift in International
9 World Commission on the Social Dimension of Globalisation, A Fair Globalisation, 91; OECD, Better Policies for
11 See ILO, Equality at Work: Tackling the Challenges, Global Report under the Follow-Up to the ILO Declaration
on Fundamental Principles at Work, Report I(B), International Labour Conference, 96th Session, 2007, at para
323-339; Yossi Dahan, “Shared Responsibility and the International Labour Organisation” 34:4 Michigan Journal
of International Law (2013), 678; Lars Thomann, Steps to Compliance with International Labour Standards: The
International Labour Organisation (ILO) and Abolition of Forced Labour (Heidelberg: VS, 2011), 35-36; Werner
Sengenberger, Globalization and Social Progress: The Role and Impact of International Labour Standards
(Germany: Friedrich-Ebert_Stiftung, 2002), 14; Rebecca Gumbell-McCormick, “International Actors and
International Regulation” in Paul Blyton et al. (eds.) The SAGE Handbook of International Relations (London:
SAGE, 2008), 325-326.
12 Rodney Hall and Thomas Biersteker (eds.) The Emergence of Private Authority in Global Governance, (New
transition.\textsuperscript{13} While they were created and thought to operate purely in the economic (non-political) dimension of member states, with time, these institutions have gradually shifted their approaches to financing economic development and expanded their mandates to include social issues and policy reforms, which had initially been thought to be outside their purview.\textsuperscript{14} A facilitating factor for this shift has been the IFIs’ use of financial leverage in recipient countries in combination with conditions attached to the financial assistance (“conditionality”)to affect typically domestic areas such as trade policy, fiscal policy, labour laws, budgetary policy and economic policies.\textsuperscript{15} In the broader picture, these institutions affect recipient countries’ human rights obligation, and in this particular case, international labour standards. Though the aspects of leverage and conditionality present various possibilities for the IFIs to implement and promote international labour standards, it has raised concerns about democracy, human rights, accountability, transparency associated with the lending programs, legitimacy and others. In short, through the use of conditionality, IFIs play a role in the creation and transmission of various policies. Whether the actions of the IFIs have been to the advantage or detriment of international labour standards warrants investigation and discussion.

Whether the involvement of these institutions in labour law policies and legislation is beneficial or detrimental can only be determined by a comprehensive understanding of these institutions, and the approaches they invoke towards labour rights. International Financial Institutions, such as the International Bank for Reconstruction and Development (IBRD- commonly known as the World Bank) and the International Monetary Fund (IMF), are intergovernmental organisations which are concerned mainly with promotion of sound economic management by member states and provision of financial assistance to member states for defined development purposes.\textsuperscript{16} In provision of assistance to member states, IFIs provide for certain conditions which the recipient state must adopt to receive such funding. Consequently, IFIs are in a position to enjoy influence over states by way of requiring states to adopt certain policies as conditions for receiving funding which, \textit{inter alia}, touch upon labour reform and leverage to push states towards the IFIs’ desired outcomes.

The ability of IFIs to affect international labour standards’ compliance or defiance by states through the use of conditionality has increasingly become a concern and even more so regarding freedom of association and collective bargaining. Though nothing in the mandates of most of the IFIs prescribes non-compliance with international labour standards, the IFIs do not address whether their policies are compatible with the obligations of the institutions, the recipient state and all the other members of the IFIs under international law.17 Thus, controversies about whether IFIs have obligations to promote and implement labour standards highlight a contradictory issue in this research.

The focus of this work is twofold: first, to assess the ways and extent to which IFIs affect labour rights on freedom of association and collective bargaining in both their lending activities and policies, and second, to address the “thought” that the activities of these institutions or the institutions themselves are “a watertight chamber to which human rights acknowledged and endorsed by the international state community have little or no relevance.”18 The study aims to examine the ways in which IFIs approach international labour standards from a legal perspective in their programs. Here, the work will explore conditionality and examine how this tool is applied or used by IFIs and what effect it has on freedom of association and collective bargaining. It will examine whether conditionality is used as a mechanism to promote and implement this principle or otherwise to dismantle or undermine it. The thesis will also explore whether international law sufficiently addresses the activities of IFIs.

1.2 Statement of the Problem
The world has changed. The dividing boundaries between what is domestic and what is international in the realm of labour law have been blurred.19 Digital technologies and international trading and financial regimes that promote the free movements of capital, goods, and services across national borders, are transforming labour markets and paid work in both developing and developed countries.20 In addition, states are faced with the increasing influence of international organisations on the formulation of their domestic economic and social policy, which rarely emanates from “hard” legal stipulations but from obligations implicit to the membership of these organisations.21 Policies that emphasise labour market flexibility and deregulation have contributed to

18 Ibid, at 610
20 Ibid.
deteriorating working conditions and labour standards for a large portion of the working population, especially in finance recipient countries. Moreover, responses to the need for financial assistance for development and responses to financial crises have highlighted how dismantling labour law can become a default policy response to issues and problems largely unrelated to labour standards.

Because of the influence and resources that the IFIs enjoy on one hand, and the need for financing for development or economic crises by states on the other, a situation has been created where the funding is afforded on the satisfaction of certain conditions which regulate the institutional or structural reforms, including but not limited to labour law reforms. This phenomenon, where certain conditions are required to be met in order for a country to secure financing, is referred to as conditionality. The essence of conditionality is that it regulates the relationship between the financiers and the recipient of development finance in a context of a more disciplinary objective of development financing, compelling the recipient state to undertake domestic reforms in pursuit of certain objectives—be it economic, social or other. The IFIs provide the finance, but it is the recipient states that implement the conditionality attached to the finance, such as policy reforms. In such a scenario, it is not unusual that the recipient state, in satisfying the conditionality violates its obligations under various international human rights instruments. The opposite of this is a possible scenario, where the recipient country is influenced to comply with international human rights as part of satisfying conditionality. In both cases, although it is the state that acts, whether in compliance with its human rights obligations or in defiance, it is influenced by the IFI via conditionality.

It is crucial to note that conditionality can be applied in a number of different contexts, with each context raising its own benefits and concerns. For example, political conditionality has been the main strategy of the European Union to promote the fundamental rules of human rights, liberal democracy and the rule of law, which are the core conditions that states must fulfill before they are allowed to enter into accession negotiations. Regardless of the specific context, conditionality has become a tool for implementing change. Returning to the problem at hand, conditionality has acquired a stronger meaning than the literal


interpretation and has now evolved to mean conditions on policy reforms (as distinct from fiduciary conditions on accounting for the use of funds) and the use of financing to leverage policy reforms, which need not be the policies that would freely be chosen by the recipient.26 Conditionality has thus come to mean a mechanism to leverage policy reform.27

The consequences of conditionality have often been mistakenly believed to be primarily financial.28 However, labour rights or labour law reforms have become a part of IFIs conditionality. Here, conditionality has become a basis for dismantling and undermining labour law, although in other instances it has been a tool for the promotion and implementation of the same. Although conditionality presents many possibilities to be a driving tool towards promoting labour rights, the use of labour law conditionality by IFIs has raised serious concerns, as previously mentioned. Not only does conditionality bypass democratic processes, but it also involves consequences for states that fail or refuse to meet such conditions. There are further concerns that the use and expanding scope of labour law conditionality, justified by economic interests, could be used to undermine labour rights. Ultimately, these concerns create a need to further study IFIs and conditionality touching upon labour policy from a legal perspective.

The study’s focus on freedom of association and collective bargaining is motivated by the controversies that shadow these rights. Less agreement exists regarding the desirability of labour unions than agreement regarding the importance of eliminating discrimination, forced labour and the worst types of child labour.29 Indeed, among the four ILO core labour standards on elimination of all forms of forced or compulsory labour, effective abolition of child labour and elimination of discrimination with respect to employment and occupation, freedom of association and collective bargaining are the most controversial as these rights bear both “economic and political implications.”30 The economic implications thus make them more susceptible to the activities of IFIs. Moreover, the impedimental effects of the protection of trade unions on the functioning of free labour markets, for example, are controversial issues as opposed to the effect of elimination of discrimination and forced labour, which can be viewed as removing impediments to freer labour markets.31 Conflicting views on the detrimental effects of unions on economic growth due to factors such as lack of flexibility for employers, a hindrance to competitiveness, and the use of political

27 Ibid.
28 Ibid.
power by unions to divert resources further highlight the controversies underlying these rights.32

1.3 Overall Objectives
The project intends to address what role IFIs play in the promotion and implementation of international collective labour rights stipulated in international human rights conventions and treaties, taking into consideration their intergovernmental nature, their influence on governments and their ability to influence national labour regulation as well as policy through conditionality and other forms of influence.

The first objective is therefore to identify the legal implications of conditionality in the light of international labour standards as well as both the risks and potentials associated with the use of conditionality by IFIs. This encompasses highlighting specific scenarios or cases in which IFIs’ conditionality has had negative or on the other hand positive legal implications in as far as freedom of association and collective bargaining are concerned, that is, where it has been a means of promoting and implementation of the rights by the recipient states or a hindrance of the same.

The second objective is to explore the international legal framework within which IFIs operate to examine whether and how international law principles apply to them in an effort to establish their human rights obligations as actors in the international arena and whether their policies and use of conditionality are consistent with international law principles and interpretations. As the activities of IFIs are governed by international law,33 it is rational to seek the limits of their activities in international law. Again, as international labour standards form part of the general human rights framework, identification of the human rights obligations of the IFIs will provide a legal basis for the analysis of these institutions’ lending activities and the consequences of such activities on the labour rights specific to this study.

The third objective is to find a point of balance where IFIs conditionality and other forms of influence can be not only useful but also sustainable tools towards greater respect and implementation of these fundamental international labour standards, even in the context of limited financial resources or monetary crises. In such an

aspiration, a crucial point of balance can be found where the member states of the IFIs play a primary role in the implementation of the international labour standards, and the IFIs activities (conditionality, policies, etc.) complement this process.

The study is enthused by the increased scope of the activities of IFIs and how these activities increasingly affect the enjoyment of international labour rights in recipient countries. A research project in this field of study is of great importance and interest as it addresses specific and current international legal issues which have become even more salient in the wake of European economic crises and the advancement towards a globalised world economy.

1.4 Research Questions
In an effort to address the research problem presented above, the first question is: what role do IFIs play in implementing and promoting international labour standards on freedom of association and collective bargaining? Here, several sub-questions arise: In what ways do IFIs take regard of/incorporate international labour standards in their projects and operational policies? Does IFI conditionality influence compliance or non-compliance of states with international labour standards on freedom of association and collective bargaining and what are the potentials and risks associated with the use of conditionality? This question and its sub-questions reflect the heart of this study.

The second question is: what rules of international law apply to international financial institutions and what forms of accountability can be invoked where their activities conflict with international labour standards on freedom of association and collective bargaining, as part of the general framework on human rights, in their operations/activities?

The third question is: what sustainable approach to conditionality can IFIs adopt pertaining to international labour standards and how can this be achieved? This question is a more general question which is relevant not only to international financial institutions, but the field of development in general.

The research does not intend to look into the efficiency of IFI policies. Nor does it intend to look at whether the economic outcomes for which these policies are justified are achieved. Nor will this research look into how well these institutions have lived up to their mandates. This research specifically examines the legal implications of the IFIs policies and their use of conditionality on international labour standards on freedom of association and collective bargaining.
1.5 Limitations and Scope of the Study

It is important to state the limitations and scope of the study to avoid any ambiguity over the specific area this study is committed to. First, some of the concepts discussed in this thesis, such as conditionality, have some non-legal dimensions (political, economic, etc.), but nonetheless have substantial effects on the understanding, form and functioning of international labour law.

Secondly, the dissertation focuses on the study of specific multilateral development banks that serve a public purpose: provide development finance to governments. In addition is the IMF, which is not typically a multilateral development bank, but is nevertheless an important actor in international development financing. The meaning of international financial institutions has at times been confused or constructed to involve other forms or branches of the relevant institutions that may have a similar function or purpose as the institutions under this study. The study will be limited to six institutions - two global and four regional IFIs. These are the World Bank and IMF along with the Inter-American Development Bank (IDB), Asian Development Bank (ADB), African Development Bank (AfDB), and the European Bank for Reconstruction and Development (EBRD). It is crucial to be cautious of the challenge that, although the regional IFIs are modeled on the global institutions, the scholarly world has generally neglected the regional institutions. This can be explained by various reasons. First, the regional institutions resemble the World Bank in function and structure and it is assumed that there is little to say, as it is believed that which stands for the World Bank must be applicable to them. Second, because they are regional institutions concerned with the development of regional members, some believe they need not concern scholars of global economic governance. This being the case, literature on regional institutions as actors in the international arena is limited, giving more motivation for a study of these institutions. This is justified by the fact that the regional institutions increasingly share the same policy space as the global institutions and enjoy a degree of longevity and international importance irrespective of the fact that they are modeled on the World Bank. Furthermore, they are composed of many of the same member states, as the global institutions and often engage in co-financing with the global institutions. For example, the members of the African Development Bank are also members of the World Bank.

34 For example, the World Bank Group consists of five agencies; the Multilateral Investment Guarantee Agency (MIGA), the International Finance Corporation (IFC), the International Centre for Settlement of Investment Disputes (ICSID), the International Bank for Reconstruction (IBRD) and the International Development Agency (IDA). The IBRD and IDA (World Bank) perform the public function mentioned above, thus, the other agencies are not relevant to this study.
36 Ibid.
37 Ibid.
Lastly, the analysis of the operational policies of IFIs is relevant to this study. However, although the institutions are economic by nature, the economic efficiency of the institutions themselves, or whether their antidotes actually work, are not a concern herein. Instead, the focus is the way in which their policies affect international labour standards on freedom of association and collective bargaining.

1.6 Source Material and Method

1.6.1 Source Material

The material used in this study consists of legal and quasi-legal sources comprising international legal acts, interpretations of legal acts by monitoring or supervisory bodies and organs, articles of agreement, policy documents, reports of various organs of IFIs, press releases, loan agreement papers, etc. The interpretational analysis and jurisprudence of international and regional human rights treaties as well as secondary instruments, such as declarations, guidelines and recommendations by various adjudicative and quasi-judicial as well as monitoring organs or bodies, are also used. An important aspect of the research is that it inquires into the functions and operations of international financial institutions, which are international organisations. In this regard, principles emanating from public international law, publications and scholarly works of experts in the field as well as literature from various relevant organisations will also form a part of the material used.

Although the legal basis of the dissertation inevitably hinges on legal sources, in certain parts of the work, there is dependence on sources gathered in areas outside legal sources, including material from areas of international relations, political science, development studies, etc. Because of the interdisciplinary nature of the work, these sources provide further understanding of the non-legal concepts in the study, particularly conditionality.

It is crucial to note that the internal activities and decision-making processes of IFIs are conducted “behind closed doors” and are not opaque to the general public. To deal with the lack of transparency intrinsically involved with the operations of IFIs, the resources relied on are memorandum of understanding (MoU), letters of intent, policy papers of the IFIs, executive notes, implementation completion and results reports, consultation papers, development policy reviews, country economic memoranda, country strategy papers and other documents produced by the IFIs that are relevant to the study, as well as literature on practical outcomes, all of which can be analysed to identify the IFIs approaches to the rights relevant herein. Noteworthy is the fact that contrary to the global institutions where there is a vast amount of literature and other sources, there is a limitation in sources of materials on the regional IFIs.
1.6.2 Method
This study adopts a traditional legal positivist method, which involves the analysis of the content of law encompassed in various international and regional legal instruments as well as interpretations and legal arguments arising from such law that are relevant to the research, and a subsequent assessment of the extent the IFIs’ policies and practices conform with these standards. For the former aspect, emphasis is laid on the ILO conventions on freedom of association and collective bargaining as well as the relevant recommendations. In addition, the various supervisory bodies in the ILO system that supervise the implementation of international labour standards, such as the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA), which are quasi-judicial bodies, have progressively established an important case law or jurisprudence which gives content to the obligations contained in the conventions, which is treated as authoritative by the member states. It is crucial to note that, in addition to being the supervisory body that specifically deals with freedom of association and collective bargaining, the CFA is unique because it has developed an important body of principles in examining cases submitted to it. The principles constitute a "veritable international law on freedom of association" and collective bargaining.
This method avoids the ‘old school’ positivism which focuses nearly exclusively on states as the exclusive makers of international law and the only original subjects of international law. The method used here instead employs more classical international legal positivism which considers the important sources of international law to be treaties, customary international law and consensus of jurists, statesmen and diplomats professionally in the relations among states, though emphasis is placed on treaties as “a success story for international legal positivism.”

In as far as this is a legal study, the method is challenged by the need to rely on materials that are outside typical legal materials which are gathered from fields outside the traditional legal field. This is justified by the fact that some of the central issues that must be discussed in order to assess the extent to which IFIs promote or implement ILS are not legal by nature and emanate from non-legal fields, such as international relations. Indeed conditionality, one of the central themes in this study, originates in the fields of international finance and international relations. To grasp these non-legal concepts and to analyse them from a legal perspective requires an in-depth study of IFIs and their use of such phenomena as conditionality. This is necessary for several reasons. One is that the evolution of international law has made individuals, groups, international organisations and inter-governmental organisations into subjects of international law in the sense that they are not merely affected by the rules of international law, but may also have duties and rights conferred upon them. This aspect is crucial in the identification of the responsibilities and duties of IFIs in international law.

Secondly, in order to assess the legal implications of the practices and policies of the IFIs, which cover the more practical aspects/actions of the IFIs, it is necessary to delve into the field of international relations, which has been contended to be the sociology of international law. In this case, the relation between the two fields is that international law consists of conventional and customary rules and principles dealing with the conduct of states and international organisations in their relations with one another, individuals, groups, etc, which are considered legally binding, while international relations provides an understanding and explains existing arrangements and institutions and identifies patterns about

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45 Mark Klamberg, Power and Law in International Society: International Relations as the Sociology of International Law (London: Routledge, 2015), 54.
46 Ibid, 59.
behaviour. Therefore, in order to understand and explain the practices of IFIs, the field of international relations is necessary, while in assessing the legal implications of these practices on international labour standards, the field of international law is applied. This is to say that, in order to get to the normative aspects (legal implications), it is necessary to crack the non-legal sources such as MoUs and policy papers. These materials are fluid and may change from time to time, but are nevertheless crucial. It is also important to note that, as will be elaborated later in this study, the IFIs are not accountable or subjected to adjudicative bodies in their operations and activities, resulting in the absence of traditional sources such as case law with respect to these institutions, which further compels the use of these non-legal sources. Despite these limitations, the use of these non-legal sources and the classification and analysis of non-legal phenomenon such as conditionality adds a level of scientific value to the work.

The reference to external factors to law and seeking answers that are consistent with an existing body of legal rules renders the study an interdisciplinary one. Loth argues that the predominance of legal positivism in the schools of jurisprudence has somehow led to ignoring the law’s operative context and other disciplines, which has diminished the effectiveness of the law. Therefore, the introduction of interdisciplinary approaches in legal studies has improved law’s effectiveness. Thus, in studying international labour law today, the methodological aspects that refer to a variety of sources and forms of analysis drawn from non-legal disciplines or fields provide better insights in understanding the various challenges that face these standards and the legal implications that these challenges produce.

Klabbers puts forth a number of risks associated with interdisciplinarity. He argues that even though an (best) international lawyer will have a working

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52 These include the risk of reproducing or even strengthening existing power configurations, the risk of immersing oneself into an aspect which it might be difficult to get out of and which will inevitably distract the lawyer from the desired achievement, and the fact that interdisciplinarity will not always and automatically enable one to come to a better understanding of international law. Ian Klabbers, “The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity” 1:1 Journal of International Law and International Relations (2004-2005), 35-38, 41. See also Andrea Bianchi, International Law Theories: An Inquiry
knowledge of neighbouring disciplines, including international relations theory, it is important to guard against the risk of doing merely international relations, under a thin veneer of international law.\textsuperscript{53} However, interdisciplinarity produces good scholarship when insights are taken from elsewhere while retaining its own (legal) disciplinary character.\textsuperscript{54}

It has been contended that regulation of labour in the present times can no longer be considered state-centric, that is, it cannot be said to be enacted, enforced or implemented by states alone.\textsuperscript{55} Some modern theories such as regulation theory maintain that legal and, to a lesser extent, social policy analysts should broaden their understanding of what constitutes “regulation” to include both legal and non-legal webs of control that transcend traditional instruments such as statutory legislation, court cases and state agencies’ deliberations, which have traditionally defined the boundaries of legal studies.\textsuperscript{56} It is crucial, however, to defend a legal rights-based approach to counter the adverse implications this theory would create, as this research tends to justify an approach which relies on the state as a key player. Additionally, although an absolute notion of state sovereignty is increasingly at odds with the realities of the modern international stage, sovereignty still retains a fundamental place in international law.\textsuperscript{57} After all, the world is still organised according to nations, and sovereign nations remain the primary players in the international arena.\textsuperscript{58}

The final method used is the comparative method. The essence of this method is the comparison itself, that is, the placement of comparable elements of two or more legal systems next to each other to determine their similarities and differences.\textsuperscript{59} In this endeavor, it is crucial that the objects to be compared share some characteristics which are a common denominator, the tertium comparationis\textsuperscript{60}, a crucial aspect in any comparison, legal or not. The comparable

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\textsuperscript{53} Ian Klabbers, “The Relative Autonomy”, 36
\textsuperscript{54} \textit{Ibid}, 45.
\textsuperscript{56} Christopher Arup et al. (eds.), \textit{Labour Law and Labour Market Regulation} (Sydney: The Federation Press, 2006), 44.
\textsuperscript{57} Mary Tsai, “Globalisation and Conditionality: Two Sides of the Sovereignty Coin” 31 \textit{Law and Policy in International Business} (1999), 1319.
\textsuperscript{58} \textit{Ibid}.
elements in this work are the IFIs, in consideration of their common function as
development institutions whose lending activities affect international labour
standards. Pursuant to determining the similarities and differences between the
content in these legal systems, it is important to consider the function, that is,
those real or potential conflict situations which the studied rules are intended to
regulate. The compared elements must be comparable to each other functionally,
meaning they must be intended to deal with the same problem and regulate the
same factual situations in real life. Finally, the similarities and differences
identified by the comparison provide insights into the factors that influence the
structure, development and substantive content of the legal systems. It is crucial
to bear in mind that institutions, both legal and non-legal, even doctrinally
different ones, are comparable if they are functionally equivalent. In such a case,
the function can serve as the tertium comparationis.

This endeavor naturally breaks away from the traditional comparative method in
legal studies, which involves the comparison of national legal systems or legal
institutions. However, Bakardjieva-Engelbrekt argues that although there is an
assumption that comparative law is a question of nation-state legal systems, “there
is no inherent limitation that would preclude extending the concept of comparative
to comparative studies of legal systems of a different type, notably
supranational and international legal systems and organisations, or cross-level
comparisons between national and supranational (or international) legal
systems”. Again, due to new challenges labour law can no longer be treated
merely as a phenomenon within national borders, as no country can escape the
impacts of international norm-setting and the consequences of globalisation. In
such a context, rulemaking can no longer be conceived as an exclusive monopoly
of state authority. It is rather to be understood as a public-private policy mix,
thereby broadening significantly the perspectives for comparative law.

1.7 Terminology
To avoid any ambiguity or confusion, it is essential to clarify and define certain
terms that are important in this research.

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61 Michael Bogdan, Comparative Law (Stockholm: Norstedt, 1994), 60.
62 Ibid.
63 Ibid, 55.
64 Ralph Michaels, “The Functional Method of Comparative Law” in Mathias Reimann and Reinhard
65 Antonina Bakardjieva-Engelbrekt, “Comparative Law and European Law: The End of an Era, A New Beginning,
or Time to Face the Methodological Challenges?" 61 Scandinavian Studies in Law (2015), 90.
1.7.1 International Labour Standards

International labour standards refers to a comprehensive system of international instruments on work and social policy. The ILO constitution stipulates two instruments of standard-setting: conventions and recommendations. While the ‘legislative’ procedure is similar for both, they differ in important ways. The ILO conventions are legally binding international treaties that members may ratify and that create legal obligations. In comparison, recommendations are not open for ratification, nor do they create legal obligations, but are guidelines for members’ policy. The standards encompass legal rights representing the international consensus on labour issues as provided for in various international instruments, particularly because they are drawn up by representatives of employers, workers and governments in a tripartite fashion and thus represent the work-related principles of the major actors in the global economy. The term “standards” does not deprive them of their legal character, but rather demonstrates their important characteristic as basic minimum standards in the world of work agreed upon by the key actors or players in industrial relations. Hence, while international labour standards are basically those that emanate from the ILO instruments, international labour law is the totality of international instruments, including both the more comprehensive ILO conventions and recommendations and the international human rights treaties which provide for labour rights in more general terms.

1.7.2 Core Labour Standards

The core labour standards (CLS) are a set of fundamental and universal human rights concerning work. The CLS emanate from constitutional principles of the ILO, covering four core principles enshrined in eight corresponding ILO conventions. The principles are freedom of association and the right to collective bargaining, elimination of all forms of forced or compulsory labour, abolition of child labour and elimination of discrimination with respect to employment.

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69 See Article 19, Constitution of the International Labour Organisation, 1919 which states that “When the Conference has decided on the adoption of proposals with regard to an item on the agenda, it will rest with the Conference to determine whether these proposals should take the form: (a) of an international Convention, or (b) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention.”
72 International Labour Organisation, International Training Center, Workers’ Activities Programme (ACTRAV), 2.
73 Freedom of Association and Protection of the Right to Organise, 1948 (No. 87) and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
74 Forced Labour Convention, 1930 (No. 29) and Abolition of Forced Labour Convention, 1957 (No. 105).
75 Minimum Age Convention, 1973 (No. 138) and Worst Forms of Child Labour Convention, 1999 (No. 182).
and occupation. The adoption of the ILO Declaration on Fundamental Principles and Rights at Work (hereinafter “the ILO Declaration of 1998”) made the application of the eight fundamental rights conventions a de facto condition of ILO membership in that the Declaration underlines that all member countries have an obligation to respect the fundamental standards, whether or not they ratified the relevant conventions. In addition, member states that have not ratified the core conventions must report on the progress they have made, that is changes in law and practice, towards implementing the core conventions. The essence of the CLS is that they describe vital labour standards necessary for decent and productive work where “men and women can work in conditions of freedom, equity, security and human dignity”.

1.7.3 Conditionality
In this study, conditionality refers to conditions tied to economic programs funded by the international financial institutions. Though conditionality itself is quite broad and covers a whole spectrum of various kinds such as fiscal conditionality, the study will focus primarily labour law conditionality.

1.7.4 International Financial Institutions
International Financial Institutions is the generic name given to all financial institutions operating on an international level, ranging from development banks such as the World Bank and EBRD, to monetary authorities such as the IMF. These organisations give loans to governments for large-scale projects, restructuring and balance of payments, usually with conditions that the countries make specific changes that IFIs believe will boost economic growth. IFIs have also been defined as supranational institutions set up by sovereign states, which are the IFIs shareholders, with the common task of fostering economic and social progress by financing projects, supporting investment and generating capital. They have also been defined as international institutions that provide financial assistance, typically in the form of loans and grants to member states, in order to

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76 Equal Remuneration Convention, 1951 (No. 100) and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).
79 Article 2, the ILO Declaration on Fundamental Principles and Rights at Work, 1998.
80 Ibid, II(B), Follow-Up to the Declaration (Annex).
83 Ibid.
promote economic and social development. Three words illustrate the central aspects of these institutions relevant to this study: financing (loans), development, and states (sovereigns). It is crucial to state that the purview of what constitutes development has changed substantially, as will be discussed in the study. It is also crucial to differentiate these institutions from commercial banks, which can also be a source of finance for governments.

All these definitions, though some broader than others, provide for the important terminological aspects of these institutions that are crucial in their assessment. International organisations, financing/loans, governments, economic (and social) development, and conditions- these terms together provide a definition of IFIs as used in this study.

1.8 Structure

The thesis examines the role that international financial institutions play in the implementation and promotion of collective labour rights, and is laid out in seven chapters. The first chapter provides the introduction to the research. It consists of the research background, problem, methodology and method, and limitations, as well as a brief definition of the concepts central to the study.

The second chapter focuses on creating a basic understanding of various features and characteristics of IFIs. It begins with a brief background of the rise of IFIs. A discussion on the mandates of the IFIs provides insight into traditional interpretations of the mandates with respect to human rights as well as more modern interpretations, discussing how the IFIs mandates have constructively expanded over time, both in the definition of economic development and the means of financing such development. An important aspect of this chapter is its description of the structures and governance of the IFIs, while highlighting the features affiliated with the leverage these institutions have due to their lending capabilities. The chapter addresses these issues in order to form a basis for the analysis of the IFIs programs and operations as well as for identifying the relationship between practices such as conditionality and collective labour rights.

Chapter three explores the concept of conditionality as the central tool used by the IFIs to effect policy change. Here, the concept is analysed from a legal perspective, while highlighting the various forms conditionality can take as well as the underlying processes that occur in fashioning conditionality. The chapter also addresses other forms of influence that the IFIs have with relation to member states and how all these different forms of influence are used to effect change in recipient or member states. These are crucial aspects for the analysis of the role

these institutions play in promoting and implementing labour rights through their financing activities.

Chapter four contains the theoretical and substantive framework underlying international labour rights. It discusses the various theoretical approaches taken in defining and elaborating labour rights. The chapter also provides an overview of the substantive international labour law framework from within the more general human rights framework. Mainly focusing on ILO standards, it is a comprehensive discussion on the various international sources of the right to freedom of association and collective bargaining, as well as the respective interpretations by monitoring or supervisory bodies.

The fifth chapter of the thesis examines the public international law framework and how IFIs relate to it. It discusses the nature of IFIs and addresses the sources of their international obligations as well as responsibilities. The chapter analyses the IFIs’ accountability mechanisms to determine whether they suffice to establish the IFIs’ responsibility with regards to human rights obligations. It addresses various international law principles and how activities of international organisations have either eroded or strengthened such principles.

Chapter six is the heart of the research and provides an analysis of how the IFIs specific to this study approach collective labour rights and how these approaches in practice affect the implementation and promotion of the rights in recipient countries. It analyses examples of how the IFIs have variably used conditionality to implement or hinder international labour standards on freedom of association and collective bargaining, and makes a comparative analysis of the approaches of the IFIs. The chapter also looks at the effects of IFIs’ conditionality on collective labour rights as well as the risk and potential of labour conditionality as applied by the IFIs.

Finally, chapter seven provides a summary of the findings and conclusions. It ends with recommendations on the way forward and how various shortcomings can be improved, as well as identifying areas for further research.
2. IFIs General Legal Framework:
Mandates and Structure

2.1 Introduction
International Financial Institutions are at the center of this study. Before discussing how their activities have affected human rights, and particularly international labour standards, a discussion of their mandates, their governance and lending activities is important in order to understand the nature of their functions as international actors, as the roles they play in the promotion and implementation of collective labour rights will be assessed in this regard. It is crucial to discuss how these institutions operate and how this affects the particular way conditionality is applied. As a basis for the assessment of the role of IFIs in the promotion and implementation of collective labour rights, this chapter provides an analytical framework for examining such roles. It focuses on the institutional mechanisms that the IFIs use for the selection, monitoring and enforcement of loans and other financial packages. The analysis highlights the unique characteristics of these institutions that provide them with a comparative advantage\(^{86}\) in providing finance in relation to the design and implementation of reforms adopted by governments.

2.2 A Brief Background: The Three Generations
The rise of international organisations came in the period immediately after the Second World War,\(^{87}\) where there was a “true hausse in the creation of new organisations”\(^{88}\) which were established by multilateral international agreements under international law.\(^{89}\) The resulting proliferation of international organisations reflected the increasing awareness that, “fundamental problems cannot be dealt with within the border of a single state”.\(^{90}\) It was notably a response to new and emerging needs that were a consequence of the creation of a significant number of new states following decolonization.\(^{91}\) While the United Nations indulged itself in issues of human rights, peace and security, the IFIs

\(^{86}\) William Buiter and Steven Fries, “What Should the Multilateral Development Banks Do?”, 2.


\(^{89}\) Gerd Drosse, Funds for Development, 1.


\(^{91}\) Gerd Drosse, Funds for Development, 1.
focused on the economic development of war-torn states as well as newly independent states.

In reflecting the emergence of IFIs as responses to specific needs of specific times, these institutions may be seen as “generational” in character. Head elaborates the three generations of IFIs, and also provides historical context in which the IFIs were formed.

The first generation is represented by the IBRD, born in the closing days of World War II with the reconstruction of Europe as its main priority (hence the inclusion of the "R" for "Reconstruction" in the name of the IBRD). The fact that the U.S. government soon took over the bulk of that task under the Marshall Plan prompted (in part) the IBRD to abandon that aim of reconstruction and to focus its attention more on the "D" in IBRD - that is, economic development in its non-European member countries. It was established to promote long-term economic development and poverty reduction by providing technical and financial support to help countries implement specific projects—for example, building schools and health centers and providing water and electricity, etc. The IMF, a monetary institution, was concurrently established and designed to regulate, supervise and promote free flow of international payments for merchandise, services and other transactions and to ensure that such payments were made within a system of fixed currency exchange rates.

A second generation of IFIs began around 1960 to cater better to the needs of Least Developed Countries (LDCs). With the rapid emergence of new states following the massive decolonization of the 1940s and 1950s, the IBRD found itself unable to provide as much assistance as was needed in those new states because IBRD loans carried market-based interest rates. Against this background, the IDA was established in 1960 as a companion to the IBRD - yielding the two institutions we now call the World Bank - to provide cheaper money through "soft loans" available to LDCs. It is during this period that the

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92 Ibid, 6.
94 Ibid.
98 Ibid.
99 The IDA is the part of the World Bank that helps the world’s poorest countries reduce poverty by providing loans and grants for programs that boost economic growth. The lending is on concessional terms, meaning at a zero or very low interest rate and over an extended period of time. The IDA also provides debt relief for heavily indebted poor countries (HIPC). See http://ida.worldbank.org/about/what-ida (accessed 22 November 2015)
“idea of development became inextricably linked with poverty reduction”. At about the same time (between the late 1950s and the mid-1960s), the IDB, the AfDB, and the ADB were formed as regional sources of development financing, which also gave regional members a greater say in regional organisations than they had in global ones. The IDB resulted from the idea of a development institution for Latin America, which was first suggested during the earliest efforts to create an inter-American system and was formally created on 8th April 1959, when the Organisation of American States drafted the Articles of Agreement establishing the Inter-American Development Bank. The AfDB was established following the end of the colonial period in Africa amid a growing desire for more unity within the continent as well as resources for development activities. This led to the establishment of two draft charters, one for the Organisation of African Unity (established in 1963 and later replaced by the African Union), and another for a regional development bank. As for the ADB, it was conceived amid the postwar rehabilitation and reconstruction of the early 1960s, by formulation of a "private plan" for a regional development bank with the vision of a financial institution that would be Asian in character and foster economic growth and cooperation in the region. All three of these regional IFIs sooner or later developed the same authority to make "soft loans" that the IDA makes.

The EBRD represents a third generation in the evolution of the IFIs. This institution, formed almost five decades after the World Bank and the latest of the regional IFIs in this study, was established to meet the historical challenge of the collapse of communism in Eastern Europe and thus help build a new post-Cold War era in Central and Eastern Europe. This IFI introduced several novel features into the operations of the IFIs, as will be discussed later.

As for today, are we on the brink of the rise of a fourth generation? With the emergence of new IFIs such as the New Development Bank (NDB - formerly known as the BRICS Development Bank) and the Asian Infrastructure Investment

105 Ibid.
108 Ibid.
Bank (AIIB), it is clear that the era of the IFIs is nowhere near a decline. It will be interesting indeed to see how these new institutions approach the issues raised in this research.

2.3 Nature

International Financial Institutions have a dual character. First, they are intergovernmental organisations that are created by states for a public purpose; and their authority and mandates are based on international agreements to which all their state members are parties. They are created by states to achieve objectives that the states cannot achieve on their own or perform certain functions that are of interest to their member states, making them tools in the hands of their member states. This means that, although these institutions clearly have an existence that is independent of their member states, legal personality, their governance and decision-making processes are to a certain extent formally dominated by their member states, or more accurately, their most powerful member states. Second, IFIs engage in financial transactions, which are, by nature, similar to market-based financial transactions, despite the IFIs’ public purpose of providing funds to public authorities or governments for public functions or use. Thus IFIs are financial institutions, albeit specialised in providing financial support and professional advice for economic development activities and promoting international economic cooperation and stability. This raises some issues relating to the functional independence of these institutions and, moreover, who is responsible for the consequences of their decisions and actions. This is particularly true as there is no well-developed public international financial law that addresses both the public purpose of IFI financial operations and the commercial nature of their transactions. The combination of their dual character and the absence of well-defined international legal principles that are applicable to their operations raises a number of issues. The first issue is whether or not IFIs

110 Ibid.
116 Daniel Bradlow, "International Law and the Operations", 1. This aspect is further discussed in Chapter 5 herein.
have any specific international legal obligations with which they must comply with in the structuring and drafting of their financial transactions. A related issue concerns the obligations of IFIs under international law to those who might be affected by their operations, whether or not they have a contractual relationship with the IFIs, as IFIs have become actors in the international legal system. Of particular interest to this study is the issue of the way IFIs financial transactions and operations affect workers’ collective rights. These issues are discussed in later chapters.

Klabbers provides three characteristics that define international organisations and differentiate them from other forms of organisations. The first characteristic is that they are created between states; in this regard, there is a presupposition of a minimum involvement of at least two states and no maximum, although sometimes organisations limit membership to states from a particular region or with a particular ideology. Second, international organisations are established on the basis of a treaty. Third, an organisation must possess at least one organ which has a will distinct from the will of its member states. However, what most sets IFIs apart from other international organisations is their function. The economic function sets the IFIs apart from, for example, those international organisations dealing with peace and security or those that are military alliances. While their specific mandates and responsibilities may differ, each of these IFIs is an intergovernmental organisation that is formed by an international agreement to which only their member states are parties. They all offer qualifying member states a range of financial products, advisory services and technical support services, all of which are designed to serve a public purpose related either to macroeconomic policy or to the general goals of development and poverty alleviation.

Two general characteristics distinguish the IFIs from private financial institutions and bilateral donors. The first characteristic is their multilateral shareholding structure and preferred creditor status. The second is a subsidised capital base and

119 The ICJ has reiterated this position in Argentina v. Uruguay, (2010) ICJ Reports 14, 20 April 2010, para 89, where an institutionalised cooperation (CARU) established in 1975 by Argentina and Uruguay to manage the river Uruguay was designated as an international organisation.
120 Jan Klabbers, An Introduction, 9.
121 Ibid, 11.
122 Ibid, 12. Klabbers humorously argues that where the collectivity merely expresses the aggregate opinion of its members, it would be useless to give such the legal form of an international organisation as one might as well have appointed a spokesperson.
123 Ibid, 23.
125 Ibid.
access to other subsidies.\textsuperscript{127} In broad terms, IFIs provide loans primarily to
governments, for development projects or as a form of budgetary finance, which
is largely fungible in that the loans free government resources for alternative uses
until they are repaid.\textsuperscript{128} In exchange for this finance, the borrowing governments
commit to implement reforms such as sectoral adjustment and institutional
building programs and to undertake public investment in human and physical
capital.\textsuperscript{129} IFIs thus have important advantages relative to private financial
institutions and bilateral donors in the design and monitoring of reform conditions
in recipient countries.\textsuperscript{130} All of these factors put together provide IFIs with the
ability to not only affect the economic realm of member borrowing states through
the financial assistance, but also the political and social realms through the
attached conditions to such financing.

2.4 Mandates
To understand the functions of IFIs, it is first and foremost important to explore
their specific mandates before analysing their role in implementing and promoting
international labour standards. This means giving texture to the general perception
of finance for economic development, which will provide a clear view of where
human rights fit in as far as the mandates of the IFIs are concerned. The
exploration of the IFIs’ mandates, with particular regard to human rights, is
crucial in identifying the scope of their activities relevant to this aspect, as this
will facilitate the identification of their approach to general human rights, which
is in turn crucial in identifying their approach to the specific case of labour rights.
The IFIs mandates are also critical for identifying the responsibilities of these
institutions in the international arena.

The legal framework within which IFIs must operate with respect to all their
activities is anchored in their respective Articles of Agreement,\textsuperscript{131} which contain
important limitations, although these have been interpreted dynamically\textsuperscript{132}, as will
be seen later in this chapter. The Articles of Agreement serve two legal
purposes\textsuperscript{133}: first, they serve as the international treaties establishing the
organisations (IFIs), describing the rights and obligations of the states that decide
to become members through ratification of the instruments.\textsuperscript{134} Second, they serve
as the constitutions of the IFIs, stating the purposes and principles that shall guide

\textsuperscript{127} Ibid, 4.
\textsuperscript{128} Ibid.
\textsuperscript{129} Ibid.
\textsuperscript{130} Ibid, 5.
\textsuperscript{131} Robert Danino, “The Legal Aspects of the World Bank’s Work on Human Rights: Some Preliminary Thoughts”
in Phillip Alston and Mary Robinson (eds.) \textit{Human Rights and Development: Towards Mutual Reinforcement},
\textsuperscript{132} Ibid.
\textsuperscript{133} Sigrun Skogly, \textit{The Human Rights Obligations of the World Bank and International Monetary Fund} (UK,
\textsuperscript{134} Ibid
the organisations and their bodies in their daily operations. In the second sense, they can be seen to create the framework for the internal law of the organisation, which is supplemented by by-laws and various rules of conduct and directives.

As the Articles of Agreement have numerous clauses, in relevance to this study and in an effort to analyse how these institutions’ mandates have come to touch on labour rights, as well as demonstrate how the mandates can be interpreted, the study will focus on three aspects of the IFIs’ mandates: the purpose, political prohibition clauses and economic considerations clauses. The study focuses on these three aspects because these clauses have been primarily used to explain the relevance of human rights in general in the activities of the IFIs.

2.4.1 All in the Family: ‘Economic Development’

As previously stated, the Articles of Agreement of the IFIs spell out their specific mandates and govern the scope of all the activities that they can engage in. The common denominator in as far as the mandates of the IFIs are concerned is contribution to the economic development of member states by provision of capital or other funds. Put simply, the IFIs provide capital/financial assistance in the form of loans and other financial packages for governments to put towards projects such as infrastructure, budget costs, etc.

Article I of the WB’s Articles sets forth the purposes of the Bank which cover a number of aspects, including assisting in reconstruction and development of member state territories by facilitating the investment of capital for productive purposes including restoration of economies destroyed or disrupted by war; mobilisation of international loans; promotion of long-term balanced growth of international trade thereby assisting in raising productivity, the standard of living and conditions of labour in their territories; and promotion of foreign direct investment. Similarly, the IDA’s Articles state its purposes to promote economic development, to increase productivity and to raise the standard of living in less developed area within its membership. In addition, all decisions and activities undertaken in furtherance of the Bank’s purposes and its development mandate must be consistent with the other provisions in the Articles. See Article 1, Articles Establishing the International Development Agency, 1954.

Ibid.

137 Article I, International Bank for Reconstruction and Development Article of Agreement (As Amended February 16, 1989), 1944. Similarly, the IDA’s Articles state its purposes to promote economic development, to increase productivity and to raise the standard of living in less developed area within its membership. In addition, all decisions and activities undertaken in furtherance of the Bank’s purposes and its development mandate must be consistent with the other provisions in the Articles. See Article 1, Articles Establishing the International Development Agency, 1954.
138 Ibid.
139 Article I, Agreement Establishing the IBRD, 1944.
As for the IMF’s mandate, its Articles of Agreement\(^{140}\) set forth the specific powers granted to the IMF and the purposes for which its powers have been granted.\(^{141}\) In Article I, the purposes of the IMF are to promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration in international monetary problems;\(^{142}\) to facilitate the expansion and balanced growth of international trade and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy;\(^{143}\) to assist in the establishment of a multilateral system of payments in respect of current transactions between members;\(^{144}\) to promote exchange stability;\(^{145}\) and to give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards.\(^{146}\) Notably, the word “development” does not appear in the purposes of the IMF, arguably because the IMF was established as a monetary agency, not as a development agency.\(^{147}\) This does not mean that the IMF is not involved in issues of development. As will be seen later, it has become a forerunner in development strategies and poverty alleviation, which is why the IMF is an important aspect of this study.

The purposes and functions of the IDB as expressed in the Articles are in many respects similar to those of the World Bank. The general purpose of the IDB is to contribute to the acceleration of the process of economic development of the member countries, individually and collectively.\(^ {148}\) This involves functions to promote the investment of public and private capital for development purposes; to utilise its own capital, funds raised by it in the financial markets and other available resources for financing the development of the member countries, giving priority to those loans and guarantees that will contribute most effectively to their economic growth; and to provide technical assistance for the preparation, financing and implementation of development plans and projects, including the study of priorities and the formulation of specific project proposals.\(^ {149}\) Thus, the IDB is mandated to pursue two overarching objectives: reducing poverty and inequality and achieving sustainable growth. Along with these objectives are two strategic goals: addressing the special needs of the less developed and smaller

\(^{140}\) Articles of Agreement of the International Monetary Fund (as amended), 1945.


\(^{142}\) Article I (i), Articles of Agreement.

\(^{143}\) Article I (ii) of IMF Articles of Agreement.

\(^{144}\) Ibid, Article I (iv).

\(^{145}\) Ibid, Article I (iii).

\(^{146}\) Ibid,Article I (v).

\(^{147}\) Marc Williams, International Economic Organisations and the Third World (Hertfordshire: Harvester, 1994), 55.

\(^{148}\) Article I (1) Agreement Establishing the the Inter-American Development Bank, 1959.

\(^{149}\) Ibid, Article I (2).
countries and fostering development through the private sector.\(^{150}\) Similarly, the ADB’s purpose is to foster economic growth in the region of Asia and the Far East and to contribute to the acceleration of the process of economic development of the developing member countries in the region, collectively and individually.\(^{151}\) This is through the utilisation of the resources at its disposal for financing development of the developing member countries in the regions\(^{152}\) as well as assistance with development policies\(^{153}\) and technical assistance.\(^{154}\) The AfD’s purpose is to contribute to the sustainable economic development and social progress of its regional members, individually and jointly.\(^{155}\) This is by using its resources to finance investment projects and programmes relating to economic and social development of its regional members; mobilisation of resources for financing; promotion of investment of public and private capital in projects; and programmes designed to contribute to economic development and technical assistance.\(^{156}\)

Finally, the purpose of the EBRD is to contribute to economic progress and reconstruction by fostering the transition towards open-market oriented economies and to promote private entrepreneurial initiatives in the Central and Eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics.\(^{157}\) Its mission is to support the formerly communist countries in the process of establishing their private sectors. Despite its public sector shareholders, the EBRD invests mainly in private enterprises, usually together with commercial partners. It is also crucial to state that the EBRD is a “two-in-one” Bank, meaning that it does not have separate institutions for private and public lending. The Bank’s core business is to lend money, make equity investments, underwrite equity issues and provide other financial products to its clients for projects in the countries of Central and Eastern Europe. The majority of the Bank’s business is non-sovereign loans, as it may commit no more than 40% of its financing to the public sectors of the borrowing countries\(^{158}\) and the public sector financing is limited to the purpose of developing infrastructure needed for market-oriented economies.\(^{159}\) The EBRD provides project financing for banks, industries and businesses, both new ventures and investments in existing companies, and also works with publicly owned companies to support privatization, restructuring state-owned firms and

\(^{150}\) Ibid, Article 1(2).
\(^{151}\) Article 1, Articles of Agreement Establishing the Asian Development Bank, 1965.
\(^{152}\) Ibid, Article 2(ii).
\(^{153}\) Ibid, Article 2(iii).
\(^{154}\) Ibid, Article 2(iv).
\(^{155}\) Article 1, Agreement Establishing the African Development Bank, 1963.
\(^{156}\) Ibid, Article 2 (a-e).
\(^{157}\) Article 1, Agreement Establishing the European Bank for Reconstruction and Development, 1991.
\(^{158}\) Ibid, Article 11(3).
\(^{159}\) Ibid, Article 11(1).
improvement of municipal services.\textsuperscript{160} The EBRD is the largest single investor in Central and Eastern Europe, and the Commonwealth of Independent States.\textsuperscript{161}

Two common aspects of the IFIs purposes can be deduced. First is the common purpose to contribute to economic development of member states and second is providing capital or resources for the activities connected to such economic development, although the means through which such economic development or economic progress is meant to be achieved may differ. An example is the difference in method between the EBRD which focuses more on the private sector and the other regional IFIs which focus on funding governments for public projects. Nevertheless, the common aim of economic development remains.

\textbf{2.4.2 ‘Economic Considerations Only: No Politics Allowed’}

To gain a view of this relationship between the mandates of the IFIs and human rights, it is crucial to look into the extent to which human rights form a part of this mandate and the approach that IFIs have or have had towards human rights in general. To this effect, the so-called political prohibition clauses are an important source of information because these clauses have been traditionally used to explain the scope of the IFIs mandates in regards to their human rights responsibilities. This is not to equate considerations of human rights with political interference or to view human rights as essentially political and inherently politicised; rather it is to recognise the traditional interpretation of political proscriptions in the constituent instruments of IFIs which have traditionally viewed human rights considerations as among the prohibited political considerations or amounting to political considerations.\textsuperscript{162}

As a starting point, the wording of the political prohibition clause in the World Bank’s Articles states,

\begin{quote}
The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes in Article 1.\textsuperscript{163}
\end{quote}


\textsuperscript{162} Siobhan McInerny-Lankford, “International Development Actors”, 172.

\textsuperscript{163} Article IV, Section 10 of the IBRD Articles of Agreement. The Interpretation bears also on the equivalent provision of the IDA Articles (Article V, Section 6).
The IDB\textsuperscript{164}, the AfDB\textsuperscript{165} and the ADB\textsuperscript{166} have analogous clauses with the same prohibition. As the World Bank has comprehensively defined and interpreted this clause over time - as opposed to the regional IFIs, which have to a greater extent, at least initially, adopted the World Bank’s position - an exhaustive discussion of the World Bank’s interpretations will shed light on the positions the regional IFIs have taken in this regard.

It is crucial to first state that, although there is no definitive statement as to what the drafters of the IBRD Articles intended by the use of the term “political prohibition”\textsuperscript{167}, it is argued that the inclusion of the “political prohibition” relates to the vision of the founders of the Bank for an impartial and neutral institution.\textsuperscript{168} In this regard, the founders wanted the Bank to have diverse membership that would not be affected by the growing political ideological divisions among nations.\textsuperscript{169} In addition to the intentions of the founders, the Bank considered human rights issues in the context of whether or not it should work with regimes which had a bad human rights record or were known to commit human rights violations, usually civil and political rights violations. In these instances, the Bank

\textsuperscript{164} “The Bank, its officers and employees shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purpose and functions stated in Article 1.” See Article VIII, section 5(f) IDB Articles, 19.

\textsuperscript{165} “The Bank, its President, Vice-Presidents, officers and staff shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member concerned. Only economic considerations shall be relevant to their decisions. Such considerations shall be weighed impartially in order to achieve and carry out the functions of the Bank.” See Article 38, AfDB Articles, 1964.

\textsuperscript{166} “The Bank, its President, Vice-President(s), officers and staff shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member concerned. Only economic considerations shall be relevant to their decisions. Such considerations shall be weighed impartially in order to achieve and carry out the purpose and functions of the Bank.” See Article 38, section 2, ADB Articles, 1966.


\textsuperscript{169} “If the World Bank and the IMF are to win the confidence of the suspicious world, it must not only be, but appear that their approach to every problem is absolutely objective and ecumenical, without prejudice or favour.”

used its Articles to fend off criticism of involvement with such regimes by classifying human rights concerns as “political”.

Turning to the interpretation of the political prohibition, it is important to highlight that this clause has been interpreted inconsistently over time. The prohibition itself encompasses two separate, but interrelated, requirements. The first part provides that the bank and its officers must not interfere in the “political affairs” of a member country and the second part provides that only “economic considerations” shall be relevant to the decisions of the Bank and its officers. It can be seen that the Articles presume a clear delineation between what is ‘economic’ and within power and what is ‘political’ and beyond power. The terms ‘economic considerations’ (and conversely, ‘political’ or ‘non-economic influences or considerations’) are not defined in any of the Articles. In the absence of any specific guidance, the Bank itself is left to decide the scope of the term ‘economic considerations’ and hence the width of its mandate and conversely, which matters should be excluded as ‘political’. In other words, the Bank itself interprets its own Articles to determine what issues and activities fall within their permissible scope of operations as well as those that are outside their jurisdiction.

In interpreting and distinguishing economic and political factors, the General Counsel of the Bank has based its opinions on the impact the particular factor has on considerations of efficiency and economy. On this basis, the Bank has defined an economic factor, within the meaning of the Bank’s Articles of Agreement, as any factor that has a direct and obvious economic effect relevant to that Bank’s work. The Bank uses a three-part test to determine if the economic effect of a particular factor in a Bank operation is direct and obvious. The economic effect must be, first, clear and unequivocal, second, preeminent and third, when the issue is associated with political actions or flows from political

172 Article IV section 10, Articles of Agreement Establishing the IBRD and Article V section 6, Articles of Agreement Establishing the IDA.
173 Article V section 5(b), IBRD Articles of Agreement; Article V section 1(g), IDA Articles of Agreement.
174 Mac Darrow, Between Light and Shadow 150.
175 Ibid.
177 Ibrahim Shihata, “Issues of ‘Governance’ in Borrowing Members: The Extent of Their Relevance under the Bank’s Articles of Agreement” Legal Memorandum of the General Counsel, 21st December 1990 (hereinafter “Legal Opinion on Governance”); See also Ibrahim Shihata, “Prohibition of Political Activities under the IBRD Articles of Agreement and Its Relevance to the Work of the Executive Directors” Legal Opinion of the General Counsel, 21st December 1987.
events, the economic effect “must be of such impact and relevance as to make it a Bank concern.”179

For interpreting “political” factors, the General Counsel of the Bank has suggested that the term political relates to “the art and practice of running a country or governing”.180 Political factors include those factors that would require the Bank to take a side in the political system of its borrower states, such as favoring one political party or faction over another, as well as considerations that might result in Bank decisions being influenced by the principles, opinions or beliefs of the people or parties holding power in the borrowing member state.181 Excluded from the term are “such typical economic and technical issues as the management of money or the finances or more generally the efficient management of a country’s resources”.182

Cissé draws a distinction between the non-political nature of the Bank’s mandate as opposed to an apolitical nature, arguing that the former is defined as “not involved in politics” and the latter as “unconcerned with or detached with politics”.183 Hence the Bank’s mandate has a nonpolitical nature (not apolitical), which can be explained as a characteristic of the functional approach to international organisations184 reflected in the technical and focused mandate of other international organisations that came to life before and after World War II, such as the ILO, UNESCO and FAO.185 As for the Bank, the functionalist approach reflected deeper views about development and prevailing economic thought where development was seen primarily as an economic endeavor, aimed at increasing gross domestic product and productivity of economies which in turn could be achieved through technical, non-political solutions. This approach has diminished as politicisation became apparent in international organisations.186

The historical exclusion of human rights from the Bank’s activities stemmed from a view of development that was defined primarily in terms of economic growth.187 From this point of view, human rights were seen not to fall within the development mandate of the Bank188 as they were deemed to be either non-economic considerations (thus having no bearing on the Bank’s work) or political, or

180 Ibid.
181 Ibid.
183 Ibid.
185 Hassane Cissé, “Should the Political Prohibition”, 60.
186 Ibid, 61.
188 Ibid.
The Bank’s views concerning the breadth of its mandate during this time were aired in the 1960s during the course of the Portuguese and South African loan controversies. In November 1965 the United Nations General Assembly (UNGA) adopted two resolutions calling upon the ‘specialised agencies of the UN to take necessary steps to deny technical and economic assistance’ to the governments of South Africa and Portugal because their respective apartheid and colonial policies were in violation of the UN Charter. The UNGA’s requests were renewed in 1967, at which time the World Bank was in the process of evaluating loan proposals for both countries. While the proposals were still pending, the then Bank’s President circulated the UN Resolutions to the Bank’s Executive Directors with the following statement,

The Bank’s Articles provide that the Bank and its officers shall not interfere in the political affairs of any member and that they shall not be influenced in their decisions by the political character of the member or members concerned. Only economic considerations are to be relevant to their decisions. Therefore, I propose to continue to treat requests for loans from these countries in the manner as applications from other countries…I am aware that the situation in Africa could affect the economic development, foreign trade and finances of Portugal and South Africa. It will therefore be necessary in reviewing the economic condition and prospects of these countries to take account of the situation as it develops.

When invited by the General Assembly to explain why the Bank could not comply with the Resolutions, the Bank’s General Counsel argued that the ‘political prohibition’ in the Bank’s Articles had two purposes. First, to prevent the possibility of using Bank financing as leverage against any Bank member in order to advance the political aims of any other member or group of members and secondly, to assure the private capital markets that economic rather than political considerations would guide the Bank’s decisions.

Although the language of the political prohibition clause appears to be absolute and does not permit any exceptions, the Bank had admitted that it “cannot ignore conditions of obvious internal political instability or uncertainty which may directly affect the economic prospects of the borrower and to this extent, a country’s political situation is taken into account.” For example, the political stability of the government of a member requesting a loan and the security of its territories could affect the country’s development prospects, including its

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189 Ibid.
191 Statement of IBRD President Woods to Executive Directors on 29 March 1966, in statement of IBRD General Counsel to UN Fourth Committee, 21 UN GAOR, c.4 (1645th Meeting), 317-318.
prospective creditworthiness and the ability of the Bank to supervise project implementation.\textsuperscript{195}

Again, in clarifying the scope of the political prohibition clause and its limits, the former General Counsel argued that the provision does not bar the Bank from financing human rights-related projects, nor does it suggest that the Bank should enjoy impunity when it becomes involved in human rights violations. The issue addressed by Article IV is a human rights conditionality \textit{strictu sensu}: the Bank should not refuse assistance, because of prevailing violations of human rights in the lending country.\textsuperscript{196} In reiterating that the prohibition is not absolute, Shihata states,

\begin{quote}
Political situations, which have effects on the country’s economy or on the feasibility of project implementation or monitoring…should…be taken into account. Human rights may, under this opinion, become a relevant issue if their violation becomes so pervasive as to raise concerns relating to the matters mentioned above.\textsuperscript{197}
\end{quote}

The Bank further argues that both of these aims will only be achieved in an appropriate legal system where law could “make an important contribution to an equitable and just society and thus to prospects for social development and poverty alleviation”.\textsuperscript{198} Here, the Bank considers issues that relate to the degree and quality of the borrower state’s intervention in its economy as falling within the Bank’s economic mandate because they have a direct effect on investment prospects in the country.\textsuperscript{199} This led the Bank to move towards influencing other aspects such as judicial reforms\textsuperscript{200} and reforms on aspects of the rule of law\textsuperscript{201} in member borrowing states.

Additionally, four political considerations have been identified as falling within the scope of the Bank’s mandate: binding decisions of the U.N Security Council, international sanctions affecting the economic prospects of a potential borrowing country, an escalation of armed conflict that affects the viability of Bank projects and the safety of Bank personnel, and where it can be unequivocally shown that political phenomena have demonstrably adverse economic consequences.\textsuperscript{202}

\textsuperscript{195} Ibrahim Shihata, \textit{The World Bank Legal Papers}, 241.
\textsuperscript{197} Ibid.
\textsuperscript{200} See for example IBRD, Loan Agreement (Peru), Loan No. 4256-PE, 17th December 1997; IDA, Development Credit Agreement (Sri Lanka) Credit No. 3384, 22 June 2000.
In general, the WB’s overall practice has shown incremental mandate expansion and evolution, and has in its operations engaged in a number of missions which encompass broad areas of human and social development, education, governance (criminal law reforms and anti-corruption), issues of inclusion, participation, accountability and equity, labour rights, rights of women, rights of indigenous people and environmental protection, many of which relate directly to the realisation of human rights, by being either pre-conditions for such realisations or the subjects of rights themselves. Major policy developments and the involvement of the Bank in these areas have often been followed by “economic effects” justifications. At this point, the Bank’s emphasis has shifted dramatically from bricks and mortar infrastructure to the large-scale inclusion of human development, institutional reform and social development, and thus the Bank’s focus has evolved from “hard lending” to “soft lending”. As a result of this shift, the Bank has now come to grips with issues of policy. Now, financing (money) has become a vehicle for policy advice, displacing the old notion that foreign capital alone would spur greater productive investment and, over time, development.

The interpretative strategy is indeed interesting. Here, the Bank gives the term “political” a fluctuating meaning and has taken advantage of the Articles’ lack of precision to expand the scope of the mandate and to define it to include certain matters that could obviously be seen as “political” Though rejecting an intrusive political role for the Bank, it is difficult to see how involvement in such subjects is not political interference in the affairs of a state.

An important feature to further explain the expansion of mandates of the WB is that the understanding of development by the Bank has also evolved over time, which has in turn relaxed the strict interpretation of the political prohibition clause. The adoption of the Comprehensive Development Framework in 1999 portrays this. The World Bank took a major turn with the adoption of the Comprehensive Development Framework (CDF), which is a holistic, long-term vision of development which emphasises the interdependence of all elements of development - structural, human, governance, environmental, economic and

203 See Operational Directive 4.20 (September 1991), para 6, which states that the Bank’s broad objective towards indigenous people, as for all people in its member countries, is to ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness. More specifically, the objective at the centre of this directive is to ensure that indigenous peoples do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits.

204 David Freestone, The World Bank and Sustainable Development, 34.

205 Mac Darrow, Between Light and Shadow, 122.


financial, and physical - making development all-encompassing. The essence of the framework in demonstrating a shift in development conceptions is the principles it makes central to development (and poverty reduction). These principles include that development goals should be determined by individual member states, and not by the World Bank; development should be holistic in nature, so that the focus is not maintained only on economic variables, but also on social and political considerations; the development process should involve all actors affected by WB lending practices; and development policies should be guided by long-term strategies.

A notable example of the change in the concept of development in the World Bank occurred when the then General Counsel of the Bank issued a legal opinion where a vision of the relationship between human rights and the mandate of the WB was set out. It was concluded that the Bank,

…can and should take into account human rights in the processes it uses and the instruments that it relies on to make economic decisions. Moreover, because of the way that international law has evolved with respect to concepts of sovereignty and interference, the range of issues that are considered to be of global concern, the Bank would not, in doing so, fall foul of the political prohibition in the Articles.

Interestingly, Danino, after emphasising the importance of embracing the centrality of human rights in the Bank’s work, argues that the legal limits exist and must be respected. These limits are interpreted dynamically, in a contemporary context, yet in a way that is consistent with the purposes of the Bank.

In 2005, the Bank’s senior management asked the then General Counsel for guidance on whether more explicit work on human rights would be in compliance with the Articles of Agreement. The review resulted in a Note which concluded that “the Articles of Agreement permit, and in some cases require, the Bank to recognise the human rights dimensions of its development policies and activities, since it is now evident that human rights are an intrinsic part of the Bank’s mission”. The Note indicates a clear evolution from the earlier restrictive interpretation of the Bank’s explicit consideration of human rights, and is rather

212 Ibid.
“permissive”, allowing but not mandating action on the part of the Bank in relation to human rights.215 In addition, the IDA’s Deputies during the twelfth IDA replenishment negotiations in 1999, recognised that democracy and respect for human rights have helped to create appropriate conditions for development.216

The Bank’s expanding and evolving mandate is further embodied in the Bank’s role with regard to the Millennium Development Goals (MDG)217, where the Bank joined with other global partners and the world community in pledging to realise the MDGs’ major targets. These targets included eradicating extreme hunger, achieving universal education, promoting gender equality and empowering women, reducing child mortality, improving maternal health, combatting HIV/AIDS, malaria and other deadly diseases, ensuring environmental stability and developing a global partnership for development.218 Both the WB and IMF were part of the Inter-Agency and Expert Group on MDG Indicators, which comprised representatives of international organisations whose activities include the preparation of series of statistical indicators that were identified as appropriate for monitoring progress towards the MDGs.219

As a final indication of the Bank’s evolved mandate and its relation to human rights, the Bank’s own policy statement underscores that internal developments have shown “growing recognition of the need for the Bank to address human rights in a more explicit fashion” as “there have been significant advances in the Bank’s thinking on this issue”.220 The Bank further states that, there are wide areas of overlap between substantive areas covered by core human rights treaties and those areas in which the Bank operates.221 Although human rights have not been instituted in the World Bank’s development mandate despite these developments, it is clear that human rights have become part of the Bank’s mandate over the

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215 Ibid.
216 In the 13th replenishment, under the heading ‘social protection’, the Executive Directors emphasised the ‘contributions to poverty reduction that could be made by eliminating harmful child labour, making labour markets more equitable and inclusive and implementing legal reforms to protect poor people’s right to assets’ (e.g. Women property rights), Report from the Executive Directors of the IDA to the Board of Governors, 25 July 2002, 31.
217 Robert Danino, “The Legal Aspects of the World Bank’s Work on Human Rights” 41:1 The International Lawyer (2007), 24. The MDGs are a set of targets embedded in the UN Millennium Declaration, which committed nations to a new global partnership to reduce extreme poverty, and set out a series of eight time-bound targets - with a deadline of 2015 - known as the Millennium Development Goals. These have been replaced by the New 2030 Agenda for Sustainable Development (UN.Doc. A/RES/70/1, 25th September 2015).
221 Ibid.
years as shown in its subsequent practice and the evolving notion of development.\textsuperscript{222} The evolving notion of what constitutes development together with the Bank’s practice of integrating non-economic issues into its work suggest that there are no major legal obstacles to adopting a rights-based approach to development.\textsuperscript{223} The Bank has increasingly embraced into its activities issues that have a human rights dimension, as exemplified above.

In contrast, the IMF’s Articles do not contain a provision analogous to the political prohibition in Article IV of the World Bank Articles. However, disclaimers to human rights by the Fund have usually drawn from more foundational assertions of mandate specificity and technical specialisation.\textsuperscript{224} The legal argumentation focuses principally on “implied powers”\textsuperscript{225} and institutional effectiveness. Here, the concept of political prohibition has been established in the IMF by constructive interpretation of its mandates and other internal procedures of the Fund.\textsuperscript{226}

The IMF’s Articles of Agreement in stipulating the obligations regarding exchange arrangements in the IMF states that the IMF is to respect the domestic social and political policies of members and to pay due regard to the circumstances of members when applying its principles.\textsuperscript{227} This has been interpreted to mean a prohibition against considering political factors in its operations.\textsuperscript{228} Swedberg, however, analyses the internal political pressures in the Fund’s governance bodies as well as external political factors, and finds various ways in which the IMF has interfered in political issues thus discarding the viability of the Fund’s (as well as the World Bank’s) economic neutrality.\textsuperscript{229}

As in the case of the World Bank, the roles originally envisaged for the IMF have surely changed, as will be discussed in subsequent chapters. The IMF no longer oversees an adjustable peg exchange rate regime through which it effectively sought to coordinate macroeconomic policy globally, nor does it attempt to


\textsuperscript{224} Mac Darrow, Between Light and Shadow, 170.

\textsuperscript{225} Ibid. ‘Interpretation can be described loosely as the search for meaning of the text while implied powers can be described as the discovery of authority not expressed in the text.’ For further analysis of these concepts see Joseph Gold, Interpretation: The IMF and International Law [The Hague: Kluwer, 1996], 45.


\textsuperscript{227} Article IV(3)(b), IMF Articles of Agreement

\textsuperscript{228} Joseph Gold, Political Considerations are Prohibited by Articles of Agreement When the Fund Considers Requests for Use of Resources, IMF Survey, 23rd May 1983, 146; Daniel Bradlow, “International Law and Operations”, 15

\textsuperscript{229} For example cutoffs of lending to socialist and/or nationalist countries, loans in violation of UN resolutions, etc. See Richard Swedberg, "The Doctrine of Economic Neutrality of the IMF and World Bank" Journal of Peace Research 23: 4 (1986), 377-387.
control the quantity of international reserves. Instead, it has taken on a new role clearing up the debris from financial crises involving various regions and countries - a role for which it was not originally designed.

While the primary focus of the IMF was originally and is still on providing financial assistance to countries with temporary balance of payments problems, it has gradually extended its role into economic development and poverty reduction of highly indebted poor countries (HIPCs), which has conventionally been a domain of the WB lending. To exemplify this, there has been an increase in poverty reduction programs through the Poverty Reduction and Growth Facility (PRGF) instead of through the stand-by agreements traditionally used by the IMF. The Guidelines on Conditionality of the IMF demonstrate clearly its change of stance on political issues. The guidelines state that, in helping members to devise economic and financial programs, The Fund will pay due regard to the domestic, social and political objectives, and the economic priorities and circumstances of members, including the causes of their balance of payments problems and their administrative capacity to implement reforms.

As for the regional IFIs, there is no formal interpretation of the political prohibition clause and the relevancy of human rights to their mandates. However, traditional approaches similar to that of the World Bank’s approach can be noted. An example is the ADB’s position similar to that of the WB’s controversial loans to South Africa. In the midst of serious human rights violations by the military junta in Myanmar, which raised international concerns, the ADB did provide financial assistance to the country. However, in 1998, the Bank suspended loans to Myanmar due to the country’s lack of solvency where Myanmar stopped repaying the loans. Hence, the loans were suspended on grounds of “economic considerations” and not human rights violations.

Similarly, the AfDB has viewed human rights considerations as among the prohibited political considerations or as amounting to political interference,

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231 Ibid.
233 A stand-by arrangement is a financing programme in the IMF which makes short-term assistance available to countries experiencing temporary or cyclical balance-of-payments deficits. It allows the IMF to respond quickly to countries’ external financing needs and to support policies designed to help them emerge from crisis and restore sustainable growth. See IMF, “IMF Stand-By Arrangement (SBA)” available at http://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/20/33/Stand-By-Arrangement (accessed 11 December 2017).
thus placing human rights beyond the AfDB’s mandate.\textsuperscript{236} The intention of the founders provides a glimpse of this intended approach, where it was seen as shielding the Bank from interference from its members and vice versa. The documents state,

> Freedom from political influence and the emphasis placed on the maintenance of sound banking principles in all the activities of the Bank - the third leading idea in the case for its establishment - are recognised as indispensable if the Bank is to succeed. They are also essential to mobilising additional non-African resources for its purposes.\textsuperscript{237}

The intention was therefore to ensure technical competence and neutrality in its dealing with member countries.\textsuperscript{238}

Similar to the World Bank, the IDB, AfDB and ADB have expanded the reach of their mandate, despite the political prohibition, to include not only non-economic elements, but also political elements in their activities. The IDB’s Operational Policy on Indigenous People includes several references to indigenous people’s rights, which it understands as “the rights of indigenous peoples and individuals, whether originating in the indigenous legislation issued by states, in other relevant national legislation, in applicable international norms in force for each country, or in the indigenous juridical systems of each people, hereinafter collectively referred to as the ‘applicable legal norms’.\textsuperscript{239} The policy further enumerates an expansive list of international and regional human rights instruments, including those under preparation, and makes reference also to the jurisprudence of international human rights bodies.\textsuperscript{240} It also makes reference to safeguarding the fundamental rights of indigenous people established in international law.\textsuperscript{241} This shows not only a deviation from the traditional interpretation of the political prohibition in the Bank, but also demonstrates expansion of activities and mandates.


\textsuperscript{240} Ibid, 5. The Policy makes specific reference to the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights(ICESCR), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child (CRC), The American Convention on Human Rights (ACHR) etc.

\textsuperscript{241} Ibid.
Following suit is the AfDB whose policy framework, though not recognising human rights in terms of human rights treaty obligations, does address human-rights-related concerns, with explicit mention of human rights. The Bank’s policy on the environment “acknowledges the significant progress made in the implementation of Agenda 21 adopted at the 1992 Rio Earth Summit; the ratification of a large number of environmental conventions, agreements and protocol; and the growing use of MDGs as a measure of development.” It is well worth reiterating the findings of the African Development Bank Advisory Council that,

While economic growth is necessarily dependent on strictly economic factors, … these factors by themselves are not sufficient… An effective public administration, a functioning legal framework, efficient regulatory structures, and transparent systems for both financial and legal accountability - in brief, those essential attributes of what is now referred to as good governance - have to be in place.

In 1999, in an appendix on governance to the amended AfDB charter, democratic governance was cited as the desired goal for all member states. Today, a number of the Bank’s policy clauses address human rights-related concerns and some make reference to human rights instruments or mention human rights explicitly. Of interest, for example, is the Bank’s policy on labour rights which makes direct reference to human rights instruments in regards to labour rights.

This is to say that, though there is little literature on the Bank’s interpretation of the political prohibition, it is obvious from the content of its policies that it has taken an approach similar to that of the WB in expanding its mandate to include consideration of issues of a political dimension.

The ADB’s stance on the political prohibition is revealed in an operations manual document regarding governance activities where it states that “while only economic considerations shall be relevant to decision making in the Bank, this


does not prohibit the Bank from taking into account the demonstrable and direct economic effects from noneconomic factors as part of “economic considerations” on which it must base its decisions”. The document provides that the “ADB charter gives primacy to economic considerations in the achievement and carrying out of the Bank’s purposes and functions.” Thus, by the Bank’s own admission, the term "economic considerations" has been "widely interpreted" and ADB programs extend to any area that is deemed to have "economic effects." This is to say that giving primacy to “economic considerations” does not exclude the ADB from engaging in social programming “because the Bank finances such programs on the basis of the economic effects of such non-economic social factors.”

An interesting example is the ADB’s policy on indigenous people. This policy makes references to a number of international human rights instruments, including the (UDHR), (ICCPR), (ICESCR), the ILO Convention on the Protection of and Integration of Indigenous and other Tribal and Sub-tribal Populations in Independent Countries (No. 107), etc.

Accordingly, the ADB’s governance agenda has also extended into such diverse areas as the environment, education, health, judicial systems and women’s empowerment. The ADB’s relabeling of an earlier draft document entitled “Good Governance” as “Governance: Sound Development Management” is in itself indicative of the sustainable-development-driven expansion of criteria “relevant” to loan activities. Many of the Bank’s strategies reflect human rights principles, even if they do not employ explicit human rights language. A good example is the Social Protection Strategy which lists a number of labour market improvements to enhance social protection and states that, “….all Asian and Pacific developing member countries…” (with a few exceptions) “…by virtue of being members of the International Labour Organisation (ILO), are held to respect, promote and realise the fundamental Core Labour Standards.” The Strategy does to some extent acknowledge the importance of the rights for social protection and the burden of respecting, promoting and realising the rights in the member states. Another relevant policy document is the Safeguard Policy Statement which

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250 Ibid.
251 Ibid.
includes references to human rights in connection with indigenous peoples. The policy statement also includes “production or activities involving harmful or exploitative forms of forced labour or child labour” among the prohibited investment activities that do not qualify for ADB financing, thereby relying explicitly on the ILO convention on minimum age in respect to child labour.

As shown in the discussion above, the second generation regional IFIs initially took similar paths to that of the World Bank in the interpretation of the political prohibition embedded in their respective Articles. However, they later expanded the interpretation to include aspects of human rights.

A final IFI is the EBRD, which is the “outlier” of the group, as far as the political prohibition is concerned. The EBRD charter does not contain a ‘political prohibition’ clause. To begin with, the preamble to the Bank’s Articles of Agreement sets forth important underpinnings for the Bank’s existence, including a commitment by the contracting parties to the “fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economies.” Although the preamble does not create legally binding obligations, it does signal the overall values of the Agreement. This makes the EBRD the first multilateral institution to have the express purpose of fostering human rights, democracy and the rule of law, which also implies that the Bank will only finance projects in a country which is committed to democracy and human rights. The Bank also requires the integration of principles of environmentally sound development in the full range of the Bank’s activities. These principles expressly stipulate political, economic and environmental (social) objectives. Three things can be deduced from the purpose of the Bank as stated. First, the Bank has the twin mandates of economic development and democracy. Second, the Bank is interested in strengthening the private sector, which is confirmed by the fact that most of the Bank’s projects are in the private sector. Third, the Bank has an obvious political mandate as reflected in the purpose. The founding members of the Bank provided no meaningful detail on how the Bank is supposed to apply the political criteria set forth in its charter. While these details were not filled in, it was however clear that consensus about the EBRD’s political mandate went beyond the World Bank’s notion of ‘good governance’ toward a

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256 Ibid, 76.
259 See EBRD, Preamble to the Agreement Establishing the EBRD, 1990.
261 EBRD, Explanatory Notes, Article 2(4).
262 Morton Halperin, Joe Siegle and Michael Weinstein, The Democracy Advantage, 199.
263 Ibid.
more elaborate set of political attributes related closely to the European Community’s standards.265 This is demonstrated by the fact that the Bank looks to and refers to such European institutions and documents as the Council of Europe, the European Convention on Human Rights ECHR), The Declaration of Principles of the Final Act of the Helsinki Agreement (cited in the preamble of the Bank), The Document of the Copenhagen Meeting on the Conference of the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE)266, the CSCE Charter of Paris for a New Europe267 and the European Commission on Human Rights.268

In as far as the political prohibition is concerned, the EBRD stands out. As a third generation Bank, created in a vastly different era than the other IFIs, the Bank explicitly endorses the complementary goals of economic growth and democratisation.269 Thus, as part of its assistance, the Bank pays great attention to the state of the rule of law in a country.270 To exemplify, the Bank refused to allow Yugoslavia to become a member until 2001 - after it had begun to democratise and the EBRD was satisfied that basic human rights were being respected.271 In a similar stance, the President of the EBRD wrote to the President of Belarus, stating that the EBRD would consider suspending the country's access to funds unless presidential elections that autumn were conducted fairly.272 Another unique characteristic of the EBRD is that, unlike the other IFIs, it does not lend to governments to support macroeconomic policies, rather it lends solely for private projects.273

The Bank’s political mandate is a radical departure, a never-before-used approach in multilateral development financing institutions,274 making the Bank unique among the IFIs. These provisions are designed to ensure that the Bank's resources are used only in countries making clear progress toward open, market-oriented economies and pluralist and democratic political systems. The Bank, unlike the other IFIs which deal exclusively with finance ministers of member states, also

266 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990.
267 Charter of Paris for a New Europe, 21st November 1990.
269 Morton Halperin, The Democracy Advantage, 199.
270 Ibid, 200.
maintains ties with foreign ministers and with international organisations like the Council of Europe and NATO, reflecting the importance it attaches to political development.275 Finally, unlike the other IFIs, the Bank has a high level of transparency where it reports the results of all its meetings, including those with the recipient governments, and those of its staff with civic groups, local governments, labour unions and other constituencies with a stake in development plans.276

2.4.3 Expansion of Mandates in Financing: Project-Lending to Policy-Lending

In carrying out the function/purpose of enhancing development by way of providing financial assistance, the IFIs have various financial facilities, also known as financing instruments. The expansion of mandates of the IFIs is not limited to the extent to which human rights fall within or outside the ambit of the activities of the IFIs. This expansion is reflected most vividly in the financing instruments of the IFIs. To begin with, it is important to highlight, at least briefly, the background from which policy-based lending emerged. As mentioned earlier, the post-WWII era marked the advent of the IFIs. Various issues in the international arena such as the reconstruction of war-struck Europe, the subsequent decolonisation of Africa and the emergence of economic crises are factors which led to the creation of these institutions. The major focus of the institutions was the economic development of member states. As it was widely accepted that infrastructure is a key factor in development, economic growth and poverty reduction277, in their initial decades of operation, the IFIs primarily financed public sector infrastructure projects through the provision of sovereign loans to members.278 This type of lending is called project-lending. This has remained a key aspect of IFI activity, although the priority placed on infrastructure has varied considerably over recent decades. Thus, for many years, the World Bank concentrated primarily on this traditional mode of lending, that is, project lending, remaining relatively uncritical of borrowers’ social and political policies.279

Project lending was characterised by funding for projects and advising nations on how to implement economic policy in order to achieve economic growth, greater output and efficiency, where such advice was provided as ‘policy dialogue’.280 This is not to say that project-lending was completely free of conditions. Although

276 Ibid.
in project-lending the World Bank did not formally make loans with the specific purpose of policy reform - with attached conditions - it did condition the decision to lend and the volume of lending to a country on a conducive policy environment.\textsuperscript{281} As a result of weaknesses identified with project lending,\textsuperscript{282} policy-based lending (also known as structural adjustment lending) was thought to be a much more efficient method of achieving policy changes in borrowing countries than policy dialogue\textsuperscript{283}, leading IFIs to focus on policy-based lending. Thus, project lending is a form of financing where financial assistance is provided by the IFI for a particular project\textsuperscript{284}, e.g. large infrastructure projects, power plants, dams, post facilities etc. On the other hand, policy-based lending provides governments with financing in exchange for agreement by the borrower government, that it will undertake particular policy reforms.\textsuperscript{285} The policy-based loans can also provide budgetary support. The main characteristic of policy-based lending that differentiates it from project lending is that proceeds are disbursed on the basis of compliance with agreed-upon conditionality (policy and institutional reforms), rather than for specific expenditures.\textsuperscript{286} Although the World Bank’s Articles of Agreement provides for the provision of project finance as the Bank’s primary policy-based lending activity, structural adjustment lending was actually introduced in 1980 under “special circumstances” allowed in Article III\textsuperscript{287} and was

\begin{footnotesize}
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\item Devesh Kapur, “Conditionality and its Alternatives” in Ariel Buira (ed.) The IMF and the World Bank at Sixty (London: Anthem Press, 2005), 34.
\item For example, in 1980, the Independent Commission on International Development Issues Report (The Commission was chaired by Willy Brandt, thus the report is known as the “Brandt Report”), which was a comprehensive and solution oriented analysis of critical global issues, highlighted the problems associated with development financing at the time. A crucial aspect of the report concerns the dimensions of development, where it was stated that economic development requires a transformation in the international economic system, emphasising the importance of human dignity, security, justice, and equity as equally valid measures of development as financial betterment, thus highlighting the importance of adjustment programmes. Thus, recognizing the structural reasons for poverty, the report prompted a move away from project support to balance-of-payment support and to attaching policy reforms to the transfer of funds, creating the structural adjustment lending era of the World Bank and IMF. See The Brandt Report available at http://unesdoc.unesco.org/llfs/cgi-bin/unlss.pl?catno=39496&set=005A7819F1_3_42&pp=18&line=1&ll=1 (Accessed 22 January 2018); See also Leonie Guder, The Administration of Debt Relief by the International Financial Institutions: A Legal Reconstruction of the HIPC Initiative (Heidelberg: Springer, 2009), 4.
\item This was initially opined by the World Bank’s head of the operational arm, Ernest Stern, and later confirmed by the then World Bank President, Robert McNamara, who stated that the way to achieve economic development was to put forward assistance to countries who would be willing to align their economic policies with those suggested by the World Bank, and in doing so, create the conditions that would be conducive to greater and faster development. See United Nations, Proceedings of the United Nations Conference on Trade and Development, Fifth Session, Manila, 7th May-3rd June 1979, New York, 1981. http://unctad.org/en/Docs/td269vol1_en.pdf . See Giles Mohan, Structural Adjustment, 27.
\item Ibid.
\item IDB, Technical Note on Design and Use of Policy-Based Loans at the Inter-American Development Bank (New York: IDB, 2016), ii.
\item Article III, Section 4 (vii), IBRD Articles of Agreement states that, “Loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development.”
\end{enumerate}
\end{footnotesize}
originally conceived as a way of financing short-term balance of payments support - and to improve the policy environment for traditional project lending.\textsuperscript{288} In response to changing borrower need and broader reform agendas, new approaches to adjustment lending evolved in the subsequent decades, giving way in the 1990s to a more developmental perspective, with growing attention to reducing poverty, building institutions, and implementing complex social and structural reforms.\textsuperscript{289} Hence, IFIs had turned their focus more towards social-oriented lending as well as programmatic or policy operations and less towards physical infrastructure due to the growing belief among development economists that project lending by itself was not successfully promoting development.\textsuperscript{290} The recognition of the importance of genuine macroeconomic policy dialogue over the traditional project and sector lending led the World Bank to change its lending policy and introduce instruments such as Structural Adjustment Loans (SAL).\textsuperscript{291} These were characterised by the concentration of conditionality on central policy issues such as trade regimes, price and incentives policy, public investment and public sector policies, institutional reform etc.\textsuperscript{292} Thus, this form of lending has been used by the Bank to stimulate policy reforms, among other things.

The IMF also followed suit. It had substantially “stuck to its Article” until the 1970s when its role changed dramatically when the Bretton Woods system of exchange rates collapsed.\textsuperscript{293} It is important to note that during this period, the membership of the organisation had tripled as decolonisation had brought a host of new independent states into the IMF.\textsuperscript{294} Since the 1970s, the activities of the IMF have changed significantly. During its early years, the IMF had prioritised balance of payments issues in industrialised countries. Later, it shifted its attention to developing countries and made economic growth,\textsuperscript{295} poverty reduction and employment creation key objectives of its policies,\textsuperscript{296} and thus increasing policy lending, as the World Bank had done. Although it had always been making adjustment loans in the form of stand-by arrangements, the IMF expanded the

\textsuperscript{289} Ibid.
\textsuperscript{292} Ibid.
\textsuperscript{295} Ibid.
\textsuperscript{296} Not all of the above objectives are specifically set out in the IMF's articles of agreement or primary legal framework.
number and maturity\textsuperscript{297} of adjustment loans.\textsuperscript{298} The assistance was dependent on the government of the country agreeing to undertake medium-term structural adjustment programs prescribed by the Fund, with the intention of fostering economic growth.\textsuperscript{299}

An interesting example of an early structural adjustment package from 1981 is that of Ivory Coast. The agreement stated,

The loan would be in support of the Government’s programme of structural adjustment. The reforms envisaged by the programme are designed to improve the level of public savings and the efficiency in the use of public resources; restructure the agricultural planning system and associated development institutions so that an expanded, well-designed investment programme yielding high returns can be mounted in the sector; reflect the costs of providing public services to the sector; assure that rational prices and world market conditions would guide decisions to invest and produce; restructure public enterprise, management, financing and accountability to ensure efficient market oriented operations; and restructure incentives, to promote efficient export-oriented industrial investments. The loan would finance imports of raw materials, intermediate goods, capital equipment and spare parts. Counterpart funds would be used for development-related expenditures in the central government budget. Government has requested Bank technical assistance to support the reforms envisaged. A separate loan for this purpose is being proposed.\textsuperscript{300}

This reflects the features of conditionality in adjustment lending that persisted for some time in the World Bank and IMF: fiscal adjustment, trade liberalization, restructure/privatization of public enterprise, investment, moves towards free markets and away from state intervention.\textsuperscript{301}

In short, structural adjustment programmes (SAP) policies aim to achieve long-term or accelerated economic growth in poor countries by re-structuring the economy and reducing government intervention. These policies have included currency devaluation, managed balance of payments, reduction of government services through public spending cuts/budget deficit cuts, reducing tax on high earners, reducing inflation, wage suppression, privatization, trade liberalisation,

\textsuperscript{297} Maturity is the period in which an IFI loan is repayed. It is the sum of the grace period (period from date of signature of loan or issue of financial instrument to first repayment of principal) and the repayment period (period from first to last payment of principal). For further details, refer to [http://databank.worldbank.org/data/Views/Metadata/MetadataWidget.aspx?Name=Average%20maturity%20on%20external%20debt%20commitments%20(official%20years)&Code=DT.MAT.OFFT&Type=S&ReqType=Metadata&ddSelectedValue=DDN&ReportID=53645&ReportType=Table](accessed 12 November 2017).


\textsuperscript{299} Giles Mohan et al., Structural Adjustment, 27.


\textsuperscript{301} William Easterly, "What Did Structural Adjustment Adjust?", 3.
cuts in social spending and governance issues (such as judicial reforms, adequate budgetary provisions for administrative bodies like electoral, anti-corruption and human rights institutions).

As for labour rights, the issue of workers’ rights and the degree to which this issue should be a part of the WB and IMF conditionality did not emerge as a central focus of the institutions until the 1990s. As a part of their general shift from project-based to policy-based lending, the IFIs became much more involved in areas that had been previously thought to be a domestic policy concern for member states, and in this particular case, workers’ rights. In return for financing or debt rescheduling, indebted countries were required to implement institutional reforms, such as, more flexible labour market laws. Such clauses as “labour market flexibility”, “wage freeze”, “employment freeze” and “rigidities in the labour laws” emerged, calling for labour law/policy reforms as part of the adjustment measures.

It is important to note that the performance records of the World Bank and IMF’s structural adjustment programs in economic terms, as with those programs’ human rights impacts, has been a matter of debate since the 1980s. According to some views, including some internal IMF studies, ‘countries that have followed the IMF’s structural adjustment programme have lagged in terms of per capita income compared to those that have not.’ While some improvements were claimed in the late 1990s, at the turn of the century the Bank’s Operations Evaluation Department and an independent expert review at the IMF still found

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304 Jerome Levinson, “Worker Rights and the International Financial Institutions” in Daniel Bradlow and David Hunter (eds.) International Financial Institutions and International Law, 321

305 Ibid.


309 World Bank, Report and Recommendation of the President of the International Development Association to the Executive Directors on a Proposed Development Credit to the Republic of Senegal for a Structural Adjustment Programme, 10th January 1986.

310 Mac Darrow, Between Light and Shadow, 68.

some considerable cause for criticism. Similarly, the controversial ‘Meltzer Commission Report’ by the US Congress International Financial Institutions Advisory Committee claimed that fifty-five to sixty percent of World Bank-financed operations were failures. By this time conditionality as a vehicle for policy reform had come under fire.

But beyond the question of economic efficiency, which is not of central significance in this study, an independent expert of the Commission on Human Rights has claimed that structural adjustment programs have had ‘distinct (and generally adverse) impacts’ on human rights at the economic and political levels. Such criticisms can be traced back to seminal studies in 1991 and 1992 by the Sub-Commission’s Special Rapporteur for the realisation of economic, social and cultural rights. In his report in 1991 the Special Rapporteur catalogued in some detail the way in which austerity measures and other aspects of adjustment programs could impair (and in the opinion of the Special Rapporteur, had impaired) the fulfillment of numerous rights guaranteed in the ICESCR at the national level, with particular focus upon the rights to education, heath, food, adequate housing and employment. The criticisms in his final report in 1992 were expanded to take account of lack of symmetry in the burdens of adjustment, a bias towards the trade interests and constituencies of developed countries, the erosion of economic self-determination, reliance on a contested and widely inappplicable economic template and failure to explore alternatives, the ineffectual nature of conditionality and programme supervision, and negative human rights impacts of privatization and liberalization.

This shift in lending to encompass other aspects of the borrowing countries than economic ones, such as social and political aspects, is demonstrated by the shift in the lending instruments of the IFIs. The World Bank, initially a traditional project-lending institution where investment lending focused on infrastructure, has adopted a number of instruments over time reflecting its traditional financing approach as well as the expanded approach. Investment Lending or Investment

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312 IMF, External Evaluation of the ESAF: Report by a Group of Independent Experts (1998); World Bank Operations Evaluation Department, (1999). In 2000 the Operations Evaluation Department concluded that only seventy-two percent of the Banks projects achieved a ‘satisfactory or better outcome.’
Project Financing provides financing to governments for activities aimed at creating the physical and social infrastructure\textsuperscript{318} necessary for poverty alleviation and sustainable development.\textsuperscript{319} This instrument focuses on the long-term (5-10 years) and finances goods, works, services and other types of expenditures. These investment projects encompass a broad range of sectors - from agriculture to urban development, rural infrastructure, education and health.\textsuperscript{320} The nature of investment lending in the Bank has changed over time. While it initially focused on hardware, engineering services, and bricks and mortar, it has come to focus more on institutional building, social development and the public policy infrastructure needed to facilitate private sector activity. This includes, for example, water and sanitation (increasing efficiency of water utilities), natural resource management (providing training in sustainable forestry and farming), post-conflict reconstruction (reintegrating soldiers into communities) etc.\textsuperscript{321}

Development Policy Financing (DPF) is a different lending instrument that provides budget support to recipient states/clients for a programme of policy and institutional actions/reforms that help achieve sustainable shared growth and poverty reduction.\textsuperscript{322} It provides quick-disbursing assistance to countries to support structural reforms in a sector or in the economy as a whole. Previously called adjustment lending, this form of loans has also evolved over time. It originally focused on macroeconomic policy reforms such as trade policy, but now generally aims to promote competitive market structures (for example legal and regulatory reform), correct distortions in incentive regimes (taxation and trade reforms), establish appropriate monitoring and safeguards (financial sector reforms), create an environment conducive to private sector investment (judicial reform and adoption of modern investment code), encourage private sector activity (privatization and public-private partnerships), promote good governance (civil service reform), and mitigate the short-term adverse effects of development policy (establishment of social protection funds).\textsuperscript{323}

\textsuperscript{318} Physical infrastructure refers to roads, railways, dams, etc. while social infrastructure refers to infrastructure mainly affiliated with service provision such as schools, clinics, hospitals etc. Examples of financing for social infrastructure include Thailand Social Investment Project Loan (IBRD, US$300 million, July 9, 1998). This project responded to the financial and economic crisis in East Asia by supporting the rapid creation of employment opportunities and the provision of essential social services to the unemployed and the poor. It also supported bottom-up service delivery by financing locally identified and managed development initiatives, and by promoting decentralisation, local capacity building, and community development. Sri Lanka Mahaweli Restructuring and Rehabilitation Project (IDA, US$57 million, April 14, 1998). This project aims to shift the focus of the Mahaweli Authority from project implementation to river basin management, to help ensure that natural resources in the Mahaweli river basin and watershed are managed more efficiently, productively, and sustainably. The project also aims to increase agricultural productivity through the rehabilitation, upgrading, and improved operation and maintenance of irrigation facilities.


\textsuperscript{322} World Bank, \textit{The World Bank Group A-Z}, 52.

\textsuperscript{323} World Bank, \textit{A Guide to the World Bank}, 68.
Development policy financing (which is governed by the Operational Policy on Development Policy Lending - OP 8.60, which replaced the Operational Directive on Adjustment Lending Policy - OD 8.60) from the adjustment lending is that the former includes considerations of social and political structures in addition to economic factors. OP 8.60 states that “the Bank’s decisions to extend development policy lending is based on an assessment of the country’s policy and institutional framework - including the country’s economic situation, governance, environmental/natural resource management, and poverty and social aspects.”

Development Policy Lending gives national governments an incentive to undertake the comprehensive multiagency policy and institutional reforms considered necessary by the IFIs. It provides “fast-disbursing” deposits in tranches to a special account in the national treasury as an incentive to undertake institutionally difficult policy reforms. In return, the government commits itself to the agreed reform programme through a Letter of Development Policy. Consequently the development policy lending tranche disbursement is always conditional on the government maintaining satisfactory macroeconomic policies and performance. In addition, the World Bank offers Programme-for-Results financing, which basically links disbursements of funds directly to the delivery of defined results, helping countries improve the design and implementation of their own development programs and achieve lasting results by strengthening institutions and building capacity.

The final type of financial assistance is technical assistance. This supports legal, policy, management, governance and other reforms needed for a country’s development goals. The Bank’s wide-ranging knowledge and skills helps countries build accountable, efficient public sector institutions to sustain development in ways that benefit citizens over the long term. Bank staff members advise and support governments in the preparation of documents such as draft legislation, institutional development plans, country-level strategies, and implementation action plans. The Bank also assists in shaping or putting new policies and programs in place.

It is crucial to highlight that the IBRD raises money primarily by selling bonds in international financial markets and thus charges interest to its borrowers at rates that reflect its cost of borrowing. The IDA on the other hand receives contributions

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327 Ibid.
329 Ibid.
from wealthier member governments and thus provides interest-free or low-interest concessional finance/loans to the poorest countries. In addition, the WB often co-finances its projects with governments, commercial banks, export credit agencies, multilateral institutions and private sector investors. Co-financing is any arrangement under which funds from the Bank are associated with funds provided by sources outside the recipient country for a specific lending project or programme.

Turning to the IMF, as stated before, it does not lend for specific projects, but rather provides financial support for balance of payments needs upon request by a member country. Following such a request, the IMF staff team holds discussions with the government to assess the economic and financial situation, the size of the country’s overall financing needs, and to agree on the appropriate policy response. The Letter of Intent and MoU provide for the country’s commitment to undertake certain policy actions, known as policy conditionality.

The lending instruments offered by the IMF vary depending on the nature of balance of payment problems. Stand-By Arrangements (SBA) address short-term or potential balance of payments problems. They have a short and flexible length/duration, typically covering a period of 12-24 months, but no more than 36 months. The repayment period is three and a quarter to five years. The Extended Fund Facility (EFF) is the main tool for medium-term support to countries facing middle-term or protracted balance of payments problems due to structural weaknesses that require time to address. The IMF also assists with the adjustment process under this Facility. The EFF differs from the stand-by arrangements in that it features longer programme engagement of three to four years to help countries implement medium-term structural reforms and a longer repayment period of four and a half to ten years. Another difference is the EFF’s strong focus on structural adjustment/reforms and specific conditionality to address institutional or economic weaknesses, in addition to policies that maintain macroeconomic stability. The Rapid Financing Instrument/Rapid Credit Facility provides rapid assistance to countries with urgent balance of payment needs due to emergency situations such as commodity price shocks and natural

331 Ibid, 68.
334 The SBA is usually used by middle income (and recently advanced market) economies. The Standby Credit Facility (SCF) is the SBA equivalent for low income countries where concessional finance at zero interest is provided. See www.imf.org/en/About/Factsheets/Sheets/2016/08/01/20/33/Stand-By-Arrangement (accessed 13 October 2017).
335 The Extended Credit Facility is the EFF’s equivalent for low income countries where concessional finance is provided. See www.imf.org/en/About/Factsheets/Sheets/2016/08/01/20/56/Extended-Fund-Facility (accessed 13 October 2016).
336 Ibid.
disasters, and domestic fragilities such as conflict and post-conflict situations.\textsuperscript{336} This instrument does not require a full-fledged programme in place as it is often a one-off loan, although there is scope for repeat use. The financing terms are similar to those under the SBA. This instrument replaced the IMF’s previous policy that covered Emergency Natural Disaster Assistance (ENDA) and the Emergency Post-Conflict Assistance (EPCA).\textsuperscript{337} Finally is the Policy Support Instrument (PSI), which offers low income countries that do not want - or need - IMF financial assistance a flexible tool that enables them to secure Fund advice and support without a borrowing arrangement.\textsuperscript{338} This non-financial instrument is a valuable complement to the IMF’s lending facilities as it helps countries design effective economic programs that deliver clear signals to donors, Multilateral Development Banks (MDBs) and markets of the Fund’s endorsement of the strength of a member’s policies.\textsuperscript{339}

In addition to the PSI, the IMF’s Executive Board has approved the establishment of a new non-financing instrument\textsuperscript{340}, the Policy Coordination Instrument (PCI), to help countries access financing from official and private donors and creditors, as well as demonstrate a commitment to reform, enabling dialogue between the countries and the Fund. The PCI is part of the Fund’s effort to strengthen global financial safety nets - a network of insurance and loan investments that countries can draw on if confronted with a crisis.\textsuperscript{341} This tool is available to the full membership with no eligibility criteria. Like the PSI, the PCI is a form of technical assistance.\textsuperscript{342}

The IMF established the Poverty Reduction and Growth Facility (PRGF) in 1999, making the objectives of poverty reduction and growth more central to lending operations in its poorest member countries. The PRGF-financed programs, were framed around comprehensive, country-owned Poverty Reduction Strategy Papers (PRSP)\textsuperscript{343}, which are prepared by governments with the active

\textsuperscript{337} Ibid.
\textsuperscript{339} Ibid.
\textsuperscript{342} Ibid.
\textsuperscript{343} PRSPs are documents prepared by a government, under supervision of the WB and IMF teams, which identifies the causes of poverty, strategies for overcoming poverty, including policy and expenditure targets. The PRSPs are “locally generated and owned” and prepared through wide participatory dialogue with civil society and other stakeholder groups. In relation to lending, these PRSPs do not replace conditionality, rather, they form a basis for lending and debt relief and are approved before a country can get concessional
participation of civil society and other development partners. They are then considered by the Executive Boards of the IMF/World Bank as the basis for concessional lending from each IFI. The targets and policy conditions in a PRGF supported programme are drawn from the country’s PRSP. Principles central to the PRGF are broad public participation and country ownership.

The IMF and WB cooperate closely on conditionality in PRGF-programs, where the IMF focuses on prudent macroeconomic and financial policies and related structural reforms such as exchange rate and tax policy, fiscal management, budget execution, fiscal transparency and tax and customs administration. The IMF, when appropriate, draws on the WB expertise in designing PRGF-supported programs, where the WB takes the lead in advising on areas such as poverty assessment, monitoring, structural and sectoral issues, social issues etc. The PRGF’s point of departure is the way in which the objectives and policies are chosen, where the country and its people take the lead. In addition, PRSPs are prepared by the government, and based on a process involving the active participation of civil society, NGOs, donors and international institutions. The PRGF was created to help develop a sense of ownership and national commitment to reaching the country’s objectives.

It was not until the 1990s that the regional financial institutions began shifting toward policy lending that was similar to the WB’s. In 1989, following the debt crisis in Latin American countries, the IDB introduced policy-based lending, then called “sector lending”, under the Seventh Replenishment (IDB-7). Adapting the model of structural adjustment lending created by the World Bank in the late 1970s, the Bank established this new instrument for two purposes: to provide borrowing countries with liquidity to help meet their financing needs and to support them in undertaking reforms. The main characteristic of policy-based lending that differentiates it from investment lending is that proceeds are disbursed on the basis of compliance with agreed-upon conditionality (policy and institutional reforms), rather than against specific expenditures. As previously stated, the original purpose of the IDB was to provide economic development
assistance to member countries in Latin America individually and collectively. However, the IDB later updated its purpose to also include social development assistance. In the mid-1980s the IDB began its shift towards policy-lending, as a result of the United States’ strenuous objection to the traditional lending practices and refusal to consider a request for a general capital increase until the IDB changed its lending policies and emphasised overall economic policies. By the late 80s, it had in fact made these changes. The IDB has various lending instruments that highlight this transformation. There are three categories of instruments: investment loans, policy loans and emergency loans. Investment loans, similar to those of the World Bank, deal with specific projects and cover various expenditures related to the project. Policy-based loans were designed to be disbursed quickly in response to proof of compliance with policy changes and are constructed with detailed policy ‘conditions’, defining in detail the changes to law, regulations or institutions that the recipient country was obliged to undertake.

The ADB, similar to the WB and IDB, initially focused on large-scale infrastructure projects such as energy, transport and communications as a means to increase economic growth. At one time, the Bank was called the “Asian Dams and Bridges” since infrastructure sectors dominated its lending programs. However, in the mid 1980s, resulting from pressure from the major donor non-regional members (especially the U.S.A.) before providing additional capital, the Bank needed to shift its policy from “economic growth and cooperation” to “social progress”. At this time, the Bank shifted from conventional project lending, and instead began supporting adjustment programs
similar to those of the World Bank. With this shift, scholarship began to focus on the complex political-economic repercussions of the associated conditionalities, particularly with respect to their impact on local planning and democratic processes. Concerns were raised as to whether the actual driving force behind Structural Adjustment Programs was unilateral pushing of reforms by IFIs or whether the domestic political- and social composition played a role in it as well.

Likewise, the AfDB, after its inception, initially sought to continue with its traditional policy of using only economic criteria in its loan decisions. But gradually, more pre-loan conditions, more financial accountability measures and more discussions on loans to the private sector were introduced, all advocated by non-regional members, who were admitted starting in 1982. External pressure for change was evident from non-regional members like the U.S and the World Bank, particularly since the AfDB had co-financed some of its loans with the WB. Following a report indicating serious problems in the quality of lending and postponed funding from major non-regional members, in the 1990s the AfDB accepted changes, thus making its shift to policy lending.

Finally, as the most recent of all the IFIs in this study, the EBRD was established at a time when policy-lending was the “buzz word”. In contrast to the other IFIs, the EBRD lacks the authority to make policy-based loans, that is, it cannot make structural adjustment, sectoral adjustment or policy-based loans. The Bank’s Articles provide that the operations of the Bank “shall provide for financing of specific projects, whether individual or in the context of specific investment programs”. The interpretation of this article, as expressed in the Explanatory Note to the Agreement, is restrictive and provides that,

The Delegates described the precise form of programme lending in which the Bank could become involved as “projects, whether individual or in the context of specific investment

357 See ADB, Review of ADB’s Policy-Based Lending, June 2011, 1.5.
359 Ibid.
361 Ibid.
363 Article 13 (ii), Articles of Agreement, EBRD.
364 John Linarelli, The EBRD: Legal and Policy Issues, 430
programs’, so as to make clear that fast-disbursing, policy-based lending is not included.365

Since the 1990s, IFIs’ approaches to policy-based lending and conditionality have further advanced.366 The policies attached to lending have moved further beyond economic policy and deeper into social policy. Conditionality has moved beyond macroeconomic policy (exchange rate regimes, capital controls and monetary policy) to structural policy (banking policy regulation and corporate governance) and social policy (environmental law, labour law, pension systems etc.).

2.4.4 Conclusion

This section has highlighted an important aspect of the activities of IFIs, that is, the mandates. Several deductions can be made from the discussion. First, is the idea of mandate flexibility. The IFIs’ mandates are flexible in that the IFIs have interpreted the mandates in ways that manipulate and expand them substantially. This mandate flexibility also highlights the discretion the IFIs have in determining what factors should be considered as within the mandates for providing financing. The mandate flexibility has allowed the IFIs to shift and expand their activities to new areas beyond their original mandates, without touching the wording of the mandates in their instruments. This flexibility epitomises the very concept of “mission creep”- a term used to describe the IFIs’ (particularly the WB and IMF) expansion of operations into areas beyond their original mandates and purposes.367 Bringing in the use of conditionality in such a context, there is no doubt that this expansion and shift in focus contributes to and results in the intensification of conditionality as a regulatory instrument368, as will be discussed in subsequent chapters. From promoting development through economic growth to governance and judicial reforms, to environmental protection and rights of indigenous peoples, to combating HIV and AIDS and so forth, the IFIs have taken on challenges that lie far beyond their mandates and indeed beyond any institution’s operational capabilities.369 However, it is crucial to note that the expansion of the mandates has gone hand in hand with their evolution. This is to say that, the mandates have evolved from a narrow economic approach to development to a more holistic approach to development, which is sensitive to interrelated dimensions of human development. The bigger picture here is that, the meaning of development has certainly changed in as far as the IFIs are concerned. In the 1970s and 1980s about 58% of the WB’s portfolio was in building infrastructure. In the 2000s, the Bank’s infrastructure activities amounted to 22% while human development and law and institutional reforms amounted to

366 Stefan G. Koeberle, “Should Policy-Based Lending Still Involve Conditionality?”, 250.
367 See Jessica Einhorn, “The World Bank’s Mission Creep”, 22-26
368 Celine Tan, Governance through Development, 118.
369 Ibid, 22.
52% of the Bank’s total lending. Even though none of the Articles of Agreement define development, one fact is for sure - it is not limited to economic development.

The second deduction is the blurred if not non-existent boundaries regarding what are economic considerations falling within the mandates of the IFIs and what are non-economic factors, thereby falling outside such mandates. McBeth states, “the distinction between economic and non-economic matters is artificial and often unsustainable, particularly in placing human rights in the latter, prohibited category”. The IFIs have demonstrated through their increasingly expanded involvement in political, civil, social and economic matters that the separation does not really exist when it comes to the notion of development. In other words, economic development cannot be achieved in a purely economic dimension, while isolating other social and political factors. It inevitably touches upon the other dimensions of human development, that is, political, social, civil, cultural etc. It is clear that the IFIs’ concept of development has come to include “non-economic” factors. In this regard, Handl states that “if non-economic or political considerations are relevant and thus legitimate for inclusion in IFI decision making on economic development grounds alone, they would appear to be so, since today IFIs' mandates must be seen as including the promotion of ‘sustainable development’ rather than ‘economic development’ pure and simple.” In any event, in practice IFIs now routinely make investment decisions based, inter alia, on sensitive “noneconomic” considerations, such as transparency of and public participation in decision making, governmental accountability and – increasingly - distribution of income and degree of public corruption. Many of these reflect basic human rights concerns; and there is no denying that certain human-rights-related conditionalities have become part of IFIs’ routine loan requirements.

An important observation to note is the value of human rights in as far as the IFIs are concerned. As discussed in the section on political prohibition clauses, the IFIs do, in some instances, consider human rights in their activities. However, the value of human rights differs, taking two main avenues. First, in the IFIs with political prohibition clauses, human rights are not an end in themselves, but rather come into play when they have some economic impact on the progress or success of IFI programs. In this case, one can say that human rights are a variable rather than a value and can be taken into or out of the equation whenever necessary. This instrumentalist approach will be discussed and elaborated in subsequent chapters. On the other hand is the EBRD with a clear human rights

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373 Ibid.
mandate. In this second avenue, human rights are an end in themselves, and their attainment is as important as the economic objectives. Here, the value of human rights is optimum. This human rights approach will also be discussed in subsequent chapters.

As far as the political prohibition is concerned, the IFIs self-perception as purely technocratic organisations that focus solely on economic criteria and eschew political considerations is illusory as development activities have inescapable political ramifications because they involve financial transfers and thus affect power relationships. While the political sphere undoubtedly overlaps considerably in terms of the development, application and enforcement of international law, to dismiss human rights out of hand as ‘political’ is to ignore law’s essential character and attributes. Thus, although the political prohibition clauses have stood the test of time, the IFIs have, through their policies, guidelines and actions, demonstrated the inseparability of the economic dimension to the others (political, social etc), including human rights. This is corroborated by more recent acknowledgement that development represents a number of interlocking aspects, as has been highlighted in the examples above covering a wide range of political, economic, social and cultural aspects, including the protection and promotion of human rights. In addition, the emergence of such concepts as the human rights-based approach to development, which will also be discussed in subsequent chapters, highlights the contention that development covers a spectrum of economic, social, cultural, civil and political rights. Therefore, although the political prohibition still persists in the constituent documents of the IFIs, it no longer holds water in as far as the irrelevance of human rights to economic development is concerned.

There seems to be no bright line, then, that separates the IFIs’ permissible consideration of a country’s general human rights conditions from impermissible political interference in that country’s affairs. Gunther attempts to “set the record straight”. He argues that expressions of concern about overextending the mandate of international financial institutions by requiring them to take account of a borrowing country’s prevailing human rights climate generally miss the point. He further argues that "sustainable development" is achievable only in a social setting that allows for public access to information, public participation, a significant measure of decentralisation

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374 Morton Halperin et al., The Democracy Advantage, 192.
379 Gunther Handl, "The Legal Mandate", 651.
of power, and governmental accountability. In this sense, a country's human rights record, which reflects the presence or absence of sociopolitical conditions necessary for the successful pursuit of "sustainable development" objectives, is also directly pertinent to the wider "economic" considerations for lending activities.380

In sum, this section has examined the expansion of the mandates of the IFIs in their lending activities. The shift from project to policy lending, along with the expansion of mandates, brought the IFIs in contact with a wide array of national or domestic policies, from financial policy to government expenditure, to national institutions and their governance, to labour law reforms, through, among other aspects, the use of conditionality. A crucial observation in this section is the great amount of influence the WB and IMF enjoy as the knowledge-based institutions381 in as far as regional IFIs are concerned. This is evident in that, following the lead of the WB charters, the regional multilateral institutions that were subsequently set up adopted similar organisng principles382 and followed suit in expanding their mandates and the justifications they used, particularly relying on the interpretations of the WB in such matters.

2.5 Structure and Governance of IFIs

2.5.1 Structural Organs

It is essential to look into the structural organisation of the IFIs to understand the major organs that govern the IFIs and show the unique manner in which the decision-making processes in these organs take place. It is crucial to bear in mind that the regional IFIs have substantially adopted the structure of the WB. The common features will therefore be set forth as well as any deviations.

In the World Bank and IMF, each member government is a shareholder of the Bank, and the number of shares a country has is based roughly on the size of its economy.383 This "one-dollar-one-vote" structure affords richer countries greater power in decision-making processes at the WB and IMF than poor countries.

380 Ibid.
382 Morton Halperin et al., The Democracy Advantage 194.
383 In the World Bank, the United States is the largest single shareholder, with 17.48% of votes, followed by Japan (7.54%), China (4.86%), Germany (4.4%), the UK (4.12%) and France (4.12%). The remaining shares are divided among the other member countries. All developing country borrowers combined have 27% of the voting share and the 48 sub-Saharan African nations command less than 6% of the votes. To become a member of the Bank, a country must first join the International Monetary Fund (IMF). In the IMF, the larger the economy the greater the quota, and therefore the greater number of votes. Quotas are assigned in the form of "Special Drawing Rights" (SDR). Not surprisingly, the Unites States has the largest quota of 17.47% providing its representative with about 16.54% of the total vote, which is enough to veto certain decisions, as a majority vote of 85% is often required. The 25 European Union member states have 31.4% of votes, while the combined voting power of all 47 African Nations is about 6%. See www.imf.org
Ultimate decision-making authority rests with the Board of Governors, to which each member country appoints a representative. Thus there are as many Governors as there are member states. For most countries, the Governor is the Minister of Finance (or national equivalent). The Board of Governors makes key determinations on strategic direction, membership, capital stock, budgets and distribution of income. The regional IFIs similarly each have a Board of Governors, which is the highest organ of each IFI. The Boards of Governors are charged with major policy decisions, budgets etc. Again, as in the World Bank, the voting power of the Governors is proportionate to the capital subscription of their countries. Finally, the Boards of Governors elect the Directors of the respective IFIs as well as the President.

As opposed to the Boards of Governors where every member country has a representative, in the Boards of Directors (or the Board of Executive Directors in some IFIs), the representation is based on capital subscriptions of the member states. The Board of Directors of the World Bank is made up of 35 Executive Directors (The IMF has 24), representing all member countries. The five largest shareholders are entitled to appoint their own representatives. Three "single constituency" Board chairs also have their own seat. Sixteen Board chairs are divided among the remaining member governments. All 48 sub-Saharan Africa countries are represented by just three Executive Directors. The Board operates largely behind closed doors, without public access to its deliberations or details about its decisions.


The United States, Germany, China, Japan, and the United Kingdom. See www.worldbank.org

The Peoples Republic of China, the Russian Federation, and Saudi Arabia.

The Bank also organises its operations primarily through twenty-seven Vice-President Units. Six regional vice-presidencies control a large degree of decision making on Bank operations within their own regions: Africa, East Asia & Pacific, Europe & Central Asia, Latin America & the Caribbean, Middle East & North Africa, and South Asia. Other vice presidencies include seven “Network Vice Presidential Units” - responsible for certain cross-cutting issue areas such as the financial sector or private sector development. The rest of the units cover such areas as external affairs, development economics, legal, and human resources.
operations evaluations, development trends, and strategic directions for the Bank.\footnote{Ibid.} Similarly, the Boards of Directors (or the Board of Executive Directors) in the regional IFIs oversee the day to day duties or activities in the IFIs such as approving loans etc. Again, similar to the World Bank, not all the members are represented in the Board of Directors and the voting power depends on the capital subscriptions of members. However, what is unique in the regional IFIs is the allocation of the greater number of Directors from the regional member countries and greater voting powers for such members.\footnote{Ibid.} In order to keep the regional banks in the hands of the regional borrowing members, the regional members have always maintained the majority of seats in the Boards of Directors. The governing structures of the regional IFIs have been altered to include non-regional members (who cannot receive any financial assistance from the banks) as well as regional members.

The President of the World Bank is simultaneously the head of all five arms of the World Bank Group. Initially, s/he was not chosen democratically, as the selection of the President of the World Bank Group was based on a "gentlemen's agreement"\footnote{The Reform of the Governance of the IFIs: A Critical Assessment" in Hassane Cissé et al. (eds.) The World Bank Legal Review 3 (Washington, D.C.: The World Bank, 2012), 42.} between the world's richest countries: the United States Government chose the head of the World Bank, while the largest countries of Western Europe named the head of the International Monetary Fund (IMF).\footnote{Ibid.} Thus, the Executive Directors formally appointed (although the U.S. Government selected and nominated) the President of the World Bank, who serves as chair of the Board of Directors.\footnote{www.worldbank.org} The process through which these persons were selected was opaque and closed to outside participation. However, in 2011, the Board of Executive Directors of the World Bank adopted a new selection process of the President of the World Bank in response to calls for “open, merit-based and transparent selection of the World Bank President”.\footnote{World Bank and IMF, Development Committee (Joint Ministerial Committee of the Board of Governors of the Bank and the Fund on the Transfer of Real Resources to Developing Countries): Strengthening Governance and Accountability: Shareholder Stewardship and Oversight, Doc DC2011-0006, 4April 2011, Annex 2.} As the Articles of Agreement of the Bank are silent on the qualifications of the President, the Board adopted criteria established by a special working group for identifying, nominating and selecting candidates for the process.\footnote{Ibid. See also World Bank, Joint Report of the Working Group on Leadership Selection Process (Washington, D.C.:World Bank, 2001).} The new criteria also widened the scope of who can nominate a candidate for the WB presidency to
include both Governors and Executive Directors. As for the regional IFIs, the President is appointed by the Board of Governors.

The Development Committee, a joint committee of the World Bank and IMF, advises the IMF Board of Governors on key issues of concern to developing nations and policies.

2.5.1 Weighed Voting

As opposed to the regional IFIs where the regional members have majority voting power, one of the most persistent complaints about the governance of the World Bank and IMF has been that member states are not effectively represented. These complaints resulted in a realignment of the quota and voting arrangements in both the World Bank and the IMF. Such rearrangements include increasing the share of developing countries and transitional members in the total vote. In the World Bank, these countries now constitute 47.19% of the total vote (an increase of 4.59%). Similarly, the size of the Bank’s Board of Executive Directors increased from 24 to 35. The IMF has also increased its member states’ basic votes in order to enhance representation of its smallest and poorest member states in its total vote as well as increased and redistributed the quotas of some of the members in order to ensure that formerly underrepresented states are now more appropriately represented in the total votes of the organisation.

The IFIs’ structures and their weighted voting systems are one of their unique characteristics. Unlike many international organisations, IFIs are based on capital subscription and weighted voting powers rather than on sovereign equality and one vote per member state. Contrary to the UN where each member’s vote is of equal value to that of any other member state, irrespective of financial contributions, and the number of member states equals the number of votes, IFIs are capitalised like a corporation. A member government subscribes to shares of

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397 www.worldbank.org
399 Ibid.
the capital stock of an organisation like an investor. The organisers of a corporation determine the distribution of the initial number of shares to be subscribed to by original shareholders. The share allocation determines the contours of control of the organisation. Despite these structures and the weighted voting systems, it is crucial to note that the IFIs in general usually seek consensus in their decision-making, although this does not limit those with the major voting power from “setting the tone” of the discussions. This weighted voting system gave the United States, as the nation with the most votes in the World Bank and IMF, an effective veto over all major decisions and rules or policy changes.

The weighted voting system, particularly in the World Bank and IMF, has been criticised on a number of grounds. It has been argued to be insufficiently democratic, giving the economically stronger countries more say than the economically weaker countries in significant development matters that are of mutual concern. This is even more true with regards to loan policies and conditionality, where the conditions attached to the loan on various policy reforms are decided by the IFIs’ staff, mostly economists, and approved by the Board, whose majority voting share is held by non-borrowing countries, leaving borrowing countries with little influence over the policies to be pursued. Again, the weighted voting system has exposed the World Bank and IMF to a “crisis of legitimacy” where the root of the problem lies in the unrepresentative nature of their structure of governance, which places control of the institutions in the hands of small groups of industrialised countries, while the developing countries, which are not only the borrowing members, but also account for most of the world’s population, are barely represented. This is most problematic in the World Bank and IMF because the majority vote is held by industrialised countries like the U.S.A, the United Kingdom and Germany, which do not borrow from these IFIs, and yet have the greatest say in the approval of loans and attached policies.

In the case of the regional IFIs, although the majority shares are held by the regional members, they are not entirely free of the perils of the weighted vote system. At the time of founding, all of the IFIs were committed to playing a role
in the economic development of the members of their respective regions and membership was limited to such members. However, all these institutions, at their own time, faced similar problems that led to the admission of non-regional members. One of these problems was a lack of capital due to the fact that in the majority of the regional banks, the members were mostly developing countries. As a way to tackle this shortage, non-regional members were allowed to join and inject capital into the operations of the regional Banks. Of course, to keep the operations of the Banks in the interest of the regional members, the weighted votes allocated to regional members have always exceeded those of the non-regional members. However, the non-regional members, particularly industrialised European countries and the U.S.A., still have a great degree of influence arising from the economic needs of the developing countries. These non-regional members have therefore still been able to influence the activities of the regional banks, despite the weighted vote system.

One suggestion to resolve the shortcomings of the weighted voting system is reverting to the ‘one country, one vote system’ where every country is represented in the Boards of Directors. This solution is problematic for a number of reasons. First, giving each country an equal vote would mean that a country such as Palau with a population of approximately twenty-one thousand people would have an equal say as India, which has a population of approximately 1.3 billion people. To remedy this, consideration could be given to population as well in allocating voting power. However, the countries which are the main donors or capital sources of the IFIs would have the least say in the voting structure and might withdraw due to the inability to protect their capital interests.

Evidently, there is not a clear-cut solution to the problems affiliated with weighted voting in the IFIs. The attempts to redistribute the voting power previously discussed shows the World Bank’s and IMF’s efforts to enhance and reinforce their legitimacy by giving more voice to the economically weaker member states. Although these changes are a positive step towards democratizing the institutions, the overall structure and the voting powers are more or less the same, as the relocated voting powers have not shifted the balance.

2.5.2 Conclusion
From the overview of the governance structures of the IFIs one can see many similarities. All of the IFIs are characterised by the weighted vote system, where the amount of votes that a member has depends and is proportional to the member’s capital subscriptions in the institution. This creates the situation where most power, be it voting or influence in decision-making, is afforded to the

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economically stronger members. The World Bank and IMF are typical examples of this. The regional banks have attempted to reduce this imbalance by controlling the votes of the non-regional (and hence non-borrowing) members by keeping the majority of the voting power with the regional members.

One aspect that characterises the functions of the various organs in the structures of the IFIs is a lack of transparency. Although the allocation of voting powers and the functions of the organs are known, their proceedings, discussions and deliberations are not open to the public. Loans for borrowing members are discussed and approved or disapproved behind closed doors. Although the IFIs have moved more towards transparency in their dealings, there are still many aspects that are oblique to the general public, even to those recipient countries whose populations are affected by the loans and their affiliated conditions or impacts, be it environmental, social, political etc.

2.6 The Relationship between IFIs and International Labour Standards: International Financial Institutions as Normative Actors

2.6.1 Introduction
As the main theme in this study is concerned with the ways in which IFIs affect the promotion and implementation of international labour rights, one must, inevitably, analyse the relationship between these two aspects to identify where they cross paths. To do so, it is vital to look into the ways in which IFIs have become normative actors in the international arena. This relationship can best be explained by theories outside the legal profession, which can, be translated into a legal perspective. The better understanding of IFI as normative actors will enhance the analysis of their activities in subsequent chapters.

International financial institutions increasingly exercise power by virtue of their ability to “fix meanings.”\textsuperscript{411} Naming and labeling the social context establishes the parameters and the very boundaries of acceptable action. This power is best exemplified in the area that is central to these institutions, that is, development. The concept of development in the post WWII era spawned a huge international apparatus which has spread its tentacles in domestic and international politics through the discourse of development.\textsuperscript{412} The continuous redefinition of what “development” consists of legitimates increased levels of intervention in the domestic affairs of states. This is fairly obvious in the IFIs where they have


established a web of interventions that affects phases of not only economic, but also political and social spheres, of states.413

2.6.2 Constructivist Theory

Constructivist theories on international organisations offer a theoretical approach explaining the role of international organisations such as the ILO, UN, WB, IMF etc. as far as international norms are concerned. Defining norms as “collectively held ideas about behaviour”414 or “shared expectations about appropriate behaviour held by a community of actors”415 or “a standard of appropriate behaviour for actors with a given identity”416, this approach suggests that international organisations play an important role in creating, diffusing and transmitting new norms in the international community,417 to the extent they are adopted by relevant actors. Some constructivists have classified international organisations into two groups: open and closed international organisations.418

Open international organisations engage in broad consultation processes with non-state actors and may include them in decision-making processes. The ILO is an example of an open organisation. On the other hand, in closed international organisations decision making processes are limited to states or state representatives and such decisions are made without consultation or with highly restricted consultation with non-state actors.419 The IMF is an example of a closed international organisation. Constructivism provides accounts of how and why what international organisations do is important, through analysis of the ways in which the rules the organisations create in turn shape the identity and interests of the actors who operate within those rules.420

This theory is relevant due to the nature of the IFIs as international organisations and their ability to create rules that in turn shape the actors within that sphere. In the context of this study, one can say that IFIs do create rules that, through their financing activities, are adopted by states, which are the main actors in the IFIs’ activities. Thus, constructivist theory helps explain many of the issues discussed in regards to the mandates and structures of the IFIs. It is not a matter of copying and pasting mandates and structures and relations with states, but rather the evolution of norms from interaction between this community of actors with a given identity (IFIs) and the treatment of these evolved norms as rules and

414 Martha Finnemore, National Interests in International Society (Ithaca: Cornell University Press, 1996), 23,
418 Ibid.
419 Ibid.
behavioural regularities.\textsuperscript{421} Again, the usefulness of this theory in this study is that it highlights how the rules generated by international organisations are transmitted. The very essence of the theory in the light of this study is to further understand the practical functioning of the IFIs. Finally, although it is not a pure theory of law, it attempts to explain the behaviour of international organisations as a consequence of two things: the internal organisational culture and identity of the organisation.\textsuperscript{422}

2.6.2.1 Organisational Culture

Organisational culture is defined as the shared ideologies, norms and routines that shape staff members’ expectations about how agendas are set, mandates are minimised and projects are implemented and evaluated.\textsuperscript{423} The World Bank is an optimum choice to exemplify the constructivist theory discussed above. The World Bank was initially a typical lending institution, that is, a bank. With time, as a result of the influence of intellectual development, the identity of the Bank shifted from being a lending institution to becoming a development institution. This also shifted the way in which development was translated into the Bank’s projects, that is, the Bank’s organisational culture changed, as will be discussed in the subsequent sections.

2.6.2.2 Identity

An international organisation’s identity is defined as the organisation’s bureaucracy culture based on its dominant profession, which informs how its mandate is undertaken and how the organisation is perceived.\textsuperscript{424} What is interesting about the identity is that an organisation can change its identity.\textsuperscript{425} When the identity of an organisation shifts, it alters the organisational culture as well. Similarly, when the identity changes, the norms transmitted also change.\textsuperscript{426}

2.6.3 Positivist Theory

Positivist theory argues that since the international organisations (IO) produce “standards or norms” in the form of political declarations (as in the case of the UNGA Resolutions), or expert-generated guidelines (as in IFI operational guidelines) that do not purport to be legally binding, the IFIs’ activities should not

\textsuperscript{421} See Mark Klamberg, \textit{Power and Law in International Society}, 43.
\textsuperscript{426} \textit{Ibid}.
be of concern to lawyers. Such “soft law” generated by IOs is an oxymoron that seek “unprecedented expansion of the concept of law into areas of normative regulation which have been considered as belonging to the law proper”, which risks causing “normative confusion and uncertainty” and “erodes the concept of legal obligation”.

However, within this same school exist self-described “enlightened” positivists who are more willing to concede that some things have changed in the modern world. They acknowledge, for example, that the modern needs of states, among other factors, have led to shortcuts for generating rules binding on states and, on occasion, for new international actors such as transnational corporations, NGOs and IFIs.

The positivist’s views create more clarity, from a legal perspective, on the status of the rules created by the IFIs. According to legal argument stemming from positivist theory, the issue of bindingness is one criteria that eludes the rules generated by IFIs, as they are not legally binding. Since they are not legally binding, they cannot possibly acquire the status of the norms positivists refer to as law proper. This study agrees and does not attempt to argue that the rules created by IFIs can be regarded as legally binding rules. However, the effect that these IFI-produced rules have on international legal rules is the point of departure this study takes. This will be discussed in detail in subsequent chapters.

### 2.6.4 Norm Creating in IFIs

A crucial aspect in the role that IFIs play as far as international labour standards are concerned is the normative one. Through their operational policies, IFIs create normative and procedural expectations for staff and partners of the institutions that contribute in many ways in “forging” and developing accepted practices under international law. The “normative forging” is said to occur through the incorporation of policy requirements, including relevant operational standards, into loan conditions which the borrowing state is bound to fulfill. Accompanied by safeguards against non-compliance, the policy requirements become enforceable. The accountability mechanisms strengthen compliance with the

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430 Ibid.


432 Ibid.
binding elements of operational standards, thereby increasing the normative significance of the policies and the jurisprudence relating to their interpretation.\footnote{For a detailed discussion see Daniel Bradlow and Andria Fourie, "The Evolution of Operational Policies and Procedures at International Financial Institutions: Normative Significance and Enforcement Potential", Working Paper, American University Washington College of Law, 6 April 2011.}

Again, IFIs as policy actors in the international arena exert varying degrees of influence on the development of specific international human rights instruments.\footnote{Mac Darrow, Between Light and Shadow, 145.} Their influence on policy in borrowing countries constitutes a means by which new patterns of behaviour are shaped, with a bearing on the emergence or consolidation of international practices which may eventually acquire the status of customary norms or general principles of international law.\footnote{Ibid, 146.} However, one must be cautious that although IFIs, through their leverage, have a bearing on the manner in which certain international norms may evolve, such bearing can be positive or negative for the concerned area. Regardless of this, the international norms evolve, and whether they bear directly or indirectly on the development of international labour norms, the bottom line is that IFIs play an important role in the evolution of these standards.

The World Bank again exemplifies the norm creation aspect. Up until the mid-1990s, the World Bank had deliberately avoided addressing corruption, arguing that its Articles of Agreement prohibited it from addressing such internal affairs and political issues of members. However, in 1997, the then President of the Bank highlighted the importance of ensuring that all Bank resources are used efficiently in a speech where he stated, “Let’s not mince words: we need to deal with the cancer of corruption”.\footnote{See World Bank, “James David Wolfensohn: 9th President of the World Bank Group, 1995-2005”, available at http://www.worldbank.org/en/about/archives/history/past-presidents/james-david-wolfensohn (accessed 2 November 2017).} After this speech, the Bank indicated that corruption is “a major barrier to sustainable and equitable development” and thus an economic and social issue rather than only a political one.\footnote{World Bank, Helping Countries Combat Corruption: The Role of the World Bank (Washington, D.C.: World Bank, 1997), 2.} The WB’s move to tackle corruption can be considered a ‘tipping point’ in the emergence of the global anti-corruption norm.\footnote{Yasunasa Komori, “The Asian Development Bank: Joining the Fight against Corruption”, 47.} Anti-corruption was seen as part of a holistic approach to development, which addressed the interdependence of various elements of development - social, structural, human, governance, environmental, economic and financial as opposed to a set of discrete projects or programs.\footnote{Heather Marquette, “The World Bank’s Fight against Corruption” 8:2 Brown Journal of World Affairs (2007), 30.} Thus anti-corruption activities supported institutional reforms mainstreamed into the World Bank’s wider development activities and, subsequently, projects, policies,
research, training etc. were directed towards anti-corruption. In addition, the Bank initiated development joint programs as well as information sharing with other IFIs, the UN, academia, NGOs etc. on the issue of anti-corruption.

Subsequently, the regional IFIs adopted anti-corruption measures in their activities. The ADB approved its first anti-corruption policy in July 1998, the IDB adopted an anti-corruption framework in 2001, the AfDB established an anti-corruption department in 2005 and the EBRD published its first Anti-corruption Report in 2006 and later adopted the agreed set of definitions for corrupt practices in 2007. In addition, the leaders of the IFIs (WBG, IMF, IDB, ADB, AfDB etc.) established a Joint International Financial Institution Anti-Corruption Task Force to work towards a consistent and harmonised approach to combat corruption in the activities and operations of member institutions. Within this timeframe, it should be remembered that the UN Convention against Corruption was adopted in 2003, being the only legally binding universal anti-corruption instrument. Other international organisations have also taken to spreading anti-corruption norms. For example, the EU has spread these norms beyond its borders and has incorporated them in its accession and neighborhood policy, requiring accession countries to reform the public sector.

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441 Ibid.
446 See “UN Convention against Corruption” available at https://www.unodc.org/unodc/en/treaties/CAC/
Today, anti-corruption has become an international issue\(^448\), as opposed to the initial perspectives where it was viewed as a problem of sovereigns within national borders.

### 2.6.5 Norm Transmitting by IFIs

Having established rules and norms, IFIs are eager to spread the benefits of their expertise and often act as conveyor belts for transmission of such\(^449\) to other actors, be it states, other IFIs etc. The tools through which transmission occurs differ from one actor to another. In some cases, it can be through the use of policy leverage as in the case of states. In other cases, it can be through other forms of influence or status, such as leverage arising from co-funding with other institutions or institutional cooperation. In 1989, the World Bank introduced its Environmental Assessment policy, which in subsequent years not only served as a legislative model at the national levels of member states,\(^450\) but also as a model for other IFIs including the IADB, ADB and EBRD. Moreover, it inspired the Rio Declaration on Environment and Development. As they are development institutions, IFIs play a major role in arbitrating the meaning of development and norms of behaviour appropriate to the task of developing oneself.\(^451\)

### 2.7 Conclusion

This chapter has highlighted important aspects in regards to the mandates and governance of the IFIs. It has looked into the structure of the IFIs to analyse the way in which these institutions are governed and the consequences of these unique structures. Furthermore, some theories that to some extent clarify the stature and effects of rules or norms created by international organisations, with particular examples using the IFIs, have been briefly discussed to provide a foundation for these aspects in subsequent chapters. A crucial observation here is the ability of the IFIs to generate, transmit or disseminate norms through their financing activities.

An important feature of this chapter is the analysis of the mandates of the IFIs, to identify the relevance of human rights in the development activities of the IFIs and how their role and mandates in this regard have shifted with time. The IFIs have been able to broaden their roles because they enjoy a broad latitude when interpreting their constituent documents. A crucial observation highlighted in this discussion is the inseparability of economic development from political as well as social dimensions of development, which has been confirmed by the IFIs practice

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\(^449\) John Mathiason, Invisible Governance: International Secretariats in Global Politics (Bloomfield: Kumarian Press, 2007), 137

\(^450\) Mac Darrow, Between Light and Shadow, 146

and shifting interpretation of the political prohibition clauses. This inseparability is corroborated by the evolved meaning of development in and outside the IFIs as well as a shift of lending activities of IFIs from project-lending to policy-based lending. A crucial supposition that is deduced from the shift of the operations of IFIs from project-lending to policy-lending is not only the emergence of social and political clauses in the operations of these organisations, but the birth and coming to the fore of conditionality as we know it today. Conditionality is central to policy-based lending because it links financial support to implementation of a programme of policy reforms considered critical for a country’s economic and social development.\textsuperscript{452} This shift has marked a heightened involvement of the IFIs in domestic economic, social and political policy, as well as in the international arena as these new loan policies and their conditionalities often entangle with the facilities of other global financial institutions and political leaders.\textsuperscript{453} It is therefore important to discuss the concept of conditionality, in order to analyse of how this tool coincides with international labour standards. The next chapter therefore turns to the concept of conditionality.

\textsuperscript{452} World Bank, Review of World Bank Conditionality, 9 September 2005, 2.

\textsuperscript{453} IDB, Technical Note on Design and Use of Policy-Based Loans at the Inter-American Development Bank
3. The Concept of Conditionality

3.1 Introduction
Whether it is with the aim of bolstering the credit quality, notably to mitigate the risk of default, or to ensure that the proceeds of financing are used for the purpose for which they have been given (such as achieving certain developmental objectives or realising certain macro-economic results), conditionality has become one of the standard features of public international finance, to such an extent that the very concept of conditionality has assumed a meaning that is hardly associated with its essential function in the relationship between creditors and debtors. Conditionality is the central tool that IFIs use to affect selected policies, and more specific to this study, labour policies, in recipient countries, making it crucial to study the concept in order to later analyse how this tool is used by IFIs to affect labour policy of recipient states. Moreover, as the concept itself is difficult to circumscribe, the delimitation of conditionality will always require the assessment of its application in the light of the specific bilateral relationship where the overall economic and (geo)-political context must also, of course, be taken into account. This chapter therefore seeks to delimit the term and to place the concept in the specific context in which it is applied in this study by elaborating the relationship it governs.

Conditionality is not a new concept and has been widely used outside the financial arena and in other disciplines. However, conditionality as used by the IFIs provides more of a legal challenge when it comes to the case of collective labour rights. This chapter analyses the concept of conditionality through an elaboration of its components and process from a legal perspective, to form a foundation for the analysis of labour rights conditionality in subsequent chapters. This chapter also aims to establish a common vocabulary in order to create a more precise use of the language of conditionality.

The chapter begins by defining conditionality and looking at the various forms it can take, in order to establish whether conditionality actually takes only one form or whether the various forms of conditionality create some sort of a grey area and/or overlap. This will create a more precise understanding of how conditionality is applied in this study’s specific context. Next, a dissection of the concept is provided in order to look into the components of conditionality as well

456 Ibid.
as the process of conditionality in an effort to identify the actors and factors in
creating conditionality. This is followed by a typology of conditionality. The final
section provides an analysis of conditionality as a legal concept as well as the
legal basis for the application of conditionality by the IFIs under this study.

3.2 Conditionality: An Abstruse Encounter

The term “conditionality” has increasingly become a catchword, especially with
the dawn of policy-lending, and even more so with the most recent economic
crisis in Europe. It is thus crucial to provide a definition for the term, which stands
at the heart of this research, in order to lay a foundation for its analysis in the
subsequent chapters. It is vital to look past the buzzword and look into the core
attributes of the term. This ambition, as basic and simple as it may seem, is a
difficult task. This is so because, although the term has been used in many
scholarly works, not to mention its status and use as a central instrument of the
IFIs financing, rarely has there been any attempt to define the term and cleanse it
of all ambiguity. There is no formal definition of the concept, not even by the
majority of IFIs that widely use conditionality, although their internal documents
(operational policies and guidelines) provide some insight. Again, the use of the
term in various disciplines further limits the possibility of identifying a solid
definition. Thus, many have relied on the simplest notion of conditionality, where
the access to IFI funds depends on the formal introduction of economic policies.\(^457\)
This is a narrow definition as it limits conditionality to economic policies, a reality
that is no longer true in the expanding mandates of the IFIs.

Scholars in the international relations discipline have attempted to define the term.
In international development, political economy and international relations,
conditionality is the use of conditions attached to a loan, debt relief, bilateral aid
or membership of international organisations, typically by the international
financial institutions, regional organisations or donor countries.\(^458\) Some
researchers have defined conditionality as “the application of specific, pre-
determined requirements that directly or indirectly enter into a donor’s decision
to approve or continue to finance a loan or grant”.\(^459\) Conditionality has also been
defined as “the use of loans and grants to secure change in developing countries
by making money conditional on the implementation of certain reforms”.\(^460\)

\(^457\) Lucas Pichler, “Conditionality and its Management by Bretton Woods Institutions: Implications Beyond the
Formal Conditions” (Master Thesis, M.A, University of Innsbruck, 2003), 5.
\(^459\) Benedicte Bull et al., The World Bank’s and IMF’s Use of Conditionality to Encourage Privatization and
the Oslo Conditionality Conference, 2006, 4.
\(^460\) Joshua Craze, World Bank Conditionalities: Poor Deal for Poor Countries (Amsterdam: A SEED EUROPE,
2008), 7.
definition limits the use of conditionality to developing countries, which has been the popular, but incorrect, belief for quite some time. Conditionality has also been defined as the linking of the disbursement of a loan to agreements concerning the economic policy which the government of the borrower country intends to pursue.\textsuperscript{461} Finally, the World Bank, using a narrow definition, has defined conditionality as “the set of conditions that, in line with the Bank’s operational policy…must be satisfied for the Bank to make disbursement in a development policy operation”.\textsuperscript{462}

An important characteristic of conditionality is put forth by the IMF’s definition, which defines conditionality as a “mechanism that links financing and policies”.\textsuperscript{463} Put simply, conditionality is a set of policy conditions or requirements by the lender, in this case the IFIs, that the borrowing state or recipient is required to meet in order to receive or continue receiving financial assistance.

All the definitions provide insight into the concept of conditionality. However, none of the definitions are clear and precise in the context of IFI conditionality. This vagueness or lack of preciseness can bring about the consequences that have been identified with the vagueness of the IFIs mandates. The lack of precision may be capitalised by the IFIs that use conditionality. Again, because of the vague definition of the term, national or international law is unable to adequately respond to the legal concerns raised by the overly imprecise comprehension of the term. All of these shortcomings provide a shaky basis for the law’s application to conditionality.

In the context of the development activities of the IFIs, it is very important to distinguish between ‘conditionality’ and ‘conditions of financing’. Tan makes a clear distinction by characterising conditionality as conditions that regulate the aspects of the economic programme or specific institutional or structural reform that is being financed by an IFI at either the national or sectoral level.\textsuperscript{464} These conditionalities are not specified in the legal agreement for financing, but are instead incorporated by reference in such contracts and may include prior actions, tranche release conditions, quantitative performance criteria and programme reviews\textsuperscript{465} etc. On the other hand, Tan defines conditions for financing as the terms of the legal agreement between an IFI and the recipient state, including financial conditions pertaining to the repayment period, loan charges, interest rate,

\textsuperscript{462} World Bank, Review of World Bank Conditionality (9th September 2005), 4.
\textsuperscript{463} IMF, Conditionality in Fund-Supported Programs-Policy Issues, 16th February 2001, 4
\textsuperscript{464} Celine Tan, Governance through Development, 96
\textsuperscript{465} Ibid.
procedures for loan withdrawals, terms on cancellation and dispute settlement. These aspects will be further discussed in subsequent sections.

3.3 Conditionality: A Multifaceted Concept
Conditionality is a multifaceted concept. This is to say that it has many forms or faces that interact with each other and at times it is difficult to separate the various forms. It is thus important to look at the basic or most common forms that bear relevance to this study, so that their identification is simplified in the future.

This form of conditionality, commonly referred to as economic conditionality, involves The initial concept of conditionality has been attributed to economists. This is because the first concrete experiences with conditionality occurred in the IFIs, specifically the World Bank and IMF, operating contracts with beneficiary countries. Here the conditionality included specific mechanisms for the assessment of correct implementation of development policies, thus being most popular amongst macroeconomists. macroeconomic as well as financial policies. Macroeconomic policies involve requiring the borrowing government to manage particular economic variables such as government budget deficit, interest rates or money supply, usually justified as necessary to promote currency stability and prevent inflation. Financial policies, on the other hand, have more to do with the repayment schedule and interest rates. Therefore, what is termed economic conditionality narrowly focuses on economic factors that influence the success rate of a project or programme, and the overall performance of a country’s economy. The aim of economic conditionality is, first, to make a recipient country able to repay its loans and, second, to overcome the difficulties that made loans necessary in the first place. This form of conditionality has also been referred to as the first generation of conditionality.

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466 Ibid.
468 Ibid.
470 Ibid.
However, in the policy context, economic conditionality has extended from economic to non-economic areas. At the end of the twentieth century and prompted by the end of the Cold War, a “new conditionality” arose, which was the institutional and political version of conditionality (thus “escaping the IFIs economic sphere”). This new form of political conditionality was a result of progressive extension from the specialised field of applied economics, where it was initially developed, to the discipline of political science. But what is political conditionality and how is it different from economic conditionality? Political conditionality is the linking, by a state or an international organisation, of perceived benefits (such as aid) to another state, to the fulfillment of conditions relating to the protection of human rights and the advancement of democratic principles. The conditionality includes a set of specific state behaviours – respecting human rights, organising multiparty elections, working in good governance mode, cutting military spending - that are considered conducive to development and whose realisation is promoted, through the threat of withholding of development assistance (the “leverage instrument”). It has been argued that this narrow perception can be widened to take into account other types of conditionality such as those relating to institutional or economic reform. The enlarged perception is further elaborated by Sørensen, defines political conditionality as the linking of aid to administrative and political reform in recipient countries, in pursuit of what is termed ‘good governance’. According to Sørensen, the components of good governance are, competent public administration, open and accountable government, respect for the rule of law and human rights, and sound economic policies, that is, adherence to market principles and economic openness. This form of conditionality has been referred to as the second generation of conditionality.

A third type of conditionality is social conditionality, although it is not really a widespread notion. This is partly because conditionality has mostly emphasised economic, institutional and political goals although in practice, most operational

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476 Dorothee Schmid, “The Use of Conditionality”, 399. Schmid argues that the enlargement of the geographical and functional scope of conditionality empirically demonstrated the organic link between economic systems and political regimes.
477 Ibid.
478 Ibid.
482 Georg Sørensen (ed.), Political Conditionality (London: Routledge, 2004), 1
conditionality is economy-oriented. However, the other forms of conditionality mentioned above involve mechanisms that are inevitably of a social nature. For example, requiring respect for workers’ rights, which is a form of political conditionality, has a social dimension to it as well.

A final type of conditionality is structural conditionality, which has been said to be the most intrusive form of conditionality. Unlike economic conditionality which deals with government spending and monetary policies, structural conditionality is broadly aimed at changing the overall architecture of national economies and/or political systems in pursuit of goals like economic growth or democratization, and is thus embedded in political systems. Examples of structural conditionality include market friendly or neoliberal reforms (e.g. trade liberalization and privatization) and governance reforms in areas such as national bankruptcy legislation and judicial reforms.

One can make some annotations regarding the various forms of conditionality. First, political and structural conditionality have been viewed as an evolved form of conditionality from the original economic conditionality. Uvin and Biagotti argue that this “new conditionality” is an expanded conditionality which developed in parallel with an increasing acceptance of a broader concept of development, where economic analysts began to admit that, in the long run, economic growth is neither sustainable nor desirable unless it is accompanied by environmental protection and reduced poverty. They further argue that the quality of governance and the pace of institutional and political reform affect all three goals simultaneously. This is to say that it is difficult to separate these forms of conditionality and apply them exclusively from one another. Each form spills over into the other and each form affects some dimension outside its own. In addition, each form of conditionality has undertones of the other forms of conditionality. In a practical sense, this means that, although an institution may impose economic conditionality, the economic conditionality can include political and/or social effects.

In addition to the various forms that conditionality can have, it can be used in a range of bilateral or multilateral relations between states and other states, or states and international organisations, or international organisations and other

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486 Ibid.
490 Uvin and Biagotti, “Global Governance”, 378.
491 Ibid.
international organisations. In each such case, conditionality is used as a tool to achieve a certain end. An example is the use of conditionality in bilateral aid. Bilateral aid is aid from a single donor country to a single recipient country. This form of aid gives the individual donor country a level of control over the aid that would not be available when working with multilateral aid. In bilateral aid, the concept of conditionality refers to the promise or increase of aid in the case of compliance by a recipient with conditions set by the donor, or its withdrawal or reduction in the case of non-compliance. Here, conditionality implies the presence of some form of pressure by the donor, and the donor’s choices or priorities determine whether the pressure is for political outcomes such as elections, or economic outcomes such as fiscal decentralisation. The aid disbursement is usually driven by political goals in donor countries such that, whether it is for reduction of poverty from an ethos of responsibility or a calculated decision to reduce terrorist activity, political justifications facilitate various forms of interference through conditionality. Conditionality in bilateral aid is different from IFIs’ conditionality in three ways. First, the conditionality emanates from a single donor, unlike the IFIs which are multilateral by nature. Second, the conditionality reflects or is based on the (political) interests of the donor, unlike IFIs conditionality which does not reflect the aggregate preferences of the multiple members to the IFI. Third, there is more direct contact between the donor and recipient states as opposed to IFI conditionality where there is almost no contact between the recipient and the IFI’s member states. Rodrik argues that because borrowing states are also shareholders of the IFIs, the conditionality and monitoring imposed by the IFIs is more politically palatable compared with the alternatives of being imposed by another sovereign government or by private financial institutions.

Accession conditionality is another way in which conditionality is used. It is conditionality imposed on a state in order for that state to gain membership or accession to an organisation. An example of this is EU accession conditionality which is set for candidate countries wishing to become members of the EU. The EU applies both positive and negative forms of conditionality to third countries for benefits such as trade, concessions, aid, cooperation agreements and political

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493 Ibid.
495 Ibid.
496 Ibid.
Both political and ideological motivations lie behind the development of conditionality in this context. This form of conditionality differs from IFI conditionality in that, first and foremost, the borrowing country is already a member of the IFI when the request for financing is made.

The various forms that conditionality can have draws attention to a very important aspect of conditionality. It is a tool associated with change to fulfill certain goals. Although it can be used in various contexts and take various shapes, it has the common function of being a tool for desired change, although this is not to say that it always results in such change, or that it solely results in such desired change. This will be further discussed later in this chapter.

3.4 Conditionality in Public Lending and Private Lending

As previously stated, this thesis focuses on the concept of conditionality in regards to public lending, that is, IFIs that lend to governments. Most IFIs also have branches that provide private financial assistance separate from the branches that provide public funding. Although conditionality can also be applied in private lending, its impact on issues such as human rights is more limited as it usually requires the private entity to do some things or prohibit them from doing some things in their operations. On the other hand, in public lending, the borrowers are sovereigns and the impacts are thus much greater. Bolivia provides an example of the potential impact of conditionality in public lending. In 2003, the then President, in an effort to satisfy the demands of the IMF in order to secure a loan, announced a new austerity programme of raising income taxes, cutting public spending and slashing the budget deficit. Consequently, marches and political protests broke out leading to violent confrontations with the army and killings of civilians as well as striking police officers. Although this is an extreme example, it sheds light on just how much of an impact conditionality can have. On the other hand, private lending is unlikely to spark anything close to this response.

Again, while in private lending, conditionality is mainly to secure the repayment of the loan, in public lending there exists a much wider range of possible goals such as economic growth, poverty reduction, monetary cooperation etc.

499 The International Finance Corporation (World Bank Group), the African Development Fund (of the African Development Bank), The Asian Development Fund (of the Asian Development Bank). The EBRD is the only exception as it is both a public and private lending institution.
500 Babb and Caruthers, “Conditionality Forms”, 15.
501 Ibid.
502 Ibid.
Therefore, in public lending, conditionality provides more room for expansion and manipulation.

### 3.5 The Formulation of Conditionality

Financing programs by IFIs are the end product of a negotiation process between governments and IFI staff. In other words, and contrary to popular belief, conditionality is not a one-sided imposition of conditions, but is rather jointly made by the IFI and a government. The negotiations phase involves preparatory papers for negotiation (Letter of Intent) and the draft agreement resulting from the negotiations. It is in this agreement that the terms of the loan and any conditionality are agreed upon (the Memorandum of Understanding). The final step is when the agreement is approved, following deliberations, by the responsible organ of the IFI, the Executive Board.

As conditionality is not applied evenly, it differs from one borrowing government to another. This differentiation is on a number of levels, such as the number of conditions, the severity of conditions etc. One concern that is relevant here is the amount of bargaining power a government seeking financial help from an IFI can have. This concern is built on two arguments. First is the obvious issue that as the IFI has “the scarce goods” and the government is in need of such financing with nothing to offer back to the IFI, it is the IFI that has the most bargaining power. Clearly it is this power that gives the IFI leverage in the negotiations. Here, leverage is the direct use of power, with a promise of reward (or a threat of punishment) for carrying out (or not) a desired policy. It is most effective when resources are scarce and because leverage is not subtle, it is easier to identify. Secondly, the preferences of the borrowing country and that of the IFI rarely coincide with each other as the government and the IFI serve different constituencies. Despite these two concerns, it is difficult to argue that conditionality is coercion by the IFIs because it is the government’s request for financial assistance (usually a ‘Letter of Intent’) that starts the whole process. It has been argued on this basis that conditionality is not a compulsion as the state can choose to receive the loan and abide by the conditions or not receive the loan. Of course, as will be discussed later, the uneven bargaining power is an issue. Yet even though it has been argued that there is often coercion where the bargaining capacities are not balanced, this argument is far-fetched because

505 Ibid.  
506 Byungwon Woo, "The Strategic Politics of IMF Conditionality", (PhD Diss., Graduate School of the Ohio State University, 2010), 11.  
508 Ibid.
coercion involves a compulsion to do something against one’s free will. The member states voluntarily join IFIs, voluntarily adopt the policies affiliated with membership, and voluntarily submit requests for financial assistance. However, this is not to ignore the bargaining power imbalances and the fact that the imbalance is exploited by the IFIs in some cases.

3.5.1 Letter of Intent
The process of obtaining financing from the IFIs begins with a letter of intent. The letter of intent is prepared by the state in need of financial assistance, generally stating the measures or reforms it intends to take, e.g., financial sector reforms and structural reforms to improve the national financial situation. In the IMF’s practice, the letter of intent is annexed to a memorandum on economic and social policy which gives more specific details of the measures the intended borrower country intends to take. In the Cypriot letter of intent to the IMF, for instance, the government stated that labour market reforms can mitigate the impact of the economic crisis on employment, limit the occurrence of long-term and youth unemployment, facilitate occupational mobility and contribute to improving the future resilience of the Cypriot economy in the face of adverse economic shocks. It is this gesture that has many times been used to invoke the voluntary nature of the relationship between states and IFIs and thus the voluntary nature of conditionality in contravening the notion of coercion on the part of the IFIs.

3.5.2 Memoranda of Understanding (MoU)
The term and use of MoU is not new in the international context. It is a tool used in many situations to create voluntary commitments between organisations, states, unions etc. It has been commonly used by the ILO with states and other organisations. An example is a cooperation agreement between the ILO and ADB, for exchange of information, documentation studies, research and best practices to promote cooperation and complementarity in operational work. Similarly, the use of MoUs is not new in the world of development finance, and has become increasingly popular. This is even more true after the economic crisis in Europe. When speaking of IFI conditionality, the MoU is an important aspect because it is the envelope and the instrument which contains the conditionality that the recipient state commits to. The corpus of MoU consists of Letters of Intent and Memoranda of Understanding.

Intent, Memoranda of Economic and Financial Policies, Memoranda of Understanding on Specific Economic Policy Conditionality, Technical Memoranda of Understanding etc.\textsuperscript{514} It is worth noting here that various terms can be used interchangeably with MoUs depending on the choice of wording of each particular institution.

The MoUs are essentially documents referring to national economic and social policies and reforms.\textsuperscript{515} They typically contain many legal and financial terms as well as terms from other domains such as administration.\textsuperscript{516} In some cases, the MoUs contain a precise description of factual legislative action to be undertaken and formally adopted by the national legislator in the state concerned.\textsuperscript{517} In such cases, the level of change is more clearly demarcated.\textsuperscript{518}

So, do these instruments create a legal agreement between the IFIs and a member state? It has always been argued by the IFIs that a MoU does not create or amount to a legal contract, nor is it an international agreement.\textsuperscript{519} The IMF’s Guidelines on Conditionality state without ambiguity that “Fund arrangements are not international agreements”\textsuperscript{520}. Alain Pellet, a former president of the International Law Commission, concurs, arguing that IMF funds are unilateral decisions that create the one-sided obligation for the IMF to grant the member state in question access to its finances, as long as the member state conforms to the relevant conditionality. Non-compliance by the recipient of these conditions does not give rise to legal responsibility, thus dismissing argument of the existence of a legal agreement.\textsuperscript{521} In this regard, Gold argues that the arrangements made between the IFIs and the recipient state do not encompass an intention of creating a legal relationship. Thus, as there is a lack of \textit{animus contrahendi}\textsuperscript{522}, and as such is clear

\textsuperscript{514} Tita Kyriacopoulou, Olympia Tsaknaki and Eleni Tziafa, "(Mis)understanding Memorandum of Understanding" 95 Procedia – Social and Behavioral Sciences (2013), 645.
\textsuperscript{515} Ibid.
\textsuperscript{516} Ibid.
\textsuperscript{518} Ibid.
\textsuperscript{519} Additionally, in some Memoranda, there is a clause clearly stating that the memorandum is not legally binding upon the parties. See Memorandum of Understanding between the International Bank for Reconstruction and Development and the National Anti-Corruption Commission of Thailand, 26th October 2009.
on the part of the parties, then it is not possible to hold that a legal agreement has been entered into.523

Dominique Carreau interestingly has an opposite view of the legal status of the arrangements between IFIs and lending states. He argues that the arrangements should be viewed as international agreements whose terms create rights and obligations for the IFIs’ members concerned.524 He considers the Letter of Intent as the counterpart to the access to IMF resources and thus his central claim is that the disguised consensual character of the acts involved and their hidden reciprocity cannot negate the true legal nature of the underlying legal instrument.525

However, it is apparent that the arrangements between IFIs and recipient member states do not form legal agreements nor international legal agreements for three reasons: the absence of legal consequences, the obvious lack of willingness of at least one of the parties (the IFI) to create a legally binding agreement and more importantly, as Zimmermann argues, the inapplicability to the letters of intent and MoU of constitutional mechanisms usually applicable to the ratification of international treaties.526

In light of the discussion above, it is crucial to explain two terms, to avoid any confusion in the use of these terms in the subsequent chapters as well as to further demonstrate the status of MoUs: programme and arrangement. The reforms required to receive financial assistance are the state’s programme. They are negotiated by the state’s authorities and IFI staff, but the programme itself is implemented by the member state.527 The arrangement supporting the programme is a more unilateral decision of the IFI and it is the IFI that sets the conditions and determines whether the conditions are met.528 As a unilateral decision of the IFI, the arrangement between a member state and the IFI, as discussed previously, is not a contract. The arrangement does not subject the member state to legal obligations to meet the conditions. If a state deviates from the arrangement or fails to meet the conditions under the arrangement, it will face no legal consequences.

The practicability of the choice by IFIs to use the MoU form is intended to preclude binding effects under international law529, although Lescano argues that there is a possibility that international law behaviour can have an unintended legal

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525 Ibid.
526 Claus Zimmermann, A Contemporary Concept, 68.
528 Ibid.
An interesting view in regards to this notion of the non-contractual status of MoUs is that of the ICJ in *Qatar v Bahrain*. Though the case does not involve the use of MoU, it does provide a practical example of Lescano’s argument. In the case, it was held that a number of letters exchanged between the King of Saudi Arabia and the Amir of Qatar, and between the King of Saudi Arabia and the Amir of Bahrain, amounted to international agreements creating rights and obligations for the parties. This argument, though creating an anecdotal basis for the implied existence of a legal agreement between an IFI and a borrowing state, cannot salvage the arrangements from their non-legal nature.

It is vital to bear in mind that though it is argued that MoUs are not contractually binding, they do, through conditionality linked to financing, produce legal consequences. For example, and more relevant to this study, as a result of MoUs, major changes have been made to the legal framework governing collective bargaining, as will be elaborated further in subsequent chapters. As will be seen, even MoUs and their disputed non-legal status have been the basis for agreements on behaviour between IFIs and states. In addition, though dubbed as mere recommendations, the MoUs have at times provided for encroachment of fundamental rights and at other times compliance of the same, and more importantly in this study, fundamental labour rights. The Troika’s MoU with Greece is a relevant example. It states,

> The Greek Government undertakes to reform wage bargaining system in the private sector which should provide for a reduction in pay rates for overtime work and enhanced flexibility in the management of working time. Government ensures that firm level agreements take precedence over sectoral agreements, which in turn take precedence over occupational agreements. Government removes the provision that allows the ministry of labour to extend all sectoral agreements to those not represented in negotiations.

It is clear that the MoUs contain the conditionality, whether financial, social or economic, that the state is required to implement. They are thus the instrument that is aimed at reform of certain rights and provides a specific framework for such reform.

MoUs are critical for this study because they provide a window into the negotiation process, which occurs behind closed doors. MoUs contain the results

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532 Andreas Lescano, “Competencies of the Troika”, 69.


534 Andreas Lescano, “Competencies of the Troika”, 70.

535 A term used to refer to the three bodies involved in Greece’s bailout, the EU, the IMF and the ECB.

536 IMF, MoU on Specific Economic Policy Conditionality (Greece), 6 August 2010, 34.

537 Andreas Lescano, “Competencies of the Troika”, 73.
of the negotiations, including the conditionality attached to the financing. They thus provide insight into the approach IFIs take towards particular issues, including human rights and in particular, labour rights. In such a situation, the issue as to whether the MoU is a legally binding document ceases to be substantial, as the legal implications of these documents, whatever their status, is profound. The legal status of the MoU as binding or non-binding contracts or international agreements is not important for determining their more practical effects, as it is the legal implications, particularly on collective labour rights, that are of interest to this study.

3.5.3 Finding Legal Traits in the Concept of Conditionality

Most international lawyers have failed to identify conditionality as a legal concept, one of the main reasons being the absence of well-defined principles of international law that must be respected by IFIs in their relationship with states requesting to access their resources. Again, ambiguity looms over what kind of legal status the “arrangements” between these institutions and states should be given. It is therefore crucial to look into conditionality from a legal perspective to better understand the legal challenges this doctrine poses and how it can thus produce legal effects.

Conditionality represents the regulatory aspect of the relationship between parties involved in international sovereign financing, that is, the IFIs and their client states. From a legal perspective, conditionality can be associated with positivists’ national civil law, which regulates contractual relationships between private entities, and specifically in a “conditional contract”. In these contracts, the conditions that decide the effectiveness of the contract are set before its execution, as are conditions on or events that would constitute a default, as legal remedies, dispute settlement procedures in case of a conflict, such as courts of law etc. In this context, the contract is treated as a unique event as it contains no consequences that past rounds of negotiations can have on the current one.

Coming to conditionality, while it shares some similar characteristics with conditions of a contract or contractual instruments, the nature and practical application of conditionality is largely peculiar to the relationship it regulates and

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541 Ibid, 9.
to the type of finance that is being regulated. Like other obligations under financial contracts, the concept of conditionality contains a fiduciary component, requiring the performance of due diligence on the part of the financing institutions to minimise the risk of debt default or a departure from agreed financing objectives. However, the scope and scale of this exercise under the doctrine of conditionality is far greater and much more intrusive than that undertaken in conventional contractual relationships. In particular, conditionality extends beyond supervision of the financial aspects of the loan agreement and its repayment and is instead focused primarily on changes in government policy and institutional reform that is the subject of the agreement.

Another peculiarity rises from the legal status of the financing contract. Unlike a borrower’s obligation to carry out a specific project under investment or project financing, such as the construction of a school or highway, a borrower or grant recipient’s commitment to execute the programme of reform under a policy-based loan or stabilization arrangement is generally not regarded as contractually enforceable. Conditionality must therefore be distinguished from conditions of financing which comprise the terms of a legal agreement between a financing entity and a client, including financial conditions pertaining to the repayment period, loan charges, interest rate, procedure for loan withdrawals, policies on cancellation and dispute settlement provisions.

From a legal perspective, a borrowing country or recipient does not usually breach a legal obligation should it fail to comply with policy conditionalities under an official financing agreement. Instead, the direct primary sanction for a breach of conditionality is the non-disbursement of funds under the agreement. The use of conditionality in development financing agreements stems primarily from the reluctance of IFIs to apply full contractual force to an agreed programme of policy and institutional reform, whereby the IFIs are unwilling to establish binding legal commitments for the substantive content of the programme itself. Various reasons have been provided for this ambivalence for creating legal relationships with recipient states. First, the political nature of the financing renders such relationships unsuited to standard forms of legal enforcement, in particular due to the potential sensitivities over their content, such that IFIs are cautious about impinging on sovereign prerogative by insisting on legal compliance with policy

543 Ibid.
544 Ibid.
545 Ibid.
547 Ibid, 115.
548 Ibid.
and institutional reform. The World Bank, for example, has stated being sensitive to being seen as “influencing or interfering” with processes which may involve “delicate and sensitive domestic considerations and involve internal decision making, including parliamentary approval”.549 Thus, attributing legal force to policy and institutional reforms which have yet to gain domestic legislative (or popular) approval may conflict with national constitutional arrangements, making compliance more onerous for the country and enforcement politically difficult for the IFI.550 Second, the lack of legality is a founding ethos for the relationship between IFIs and client states resulting in the absence of any “language of credit”551 or language having a contractual connotation.552 A final reason is that the IFIs have traditionally been reluctant to subject their operations to external justifiability. For example, the WB and IMF have consistently resisted outside interference with their decision making and administrative processes and have repeatedly opposed recourse to external adjudication for disputes with member states. IFIs have reserved for themselves the right to interpret their own constitutions and by-laws. Similarly, although both the WB and IMF have agreements with the UN, giving them authority to seek advisory opinions from the ICJ on matters of interpretation and legal issues arising from their operations, this authority has not been utilised to date.553

Although conditionality can be used in what is normally termed “investment” or “project” financing - aimed at specific infrastructure or other expenditure - this particular instrument is most commonly used in financing attached to policy changes, usually via a programme of structural or sectoral policy and institutional reform.554 As a combination of fiduciary, political and policy elements, conditionality is particularly suited to regulating the relationship between the financiers and recipients of development finance. The objective of policy and institutional reform is central to conceptualizing the role of conditionality in official development financing.555

The doctrine of conditionality therefore operates within a framework of self-adjudication in which the IFIs (through their organs and staff) operate as both the rule maker and enforcer.556 The practice of conditionality allows them to set

555 Ibid, 116
556 Celine Tan, Governance through Development, 119
preconditions for access to development financing, determine which conditions should apply to countries and establish if a condition has been met and which penalties should be meted out to a non-compliant member state.\textsuperscript{557} These significant powers of discretion accorded to IFIs under the practice of conditionality enable them to extract a wide range of policy commitments from borrowing states,\textsuperscript{558} as well as to create more intrusive reforms. Breach of the conditions could result in penalties such as ineligibility to use the resources of the IFIs, suspension of voting rights or compulsory withdrawal from the organisation.\textsuperscript{559}

Degnbol-Martinussen and Engberg-Pedersen identify two components which conditionality links: \textit{normative} and \textit{operational}. \textit{Normative} activities broadly refer to influence over social, political and economic organisation and ideology in recipient countries, while \textit{operational} activities comprise the implementation of programs including technical assistance, infrastructural development and emergency assistance.\textsuperscript{560} According to the authors, conditionality polices are “the interface between normative and operational activities”.

The combination of the policy reform (normative) content of conditionality and the link between such policy prescriptions and financial transfers brings Kalderimis to the conclusion that the practice of conditionality is a form of “regulation by appropriation”\textsuperscript{561} whereby regulatory norms are inserted into a jurisdiction through the terms/conditions of credit disbursement, and thus circumvent conventional arenas of law-making or norm-creation.\textsuperscript{562} This form of regulation enables the entity with greater bargaining power to use financial leverage to influence the behaviour of other entities, including formulating legislative and other regulatory changes desired by the former.\textsuperscript{563} It is this wide regulatory impact - the impact of conditions of lending outside the subject of loans - which not only differentiates the doctrine of conditionality from conventional contractual principles, but also represents the source of contention with conditionality.\textsuperscript{564}

\textsuperscript{558}Ibid.
\textsuperscript{563}Ibid.
\textsuperscript{564}Ibid, 189.
As a result of conditionality, borrowing states confront tighter economic constraints and clearer policy compromises and adjustments.\textsuperscript{565} The erosion of their absolute freedom to pursue internally generated policies is the flipside of the opportunities for accelerated growth beyond that capable of being financed by domestic savings.\textsuperscript{566} The questionable regulatory nature of conditionality is compounded by the discretionary nature of these arrangements. The use of conditionality to police IFI financial transactions in lieu of formal legal arrangements has accorded these institutions significant autonomy and wide discretionary powers vis-à-vis the nature and substance of their financial and policy interactions with the borrowing member states.

It should be emphasised here that the absence of legal consequences does not mean that there is total absence of other forms of consequences. This is to say that, compliance by the borrowing state to IFI conditionality is not out of fear of being held legally responsible, but rather in order to ensure that the hard currency it is in need of is provided and keeps flowing.\textsuperscript{567} In addition, states have little leeway in these mechanisms and effective sanctions arise from non-legal vectors, thereby contributing to the emergence of a normative power for IFIs.\textsuperscript{568}

The point of distinction between the understanding of conditionality as a legal concept and that applied by the IFI is that, in the legal concept, the application of the conditional contract is subordinated to laws and, for the case of disputes, to the judgement of an independent court.\textsuperscript{569} IFIs on the other hand are not subject to such principles since IFI conditionality, as applied by the IFIs, lies beyond the regulative influence of national law and courts.\textsuperscript{570}

In light of the discussion above and from a legal perspective, one can conclude that conditionality can be located at an intermediate point between the total absence of legal commitments and a formal legal agreement.

### 3.6 Actors

As stated before, in the negotiations for funding by IFIs, it is the government and the respective IFI that are involved. The IFIs generally do not negotiate directly with domestic interest groups.\textsuperscript{571} It has been argued that the disparities between bargaining power held by the IFIs as creditors and the debtor state renders the


\textsuperscript{566} Rodney Hall and Thomas Biersteker (eds.) The Emergence of Private Authority in Global Governance, 81

\textsuperscript{567} Claus Zimmermann, A Contemporary Concept of Monetary Sovereignty, (Oxford: Oxford University Press, 2014), 69.

\textsuperscript{568} Ibid.

\textsuperscript{569} Lukas Pichler, “Conditionality and its Management”, 9.

\textsuperscript{570} Ibid.

\textsuperscript{571} Teri Caraway,Stephanie Rickard and Mark Anner, “International Negotiations and Domestic Politics”, 33
“negotiations” meaningless.\textsuperscript{572} Conditionality can be said to be intimidating when the cost of not accepting the conditionality is so high that a borrowing country has no choice but to accept conditions that make it do things it would not have done otherwise, particularly as countries have a strong preference for avoiding the costs of default.\textsuperscript{573} Whether debtor countries will accept conditionality ultimately depends, therefore, on whether they have alternative sources of finance.\textsuperscript{574}

However, beneath the surface, there are other actors that may in one way or another have influence or shape the outcomes of the negotiations, particularly with regard to conditionality. For example, it has been argued that democratic countries have fewer conditions than non-democratic countries due to domestic politics resulting from stronger electoral constraints in democracy.\textsuperscript{575} In other words, autocratic leaders are far less constrained by electoral concerns because elections, when they occur, are not free or fair and so the populace has much less control over political leaders and the leaders are less concerned with winning support.\textsuperscript{576}

In addition, strong domestic interests that can resist and potentially interrupt the implementation of the policy reform measures can reduce the number of conditions.\textsuperscript{577} Woo, in his study, concludes that domestic political institutions and interests exert considerable influence over the design of conditionality.\textsuperscript{578} Volcker makes a humorous comment in regards to the IMF by stating that, “When the Fund consults with a poor and weak country, the country gets in line. When it consults with a big and strong country, the Fund gets in line.”\textsuperscript{579}

Studies have shown that economic interests of important groups of citizens, such as workers’ unions, can influence IFI loan conditions.\textsuperscript{580} Among democratic countries that borrowed money from the IMF between 1980 and 2000, those with stronger domestic labour received less-intrusive labour-related conditionality (that is, conditionality that stipulates domestic labour market reforms),\textsuperscript{581} thus

\textsuperscript{572}Ibid.
\textsuperscript{574}Ibid.
\textsuperscript{575}See Byungwon Woo, “The Strategic Politics of IMF Conditionality”, (PhD Diss., Graduate School of the Ohio State University, 2010), 126-128. Woo makes a study of IMF conditionality by coding 263 Letters of Intent and Memoranda of Economic and Financial Policies signed between 1994 and 2006, identifying the various factors and domestic interests that affect the different levels of conditionality such as the number of conditionality and severity.
\textsuperscript{576}Teri Caraway, Stephanie Rickard and Mark Anner, “International Negotiations and Domestic Politics”
\textsuperscript{577}Ibid.
\textsuperscript{578}Byungwon Woo, “The Strategic Politics of IMF Conditionality”, 42.
\textsuperscript{580}Teri Caraway, Stephanie Rickard and Mark Anner, “International Negotiations and Domestic Politics”, 28.
\textsuperscript{581}Ibid.
suggesting that governments facing powerful labour unions at home receive less labour conditionality by leveraging their opposition to reforms as bargaining chips in international negotiations. The government negotiates to minimise labour related conditionality where workers have the potential to be politically powerful. Thus, domestic actors’ preferences to some extent shape the terms of international cooperation.582 Another factor is the country’s economic circumstances where a country in severe economic distress may experience more conditions as IFIs have at times maximised conditions in the neediest countries.583

Interestingly, some have connected this variation in conditionality to geopolitics in determining the total number of conditions. For example, some argue that countries important to the U.S.A. tend to receive fewer conditions. Dreher and Jensen, by analyzing 206 letters of intent from 38 countries submitted during the period April 1997 through February 2003, came to the conclusion that closer allies of the United States (as well as other Group of 7 countries) received IMF loans with fewer conditions, demonstrating the disproportionate influence of the major shareholders of the IFIs.584 For example, among countries that received IMF monies between 1980 and 2000, 41 percent received no labour conditions in their loan contracts. This includes, for example, South Korea. At the other extreme, three countries received very intrusive labour conditions in their loan contracts. For these three countries, the sum of all labour conditions included in the arrangement letters (weighted by their intrusiveness) over the period from 1980 to 2000 is greater than sixty. These high conditionality countries include Bolivia, Chad, and Mali.585

It is crucial to bear in mind that, although conditionality is negotiated between the government and the IFI, where legal reforms are required, the country’s legislature must enact relevant laws in order to implement the conditionality. However, the IFIs’ leverage can still penetrate into the state legislative bodies. An example is the IMF’s activities in Argentina, where the IMF, through conditionality, proposed a tax reforms package. When the reforms were altered during debate in parliament, the IMF announced that it would cancel its loan if the parliament did not annul its decision. Finally, the parliament passed a tax bill that complied with the IMF’s conditions.586 This example demonstrates the role

582 See Helen Milner, Interests, Institutions, and Information: Domestic Politics and International Relations (New Jersey: Princeton University Press, 1997), 33-60
585 Ibid.
played by IFIs when they formulate economic policies and reveals how this process can weaken democratic procedures.\textsuperscript{547}

![Diagram of Conditionality](image)

*Figure 1: The Process of Conditionality*

The figure illustrates the process of conditionality where IFIs provide financing to governments, which in turn commit to undertake various policy reforms, usually by reforming various domestic laws.

3.7 Categories of Conditionality

There are various categories of conditionalities. In order to understand them and how they differ from each other, it is helpful to briefly look into the various categories. These categories are not to be confused with the various forms previously discussed. It is important to note that, as far as public lending by the IFIs is concerned, several types of conditionality can be used at the same time for various reasons.

3.7.1 Ex-ante Conditionality v Ex-post Conditionality

If conditions need to be fulfilled before entering into a relationship or before reaping the benefits of a beneficial agreement, it is commonly referred to as ex-ante conditionality. The interest of the conditionality recipient in receiving the benefit is used by the conditionality actor as a lever for desired behaviour change.\textsuperscript{548} Thus, the IFI sets the pursuit of certain objectives as a condition before

\textsuperscript{547} Christine Kaufmann, *Globalisation and Labour Rights*, 9.

\textsuperscript{548} Svea Koch, "A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons"
a financial relationship can be established. This type of conditionality has been seen to be useful for those who argue that effectiveness can only be achieved if a country’s policy environment is already favourable.

Ex-post conditionality, on the other hand, refers to conditions that are set during the course of an ongoing relationship. The leverage mechanisms in ex-post conditionality include the interest of the conditionality recipient in upscaling, continuing, or resuming beneficial cooperation. The advantage of this type of conditionality is that it is based on actual completed actions or measures, which tends to be more flexible and more supportive of government ownership than ex-ante conditionality.

In some ways, ex-post conditionality is a bit contradictory because, strictly speaking, conditions can only be imposed in advance. However, what it means is that a donor expresses beforehand, but vaguely and implicitly, that there is an expectation that certain conditions will be met, and that the donor will consider afterwards what action to take if these conditions are not met. Implementing ex-post conditionality faces some practical difficulties, including the identification of meaningful intermediate indicators on which to base disbursements and the considerable time lag resulting from collection and measurement of result indicators in often challenging circumstances.

3.7.2 Process Conditionality v Outcome Conditionality

Process conditionality focuses on the management of funds, or on the process of planning, adopting and implementing policies. In general, process conditionality ensures that certain institutions are in place or that certain participation principles are followed in order to enhance transparency and the representativeness of governance. Process conditionality has been seen as beneficial in that it can motivate countries to accelerate reforms.

At the other end of the spectrum lies outcome conditionality, also known as results-based conditionality. This form of conditionality focuses on measurable outcomes, such as GDP growth or poverty reduction, rather than on the type of policies implemented to reach them. This form of conditionality is central to the


587 Hilde Selbervik, Aid and Conditionality, 13.
591 Ibid.
593 Ibid.
594 Ibid.
596 Ibid.
concept of results orientation in aid and output-based aid. A results-oriented approach to conditionality is based solely on outcomes for the use of different loan disbursement procedures, to align conditionality with country performance rather than promises. The loan disbursements are linked more to outcomes than to policies and therefore, in this type of conditionality, the donor is “more concerned with the destination rather than the journey”. This kind of conditionality gives more discretion to the recipient country’s authorities in achieving agreed outcomes and reduces intrusive donor micromanagement of policy and institutional reforms. The European Commission has espoused this approach as an alternative, to move away from intrusive micromanagement through policy matrices and action plans, and thus to allow countries greater flexibility in choosing their specific paths toward reaching their stated goals.

However, this type of conditionality is plagued with its own difficulties. First of all, outcomes result from many factors in addition to policy choices, which makes the link between government action and outcomes often unclear. An example of this is the complex relationship between social spending and social outcomes. Thus countries may suffer if financing is withheld based on inadequate outcomes beyond the government’s control. Second, it is rather harder to monitor outcomes than policies, and data on outcomes is usually fraught with methodological problems. Finally is the problem of time. Outcomes typically change slowly and some need to be monitored over a long term to observe change - creating a situation where governments could be held responsible for the actions of their predecessors. Thus, this type of conditionality is unsuited to policy lending as policy lending involves disbursements over short periods, such as three years or even less. For example, policy-based lending that supports complex structural reforms such as public sector management, privatization and tax reforms results in tension between the rapid provision of financing and the often slower pace of intensive reforms.
3.7.3 Fiduciary Conditionality v Policy Conditionality

Fiduciary conditionality relates to the financial management and public accountability of the allocated funds and includes financial management, procurement and transparency.\(^\text{608}\) The purpose of fiduciary conditionality is to ensure that the finance is used efficiently and for the purpose intended, as well as a means to limit unwanted practices, such as corruption and the diversion of funds to illicit uses.\(^\text{609}\) It is hence an element of regular financial accountability.\(^\text{610}\)

In policy conditionality, financing is provided on the condition of policy changes or policy reforms on the part of the recipient. This type of conditionality includes conditions for the implementation of policies that are believed to facilitate the achievement of certain development goals. It is important to note that funding is not necessarily directed towards the areas of policy conditionality.\(^\text{611}\)

As most policy conditionality assumes the existence of a conflict of interest between the donor and recipient on policies\(^\text{612}\), policy conditionality is used to persuade policy makers to carry out beneficial reforms which - in the absence of policy conditionality - they would not have carried out.\(^\text{613}\) Put simply, if policy conditionality is required in the first place, it is presumably because policy makers do not like the reforms.\(^\text{614}\) It has been argued that the difficulty with this type of conditionality is its reversibility, that is, policy makers will abandon these reforms once the financial incentive ceases, and thus the reforms will disappear once the conditionality disappears.\(^\text{615}\)

3.8 Rationale for Conditionality

There are various reasons that IFIs use conditionality. A first reason is to serve as a commitment device. The use of conditionality as a commitment device can be viewed in two ways. First, it can create a substitute for collateral\(^\text{616}\), the main aim of which is to ensure the money is paid back. A good example is provided by the Articles of Agreement of the IMF which provides that the purpose of IMF conditionality is to ensure that IMF resources are used in order to enhance the borrowing country’s ability to pay back the loan by helping the borrower adjust

\(^{608}\) Benoit, Benoit, \textit{The World Bank and IMF’s Use of Conditionality}, 4


\(^{611}\) Benoit, Benoit et al., \textit{The World Bank and IMF Use of Conditionality}, 4


\(^{614}\) \textit{Ibid.}

\(^{615}\) \textit{Ibid.}

its own economic policies.\textsuperscript{617} In the long run this would ensure continuing availability of IMF resources for other member countries.\textsuperscript{618} Thus, conditionality serves as a commitment device to address time inconsistency problems, making it difficult for countries to change policies in the future. As it cannot be taken for granted that governments will pursue appropriate policies, and, as a consequence, governments do not receive loans, those governments have incentives to bind themselves in order to minimise investors’ risk perceptions.\textsuperscript{619} Moreover, Dhonte argues that conditionality can be used as a commitment device where governments tie their hands by including preferred policy measures in programs with the IFIs, in order to enhance policy credibility.\textsuperscript{620}

Another motivation for the use of conditionality is as an inducement. Central to this objective is the aim to induce the recipient government to do something it would not have chosen to do without the offer of financing.\textsuperscript{621} In this context, the financing becomes an incentive for the recipient government to change its policies.\textsuperscript{622} This is the very essence of policy lending; to induce governments to change or introduce policies that they would not have changed in absence of any financing. This objective becomes more relevant the further a country’s policy is from the IFIs’ preferred policy.\textsuperscript{623} Mosley argues that conditionality is used to induce behaviour that is perceived as beneficial by the lending institution.\textsuperscript{624} Again, conditionality best serves as a way to induce policies where the IFI and the recipient country disagree about the policies required, perhaps due to the existence of different objectives.

Conditionality can thus be used as a disciplinary tool for recipient governments to ensure that the governments “behave” in a certain way. IMF conditionality has often played this role, used to ensure fiscal discipline on the part of the recipient governments.\textsuperscript{625} Again, the World Bank and the IMF have used conditionality to link governance norms, which are imbued with disciplinary authority,\textsuperscript{626} to funding. The disciplinary force of conditionality does not derive exclusively (and often not primarily) from standard contractual sanctions but from the wider economic and geo-political impact of non-compliance.\textsuperscript{627}

\begin{thebibliography}{99}
\bibitem{617} Article V section 3 (a), Agreement Establishing the International Monetary Fund, 1945.
\bibitem{618} Byungwon Woo, “The Strategic Politics”, 10.
\bibitem{620} Ibid.
\bibitem{621} Paul Collier et al., “Redesigning Conditionality” 25:9 World Development (1997), 1400.
\bibitem{622} Ibid.
\bibitem{625} Claus Zimmermann, A Contemporary Concept of Monetary Sovereignty.
\bibitem{626} Jonathan Murphy, The World Bank and Global Managerialism (London: Routledge, 2008), 153.
\end{thebibliography}
involved whenever the donor can halt the flow of resources if the recipient country does not meet certain conditions.  

A final reason conditionality is used is for credibility. By complying with IFIs conditionality, the recipient government sends a message to potential private investors and helps it increase its credibility and a reputation for predictable behaviour. Because government performance is monitored by the IFIs, their financial position on a government are sometimes taken into account by other private creditors or potential investors. In such a case, compliance with conditionality can be used as an indicator for creditworthiness of a country in the international public and private arenas. Lastly, conditionality restrict the way in which the financial assistance is spent, particularly if the IFIs have different preferences than the borrowing government. Again, in this situation, conditionality is applied as a credible threat to avoid reversal.

3.9 Legal Basis and Application of Conditionality by IFIs

As stated before, conditionality is the practice of giving financial assistance contingent on the recipient government making certain changes, mainly in policies. The manner in which IFIs apply conditionality differs. The crucial element in the assessment of such application is the legal basis of the application of conditionality. In identifying the basis, it is crucial to examine the specific clauses in the IFIs Articles of Agreement, guidelines, operational policies etc. that governs the use of conditionality.

There is no formal definition of conditionality in the World Bank’s legal framework or operational policies. Again, as the Bank was originally a project-lending institution, the Bank’s Articles of Agreement do not specifically prescribe or regulate conditionality in policy-based lending. Policy-based lending is an exception to the Articles and takes place under “special circumstances”. This exception clause allows the Bank to depart from its traditional practice of making or guaranteeing loans. However, it has been argued that the use of conditionality in the Bank’s operations can be regarded as consistent with certain Articles. The Bank’s General Counsel has emphasised that the Articles cannot be subject to a strictly literal reading. The Articles, they argue, must receive a great measure of purposive interpretation to reflect the Bank’s changing role as a

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629 Paul Collier et al., “Redesigning Conditionality”, 1400.
630 Article III (4)(vii), IBRD Articles of Agreement, and Article V (1)(b), IDA Articles of Agreement.
632 World Bank, Memorandum from the Vice President and General Counsel, “Authorised Purposes of Loans Made or Guaranteed by the Bank” Sec M-88-517, para 13 (May 10 1988) “Authorised Purposes Opinion”.

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development institution. 633 In reciting its purposes, the WB’s Articles provide that the institution may provide funding for productive purposes on “suitable conditions”. 634 None of the provisions of the Articles explicitly require conditionality for policy-based lending. However, when the World Bank introduced SAPs in 1980, it made a borrower’s willingness to formulate a suitable programme of structural adjustment an important pre-condition for these operations. 635 Here, the Bank’s support for a borrower’s “programme” was linked to various changes that a country would make in its export-import balance, policies, institutions, and investment guidelines. 636 It was envisaged that these changes or “conditions” would enable the borrower to meet its development requirements. 637 As adjustment lending in the Bank increased, the importance of conditions associated with these operations grew. 638

On the other hand, in the IMF, the conceptual framework of conditionality has not changed significantly since the Fund was created. However, the scope and modalities of conditionality have evolved considerably over time. 639 In regards to scope, the coverage of conditionality has gradually expanded from macroeconomics to structural reforms. Regarding modalities, the IMF has evolved from virtually no ex-post monitoring to the presence of reviews and performance criteria in almost every Fund arrangement. 640

Coming to the legal basis, the purposes of the Fund provide,

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 to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity. 641

The Original Articles of Agreement of the IMF did not provide an entirely explicit basis for policy conditionality. Authority for conditionality is based on the vague requirement in Article 5 of the Fund’s Articles of Agreement that its resources be

633 Ibid.
634 Article II(ii), IBRD Articles of Agreement.
636 World Bank, Senior Vice President and General Counsel, Legal Note on Development Policy Lending 3, para 2 (July 26 2004).
640 Ibid.
641 Article I(v), Agreement Establishing the IMF, 1944.
made available under “adequate safeguards”. As the IMF’s Articles of Agreement put it, borrowing countries’ policies have to be in line with the purposes of the Fund, avoiding “measures destructive of national or international prosperity”. They have to guarantee that resources are made “temporarily available . . . under adequate safeguards”. In other words, loan repayment would be at risk without conditions; to secure the revolving character of the Fund’s resources conditionality is thus inevitable. As broad and vague as the Article is, it is the only statutory basis upon which conditionality in the IMF is based.

Like the WB, which has heavily influenced the IDB’s structure and functions, the IDB does not have a clause with the term “conditionality” in its Articles of Agreement. In fact, the Articles state that “loans made or guaranteed by the Bank shall be principally for financing specific projects”. However, the IDB has interpreted the Article to the effect that investment operations can incorporate some policy and institutional strengthening components to help overcome constraints that hinder investment effectiveness. The IDB operational guidelines provide little guidance on what qualifies as a policy or institutional reform, and thus as appropriate policy conditionality. IDB guidelines (CS-3633-1) state that disbursement conditions (and indicative triggers for programmatic series) should be critical (reflect a set of measures that are essential for the achievement of expected results), parsimonious (the minimum required for success), and realistic (the undertakings are within the borrower’s ability to carry out, given constraints). They also note that conditions and triggers should reflect output indicators (processes completed, actions taken, institutions modified, policies adopted) or, in some instances, immediate outcomes. However, the guidelines do not discuss good practices or provide examples to guide the design of policy matrices. In addition, the Articles of Agreement of the IDB and the operational guidelines do not provide a material limitation as to the conditionality to be applied in policy-based lending. As far as Article III, Section 7 is concerned, it has been interpreted by the IDB, from a legal perspective, to mean that at least 50% of the Bank’s lending is to be devoted to investment lending. The Bank has thus established caps on policy-based loans, but the only limitation explicitly mentioned is a quantitative one. As of 2015, the Bank set the cap on policy-based lending to be 30% of ordinary capital and 30% of special funds.

643 Article 5, Section 3(a), Articles of Agreement of the International Monetary Fund, 1944.
644 Article III, Section 7, Agreement Establishing the Inter-American Development Bank.
645 IDB, Technical Note on Design and Use of Policy-Based Loans at the Inter-American Development Bank (New York: IDB, 2016).
646 Ibid.
647 Ibid, 7.
648 Ibid.
Like the WB, the ADB’s Articles of Agreement do not provide for conditionality. The Operating Principles of the Bank do provide for conditions to loans, requiring that the Bank, in consultation with the government, discuss the terms and conditions of the loan and if approved, the loan takes effect once certain conditions are met. The documents of the Bank provide no specific limit as to the use of conditionality by the Bank.

As is the case with the WB, IMF, IDB and ADB, the AfDB’s Articles of Agreement do not provide for conditionality. However, the Bank’s guidelines provide a hint on this issue, though the provision itself is quite vague. The General Conditions Applicable to the African Development Bank Loan Agreements and Guarantee Agreements (Sovereign Entities) states,

The loan agreement may provide for certain operational conditions to be satisfied by the Borrower and/or Guarantor and the Bank shall, in such event, be at liberty to withhold the first disbursement and/or any other disbursement unless and until such operational conditions have been satisfied and, in the case of continuing obligations, no disbursement may be forthcoming for the duration of default in compliance with any such operational conditions.

This provision not only provides for the discretion of the Bank in applying conditionality to loans with sovereigns, it also provides for suspension of financing as a means to enforce such conditions. Similar to most of the other IFIs, the AfDB’s documents lack a precise limitation to the use of conditionality.

Finally, the EBRD provides a unique breakaway from the common issues arising from the legal basis of conditionality in the other IFIs. The basis of conditionality in the EBRD is provided for in its Articles of Agreement. Displaying clearly its political mandate, which will be discussed later in this study, the Bank applies political conditionality that caters for the Bank’s express purpose - fostering multiparty democracy, pluralism, market-oriented economics, the rule of law and human rights. Again, the Bank’s Articles of Agreement provide for social conditionality in regards to environmental protection. Interestingly, the Bank has a limitation cap similar to that of the IDB. The Bank’s Articles provide that not more than 40% of the Bank’s committed loans, guarantees and equity investments shall be provided to the state sector.

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650 Article 12.02, General Conditions Applicable to the African Development Bank Loan Agreements and Guarantee Agreements (Sovereign Entities), February 2009.
651 See Article 1, Agreement Establishing the European Bank for Reconstruction and Development, 1990. See also Preamble of the Agreement.
652 Article 11 (3) (i), Agreement Establishing the EBRD.
3.10 Enforcement of Conditionality

As natural in any other financial agreement, agreements between IFIs and borrowing states must deal with the risk of non-compliance which could arise by accident or opportunism. Different mechanisms have thus evolved for managing that risk. As discussed earlier, the failure or unwillingness of the recipient country to meet the conditionalities attached to funding is not a fortiori a breach of a contract or violation of international law, nor does it entail legal consequences. However, while the legal effects of non-performance are minimal, there are still repercussions of non-compliance with conditionality, which serve as a means to ensure the implementation of conditionality by recipient states.

At the forefront of mechanisms that are used to ensure recipient states comply with conditionality is suspension of financing. When a debtor nation has failed to comply with agreed-upon conditions, the IFIs can suspend the release of the next disbursement. General conditions for World Bank lending stipulate that the Bank may suspend financial transfer under the loan agreement if the borrower fails to perform its debt service or any other obligation under the agreement. The severity of this measure is brought about by the implications of the measure itself. Because private banks and institutions often view a credit package as a “seal of approval” that the borrowing nation is a reasonable investment, IFIs such as the IMF and WB have developed into de facto analysts of nations’ economic health. In the event of a halt in these institutions’ credit, private creditors may believe that the debtor nation has become an unacceptable investment risk, causing commercial banks to also withhold funding. For example, in July 1998, the IMF and Russia officially negotiated a United States Dollar (USD) 22.6 billion bailout package in which Russia was required to implement structural reforms and reduce its budget deficit from 5.6% in 1998 to 2.8% in 1999. To accomplish this, the IMF required Russia to strengthen its revenue performance, defend its exchange rates and allow domestic interest rates to rise substantially. However, after the package was approved, the nation refused to implement many of the required reforms. As a result, the IMF refused to grant Russia’s request for

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658 Mary Tsai, “Globalization and Conditionality”, 1322.
additional credit a few days before its devaluation and suspended the financing package entirely after releasing just one installment.\textsuperscript{660} Moreover, the proliferation of joint financing frameworks, such as multi-donor budget support arrangements (usually administered by the World Bank and IMF), has increased the interdependence of programme conditionalities by linking disbursements from different financiers to the compliance of a central project of reform or more onerously, to successful implementation of multiple programmes administered separately by respective institutions. This means failure to comply with conditionalities established by one donor or financier may affect disbursement from other financial sources.\textsuperscript{661} It is crucial to bear in mind that determination as to whether conditionalities in a financing agreement have been complied with rests largely with the IFIs staff, management and other organs within the IFIs, further reaffirming the discretionary powers of IFIs.\textsuperscript{662}

Surveillance is a complementary means for IFIs to ensure that a country is implementing the conditions of a loan. Among the IFIs, the IMF most commonly performs surveillance.\textsuperscript{663} It does so in carrying out its mandate provided for in Article IV of its Articles of Agreement which requires the fund to “oversee the international monetary system to ensure its effective operation.” This unfolds to include the mandate to promote economic growth and financial stability, as well as to help prevent crises.\textsuperscript{664} Thus conditional lending and technical assistance complement surveillance.\textsuperscript{665} It is important to state that the IMF plays two roles: a financial role by providing financial assistance to countries that are experiencing balance of payments difficulties and a regulatory role, in particular by engaging in surveillance over countries’ economies and economic policies.\textsuperscript{666} The practice of surveillance itself is governed by a series of general policy decisions adopted by the Fund’s Executive Board.\textsuperscript{667} Article IV Consultations involve meetings, usually annually, with individual country members where an IMF team of economists visits a country to assess economic and financial developments and discuss the country’s economic and financial policies with governments and central bank officials.\textsuperscript{668} The team’s findings are reported to the Executive Board and the Board’s views are transmitted to the country’s government.\textsuperscript{669} The surveillance process has evolved from a strict system of fixed exchange rates into

\footnotesize{\begin{itemize}
\item\textsuperscript{660} Mary Tsai, “Globalization and Conditionality”, 1324.
\item\textsuperscript{661} Celine Tan, “The New Disciplinary Framework: Conditionality”, 115.
\item\textsuperscript{662} See Celine Tan, Governance through Development: 119
\item\textsuperscript{664} Ibid.
\item\textsuperscript{665} Ibid.
\item\textsuperscript{667} Ibid.
\item\textsuperscript{668} IMF, “Surveillance” available at www.imf.org/external/about/econsurv.htm (accessed 23 November 2016)
\item\textsuperscript{669} Ibid.
\end{itemize}}
a policy dialogue in which the Fund seeks to persuade the authorities of member countries to follow appropriate economic policies in areas that may be a cause for concern and, where a member is implementing inappropriate policies, to change them before they lead to a crisis. Hence, the surveillance mechanism helps the IMF monitor whether certain policies are being followed.

Where a country fails/refuses to meet conditionality, it may send adverse signals to private financial markets or other official financiers. For example, countries’ track records with the IMF are taken into account for debt rescheduling under Paris Club arrangements as well as by international credit rating agencies in their assessment of countries’ investment climates, thereby affecting countries’ future financial solvency and access to credit.

A final mechanism is debt relief. Debt relief by the IFIs can be provided in various ways. A country may be offered relief on eligible debt held by multilateral, bilateral and commercial creditors in order to bring the country’s external public debt to sustainable levels. To receive debt relief, a country must have achieved certain reforms. For example, debt relief under the IMF’s enhanced HIPC initiative is contingent on the debtor country establishing a “track record of reform and sound policies through IMF and IDA supported programs.”

Therefore, the absence of a legally-binding contract to enforce execution of the terms by both parties does not limit the IFIs from ensuring that conditionality is complied with. The various mechanisms established by the IFIs such as surveillance as a monitoring tool as well as incentives such as debt relief facilitate their ability to enforce conditionality in non-legal means.

3.11 Promoting Change: The Subtle Means

Thus far, the concept of conditionality as an instrument for policy change has been explored. However, the ability of the IFIs to affect policies, and particularly rights on freedom of association and collective bargaining, does not only rely on the use of conditionality. IFIs also promote international collective labour rights in other ways. As stated earlier, the IFIs have long-standing relationships with member states and their influence in regards to a member’s policies does not only exist

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670 Ibid.
during the time span of a programme or project. The term ‘promote’ means ‘to contribute to the progress or growth of’674 something or to advance something. It means to urge the adoption of 675 or work for something. Promoting involves persuasion, which in this context includes efforts by global institutions or powerful nations to convince other nations to enact reforms that converge on global norms.676 In this case, promoting refers to the ability of the IFIs to persuade member states to adopt or implement, or respect, certain reforms or standards. For example, the WB promotes particular ideas of development by using its position as “the lead multilateral development lender and voice of the international community on development”677 and “a fount of development wisdom reflecting leading technical research”678 as a source of legitimate authority in the area of development. Thus, the World Bank and IMF do not in all cases produce and propose ideas or reforms and then condition them where financing is required, rather, they work to persuade borrowing as well as non-borrowing states to implement the ideas or reforms.679 Various consultations, such as the Article IV Consultations in the IMF, technical support and other non-lending services play a role in the IFIs’ efforts to promote various policy reforms in member states.

This phenomenon may be difficult to reconcile with legal doctrines, as it is based on relationships where entities enjoy some form of normative force that is non-binding.680 However, even in a legal context, certain aspects of persuasion can be identified, for example in the role of judicial precedent, where earlier judgements can have a persuasive role for a case at hand.681

3.12 Conclusion
This chapter has discussed the concept of conditionality and its properties from a legal perspective. The identification of some differences and similarities between the uses of conditionality in other fields aimed to provide a better understanding of conditionality and how it can be applied in various ways. The classification of various types of conditionality provides a better understanding of how conditionality can be used in various ways, on various grounds to produce various results. This is crucial in understanding how conditionality can be used to bring about a certain purpose or outcome.

674 The Free Dictionary by Farlex.
675 Black’s Law Dictionary.
676 Mark Klamberg, Power and Law in International Society, 27.
681 Ibid.
A discussion of the process of conditionality provided a clear look into the features and components surrounding conditionality, in order to clarify non-legal as well as legal vocabulary that will be used in subsequent chapters. Examining conditionality through a legal lens is of great importance as it provides the crucial link between norms on one hand and operations on the other, providing the theme most central to this study. The discussion of the legal basis for the application of conditionality highlighted how the legal basis in the IFIs’ instruments is quite vague, shaky and subject to manipulation, as are the IFIs’ mandates. An important aspect of the IFIs is their ability to persuade member states to take various legal reforms and policies due to the status the IFIs enjoy as “development doctors”. This affords them influence in promoting various policies, even when the policies are not tied to a lending programme. Although this role of IFIs is more subtle, it nevertheless has legal effects in a practical sense.

Before analysing the legal implications of conditionality and other forms of influence as far as international labour standards on freedom of association and collective bargaining are concerned, it is crucial to first look at the international legal framework, both theoretical and substantive, of these rights and the features that define them.

4.1 Introduction
This chapter confers two main points. First, it looks into the theoretical basis of collective labour rights in order to provide a better understanding of the theoretical keystones of these rights and provide an overview of various theoretical approaches to labour rights that have developed with time. This includes a discussion on the role and justifications for these rights as well as their limitations and weaknesses today. Second, the chapter explores the substantive legal framework governing these rights. As the rights discussed form the legal basis of this study, these aspects are crucial in the understanding and analysis of the subjects central to this research and will be employed in later parts of the study.

4.2 Historical Perspectives
International labour rights, as a system of standards and rules codified in international law and institutions, have long existed as international norms. They comprise part of several different international normative regimes, including international human rights.682 International Labour Standards (ILS) are a comprehensive system of international instruments on work and social policy.683 Primarily consisting of ILO conventions (legally binding international instruments) and recommendations (non-binding guidelines), the standards encompass legal rights representing the international consensus on labour issues.684 It is crucial to note that the term “standards” (and not law) does not deprive them of their legal character, but rather, demonstrates their important characteristic - the fact that they are minimum social standards agreed upon by various players (workers’ unions, employers’ organisations and governments).685 Therefore, to avoid any confusion, international labour law is the totality of international instruments, including the more comprehensive ILO instruments, as

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684 Ibid.
685 Ibid.
well as international human rights treaties which provide for labour rights in more general terms.\footnote{Jean-Michel Servais, \textit{International Labour Law} (The Netherlands: Kluwer Law International, 2011).}

The idea that improvement of working conditions at the national level required international cooperation goes back to the 19th century, when the process of industrialisation had brought about miserable working and living conditions for the working class.\footnote{See Heiko Sauer, “International Labour Organisation”, The Max Planck Encyclopedia of Public International Law, August 2014, para 1.} At this point, there were social, economic and political factors that led to the regulation at the international level. The main economic factor included the concern that the economic position of a country which had adopted protective labour legislation would be jeopardised if other countries did not adopt such legislation as well; international standards would be a form of guarantee against unfair competition exercised by countries with inferior conditions of work.\footnote{Nicolas Valticos, \textit{International Labour Law} (The Netherlands: Springer Science+Business Media Dordrecht, 1979), 17.} On the political front, a link was established between protection of workers and maintaining social peace, where international regulation of working conditions could prevent social upheavals.\footnote{Victor-Yves Ghebali, \textit{The International Labour Organisation: A Case Study of the Evolution of U.N. Specialized Agencies} (The Netherlands: Martinus Nijhoff, 1989),3.} These developments led to the creation of the International Association for the Legal Protection of Workers, a private association which successfully adopted two international labour conventions\footnote{Ibid.}, and whose activities were abruptly halted with the outbreak of the First World War. After WWI, Part XIII of the Versailles Peace Treaty\footnote{Article 427 of the Treaty lists the methods and principles for regulating labour conditions which all labour communities should endeavour to apply. The second principle is the right of association for all lawful purposes by the employed as well as by the employers. See Article 427, Treaty of Versailles, 1919.} (1919) led to the creation of the ILO after which other international human rights treaties, both international and regional, were adopted.

The emphasis on freedom of association, which had been a feature of ILO action during the Cold War, became less appealing when the prime targets were no longer communist governments such as Poland, Czechoslovakia and the USSR, but instead were countries pursuing the neoliberal agenda of labour market reform.\footnote{Philip Alston, “Core Labour Standards and the Transformation of the International Labour Rights Regime” in \textit{Social Issues, Globalisation and International Institutions: Labour Rights and the EU, OECD and WTO}, Virginia Leary and Daniel Warner (eds.) (Leiden: Martinus Nijhoff, 2006), 9.} However, from the end of the 19th Century and through most of the 20th Century, labour law was largely focused on collective issues.\footnote{Harry Arthurs, “Labour Law After Labour” in \textit{The Idea of Labour Law}, Guy Davidor and Brian Langille (eds.) (UK: Oxford University Press, 2011), 14.} Labour law permitted, protected and promoted concerted work action, they sought to regulate union management conflict and operated in a way of abstention so that the employer and worker representatives could institute a regime of ‘collective
laissez-faire. In the early post-war period, most advanced economies relied on Keynesian measures to promote economic expansion and full employment, thereby creating a positive environment for collective bargaining. However, later many advanced economies adopted a monetarist policy, often in tandem with the deregulation of labour markets and restrictions on union power.

Understandably, the content of labour law has changed over time. In the early years of the industrial revolution, it sought to protect the most vulnerable workers against physical and moral brutality. Labour law next sought to ensure that they worked in safe and salubrious conditions, and ultimately to require that they be paid enough to meet “the normal needs of the average employee regarded as a human being living in a civilised community”. This has been particularly important in the context of the decline in union membership globally and the need for labour movements to redefine their aims to reflect a more “modern” approach. New legal forms came to the fore, which recognised the interdependent activities of employees and workers and a need to coordinate those activities in the public interest. The lesson one draws from this history is that collective labour law can only survive with strong laws that create a secure exception to the economic constitution that protects a market economy.

4.3 Conceptualization of Labour Law Theories

4.3.1 Introduction

General theory about law is not a mere plaything of academic scribblers, with no meaning for men in action, but rather a guide that informs our conception of various aspects of law. The study of legal theory can be justified simply as the pursuit of knowledge and understanding, and the study of theory that relates to law is even easier to justify because the uses of law affect daily life, and theory influences how law is used. Therefore, to deepen the understanding of labour law in this setting, it is crucial to examine the various theories explaining labour law.

The origin of modern conceptions of labour law was a response to what German scholars at the end of the 19th century characterised as the “social question”, a set of problems resulting from industrialisation including the degradation of women and children, poverty, unemployment and strikes, as well as legal treatment of

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694 Ibid, 15.
695 Ibid, 3.
696 Ibid, 14.
700 Ibid.
trade unions and collective agreements.701 However, in studying labour law today at any level, be it national, transnational or international, one faces a number of challenges which did not particularly trouble the scholars of the 18th and 19th centuries. The first modern challenge is the rise of dogma in the 1980s and 1990s which, in the name of flexibilisation, taught that statutory protections for workers caused labour market difficulties.702

Another related challenge arises due to changes in the organisation of work and working relationships, particularly in the late 20th and early 21st centuries.703 While it could previously be assumed in most scholarship that most workers were employees hired under a contract of employment with a view to a long term engagement, today the picture is rather more complicated.704 Motivated by a desire to “maximise flexibility”, to be in a position to shrink and grow the workforce as circumstances demand, employers have made ever greater use of a variety of working relationships that do not fall within the category of “employment”.705 Examples of these are agency, part-time or zero hour workers. These changes in the nature of work, workplaces and workers have radically challenged the notion that all workers ultimately have common interests.706 Arthur humorously argues that workers are now arguably more likely to identify themselves on the basis of their roles as consumers rather than producers, what brand of beer they drink, what football team they support, what religious sect they adhere to, what ethnic or national myth they align themselves with; all of these seem more accurate to express their aspirations and more effective to mobilise their energies than solidarity with fellow workers determined to vindicate their rights and interests through industrial or political actions.707

These challenges to the existence of labour law share a common perspective: considerations of efficiency, wealth maximisation and economic prosperity undermine mandatory employment standards and protections for organised labour.708 In response to such challenges, it is tempting to seek a theory of labour law that precludes the discussions of efficiency and welfare by an appeal to an overriding value that justifies labour law.709 In highlighting the contention

704 ibid.
705 ibid.
706 ibid.
707 ibid.
709 ibid.
709 ibid.
surrounding the advocacy for labour rights on the one hand and those that would cheer on the beheading of labour rights on the other, it is crucial to look into the various theories that have developed alongside the rise and (disputed) demise of labour rights. However, as there are numerous theories that relate to these aspects and cannot be fully exhausted in this study, this chapter will only focus on the most relevant ones. The theories themselves are not exhaustive and monolithic constructs, but have, under the surface, branch approaches as well.

4.3.2 Theory of Rights
Having looked briefly at the historical aspects that led to the establishment of labour rights, one can agree with Ramcharan that, “humanity’s collective experience with injustice constitutes a fruitful foundation on which to build a theory of rights”.

In an era where challenges based on economic prosperity undermine mandatory employment standards and protections for organised labour, it is important to look to theories that can appeal to an overriding value that justifies labour law, that is, a strong theory of rights. The significance of a theory of rights lies in the weight attributed to the rights, which override any other policies and principles, save for appeals to other rights, thus withstand attacks that promote other values and goals which may argue against the regulation of the labour market and the workplace.

Recognising the potential power of rights, some labour lawyers have been drawn towards the articulation of the interests of workers and organised labour through the language of rights. Here, labour rights may be claimed as internationally protected human rights. Alston argues that the rights language as far as labour rights are concerned is desirable because:

(i) It provides a context and a framework
(ii) It involves (states’) legal obligations
(iii) It underscores that certain values are non-negotiable
(iv) It brings a degree of normative certainty
(v) It makes use of the agreed interpretations of rights that have emerged from decades of reflection, discussion and adjudication.

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710 Bertrand Ramcharan, Contemporary Human Rights Ideas (Abingdon: Taylor and Francis, 2008), 17.
711 Hugh Collins, "Theories of Rights as Justifications for Labour Law", 139.
712 Ibid.
Framing claims in the human rights discourse means that labour movements can move away from economic arguments and special interest politics and towards a stance based on ethics and morality which transcends any controversy over the (possibly detrimental) impact of unions on the economy.\textsuperscript{715} This approach not only refers to the so-called fundamental social rights but to all the fundamental rights human beings enjoy in modern society. These rights are embedded in national constitutions as well as in international and supranational charters.\textsuperscript{716}

Again, human rights have significant normative power.\textsuperscript{717} They are high priority, compelling claims which are “not absolute but strong enough to win most of the time when they compete with other considerations”.\textsuperscript{718} Moreover, human rights have hegemonic status and political appeal and human rights claims can, therefore, be used instrumentally by civil society organisations and labour rights movements to gain public support for their activities.

The concept of labour rights as human rights, or whether labour rights are or have the status of human rights, has been an issue debated by various scholars taking positions on either side. One argument that has been reiterated against the concept of ‘labour rights as human rights’ is the lack of universality of these rights in that they do not apply to everyone, but only to those in paid employment or in employment-like relationships.\textsuperscript{719} This is to say that, in contrast to human rights, which are universal and possessed by all human beings by virtue of their humanity, labour rights can be defined as the set of rights that humans possess only by virtue of their status as workers. The particularity of this definition can be restrictive, because it limits the rights holder to his or her identity or function as a worker. Furthermore, what constitutes work is also a contested question as informal work and nontraditional forms of work have sometimes been excluded from the definition of work.\textsuperscript{720} However, a counter argument is the notion of universality which is argued by Macklem, who states that ‘while labour rights as workers’ rights operate primarily to protect the domestic rights of workers from international competition, the normative significance of labour rights in international human rights law lies in the universality of the interests they seek to


\textsuperscript{716} Ibid.


\textsuperscript{718} Ibid.

\textsuperscript{719} Hugh Collins, “Theories of Rights”, 142.

\textsuperscript{720} Kevin Kolben, “Labour Rights as Human Rights?”, 453.
Mantouvalou has eloquently argued that the enjoyment of labour rights as human rights depends, and should only depend, on someone’s status as a human being who is also a worker.\footnote{Virginia Mantouvalou, “Workers without Rights as Citizens at the Margins” 16:3 Critical Review of International Social and Political Philosophy (2013), 379.}

Another concern about the rights-based approach to labour rights is whether, in thinking about the foundations of labour law, universal human rights might provide grounding for the normative values espoused by labour law. Are labour rights really the same kind of rights that are central to universal human rights discourse?\footnote{Hugh Collins, “Theories of Rights”, xx Collins illustrates the question by comparing rights to dignity or freedom or the against torture, presenting an urgent and weighty moral claim and applicable to every person on the one hand and the right to just remuneration and a paid holiday on the other. See also M Risse, “A Right to Work? A Right to Leisure? Labour Rights as Human Rights” (2009) 3(1) Law & Ethics of Human Rights, 8.}


However, this approach is flawed because it assumes that power flows from rights, while history has demonstrated that the opposite is true.\footnote{Ibid.}

It has also been argued, in contra to the rights-based approach, that while human rights are often conceived as timeless fundamental needs, labour rights may evolve according to the system of production, the forms of work and the division of labour.\footnote{James Nickel, Making Sense of Human Rights 2nd Edition (UK: Blackwell, 2007), 128.}

An interesting argument as to the human rights status of labour rights is that human rights basically involve protection against the power of the state while labour rights are protections against private parties/employers and not the state.\footnote{See Richard Epstein, Forbidden Grounds (Massachusetts: Harvard University Press, 1992); Richard Epstein, “In Defense of the Contract at Will” 51 University of Chicago Law Review (1984).}

That is, typically human rights involve state power and not private economic power. This is clearly a misconception, as human rights do not only impose duties on the state. The misconception may be explained because the main body of international human rights law was first developed as a bulwark against totalitarian regimes of the 20th century, and imposed duties on state authorities only.\footnote{Virginia Mantouvalou, “Are Labour Rights Human Rights?” 3:2 European Labour Law Journal (2012), 161.}

However, with time, legislatures and courts have increasingly considered the application of human rights to the private sphere as well.\footnote{Guy Mundlak, “Human Rights and the Employment Relationship: A Look through the Prism of Juridification” in Daniel Friedmann and Daphne Barak-Erez, Human Rights in Private Law (Portland: Hart Publishing, 2001), 298.}

An example to challenge this argument is the ECHR, which has consistently ruled that private
power can be as harmful as public power\textsuperscript{730}, and interpreted human rights documents in ways that mirror this, recognising positive state obligations to regulate the private sphere, including the employment relations.\textsuperscript{731} Thus, human rights principles have been extended beyond state action, and developed a positive rights jurisprudence in the employment context.\textsuperscript{732} In addition, there is acceptance that civil rights also apply in the contractual sphere and place obligations on the contracting parties.\textsuperscript{733} Finally, the incorporation of various labour rights in international human rights instruments, and particularly freedom of association which is provided for in the ICCPR as well as the ICESCR, demonstrates the human rights nature of these rights.

From a positivist view, one would be satisfied that labour rights are human rights, if this position is sufficiently supported in law.\textsuperscript{734} Indeed, when looking at the various provisions in human rights instruments, one is satisfied that not only are labour rights human rights, but that there is an extensive list of these rights in human rights law. The UDHR was the first human rights instrument to document labour rights.\textsuperscript{735} However, the treaties that followed the UDHR separated some labour rights from others, classifying some as civil and political rights in the ICCPR and some as social and economic rights in the ICSECR.\textsuperscript{736} Rights such as the right to form and join trade unions were categorised as civil and political rights while rights such as the right to work and the right to decent working conditions were categorised as social and economic rights. Rights in the social treaties were weakly worded and monitored\textsuperscript{737}, thus given “second hand” treatment, with the implication that some were treated as real human rights, while others were


\textsuperscript{735} See Article 23, Universal Declaration of Human Rights, 1948.

\textsuperscript{736} The separation also took place at the regional levels where the Council of Europe and the Organisation of American States separated civil and political rights and social and economic rights in two documents: the European Convention on Human Rights and the European Social Charter as well as the American Convention on Human Rights and the Additional Protocol in the Area of Economic, Social and Cultural Rights of 1999.

\textsuperscript{737} The ICCPR recognizes a right for an individual to petition before the Human Rights Committee in an Additional Protocol. The ICESCR has an Additional Protocol on individual petition on some rights such as trade union rights which is not yet operational, so it is only monitored through reporting procedures.
presented as aspirational goals. Arguably, this separation reinforced the existing hierarchy between civil and political rights which are seen as ‘universal, paramount, categorical moral rights’, and economic and social rights which had a much lower status, with some authors proclaiming them not to belong to the human rights scheme at all.

The Declaration on Fundamental Principles and Rights at Work of 1998 unequivocally categorises labour rights as human rights. The Declaration determined that “all members, even if they have not ratified the conventions in question, have an obligation arising from the very fact of membership in the organisation to respect, to promote and to realise, in good faith and in accordance with the constitution, the principles concerning fundamental rights.” Of the ILO’s 190 or so conventions “aimed at promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity”, four categories of rights have been identified and endorsed as basic human rights that all member states have pledged to respect. These rights are freedom of association and collective bargaining, forced labour, discrimination and child labour. These categories correspond to eight conventions that are together known as the fundamental rights conventions or core labour standards (CLS). It is crucial to emphasise that the core conventions are qualitative standards, that is, they represent norms of behaviour rather than quantitative benchmarks such as minimum wages.

Whatever the argument, the rights that are central to this study - freedom of association and collective bargaining - inarguably fall within the scope of fundamental human rights. It is thus fair to conclude that indeed certain labour rights cannot be denied the status and protection of human rights. Trade union rights are an example of such rights as they are covered by both categorisations of human rights instruments discussed above, not to mention the fact that they date back before the human rights instruments themselves. Moreover, the principal achievement of the ILO’s Declaration of Fundamental Principles and Rights at Work has been to expand labour protection into the domain of human rights by emphasising the status of the core conventions as basic (fundamental) human rights and tie these to the pursuit of freedom and economic progress and

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743 Ibid.
acknowledgement that social problems are political as well as economic in nature.  

Finally, although what labour rights entail in terms of labour market regulation might vary from state to state depending on the nature of their national economies, at a certain level of abstraction, labour rights possess universal value as instruments that protect essential features of what it means to be human. This view, grounded in a moral conception of human rights, also sees the relationship between domestic and international human rights in instrumental terms.

4.3.3 Legal Instrumentalism
Instrumentalism is an approach in law where law is perceived as a means to the attainment of an end or a tool for social good or an instrument to direct social change. Summers sets forth four related yet distinguishable characteristics of instrumentalist theory. First, law is not viewed as a set of axioms or conceptions from which legal personnel may formally derive particular decisions, but as a body of practical tools for serving specific substantive goals. Second, instrumentalism conceives law not as an autonomous and self-sufficient system, but as merely a means to achieve external goals that are derived from sources outside the law, including the dictates of democratic processes and the “policy sciences”. Third, instrumentalism assumes that a particular use of law cannot be a self-justifying “end in itself”, but instead can only be justified by reference to whatever values they fulfill. Lastly, law is considered to serve generally instrumental values rather than intrinsic ones, that is, law’s function is to satisfy democratically expressed wants and interests, whatever they may be (within constitutional limits). The rise of instrumentalism is associated with multiple factors, such as the “progressive era” in the United States, the industrial revolution and technological advances in the nineteenth and twentieth centuries.

751 Ibid.
752 Ibid. At this time there was a rise in instrumentalist scholarship (the Progressive Movement), in the context of belief of corrupted democracy and the concentration of political power in big corporations, the need for extension of the voting franchise to women, the need for industry to be regulated, need for protection of workers, need to relieve poverty and old age hardship etc. See Cushing Strout, The Pragmatic Revolt in American History: Carl Becker and Charles Beard (Connecticut: Yale University Press, 1958).
In as far as labour law is concerned, this theory configures the structure of labour law around its instrumental role in promoting particular goals. Sometimes these goals are welfarist, such as the amelioration of subordination or unequal bargaining power. Sometimes these goals are economic, such as the promotion of efficiency, productivity or competitiveness. To demonstrate is the principle aim of labour law in steering towards a particular conception of social justice, such as a more egalitarian society, and the norms of labour law are required primarily for the instrumental purpose of securing that goal. Of more relevance to this study is the example where the goal is economic development where labour standards are considered as merely instrumental in the pursuit of a wider mission to promote certain development outcomes.

The instrumental approach is fundamentally different from a rights-based approach. In an instrumental framework, individuals are not the holders of rights but rather the objects of policies or goals, where such rights are merely a means. In contrast, in a rights-based approach, the rights are the goals.

4.3.4 Institutional Theory
Institutionalism is an approach that orients enquiries around the rule-making and dispute resolving institutions in the sphere of work regulation. The structure of the discipline reflects judgements about which of those institutions are identified as particularly central and significant. Collective \textit{laissez-faire} in the 1950s represented the heyday of the institutional approach, with the institutions of collective bargaining located at the center of the discipline. Later, the institutional theories came to regard the individual contract of employment as the institutional center piece of labour law.

4.3.5 Neoliberalist Theory
A theory that stands out in this study is that of neoliberalism. Neoliberalism is not a legal theory or a theory of labour law; instead, it is an economic theory. Nevertheless, neoliberalism is relevant from a labour law perspective. As Mitchell and Arup argue, labour markets have at times been regulated more

\footnotesize{
755 \textit{Ibid}.
756 Hugh Collins, “Theories of Rights as Justifications for Labour Law, 137.
757 \textit{Ibid}.
759 Christine Kaufmann, \textit{Globalisation and Labour Rights}, 98.
}
emphatically in pursuit of non-protective economic goals in preference to extending or maintaining the immediate legal rights of workers.\textsuperscript{762} The idea that labour law is necessarily about the “protection” of employees has to some extent been abandoned, and one can recognise trends in the reshaping of labour law policies to remove employment protections and institute more market-based approaches to labour relations.\textsuperscript{763} In this respect, labour law is seen as a means of business facilitation, as a stimulus to micro-economic efficiency, as a contributor to national competitiveness and as macro-economic regulation.\textsuperscript{764} It is in this context that economic theory, such as neoliberalism, finds its way into the analysis of labour law or labour rights.

Bluntly, a crisis in labour law today derives from the overall challenge that neoclassical thought has raised.\textsuperscript{765} The founding figures of neoliberal thought took political ideals of human dignity and individual freedom as fundamental and held that these values were threatened not only by fascism, dictatorships and communism, but by all forms of state intervention that substituted collective judgements for those of individuals free to choose.\textsuperscript{766} It is this contention that lies at the centre of this school of thought; individuality as opposed to collectivity.

The neoliberal state’s approach to labour markets is problematic. Internally, the neoliberal state is necessarily hostile to all forms of social solidarity that put restraints on capital accumulation. Independent trade unions or other social movements need therefore to be disciplined, if not destroyed. ‘Flexibility’ becomes the watch word with respect to labour markets.\textsuperscript{767} Neoliberalism theory sees labour regulation as an external intervention, or interference with the market. The eventual result would be to reduce economic growth in various ways.\textsuperscript{768} In this theory, it is postulated that competitive labour markets lead to two highly desired end states: efficient allocation and full utilisation of labour.\textsuperscript{769} Implicit in these two ends are two other outcomes: competitive (labour) markets allow a highly flexible and adaptive shift of labour resources in response to changing economic conditions, and competitive markets minimise cost and maximise productivity of labour.\textsuperscript{770}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{763} Ibid.
\item \textsuperscript{764} Ibid.
\item \textsuperscript{765} David Harvey, A Brief History of Neoliberalism (London: Oxford University Press, 2005, 75
\item \textsuperscript{766} Ibid, 3.
\item \textsuperscript{767} Ibid, 75.
\item \textsuperscript{768} Simon Deakin, “The Contribution of Labour Law to Economic and Human Development”, 158.
\item \textsuperscript{769} Bruce Kaufman, “Labour Law and Employment Regulation: Neo-Classical and Institutional Perspectives” in Labour and Employment Law and Economics Kenneth Dau-Schmidt, Seth Harris and Orly Lobel (eds.) (USA: Edward Elgar, 2009), 3-14.
\item \textsuperscript{770} Ibid.
\end{itemize}
\end{footnotesize}
A cornerstone of this theory is faith in the markets’ capacity for self-regulation, that is, the market is capable of generating all the rules it needs to work properly. The labour market is modelled as not substantively different from other kinds of markets and to this effect, labour is a commodity like any other. Furthermore, markets self-adjust, thus prior to intervention of worker-protective laws, the market is in equilibrium. The theory also views regulation as likely to produce inefficiencies. The theory does allow that sometimes regulation is a necessary, but should be limited to setting up only basic rules, as beyond that, labour regulation can only serve to prevent the market from generating growth, employment and wealth, which according to neoliberalism, would be fairly distributed.

Neoliberal theory, therefore, has a strong normative predisposition in favour of individualism, in that autonomous decision making by individual agents (workers and employers) can lead to an outcome which is in the interest of society as a whole. It thus leads to an agenda of free(er) labour markets and deregulation of the employment relationship. Coming to the core of the activities of IFIs, this line of thought holds that labour regulation has negative effects on economic development. Thus countries which maintain extensive labour law regulations are effectively making a choice which implies lower growth and reduced development in favour of certain social goals such as a more egalitarian income distribution. As neoliberalism favours governance by experts and elites, a strong preference exists for governance by executive order and by judicial decision rather than democratic and parliamentary decision-making. This being the case, the backlash with this school of thought is that first, institutions with enormous power are outside any democratic control whatsoever. Second, internationally, there is no accountability, let alone democratic influence over institutions such as the World Bank and IMF, which “profess” this theory.

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774 Arturo Bronstein, International and Comparative Labour Law: Current Challenges, 26
775 Milton Friedman and Rose Friedman, Free to Choose: A Personal Statement (London: Secker & Warburg, 1980).
777 Ibid.
779 David Harvey, A Brief History of Neoliberalism (London: Oxford University Press, 2005), 66.
In rebuttal to arguments that labour rights have become irrelevant in the face of declining union density, rising unemployment and the spread of market liberalism, it is argued that markets do not function in isolation from their social and political contexts, thus social protection and dialogue are fundamental elements of adjustment. The various labour market reforms which have been ideologically inspired by neoliberal thought have disregarded the positive cause-and-effect relationship between labour law and the economy. In a nutshell, the process of neoliberalism has entailed much “creative destruction”, not only of prior institutional frameworks and powers (even challenging traditional forms of state sovereignty), but also of division of labour, social relations, welfare provisions, etc. To exemplify, given the restriction on all forms of labour organisation and labour rights and heavy reliance upon massive but largely disorganised labour reserves in countries such as Indonesia, India, Mexico and Bangladesh, it would seem that labour control and maintenance of a high rate of labour exploitation have been central to neoliberalisation all along. Moreover, today, globalisation and neo liberalisation are the economic and political forces fueling the transformation of labour markets in many countries.

As a final note, it is crucial to provide one last view of freedom of association and collective bargaining, through the eyes of a neoliberalist. Neoliberal scholars concede that every person has a right to form and join a trade union. What commentators like Frederich Hayek have objected to is legislation that is designed to promote collective bargaining or protect collective action on the basis that such laws constitute distortions of the market in a way that impinges unacceptably an individual’s freedom. It is enticing at this point to mention the Washington Consensus, which is an example of the neoliberal ideology, and how the IFIs that have followed this ideological prescription have approached labour rights. However, this will be discussed in depth in later chapters.

4.3.6 Conclusion
The theory of rights and the neoliberal theory are the theoretical basis for the contentions between human rights institutions on the one hand and international financial institutions which embrace neoliberalism on the other. As Stiglitz put it, it might seem as if the fundamental propositions of neoclassical economics were

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782 Ibid, 3.
783 Ibid, 76.
784 David Harvey, A Brief History of Neoliberalism, 66
designed to undermine the rights and position of labour.\textsuperscript{786} The solution to this area of contention is one of the issues brought up in this research, which discusses various aspects of the relationship between labour law and development, particularly in regard to development finance. While the link between labour law and economic growth is both complex and contested, there is less doubt over the positive relationship between active trade unions (lower inequality of earnings and improvement of economic performance), on one hand, and higher productivity and speedier adjustment to shocks on the other.\textsuperscript{787}

\section*{4.4 Conceptualizing Freedom of Association and Collective Bargaining}

\subsection*{4.4.1 Introduction}
As freedom of association and collective bargaining are at the centre of this research, it is crucial to look at the legal concepts explaining these rights. Raz defines legal concepts as those used primarily to express the contents of legal norms and their applications, and only secondarily and derivatively in other contexts.\textsuperscript{788} This section therefore provides an analysis of the conceptual aspects of the rights to freedom of association and collective bargaining.

\subsection*{4.4.2 Fundamentality}
One small but equally important issue that has come to light when asserting freedom of association and collective bargaining as fundamental rights is the issue of “fundamental rights versus human rights”. These two terms have many times been used interchangeably, displaying a notion that human rights are fundamental rights. However, some have argued that although the two quite often overlap, they are not the same.

Palombella argues that the two terms are not the same. While characterising human rights as being the product of a social system as well as a presupposition of it, a minimum, transcendental, categorical \textit{ought} beyond any single ethics, he argues that fundamental rights are a shared normative social practice, inspired by ethically demanding objectives and raised to the level of criteria or legitimacy around which the socio-legal system turns.\textsuperscript{789} If human rights, therefore, remain above ethical conflicts, fundamental rights are the highest normative moment of the public legal equilibrium between conflicts.\textsuperscript{790} He distinguishes human rights

\begin{thebibliography}{99}
\bibitem{790} \textit{Ibid.}
\end{thebibliography}
from fundamental rights in that he views human rights as moral visions of what is due to human beings, deontological imperatives, even if abstract, while viewing fundamental rights as those which are assigned a meta-normative role in a legal order and an ultimate value in the corresponding social and ethical context.791

Verdirame treats international human rights as cognate to fundamental rights. He argues that although it may be objected that constitutional entrenchment makes fundamental rights different from human rights, such difference thins out when one considers their political justification: expressions of these rights can be found in the preambles and bodies of national constitutions.792 Moreover, although not entrenched in a constitutional sense, the protection of a fundamental right in an international treaty also provides an entrenchment of some sort: it seeks to protect “the basic political culture of a society”793 and does so by connecting it to a system of binding international obligations which are in practice even more difficult to amend than constitutional bills of rights.794 He concludes by arguing that the idea of fundamental rights is to protect, as far as possible, a select group of entitlements from other considerations - be they utility, convenience or public interest - and encroaching upon fundamental rights would downgrade fundamental rights to a different status.795

Alexy gives a more simplistic distinction of the two concepts. He argues that fundamental rights are rights incorporated into a constitution with the intention of converting human rights into positive law796, thus showing the view that fundamental rights are built on or are an evolved form of the human rights. Neves agrees with this distinction, and also argues that the distinction between human rights and fundamental rights has to do with constitutionality, that is, fundamental rights being constitutionally guaranteed by states while human rights are internationally protected normative expectations of legal inclusion for every single person in world society.797 Neves, however, admits that the contents of human rights and fundamental rights do coincide.798

Coming back to labour rights, freedom of association and collective bargaining are not only human rights, but crucial legal principles. In theory, different approaches assert the fundamentality of certain norms, and their status as legal principles. One such approach is that of criteria, which allows one to classify

791 Ibid, 1.
795 Ibid, 357.
798 Ibid.
certain norms as fundamental norms. Untercshutz takes this approach, where she discusses four criteria to be:

1. The criterion of hierarchical supremacy of the norm. These can be found in legal acts considered as most important in the given branch of law or placed in a high position in the hierarchical order of legal sources. These may include constitutional norms, many of which have the nature of principles.

2. The criterion of superiority of substance in relation to other norms. A norm that gives rise to the entire group of norms may be considered fundamental. In other words, consequent norms can be derived from fundamental principles.

3. The criterion of the special role played by a norm in the design of legal institutions. Principles encompass important standards especially useful in the construction of legal institutions understood as “a set of legal rules creating one functional unit due to the fact that it sufficiently exhaustively regulate an important fragment of human relations”.

4. Extra-legal justification of the norm, or common acceptance of a social rule, that is, its axiological justification.799

One cannot deny that the criteria fit appealingly with freedom of association and collective bargaining. First, the rights are found in not only the most crucial human rights instruments as will be discussed subsequently, but also some of the oldest.

Again, freedom of association and collective bargaining rights, being amongst the ILO core labour standards, are constitutional principles incorporated in the ILO constitution itself. Moreover, the 1998 Declaration on Fundamental Rights at Work also provides for these rights in the fundamental rights category, obliging member states to respect and enforce them, regardless of ratification.800 It is crucial to bear in mind that the Declaration does not establish new legal obligations on Member States, but reflects policy obligations that members undertake by virtue of their ILO membership.801 The Declaration only encompasses the essence, that is, the goals, objectives and aims of the fundamental conventions, not the detailed legal obligations that come with ratification.802 This is to say that the Declaration did not bestow fundamentality upon these rights, but rather reaffirms them, as the International Labour Conference has stated that,

800 See ILO, Declaration of Fundamental Rights at Work, 1998.
801 Christine Kaufmann, Globalisation and Labour, 103.
802 Ibid.
…fundamental rights are not fundamental because the Declaration says so; the Declaration says they are fundamental because they are.803

Again, as argued by Bogg, these rights/principles are instrumentally significant in the formulation and enforcement of other fundamental labour rights.804 The effect of the categorisation of collective labour rights as fundamental is that these rights “have a trumping effect over other efficiency or welfare considerations”.805

4.4.3 Collectivity

Freedom of association and collective bargaining are collective rights, meaning they are enjoyed by a collective entity, which can be a group of workers, employers, etc.. This is in line with Raz’s interest theory of collective rights where he argues that individuals as well as groups possess rights. Collective rights are based on the interests of the group in question, but naturally, there is no intrinsic value in protecting the rights of groups. Therefore, collective rights can only be deemed so if they serve the interest of the individuals in the group.806 The interests that make the case for the right are separate, yet identical, to interests of the group’s members.807

Hartney provides a conceptual justification of collective rights by arguing that the justification of collective rights is not an empirical but normative one.808 This pertains to the value of the existence of certain groups and the importance of protecting these groups against forces which might weaken or destroy them, perhaps even to the extent of outweighing certain rights of individuals (either within the group or outside it).809 Here, collective rights are most coherently grounded in ontological individualism, which argues that in phenomenological terms, all groups are in the end reducible to their individual members810, as opposed to ontological collectivism which holds that collectives exist somehow independently of their individual members.811

Finally, a system for assessing compliance with freedom of association must examine several components. The three most central are freedom of association, the right to organise, and the effective recognition of the right to bargain

804 Alan Bogg, “Labour Law and the Trade Unions”, 105
807 Peter Jones, supra, 85
809 Ibid.
810 Ibid, 299.
collectively (hereafter “right to collective bargaining”). The right to strike is also a crucial component of these rights as it is “an essential means through which workers and their organisations may promote and defend their economic and social interests.”

4.4.4 Freedom of Association

The term freedom of association refers to a right to organise in autonomous trade unions that are able to be effective in representing their members. Wedderburn set forth two distinct interpretations of the freedom of association. The first one is a purposive one, where freedom of association connotes protection of the collective aims of the association. The right to form trade unions in many Western European countries takes account of this factor and invariably includes within it, an area of protection for some aspects of collective action, for example a right or liberty to bargain or to strike. Similarly, Bogg argues that freedom of association is a vital fundamental right that supports the associational spaces where individuals engage in forms of mutual ‘self-help’ and a life of self-constituting action. The second interpretation, which Wedderburn describes as “emasculating”, sees freedom of association as no more than the right of persons to associate.

Some theorists have grounded freedom of association rights in a more fundamental normative premise: citizenship in a free democratic society entails the right to freedom from ‘domination by others’. As elaborated by Pettit, ‘freedom as non-domination’ requires not merely non-interference in individuals’ life choices (including their contractual choices); it requires the ability to contest the decisions of others, both public and private actors, who wield power over

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813 The right to strike is not spelled out in either the ILO Constitution or any ILO conventions. However, all relevant ILO supervisory bodies have found that the right to strike is a necessary corollary of the right to organise and bargain collectively. See Lee Swee, "Crisis in the ILO Supervisory System: Dispute over the Right to Strike", International Journal of Comparative Labour Law and Industrial Relations 29:2 (2013), 204.
814 ILO Committee on Freedom of Association’s Digest of Decisions, para 522.
817 Alan Bogg, “Labour Law and the Trade Unions”, 97
one’s life and livelihood.\textsuperscript{820} In the employment context, this entails a basic right of individuals to challenge employer decisions free from the threat of reprisals; and it also entails a right to challenge employer decisions in association with others through a union or otherwise.\textsuperscript{821} The usefulness of the theory of ‘freedom as non-domination’ is that it gives content to the traditional but rather opaque invocation of unequal bargaining power as a justification for the right to act through trade unions. Given the economic power that employers have over workers (at least most workers most of the time), the right to form a union is necessary to ensure worker-citizens enjoy freedom from domination by their employers.\textsuperscript{822} Finally, it is crucial to summarily look at the two components of freedom of association.

\textbf{4.4.4.1 Freedom to Associate with Others}

Freedom of association as a basic normative principle entitles individuals to do in concert with others what each has the right to do individually.\textsuperscript{823} This means that individual employees are entitled to join with their fellows to contest employer decisions and conduct and thereby bring social pressure to bear on an employer, free from employer reprisals.\textsuperscript{824} It is important to note that freedom of association is embodied in international human rights instruments, including the ILO fundamental conventions, which reflects the concerns of the constituencies that participated in their negotiations and the bargaining power that trade unions have historically exercised in shaping these institutions.\textsuperscript{825}

\textbf{4.4.4.2 Non-Interference/Non-Intervention}

Non-interference, put simply, refers to a worker’s choice to form or join a trade union where government and employers must not interfere with such a decision.\textsuperscript{826} This is to say that there should not be any interference with the worker’s choice by the public authorities (government) or employers.\textsuperscript{827}

\textsuperscript{820} Some have applied Pettit’s political theory within the labour law context. See Nien Hsieh, “Workplace Democracy, Workplace Republicanism and Economic Democracy” \textit{Revue de Philosophie Economique} (2008), 57.


\textsuperscript{822} Ibid.

\textsuperscript{823} Ibid, 157.

\textsuperscript{824} Ibid.

\textsuperscript{825} Ibid.

\textsuperscript{826} Anne Davies, \textit{Perspectives on Labour Law} (Cambridge : Cambridge University Press, 2004), 202

4.4.5 Collective Bargaining

Bargaining has been defined as the process by which the antithetical interests of supply and demand, of buyer and seller, are finally adjusted so as to end in the act of exchange.\textsuperscript{828} The individual bargain concluded between employers and employees in labour markets, which is given a legal form in employment contracts, accords with this definition.\textsuperscript{829} Collective bargaining is a term used to cover negotiations between employers and employees, when the employees work in concert, and they meet a “collective will”.\textsuperscript{830} Thus, collective bargaining describes the most important function of unionism.\textsuperscript{831} When a trade union negotiates a collective agreement, it presents the so-mentioned collective will to employers. The actual settlement of conflicts between the employers and employees is largely, perhaps even wholly, transferred to the negotiating table where representatives act on workers’ and employers’ behalf. In this sense, collective bargaining might be said to replace individual bargaining.\textsuperscript{832}

A collective agreement (or collective bargain, or in some countries where it has a legal force, a collective contract), being the result of the bargaining, does not commit anyone to buy or sell labour, but does something quite different. It is meant to ensure that when labour (the specific kind of labour referred to) is bought and sold, its price and the other terms of transaction will accord with the provisions of the agreement.\textsuperscript{833} These provisions are in fact a body of rules intended to regulate, among other things, the terms of employment contracts. This is to say that, collective bargaining is itself essentially a rule-making process and this is a feature which has no proper counterpart in individual bargaining.\textsuperscript{834}

It is argued that collective bargaining is primarily a political institution because of two features: it is a rule making process and it involves a power relationship between organisations.\textsuperscript{835} The political work of trade unions can take the form of direct representation, with trade unions being reserved seats in some parliaments (e.g. Senegal) and on tripartite bodies that have a role in determining national economic and social policy (e.g. Netherlands).\textsuperscript{836} More typical in Western Europe is the exercise of power by trade unions (backed by threat of industrial action) and lobbying political decision makers at the national level.\textsuperscript{837} Political actions of trade

\textsuperscript{829} Ibid.
\textsuperscript{831} Ibid.
\textsuperscript{832} Allan Flanders, “Collective Bargaining”, 5.
\textsuperscript{833} Ibid.
\textsuperscript{834} Ibid.
\textsuperscript{835} Ed Rose, Employment Relations, 3rd Edition (Essex: Pearson Education Limited, 2008), 278
\textsuperscript{837} Ibid.
unions have often extended well beyond narrow interests: a prime example of this was the struggle against apartheid within South Africa and the international solidarity expressed by unions around the world in words and in deeds (e.g. organising dockworkers’ boycotts of imported South African coal).\textsuperscript{838}

An important issue to bear in mind is that the employment relation is characterised by democratic deficits\textsuperscript{839} In this regard, Chamberlain describes the contribution of collective bargaining towards furthering industrial democracy.\textsuperscript{840} Workplace democracy is the notion that workers have the right to participate in the making of decisions that have significant implications for themselves or their workplace, and inherent in this notion is liberty, independence, pluralism and a voice in decision making: the common roots shared by both freedom of association and democracy.\textsuperscript{841} Collective bargaining’s main philosophy is to promote and encourage democratic values between the union and management, in arriving at an acceptable and desirable agreement with regards to their working conditions, thereby symbolising the democratic processes which are a by-product of industrial democracy.\textsuperscript{842}

4.4.6 Defending the Purpose of Freedom of Association and Collective Bargaining

Regulation that allows, promotes or provides structure for collective bargaining can be justified on several different grounds.\textsuperscript{843} Whatever the grounds, the regulations are contested by those who challenge labour unions, not to mention those who have experienced a loss of faith amidst a decline in collective bargaining in many countries.\textsuperscript{844} However, collective bargaining can still be relied on as a vehicle for workers’ rights.

Through collective bargaining, employees are able to gain some bargaining power – ‘countervailing power’\textsuperscript{845} – to the power of their employer. Cox argues that the right to freedom of association and collective bargaining has a democratic

\textsuperscript{838} Ibid.
\textsuperscript{843} Guy Davidov, A Purposive Approach, 86.
\textsuperscript{844} Ibid.
\textsuperscript{845} See John K. Galbraith, American Capitalism: The Concept of Countervailing Power (U.S.A.: Houghton Mifflin Co., 1956), Chapter 9. Galbraith uses the term ‘countervailing power’ to describe power that is used to restrain private economic power.
attribute as it subjects the employers to a ‘rule of law’. Collective agreements commonly set rules on how workers should be treated, thus limiting the arbitrariness of being subjected to the complete control of the employer. Collective agreements help ensure that the employer cannot do anything it pleases (like a ruler in a dictatorship), making the relationship between employer and employee much more democratic. Another democratic attribute of freedom of association and collective bargaining is found in the ability it gives the employees to voice their views, concerns and demands, and to some extent participate in the self-government of the workplace. One must bear in mind that workplace democracy in many cases has expanded beyond the workplace. Bearing witness to this is the essential role played by workers’ unions in transforming towards and achieving democracy in various countries such as South Africa, Chile, Poland etc.

Through collective bargaining, employees can and do achieve better terms and conditions as it facilitates the redistribution of resources (as well as power) from employers to employees. However, this view has been contested with the argument that the improved unionised workers’ terms and conditions make employment more costly for the employer, which will result in reduced demand for employees in the non-unionised sector, leading to the most vulnerable (lowest paid) employees paying for their collective bargaining rights with their jobs. Here one can counter-argue that there appears to be no convincing evidence that unionisation reduces employment. In addition, unions are just as rational as employers and will most likely stop short of demanding raises that will end up hurting their own members. It is crucial to note that the notion of redistribution is not limited to the localised workplace. It can also be associated with fair or fairer income distribution. For example, through freedom of association and collective bargaining, workers’ and employers’ organisations can help address wage inequalities through tripartite dialogue on minimum wages or collective negotiations on wage levels. In fact, measures of income distribution for different countries indicate that higher levels of trade union density, collective

847 Guy Davidov, A Purposive Approach, 87.
849 See, for example, Mphariseni Budeli, Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order (Ph.D Dissertation, University of Cape Town, 2007).
851 Guy Davidov, A Purposive Approach, 90.
854 Guy Davidov, A Purposive Approach, 92.
bargaining coverage and coordination measures tend to be associated with more equitable income distribution and less inequality. An exemplary case is the inclusion of labour in the political economy leading to progressive development of the welfare state in the Nordic countries, which contributed significantly to a reduction in income inequality.

On a wider perspective, it has been argued that freedom of association and collective bargaining can also affect income/wealth distribution by providing trade unions with a countervailing power to offset market dominance by a few large corporations and prevent a winner-takes-all economy with its extreme concentrations of wealth. In this view, not only has the strength of corporations made it necessary for workers to develop the protection of countervailing power, collective bargaining has provided unions with the opportunity for getting something more as well.

A final argument against unions, which has been employed particularly by the financial institutions relevant to this study, is the issue of economic efficiency. However, the actual impact of unions and collective bargaining on economic efficiency is highly controversial. Even research by the IFIs themselves has not proved (or has had contradicting conclusions) that unionisation is an impediment to economic efficiency. When it comes to one specific aspect of economic efficiency, it is clear that the impact of freedom of association and collective bargaining on productivity is positive. To begin with, laws promoting these rights were designed to limit industrial conflict which was obviously seen as detrimental to efficiency. Empirical evidence suggests that the positive effects of unionisation on productivity are greater than any negative impacts.

### 4.4.7 The Role of International Labour Standards in International Law

A crucial role that labour standards play, as the name explicitly indicates, is standard setting, which the ILO has emphasised in its activities. Standards are a tool for resolving conflicts between different interest groups through policy and legislation. Labour standards set a minimum threshold, ensuring that workers are not totally at the mercy of their employers. The process of standard-setting

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860 Guy Davidov, A Purposive Approach, 94.
862 Christine Kaufmann, Globalisation and Labour Rights, 49.
clearly indicates that ILS represent national and international communicative devices for mutual transnational learning and problem-solving. ILS usually promulgate a general goal and set out the means and instruments to attain that goal, frequently derived from the synthesised experience of countries that have been exposed to the problem and have found a cure or at least a way to cope with it. Information gathering prior to setting the ILO norm, its subsequent probing in the country context, and the feedback to the ILO ensure that ILS provide a repository of international knowledge about how to address labour issues. They embody the accumulated international wisdom on the use of labour, incorporating experience gained from both good and bad working arrangements. The tripartite composition (employers, workers and governments) of the ILO legislative organs and monitoring bodies ensures that, when designing the standards, due consideration is given to practicability, manageability and cost effectiveness.

International labour standards can also be perceived as a tool. The main users of ILS are, of course, states (governments). However, other actors have found them to be a useful tool as well. Increased consumer interest in the ethical dimension of products has led various multinational enterprises to improve labour conditions in their production sites and in their production chains. While these standards on labour conditions are not a substitute for binding international instruments, they play an important role in spreading the principles contained in international labour standards. These standards have also been used in various collective agreements, for example, in the garment and textile industry. In addition, ILS have found their way into various trade agreements as well as foreign direct investment, such as the International Finance Corporation’s (IFC) standards toolkit which contains international labour standards.

Moreover, regulatory powers of the ILO, such as they are, have been based on the principles of dialogue, cooperation and moral persuasion backed by an extensive programme of technical assistance in the application of ratified Labour Standards. Therefore, ILS regulate the collective organisation of actors and the

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864 Ibid.
866 See for example Economic Partnership Agreement between the East African Community Partner States, on the One Part, and the European Union and the Member States, of the Other Part (EU-EAC EPA), 16th October 2014, which makes reference to the ILO Declaration on Fundamental Principles and Rights at Work.
867 See Performance Standards 2(PS2), IFC Performance Standards on Environmental and Social Sustainability, 2012
relations and forms of negotiation between them. With the unique procedures through which they are created, and contrary to human rights instruments where states are represented solely by public officials in negotiations and adoption, the ILO tripartite composition of governments, workers’ representatives and employers’ representatives provides an optimum demonstration of the potential of social partners participation in the processes of the standards, which are more of a consensus on labour issues rather than a command, as well as structures and channels for social dialogue on various issues, including development.

ILS also set minimum and maximum terms for utilisation of labour resources (e.g. minimum wages laws, maximum number of weekly hours, minimum noise levels, maximum weight carried by a worker, protection from toxic substances etc.). The standards remove the employer’s ability to seek and gain a competitive advantage by paying substandard wages and keep the public and/or state from ‘subsidizing’ firms that cannot pay a living wage. ILS provide ways and means of support or promotion for particular courses of action or services (for instance, public agencies for placement and training of workers).

4.4.8 Justifications for ILS

There are two dimensions to the economic argument in favour of ILS. One is a conventional ‘static’ economic efficiency argument where ILS correct distortions in labour markets, which results in better allocation of scarce resources that raises output and economic being. The second argument is based on ‘dynamic’ economic efficiency: ILS change the pattern of incentives facing businesses and government. In doing so they shift economies to a ‘high road’ path of economic development in which wages are higher and in which business competition focuses on productivity and product quality rather than minimum costs.

The traditional story is simple: employees suffer from unequal bargaining power compared to their employer. The unequal power makes contract law inadequate, as the requirement is not met for both parties to the contract being able to agree freely on the terms that are mutually beneficial. As a result, employees are in need of protection. The law provides such protection to employees (“the weaker party”), by ensuring minimal terms in legislation and by opening the possibility of collective bargaining. When one party is systematically stronger (the

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870 Werner Sengenberger and Frank Wilkinson, “Globalisation and Labour Standards”, 133
871 Ibid. Additionally, these standards can help to promote cooperation between firms in joint development, pooling and sharing of resources for gaining markets and improving performance and for generating a political voice.
873 Ibid.
employer), the law can no longer assume that the terms of the contract reflect the free will of both parties.

Adam Smith famously described unequal bargaining power in employment stating,

It is not difficult to foresee which of the two parties must upon all ordinary occasion, have the advantage in the dispute and force the other into a compliance with their terms...the master can hold out much longer...many workmen could not subsist a month, and scarce any year without employment.\(^{875}\)

As previously stated, neoliberal economists view labour law as a cost, impinging on the efficient management of business. This group insists that efficiency is achieved by letting the workers choose freely and they consider any intervention such as labour laws to be harmful and result in less efficiency. However, lawyers have considered this “intervention” to be necessary on other grounds, such as achieving fairness or distributive justice, defending human dignity, or promoting equality and workplace democracy.\(^{876}\) More recently studies have shown that labour rights actually improve efficiency. Labour rights can reduce difficulties resulting from the incomplete nature of the employment contract by promoting trust in the relationship.\(^{877}\) These factors have been corroborated by empirical research and have shown for example that labour unions can enhance efficiency because the job security that comes with collective agreements can boost productivity.\(^{878}\)

The issue of dignity is an important validation for ILS. Human rights and labour lawyers tend to characterise at least some labour standards as being fundamental to human dignity. These lawyers further assume that the essential minimum standard will only be assured if a strong legal regime including both national and international components is put in place in order to encourage governments to ensure the protection of their workers’ rights.\(^{879}\) Accordingly, freedom of association can be seen to be ‘constitutive of the essence of humanity’ and a right which, as an aspect of freedom in general, has the deepest normative salience for humans.\(^{880}\) In addition, the concept of dignity extends beyond freedom of the


individual to the opportunity to live a life with respect. The concept has also been regarded as a modern statement of the slogan “labour is not a commodity”.\(^{881}\)

Social justice became a central element in legal thought in the 18th century (1900s). It became important in legal thought because it represented the idea that justice did not have to be achieved through a set of abstract legal rights which had little to do with the experience of general society. Social justice includes the fair distribution of wealth, power and other goods in society.\(^{882}\) The principle aim of labour laws in this context is to steer towards a particular conception of social justice.\(^{883}\) Wealth and power are asymmetrically distributed in most societies; since workers possess less of both than employers, they are inherently disadvantaged.\(^{884}\) States may intervene in various ways: by redistributing wealth through taxation and transfer payments, by detaching power from wealth by mandating workers’ participation in enterprise and workplace governance, or by nullifying the advantages enjoyed by employers by encouraging countervailing worker power in the form of unions.\(^{885}\)

ILS can serve as a general guide and as a source of inspiration to governments by virtue of the authority which attaches to texts adopted by an assembly composed of representatives of governments, employers and workers of nearly all the countries in the world.\(^{886}\) It can thus be said that ILS have developed into a kind of international common law, playing a part similar to that played in various times in history in the field of civil law, first by Roman Law and later by certain European codifications.\(^{887}\)

### 4.4.9 Limitations of ILS

Charny lists a series of barriers to international standards. They include irreconcilable cultural traditions as well as the problematic nature of international enforcement mechanisms.\(^{888}\) The international labour standards developed by the ILO are to be seen as the universal basis of the international body of labour law. This is even more so with regard to the core fundamental rights as contained in

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\(^{881}\) Hugh Collins, *Theories of Rights*, 137.


\(^{883}\) Harry Arthurs, *Labour Law after Labour*, 17


\(^{886}\) David Charny, “Regulatory Competition and the Global Coordination of Labour Standards” in Regulatory Competition and Economic Integration: Comparative Perspectives Daniel Esty and Damien Geradin (eds.) (London: Oxford University Press, 2001), 311, 328.
the Declaration on Fundamental Principles and Rights at Work of 1998. However, the ILO's approach of standard setting is not without problems.

The main critique regarding the ILO has been the lack of “police power” to compel adherence to ILO standards and to impose sanctions on violations,\(^889\) that is, the ILO lacks the power to enforce its standards. The ILO’s sanctioning mechanism is still based on the idea of ‘mobilisation of shame’ or in other words ‘naming and shaming’, which has caused the ILO to be perceived as “toothless”.\(^890\) This is quite distinct from sanctions in other international organisations like the UN and WTO which can resort to economic, trade and other forms of sanctions. The theory behind the ILO sanctioning mechanism is that states do not want their failures to observe international standards to be publicised (they fear naming and shaming)\(^891\) and the threat of such will act as a form of mild coercion for them to comply with their obligations. However, the success of mobilising shame as a method of regulating state behaviour depends on many factors, including the level of publicity of such within the country and abroad. For those that have been subject to numerous instances of international ‘naming and shaming’ a stage may have been reached where further instances will have little or no effect on their reputations. It is likely that ‘shame’ is not very widespread among those states which do not live up to what they have ratified.

Another limitation concerns the changes in the modern world of work. Changes such as globalisation and social change have caused the emergence of non-standards forms of employment such as temorary agency, fixed term contracts, zero-hour contracts, self employment, etc., which have become a contemporary feature of labour markets around the world.\(^892\) These various forms of employment have resulted in a heterogeneous workforce with dissimilar patterns of labour participation and different interests and demands, posing a challenge with regard to worker representation.\(^893\) Therefore, the ILO standards, especially those on freedom of association and collective bargaining, require new methods of representation.

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\(^893\) ILO, *Your Voice at Work: Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles at Work*, Report I(B), ILC 88\textsuperscript{th} session, 2000.
Lastly, a limitation to the ILS is outdatedness. Some of the conventions are outdated and no longer feasible for the modern world of work and the various forms the employer-worker relationship has taken in this modern, globalised and technological era.  

4.5 Fundamental Labour Rights Standards on Freedom of Association and Collective Bargaining

4.5.1 Introduction
At the end of the First World War, international regulation of working conditions was needed for several reasons. Increasing the level of labour standards was considered a humanitarian issue, a consensus existed that industrial peace and international peace were closely related, and the parties at the Versailles Conference were concerned that if social protection was not increased, world peace would be severely threatened by countries that undermined labour standards and promoted social dumping.

During the period after the Second World War, the Declaration of Philadelphia, which was unanimously adopted, solemnly declared the aims and purposes of the ILO and the principles which should inspire the policies of its members. The significance of the Declaration lies not only in what it represents for the ILO, but also the nature of thinking on national and international economic and social policy that underlies it. The Declaration can be seen as one of the key documents which shaped the world order after the Second World War and which set out the guiding principles for national economic and social policies within that order. An essential fact is that the Declaration expanded the mandate of the ILO beyond areas of conditions of work and labour legislation to national as well as international economic policies affecting employment and the welfare of workers. Subsequently, social rights were instituted in various human rights instruments as part of a wider effort to regulate the labour market, in line with

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897 Ibid.
the slogan “labour is not a commodity”. The human rights instruments today form the international legal framework of labour rights. The Declaration, among other things, affirms that freedom of expression and of association are essential to sustained progress. In summary, the Declaration set out the principles while the ILO conventions set out the rights.

For a number of decades now, the right to freedom of association and collective bargaining has been explicitly recognised as a fundamental right in a number of international documents. As rights are the product of specific historical circumstances with political and economic trends directly influencing how rights are created, defended and implemented, internationally, human rights emerged as a result of the failure of the Westphalian system to protect human beings from abuse and genocide. Though they are human rights, labour organising rights are unique because they are civil and political rights, and social, economic and cultural rights. They are civil and political because they incorporate elements of workers’ rights to free assembly, free speech and free association and they are social, economic and cultural rights because they are concerned with the redistribution of wealth and social justice. Moreover, trade unions were created partly to counter the inherently unequal and often exploitative employment relationship. By protecting a mechanism for workers' organisations, these rights provide a democratic means to give voice to workers' political, social and economic interests.

It is thus essential to look at the substantive legal framework governing these rights in an effort to identify the main elements and principles associated with these rights, which will form an important basis for analysis in subsequent chapters.

4.5.2 ILO Conventions

International labour standards are legal instruments drawn up by the ILO’s constituents (governments, employers and workers) setting out basic principles and rights at work. They are either conventions, which are legally binding international treaties that may be ratified by member states, or recommendations, which serve as non-binding guidelines. In many cases, a convention lays down

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900 ILO, Declaration Concerning the Aims and Purposes of the ILO (Declaration of Philadelphia), 1944, Article I(a).
901 Article I(b), Declaration Concerning the Aims and Purposes of the ILO, 1944.
904 Ibid.
905 Ibid
Developing international labour standards at the ILO is a unique legislative process involving the “tripartite” feature, with representatives of governments, workers and employers from around the world. The ILO is the only organisation that uses this tripartite approach. Freedom of association was reaffirmed as one of the ILO’s fundamental principles when the Declaration of Philadelphia908 was incorporated into its constitution, making it a constitutional principle.909 Membership in the ILO requires formal acceptance of obligations contained in its Constitution, which includes a clear affirmation of the principle of freedom of association,910 and consequently, members must respect the principle of freedom of association regardless of whether they have ratified conventions No. 87 and 98.

In a nutshell, freedom of association and collective bargaining are constitutional principles of the ILO and thus, member states commit to this principle by virtue of their membership. However, to transpose the principle into tangible and enforceable rights, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949(No.98) as well as the recommendations and jurisprudence of the ILO supervisory bodies “flesh out”911 the rights, translating the principle of freedom of association into specific rights capable of enforcement in law and applicable in practice.912 Convention No. 87 deals more with freedom of association which basically concerns the relationship of employers’ and workers’ organisations with the public authorities or the government. Convention No. 98 deals more with relations between workers’ organisations and employers, with the government in a distant regulatory role.913

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910 The Principle of freedom of association is affirmed in the preamble of the Constitution of the ILO as well as Article I(b) of the Declaration of Philadelphia which names freedom of association as an essential principle to sustained progress and is incorporated in the Constitution.
4.5.2.1 ILO Declaration on Fundamental Rights at Work, 1998

In 1998 the International Labour Conference adopted the Declaration on Fundamental Rights at work. The Declaration identifies four categories of fundamental rights at work embodied in eight fundamental ILO conventions (core labour standards) as being fundamental to guarantee the rights of those who work, whatever the level of development of the member state. This is not to say that the other conventions contribute lesser or greater amounts to the cause of human rights, but rather, the eight conventions are considered to be of higher priority than the others, as they are the instruments that are necessary in the struggle for better individual and collective conditions at work. In as far as freedom of association and collective bargaining are concerned, Article 2 of the Declaration sets out the right to freedom of association and the effective recognition of the right to collective bargaining as core labour standards. This provision also states that these principles were embedded in the very fabric of the ILO Constitution and as such, constituted obligations to which all ILO member states were obliged to adhere. Moreover, the Declaration not only acknowledges the obligation of member states, but also the obligation of the ILO to take action to assist its members, inter alia, “by encouraging other international organisations…to support these efforts.” The significance of the Declaration lies in the fact that it identifies an international conception of what constitutes the core of international labour law to be respected by all states. The Declaration states that,

All members, even if they have not ratified the Convention in question, have an obligation arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith, and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions, including freedom of association and the effective recognition of the right to collective bargaining.

Here, the Declaration imposes a constitutional obligation that does not depend upon voluntary acceptance. In addition, the follow-up procedure requires states to report on their obligations under the core conventions that they have not

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914 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87); Right to Organise and Collective Bargaining Convention, 1949 (No.98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No.138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No.111).


916 Article 3, ILO Declaration on Fundamental Principles and Rights at Work, 1998.


918 Article 2, ILO Declaration on Fundamental Principles and Rights at Work, 1998.

Therefore, the core labour rights provided for by the Declaration constitute baseline entitlements or a minimum set of rights that, as a matter of international law, all states must comply with regardless of their level of development or location in the international economy. The Declaration reaffirms the fundamentality of the rights therein by stating,

The International Labour Conference,

Recalls:

(b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognised as fundamental both inside and outside the Organisation.

All in all, the central importance of this Declaration is that it is a unanimous confirmation of the international community which characterised and elevated the CLS to the status of human or fundamental rights, grounded on the essence of human dignity at work and touching upon bedrock values of freedom and equality. This characterisation emphasises the universal nature of the standards and is intended to liberate them from analysis solely in economic terms. Finally, it recognises that social justice and economic progress are inextricably linked.

4.5.2.2 The ILO Supervisory System

It is important to understand the ILO’s supervisory system as much of its jurisprudence, as previously stated, emanates from this system. The ILO has a unique system of supervision in as far as compliance with ILO conventions by member states is concerned. This is even more so in regards to the supervision of freedom of association and collective bargaining conventions.

The system can be divided into two categories. First is the regular system of supervision whereby member states are obliged to report regularly on measures they have taken to implement the conventions they have ratified. The reports are also submitted to national workers’ and employers’ organisations, which are also allowed to submit their comments on the reports. The reports are examined by the Committee of Experts on the Application of Conventions and Recommendations.
(CEACR), which in turn provides impartial and technical evaluation of the application of conventions by a member state, making comments in the form of observations - comments on fundamental questions raised by the application of a particular convention by a state - or direct requests, which are more technical questions or requests for further information. It is important to note that the CEACR consists of eminent jurists from various geographical areas, legal systems and cultures. The CEACR’s report regarding compliance with the ILO conventions by member states is submitted to the International Labour Conference - the highest organ in the ILO system - where it is examined by the Conference Committee on the Application of Standards, made up of government, employer, and worker delegates. This Committee examines the report in a tripartite setting, selectively examining situations that merit further review and issues conclusions recommending the actions states are to take to remedy problems of incompliance.

The second part of the supervisory system is the special system or the special procedures, which basically consist of a complaints system provided for under the ILO Constitution. These take the form of representations or complaints. Representations, governed by Article 24 of the ILO Constitution, grant employers’ and workers’ organisations the right to present to the ILO Governing Body a representation against any member state which, in its view, “has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party.” Representations concerning the application of Conventions Nos. 87 and 98 are usually referred for examination to the Committee on Freedom of Association. A three-member tripartite committee of the Governing Body may be set up to examine the representation and the government’s response. The report that the committee submits to the Governing Body states the legal and practical aspects of the case, examines the information submitted, and concludes with recommendations. Representations concerning the application of Conventions Nos. 87 and 98 are usually referred for examination to the Committee on Freedom of Association. Complaints, governed by Article 26 of the ILO Constitution, may be filed against a member state for not complying with a ratified convention by another member state which has ratified the same convention, a delegate to the International Labour Conference, or the Governing Body in its own capacity. Upon receipt of a complaint, the Governing Body may form a Commission of Inquiry, consisting of three independent members, which is responsible for carrying out a full investigation of the complaint, ascertaining all the facts of the case and making recommendations on measures to be taken to address the problems raised by the complaint. A Commission of Inquiry is the ILO’s highest-level investigative procedure; it is generally set up when a member state is accused of committing persistent and serious violations and has repeatedly refused to address them.

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926 Article 24, ILO Constitution, 1919.
Soon after the adoption of Conventions Nos. 87 and 98 on freedom of association and collective bargaining, the ILO came to the conclusion that the principle of freedom of association needed an additional supervisory procedure to ensure compliance with it, even in countries that had not ratified the relevant conventions.\footnote{ILO, “Committee on Freedom of Association” available at www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm (accessed 24 July 2016).} As a result, in 1951 the ILO set up the Committee on Freedom of Association (CFA) for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant conventions.\footnote{Ibid.} Complaints may be brought against a member state by employers’ and workers’ organisations. The CFA is a tripartite body of the Governing Body of the ILO\footnote{Eric Gravel, Isabelle Duplessis and Bernard Gernigon, The Committee on Freedom of Association: Its Impact over 50 Years (Geneva: ILO, 2001), 10.} and is composed of an independent chairperson and three representatives each of governments, employers, and workers.\footnote{ILO, Committee on Freedom of Association, available at http://ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm (accessed 24 July 2016).} If it decides to receive a case, the CFA establishes the facts in dialogue with the government concerned and if it finds that there has been a violation of freedom of association standards or principles, it issues a report through the Governing Body and makes recommendations on how the situation could be remedied.\footnote{Ibid.} Governments are subsequently requested to report on the implementation of the CFA’s recommendations. In cases where the country has ratified the relevant instruments, legislative aspects of the case may be referred to the Committee of Experts. The CFA may also choose to propose a “direct contacts” mission to the government concerned to address the problem directly with government officials and the social partners through a process of dialogue.\footnote{Ibid.}

4.5.2.3 Freedom of Association (Convention No. 87)

The right to organise and form employers’ and workers’ organisations is the prerequisite for sound collective bargaining and social dialogue. This fundamental Convention No. 87 sets forth the right for workers and employers to establish and join organisations as well as the conditions for the enjoyment of these rights.\footnote{ILO, “International Labour Standards on Freedom of Association”, available at http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/lang--en/index.htm (accessed 24 July 2016).}

4.5.2.3.1 Establishment of Organisations without Distinction

Article 2 of the convention provides that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the

\footnote{Ibid.}
\footnote{Eric Gravel, Isabelle Duplessis and Bernard Gernigon, The Committee on Freedom of Association: Its Impact over 50 Years (Geneva: ILO, 2001), 10.}
\footnote{Ibid.}
\footnote{Ibid.}
rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. This is to say that, all workers and employers, no matter what their sector of activity (with the exception of the armed forces and police as per Article 9 of the convention), political opinion, sex, nationality, race etc, have the right to establish trade unions. In essence, the Article is designed to give expression to the principle of non-discrimination in trade union matters, and the words “without distinction whatsoever” used in this Article mean that freedom of association should be guaranteed without discrimination of any kind based on occupation, sex, race, beliefs, nationality, political opinion etc., not only to workers in the private sector of the economy, but also to civil servants and public service employees in general.

As previously stated, distinction can be on the basis of race, political opinion, nationality etc. However, an interesting distinction is the one based on occupational category. It is crucial to reiterate the wording of Article 2 and Article 9 of the Convention where the former provides for the right to establish trade unions “without distinction whatsoever” yet the latter allows for the exception of the “armed forces and police”. The enjoyment of the rights by the armed forces and police is left to the discretion of the State and determination by national laws and regulations, meaning that States that have ratified the Convention are not required to grant these rights to these categories of persons. This clearly means that other public servants or employees of the state are entitled to the rights under Convention No. 87.

In a case where certain categories of civil servants in El Salvador were excluded from the right to organise, the Committee requested the Government take the necessary measures to revise the provisions of the Constitution of the Republic and the Civil Service Act (LSC), which had excluded certain categories of public servants from the right to organise, such as members of the judiciary, public servants who have authority to make decisions or hold managerial posts, employees with duties of a highly confidential nature, private secretaries of high-ranking officials, diplomatic representatives, assistants of the Public Prosecutor, or auxiliary agents, assistant prosecutors, labour prosecutors and delegates. The CEACR recalled first that according to Articles 2 and 9 of the Convention, all workers, with the sole exception (emphasis added) of members of the armed forces and the police, shall enjoy the guarantees set in the Convention. It further stated that laws and regulations providing that high-level officials must form separate organisations from those of other public servants are compatible with the

936 Ibid.
937 CFA, Case No. 1900 (Canada), 308th Report, November 1997, para 182.
938 CFA, Case No. 2738 (Russian Federation), 357th Report, June 2010, para 1134.
939 CFA, Case No. 1844 (Mexico 300th Report, November 199,  para 240.
Convention, provided that they limit this category to persons exercising senior managerial or policy-making responsibilities.\textsuperscript{940} In essence, Convention No. 87 has a very clear distinction between those employers and employees who are to enjoy the rights provided for in the Convention and the exceptions thereto.

4.5.2.3.2 Establishment of Organisations without Prior Authorisation

Article 2 of the Convention further provides for the right of workers and employers to join organisations of their own choosing without previous authorisation.\textsuperscript{941} It is crucial to note that this provision does not mean that formalities prescribed by national regulations concerning constitution and functioning of trade unions should not be present. Authorities may prescribe legal formalities\textsuperscript{942} for the establishment of organisations as long as they are not applied in such a manner as to delay or prevent the establishment of trade union organisations, which would be incompatible with Article 2 of the Convention.\textsuperscript{943} The absence of a time limit for registration can illustrate such a delay. In considering legislation which did not provide for a time limit, the CEACR noted that section 48 of Tanzania’s Employment and Labour Relations Act (ELRA), which provides for the process of registration, does not set forth a time period within which the registrar must either approve or refuse an organisation’s application, and requested the Government consider amending the ELRA so as to provide for a reasonable time period for the processing of applications for registration.\textsuperscript{944}

Another example of legal formalities that delay or prevent the establishment of trade union organisations is prior authorisation, where the establishment of a workers’ or employers’ organisation is subject to approval or authorisation of a government department or authority. The CFA, in a case where national legislation required that a trade union acquire previous authorisation from the Ministry of Labour for its establishment, stated that,

\begin{quote}
  as regards the alleged law and practice of previous authorization from the Ministry of Labour for the establishment of a trade union, the Committee recalls that the principle of freedom of association would often remain a dead letter if workers and employers were required to obtain any kind of previous authorization to enable them to establish an organisation. Such authorization could concern the formation of the trade union organisation itself, the need to obtain discretionary approval of the constitution or rules of the organisation, or, again, authorization for taking steps prior to the establishment of the organisation. This does not mean that the founders of an organisation are freed from
\end{quote}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{940} Observation (CEACR) - adopted 2015, published 105th ILC session (2016), Freedom of Association and Protection of Right to Organise Convention, 1948, (No. 87) on El Salvador.
\item \textsuperscript{941} Article 2, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).
\item \textsuperscript{942} \textit{Workers’ Activities Programme (ACTRAV)}, ILO International Training Centre, “Freedom of Association” available at \url{www.itcilo.org/...centre/programmes/workers-activities/.../freed}, 6.
\item \textsuperscript{943} CFA, Case No. 1894 (Mauritania)308th Report, November 1997, para 536.
\item \textsuperscript{944} Observation (CEACR) - adopted 2010, published 100th ILC session (2011), Freedom of Association and Protection of the Right to Organise Convention, 1948, (No.87) on Tanzania.
\end{itemize}
\end{footnotesize}
the duty of observing formalities concerning publicity or other similar formalities which may be prescribed by law. However, such requirements must not be such as to be equivalent in practice to previous authorization, or as to constitute such an obstacle to the establishment of an organisation that they amount in practice to outright prohibition.945

4.5.2.3.3 Right to Establish and Join Organisations of their Own Choosing

It is crucial to note that the free choice of workers to establish and join organisations is fundamental to freedom of association as a whole. Again, the right to establish and join unions of their (workers and employers) own free choosing has more to do with the concept/principle of free choice. In this regard, workers and employers must be free to choose their trade union at the level of the enterprise and at other levels.946 When it comes to the issue of establishing organisations, the principle of free choice does not presuppose the existence of several workers’ organisations, but merely establishes the right for any group of workers to set up an organisation outside the existing structure if it considers this to be the best means of defending its material or moral interests. Hence, while it is usually to the workers’ advantage to avoid the existence of multiple trade unions, the unity of the trade union movement must be agreed by the unions and not imposed by the State.947

There are various ways, sometimes subtle, in which this right can be restricted. A clear intervention with this right would be restrictions by law or regulation which preclude the establishment of more than one trade union representing the firm’s workers. This can be through the imposition by law of a unified trade union system running from the firm level up to the national and inter-occupational levels (monopoly). The CEACR has commented on the application of Convention No. 87 in Cuba since Cuba ratified the Convention 1952. In particular, the CEACR has maintained that the references to the Central Organisation of Cuban Workers (CTC) in the Cuban legislation results in a legislatively imposed monopoly in violation of the right of workers freely to form and join organisations of their own choosing. It further maintained that a system with a single party and a single central trade union organisation, where the statutes of such an organisation established the objective of following the policy of the Party, was likely to lead to excessive interference in trade union independence and the election of trade union leaders.948 Noting the Government’s indications since the mid-1990s that it was reviewing its Labour Code and would keep these comments in mind, the CEACR emphasised the need to guarantee the right of all workers to establish independent

945 CFA, 3 Case No. 2961 (Lebanon ), 70th Report, October 2013,para 489. Lebanon had not ratified Convention No. 87.
946 Jean-Michel Servais, International Labour Law, 114.
occupational organisations in full freedom, at both the first and the central levels, including organisations that are outside any existing trade union structure, if they so wish.\(^949\) Despite the Government’s repeated assurances that workers could indeed freely join the organisation of their own choosing, regardless of the reference in the Labour Code to the CTC, the ILO supervisory bodies were obliged to note at the end of the 1990s that a number of attempts to establish workers’ organisations outside the CTC structure were denied recognition by the Government.\(^950\) Such was the case for the Union of Cuban Workers (USTC),\(^951\) the Confederation of Democratic Workers of Cuba (CTDC)\(^952\) and the Single Council of Cuban Workers (CUTC).\(^953\) Subsequently, those associated with the CUTC were sentenced for subversion in summary hearings to from 10 to 26 years imprisonment.\(^954\) The CFA concluded that, in a context where every single attempt to form an organisation outside the unified structure remains unrecognised and, in certain cases, is even punished, it is not surprising that doubts arise as to whether the trade union unity is imposed or chosen. The view that such alternative voices must be quashed to ensure a better protection of workers’ rights cannot be supported by the principles of freedom of association.\(^955\)

Another restriction on the element of free choice is discrimination or favouratism, where an organisation is given preferential treatment by the government. This treatment can influence either directly or indirectly, the choice of workers/employers as to which organisation they wish to belong, even if under normal circumstances or in the absence of such treatment, they would not choose this organisation. In this regard, the CFA stated that,

> As a general rule, when a government can grant an advantage to one particular organisation or withdraw that advantage from one organisation in favour of another, there is a risk, even if such is not the government’s intention, that one trade union will be placed at an unfair advantage or disadvantage in relation to others, which would thereby constitute an act of discrimination.\(^956\) By according favourable or unfavourable treatment to a given organisation as compared with others, a government may be able to influence the choice of workers as to the organisation they intend to join; in addition, a government which deliberately acts in this manner violates the principle laid down in Convention No. 87 that public authorities should refrain from any interference which would restrict the rights provided for in the Convention or impede their lawful exercise. On more than one occasion, the Committee has examined cases in which allegations were made that public authorities had, by their attitude, favoured or discriminated against one or more trade union organisations. Any discrimination of this kind jeopardises the right of workers set


\(^{951}\) CFA, Case No. 1628 (Cuba) 305th Report, November 1996, paras 26-30.

\(^{952}\) CFA, Case No. 1805 (Cuba), 308th Report, November 1997, paras 225-240.

\(^{953}\) CFA, Case No. 1961 (Cuba), 320th Report, March 2000, paras 598-625.

\(^{954}\) CFA, Case No. 2258 (Cuba), 334th Report, June 2004, para 408.

\(^{955}\) Ibid.

\(^{956}\) CFA, Case No. 2139 (Japan), 328th Report, June 2002, para 445.
out in Convention No. 87, Article 2, to establish and join organisations of their own choosing.\footnote{CFA, Case No. 2200 (Turkey), 334th Report, June 2004, para 750.}

4.5.2.3.4 Administration and Activities of Organisations

There are four main aspects to trade union activity, which are provided for under Article 3 of the Convention: the free election of representatives, the planning and implementation (formulation) of trade union operations or programmes, the drawing up of the constitution and rules, and the organisation of the management and activities.\footnote{See Article 3, Freedom of Association and Protection of the Right to Organise Convention, 1948.} The principle of non-interference exists for all four aspects, that is, the authorities are to refrain from any interference that would restrict these activities or impede the lawful exercise thereof.\footnote{Ibid.}

In as far as the free election of representatives is concerned, one must bear in mind that the autonomy of organisations can be effectively guaranteed only if their members have the right to elect their representatives in full freedom.\footnote{Bernard Gernigon, Alberto Odero and Horracio Guido, “Freedom of Association” in Fundamental Rights at Work and International Labour Standards (Geneva: ILO, 2004), 14.} Central to this aim is the fundamental idea in Article 3 of the Convention that the workers/employers may decide for themselves the rules which should govern the elections that are held therein.\footnote{CFA, Case No. 2276 (Burundi), 335th Report, November 2004, para 404.} Summarily, the prohibition on state intervention in union elections exists to guarantee the impartiality and objectivity of electoral procedures.\footnote{Human Rights Watch, A Decade under Chávez: Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela (New York: Human Rights Watch, 2008), 139.}

The interference of this right can take various forms. One form is direct interference with the election or electoral process. In one interesting case, after a union’s (Confederation’s) elections, the administrative authorities (The Ministry of Labour, Employment and Social Security) intervened after they found that the quorum had not been reached in the executive council of the union and decided that the council should be reconvened to confirm the decision taken or a new election procedure organised. In its defense, the government argued that it acted in defense of international and constitutional guarantees which had been objectively prejudiced through failure to comply with clear statutory provisions, and which resulted in the exclusion of the representatives of important organisations from participation in the executive council of the organisation. The CFA concluded that,

The right of workers’ organisations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the
This case also underlined the important requirement in the enjoyment of the right to freely elect representatives, that is, with regard to an internal dispute within the trade union organisation, and with a view to guaranteeing the impartiality and objectivity of the procedure, the supervision of trade union elections should be entrusted to the competent judicial authorities.\textsuperscript{964} Of importance is the fact that interference with the elections does not only include the procedures, but also the outcome; hence, election results, for example, should not be subject to approval by the authorities.\textsuperscript{965} Again, the issue of determination of eligibility for union office is a matter that should be left to the discretion of union by-laws and laws or regulations governing eligibility conditions, such as race, occupation, political opinions, criminal record etc., are incompatible with convention No. 87.\textsuperscript{966}

When it comes to the right of unions to organise their activities and formulate programmes, Article 3 provides that unions, whether workers’ or employers’, should be able to formulate their own programmes and operate with the necessary financial autonomy and independence.\textsuperscript{967} Union premises, correspondence and other communications should not be violated and their organisation's assets should be protected. The right of unions to formulate their programmes includes the right to hold meetings, communicate with management, and obtain information from employers. Additionally, their leaders or representatives should have the right to enter the workplace (with due respect for the rights of property and management).\textsuperscript{968} Thus any provisions which give the authorities the right to restrict the activities and objects pursued by trade unions for the furtherance and defence of the interests of their members would be incompatible with the principles of freedom of association.\textsuperscript{969}

The right for workers’ and employers’ organisations to draw up their own constitution and rules is of equal importance to the enjoyment of freedom of association under the Convention. This is not to say that any legislation covering this aspect is incompatible with the Convention. The requirement is that national legislation should only lay down formal requirements respecting trade union constitutions, except with regard to the need to follow a democratic process and to ensure a right of appeal for the members to an impartial and independent

\textsuperscript{963} CFA, Case No. 2979 (Argentina), 371st Report, March 2014, para 150.
\textsuperscript{964} CFA, Case No. 1920 (Lebanon), 308th Report, November 1997, para 524.
\textsuperscript{966} \textit{ibid}, para 405-426.
\textsuperscript{967} Article 3, Freedom of Association and Protection of the Right to Organise Convention, 1948.
\textsuperscript{968} Workers' Activities Programme (ACTRAV), ILO International Training Centre, "Freedom of Association", 8.
\textsuperscript{969} CFA, Digest of Decisions, para 496.
judicial body.970 Thus, legislative provisions which regulate in detail the internal functioning of workers’ and employers’ organisations pose a serious risk of interference by public authorities.971

Finally is the right to organisation of management, which simply means the workers or employers, in their organisations, may decide for themselves the rules which should govern the administration of their organisations without interference of public authorities.972

4.5.2.3.5 Dissolution and Suspension of Organisations

Article 4 of the convention clearly prohibits the dissolution or suspension of workers’ and employers’ organisations by administrative authority. Such dissolution or suspension can be on various grounds such as insufficient membership, cancellation of registration or trade union status by the registrar of trade unions, by legislative measures etc. However, where the dissolution or suspension is voluntary, that is, the decision to dissolve a trade union organisation was freely taken by a union congress convened in a regular manner by all workers concerned, such is not an infringement of the rights under the Convention.973 An interesting case in this regard is where a government, through presidential ordinances, had excluded a trade union from the purview of legislation on trade unions (Industrial Relations Ordinance) and consequently, the union was banned by the management, its registration was cancelled and its activities suspended. This was justified on the ground that the massive theft of electricity, rampant corruption and inefficiency in WAPDA, an organisation which had initially been established for the development of water and power resources of the country, had seriously affected the viability of the organisation. The Government had further indicated that although the management of WAPDA had tried various measures to restore the financial viability of the organisation and to reintroduce a culture of efficiency, accountability and discipline, it had not succeeded due to interference and pressure by the union and corrupt elements therein. In reviewing the situation, the CEACR stated,

In this regard, the Committee first reminds the Government once again that the Committee of Experts on the Application of Conventions and Recommendations has emphasised that the freedom of association Conventions do not contain any provision permitting derogation from the obligations arising under the Convention, or any suspension of their application, based on a plea that an emergency exists.974 …The Committee had emphasised that the cancellation of registration of an organisation by the registrar (or deputy registrar) of trade unions was tantamount to the suspension or dissolution of that organisation by administrative authority which constituted a clear violation of Article 4 of Convention No. 87 and that cancellation of a trade union’s

972 CFA, Case No. 2132 (Madagascar), 331st Report, June 2003, para 589.
973 CFA, Digest of Decisions, para 679.
registration should only be possible through judicial channels… It recalls in this respect that the solution to the social and economic problems of any country cannot possibly lie in the suspension of trade union rights. On the contrary, only through the development of free and independent trade union organisations and negotiations with these organisations can a government tackle such problems and solve them in the best interests of the workers and the nation.

4.5.2.3.6 Federations, Confederations and International Affiliation

Article 5 of Convention No. 87 provides for the right of workers’ and employers’ organisations to establish and join federations and confederations, and that any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

A basic organising principle of the labour movement is to build cohesion amongst labour groups in order to minimise fragmentation and maximise labour’s influence locally, nationally and internationally. This can best be done by encouraging affiliations with other labour bodies. Unions at the local level should be allowed to join larger unions. Unions should be able to affiliate with national federations and international bodies such as the Global Union Federations (GUFs). And national confederations should be able to affiliate with international confederations such as the International Trade Union Confederation (ITUC) and the World Federation of Trade Unions (WFTU). These are not the only combinations possible of course, but the principle is clear: working people and their organisations are strengthened when they unite and they should be allowed to do so. Freedom of association principles specifically include references to the right to associate or combine at higher levels occupationally and internationally. The organisations which are created should have the right to freely engage in activities to further the interests of their members. Convention 87 stipulates the organisations should enjoy the various rights accorded to the first-level organisations such as the right to freely elect representatives, create their own constitutions and organise programmes.

Restrictions on this right occur if public authorities approve or reject an application for the creation of a confederation, or where legislation requires that government permission be obtained for the international affiliation of a trade union. All of these have been concluded to be incompatible with the Convention.

975 Ibid, para 426.
976 CFA, Case No. 2006 (Pakistan), 338th Report, November 2005, para 266.
977 CFA, Case No. 2006 (Pakistan) 338th Report, November 2005, para 266.
979 CFA, Case No. 2225 (Bosnia and Herzegovina), Report No. 332, November 2003, para 380.
4.5.2.3.7 The Right to Strike

It is important to note that Convention No. 87 does not contain a provision on the right to strike. Nevertheless, the ILO’s supervisory bodies have had to address this issue and have established constructively that the right to strike is considered an “intrinsic corollary of the right of association protected by Convention 87”\(^\text{981}\). The Convention provides the foundation for the right to strike; hence the CFA has stated that the right to strike is “the sole preserve of trade union organisations”\(^\text{982}\). In addition, the CEACR has asserted that a prohibition on the right to strike, “constitutes a considerable restriction of the opportunities open to trade unions for furthering and defending the interests of their members and of the right of trade unions to organise their activities”.\(^\text{983}\)

It is crucial to state that the CFA has provided for the legitimate exercise of this right, that is, though it has always regarded the right to strike as constituting a fundamental right of workers and of their organisation, it has regarded it as such only in so far as it is utilised as a means of defending their economic interests. Finally, the Convention places an onus on the State to “take all appropriate measures to ensure that workers and employers may exercise freely the right to organise”.\(^\text{984}\)

4.5.2.3.8 Limitations to the Rights under the Convention

The limitations to the enjoyment of the rights set out in Convention No. 87 are very clear and provided for in Article 9 of the Convention. This is that, the Convention leaves the extent to which such rights apply to the armed forces and police up to the member states and national laws and regulations. This does not imply that members of the armed forces and police should not enjoy these rights at all, but rather that to what extent and how should be determined at the national level.

In a case where workers working in the prison services of the country were denied the rights to organise on the basis of national legislation as well as Article 9 of the Convention, the CEACR stated,

\begin{quote}
The Committee notes that the Government indicates that prison services, in accordance with article 19 of the Constitution, are part of the disciplined forces and that these forces are not permitted to unionise and that the prison services are not only part of the justice system but they have also security responsibilities. The Committee recalls that while
\end{quote}


\(^{982}\) CFA, Case No. 2153 (Algeria), Report No. 336, March 2005, para 173


\(^{984}\) Article 11, Convention No. 87, 1948.
exclusion from the right to organise of the armed forces and the police is not contrary to the provisions of the Convention, the same cannot be said for prison staff and the functions exercised by the prison staff should not justify their exclusion from the right to organise on the basis of Article 9 of the Convention (see General Survey of 1994 on freedom of association and collective bargaining, paragraph 56). In these circumstances, the Committee once again requests the Government to amend the abovementioned sections of the TUEO Act, the Trade Disputes Act and the Prison Act in order to grant to prison staff the right to establish and join organisations of their own choosing.985

In a related case, the Moscow Police Employees Union (PSM) filed a complaint due to the fact that the organisation had been subjected to an illegal search where its premise had been broken into by an Economic Crimes Division and documents relating to the union’s accounts and computers were confiscated. The PSM cited violations of national laws and regulations on Trade Unions as well as the rights under Convention No. 87 to formulate and adopt their own by-laws, organise their activities, hold meetings etc., without any form of control (including financial control) over the activities of a trade union. The Committee reiterated the exception in Article 9 of Convention No. 87 and concluded that the authorities had not violated the Convention.986

4.5.2.3.9 Conclusion

ILO Convention No. 87 provides the basic rights to establish trade unions and employer associations, which are necessary components of collective bargaining.987 The Convention emphasises the right of unions to be free from governmental interference, whether the interference comes from excessive regulation, restrictions on political activity, or denial of civil liberties, such as freedom of assembly or freedom of the press.988 Conclusively, and in the words of Otto Khan-Freund, “freedom to organise has two social and therefore two legal functions. It is a civil liberty, a human right, an aspect of freedom of association...its existence and adequate guarantees for its existence are, however, also indispensable conditions for the operation of collective labour relations.”989

986 CFA, Case No. 2738 (Russian Federation), Report No. 357, June 2010, para 1134.
4.5.2.4 Collective Bargaining (Convention No. 98)

As a starting point is it important to note that the rights and guarantees to freedom of association provided for in Convention No. 87 and discussed above are *sine qua non* conditions for a trade union to be able to play its role of promoting and defending the interests of its members, whereas collective bargaining is a fundamental means of attaining that objective.\(^{990}\) Convention No. 98 basically deals with collective bargaining rights and provides more specifically for the conditions in which freedom of association can be realised.\(^{991}\)

Collective bargaining is a key means through which employers and their organisations and trade unions can establish fair wages and working conditions. It also provides the basis for sound labour relations. Typical issues on the bargaining agenda include wages, working time, training, occupational health and safety and equal treatment. The objective of these negotiations is to arrive at a collective agreement that regulates the terms and conditions of employment. Collective agreements may also address the rights and responsibilities of the parties thus ensuring harmonious and productive industries and workplaces. Enhancing the inclusiveness of collective bargaining and collective agreements is a key means for reducing inequality and extending labour protection.\(^{992}\)

In order to comprehend the full weight of the convention and the rights encompassed therein, the convention needs to be considered together with other conventions and recommendations such as the Collective Bargaining Convention (No. 154), the Collective Bargaining Recommendation (No. 91) etc., which further elaborate more specifically the content of these rights. For example, Convention No. 98 provides that appropriate measures be taken to encourage and promote the full development and utilisation of machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations. However, it does not specify how this might be done. Here, Convention No. 154 and its accompanying Recommendation (No. 163) are key to furthering the promotion and implementation of the basic principles of Convention No. 98 as they show how it can be done in a practical way, without really creating new obligations of their own.\(^{993}\) They were adopted specifically to complement Convention No. 98 by setting out the types of measures that can be adopted to promote collective bargaining and the aims of these measures. Together they show how the right to bargain collectively can be effectively exercised.\(^{994}\)

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991 Teri Caraway, “Freedom of Association”.
994 Ibid.
4.5.2.4.1 The Right to Bargain Collectively

In the ILO conventions, collective bargaining is deemed to be the activity or process leading to the conclusion of a collective agreement.995

The ILO Collective Bargaining Convention (No.154) defines collective bargaining as,

All negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for:

(a) determining working conditions and terms of employment; and/or
(b) regulating relations between employers and workers; and/or
(c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.996

Two key elements of collective bargaining are reflected in this definition. The first element is negotiations between workers and employers and second is the determination of working conditions or regulation of the relations between these two groups. The former concerns the process (negotiation: process between two or more parties (each with its own aims, needs and viewpoints) seeking to discover a common ground and reach an agreement to settle a matter of mutual concern or resolve a conflict)997 and the latter concerns the outcome, that is, determination of working conditions. In so determining the working conditions and terms of employment as well as regulating relations between employers and workers and their organisations, collective bargaining may cover various matters such as the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities etc.998

The concept of working conditions used by the ILO supervisory bodies is not limited to traditional working conditions (working time, overtime, rest periods, wages etc.), but also covers “certain matters which are normally included in conditions of employment”, such as promotions, transfers, dismissal without notice etc.999 This trend is in line with the modern tendency in industrialised countries to recognise “managerial” collective bargaining concerning procedures

to resolve problems, such as staff reductions, changes in working hours and other matters which go beyond terms of employment in the strict sense.\textsuperscript{1000} Although the range of subjects which can be negotiated and their content is very broad, they are not all-encompassing and need to be clearly related to conditions of work and employment or, in other words, matters which are primarily or essentially questions relating to conditions of employment.\textsuperscript{1001} The Committee of Experts has concluded that it is not contrary to Convention No. 98 for some subjects to be excluded from negotiations, particularly subjects the employer can decide as part of the freedom to manage the enterprise, such as the assignment of duties and appointments.\textsuperscript{1002}

One form of restriction that is common is unilateral restriction of the scope of issues that are negotiable for concluding collective agreements. An interesting case is where a trade union, despite making numerous proposals to bargain for working conditions and being turned down by hospital officials on grounds that the various issues were not subject to collective bargaining because they were administrative matters, made a proposal that pregnant workers be exempted from the night shift. The medical facility responded that this matter could not be a subject of negotiation since the system was well entrenched in legislation. Although national legislation in the country did prohibit public servants from going on strike, it provided for collective bargaining rights for them. The CFA concluded that measures taken unilaterally by the authorities to restrict the scope of negotiable issues is not compatible with Convention No. 98 and the appropriate method to resolve these difficulties is by having discussions, on a voluntary basis, for the preparation of guidelines for collective bargaining.\textsuperscript{1003} Even where legislation contains provisions concerning the content of collective agreements in such a manner as to restrict some matters as not negotiable is incompatible with the Convention.\textsuperscript{1004}

With regard to the negotiable issues relating to the relations between the parties which are mentioned in Convention No. 154 as subjects of collective bargaining, it should be recalled that the Workers’ Representatives Convention, 1971 (No. 135), and its corresponding Recommendation, envisage a series of guarantees and facilities for these representatives, which may be obtained through collective agreements or in other ways. The issues concerning relations between the parties covered by collective bargaining not only include trade union guarantees and

\textsuperscript{1003} CFA, Case No. 1897 (Japan), 308th Report, August 1996, para 473.
\textsuperscript{1004} CFA, Case No. 2698 (Australia), 357th Report, June 2010.
facilities, but also other forms of consultation, communication and cooperation and the procedures established for the resolution of disputes. 1005

Finally, collective bargaining should not be confused with the concept of consultation within the ILO legal framework, which is an equally crucial concept in as far as freedom of association and collective bargaining is concerned. In ILO instruments, the scope of consultations is normally wider than that of collective bargaining. Consultations cover matters of common interest to workers and employers and allow their joint examination with a view to identifying, in so far as possible, appropriate solutions which are commonly agreed to. Consultations also enable the public authorities to receive opinions, advice and assistance from organisations of employers and workers on the preparation and application of legislation on matters relating to their interests, such as the composition of national bodies and the preparation and implementation of economic and social development plans. In contrast, collective bargaining is normally confined to determining terms and conditions of employment and relations between the parties. 1006

The essence of consultation is seen in the ILO framework, which is based on the unique principle of tripartism, that is, dialogue and cooperation between governments, employers and workers in adopting standards and ensuring support from all ILO constituents. 1007 To effect this, the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) is a priority convention, the ratification and implementation of which has been made a priority by the ILO. At the national level, tripartite consultations are a means of ensuring that the ILO standards are formulated, applied and supervised with the participation of employers and workers, thus further ensuring greater cooperation among social partners leading to better governance and dialogue on wider social and economic issues. Therefore, collective bargaining is an integral part of consultation. 1008

The Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113) provides that measures should be taken to promote effective consultation and cooperation between public authorities and employers’ and workers’ organisations without discrimination of any kind against these organisations. 1009 Again, such consultation should aim at ensuring that the public authorities seek

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1006 Ibid, 11.
1009 ILO, Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), para 1.
the views, advice and assistance of these organisations, particularly in the preparation and implementation of laws and regulations affecting their interests.\textsuperscript{1010}

4.5.2.4.2 Principle of Free and Voluntarily Collective Bargaining

The voluntary nature of collective bargaining is provided for by Convention No. 98, which states that,

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.\textsuperscript{1011}

This provision is central to the right to collective bargaining, that is, voluntary negotiation of collective agreements by employers and workers. It is this voluntary negotiation of collective agreements which is considered to be “a fundamental aspect of the principle of freedom of association.”\textsuperscript{1012} This is also to the effect that collective bargaining should not entail recourse to measures of compulsion, which would alter the voluntary nature of such bargaining.\textsuperscript{1013} Again this means that governments should not interfere in the contractual freedom of the bargaining parties. One can simply say that, as the negotiations to the agreement are voluntary, so should be the settlement in cases of disputes in regards to that agreement. Additionally, the ILO supervisory bodies have emphasised that the machinery which supports bargaining (such as the provision of information, consultation, mediation, arbitration) should also be voluntary.\textsuperscript{1014} In essence, when it comes to settling disputes in regards to the process of collective bargaining, the CEACR provides for how such disputes are to be resolved. Where there is disagreement during the process of drafting a collective agreement (where a dispute arises between the parties in the process of collecting bargaining), interference or intervention by the authorities is not to be imposed, as an obligation and recourse to binding arbitration is possible only with the agreement of all parties to the negotiations.\textsuperscript{1015} The CFA has also corroborated this position by providing that the bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent, and recourse to these bodies should be on a voluntary basis.\textsuperscript{1016} Thus, recourse to compulsory

\begin{thebibliography}{10}
\bibitem{1010} Ibid, para 5.
\bibitem{1011} Article 4, The Right to Organise and Collective Bargaining Convention No. 98, 1949.
\bibitem{1013} CFA, Case No. 2349 (Canada), 337th Report, June 2005, para 404.
\bibitem{1015} Observation (CEACR) - adopted 2013, published 103rd ILC session (2014), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) on Cuba.
\bibitem{1016} CFA, Case No. 2145 (Canada), 327th Report, March 2002, para 305.
\end{thebibliography}
arbitration amounts to intervention in collective bargaining and is thus not compatible with the Convention.\textsuperscript{1017}

Another important aspect of voluntary collective bargaining is that of good faith. This principle basically underlines that both workers’ and employers’ unions are required to bargain and make every effort to reach an agreement through genuine and constructive negotiations and avoid any unjustified delays in the holding of negotiations, since collective bargaining can only function effectively if conducted in good faith by both parties, and good faith cannot be imposed by law.\textsuperscript{1018} In practice, the supervisory bodies have accepted imposition of certain sanctions in the event of conduct which is contrary to good faith or which constitutes unfair practice in the course of collective bargaining, provided the sanctions are not disproportionate and have allowed conciliation and mediation imposed by law within reasonable time limits.\textsuperscript{1019} These criteria have undoubtedly taken into account the objective of promoting collective bargaining in situations in which the trade union movement is not sufficiently developed. They have also taken account of the underlying concern in many legislations to avoid unnecessary strikes and precarious and tense situations resulting from the failure to renew collective agreements, particularly where they cover extensive categories of workers.\textsuperscript{1020}

As the rationale for collective bargaining is regulation of the terms and conditions of employment by means of collective agreements, it is crucial to define this aspect as well. Collective agreements, as defined by the Collective Agreements Recommendation (No. 91), are all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers’ organisations on the one hand and one or more representative workers’ organisations, or, in the absence of such organisation, the representative of the workers duly elected and authorised by them in accordance with national law and regulations on the other.\textsuperscript{1021}

This Recommendation defines collective agreements, and also the parties to such an agreement, that is employers or employers’ organisations and workers’ organisations. It also acknowledges the possibility of the absence of a workers’ organisation in which case an elected and authorised representative is viable. This also means that negotiations between an employer and non-unionised employees or individual employees, where a trade union already exists, is inconsistent with Convention No. 98. In the case of the former, direct agreements with non-


\textsuperscript{1019} CFA, Case No. 1822 (Venezuela), 304th Report, June 1996, para 508-509.

\textsuperscript{1020} Bernard Gennigon, Alberto Odero and Horacio, Guido, “ILO Principles Concerning Collective Bargaining”, 41.

\textsuperscript{1021} Article 2, Collective Agreements Recommendation, 1951 (No. 91).
unionised workers have been criticised by the CEACR as this means of bargaining can be used for anti-union purposes. In the case of the latter, the CFA, in a case where there was legislation that allowed the employers to negotiate a free collective labour agreement with workers, even if they were not organised into a trade union, has stated that negotiation between the undertaking and its employees, bypassing representative organisations where these exist, might be detrimental to the principle that negotiations between employers and organisations of workers should be encouraged and promoted in accordance with Article 4 of Convention No. 98.

Again, refusal by the authorities to approve or register a collective agreement, pursuant to legislative provisions, on grounds such as incompatibility with the general or economic policy of the government or official directives on wages or conditions of work which require prior approval of collective agreements by the authorities are incompatible with the convention. The only exception is where such approval or registration is on grounds of errors of pure form or procedural flaws, or where the collective agreement does not conform to the minimum standards laid down by general labour legislation.

The final issue concerns the bargaining level. The ILO supervisory bodies have stated that according to the principle of free and voluntary collective bargaining embodied in Article 4 of the Convention, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law. Indeed, there may be circumstances where the parties wish to bargain across sectors through regional or national agreements. This position is echoed by the CFA, which has additionally provided criteria for any alteration of the bargaining structure. It has stated that,

where a government has sought to alter the bargaining structures in which it acts actually or indirectly as the employer…it is particularly important to follow an adequate consultation process, whereby all objectives perceived as being in the overall national interest can be discussed by all parties concerned, in keeping with the principles established in the Consultation (Industrial and National Levels) Recommendation, 1960 (No.113). Such consultation is to be undertaken in good faith and both parties are to have all the information necessary to make an informed decision. The need to hold consultations also applies prior to the introduction of legislation through which the government seeks to alter bargaining structures in which it acts actually or indirectly as employer.

1023 See CFA, Case No. 2138 (Ecuador), 327th Report, March 2002.
1024 ILO, Digest of Decisions, para 1006.
1025 CEACR (Observation) - adopted 2013, published 103rd ILC Session (2014) on Turkey, Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
1026 CFA, 311th Report, November 1998, Case No. 1951 (Canada), para 228.
1027 ILO, Digest of Decisions, para 1086.
The binding effect of collective agreements is defined by the ILO’s Collective Agreements Recommendation, 1951 (No. 91). This provides that once concluded, the collective agreement binds the signatories to it and those on whose behalf it is concluded. Any stipulations included in individual contracts of employment that are contrary to those contained in the agreement are regarded as a breach of the agreement and hence null and void. This is to say that, collective agreements take primacy over individual contracts of employment. However, there is an exception to this rule in regards to deviation from the stipulations in the collective agreement. Stipulations in contracts of employment which are more favourable to the worker than those prescribed by a collective agreement are not to be regarded as contrary to the collective agreement.

Having previously looked into interventions in the process of bargaining, it is equally important to look into interventions with the collective agreements which have been concluded and are thus binding on the parties. One important aspect to look into that is relevant to this study is the case of the bindingness of collective agreements in the context of economic crises. The crises could be in the form of combating inflation, achieving balance of payments, combating unemployment, economic reconstruction subsequent to situations of war or other economic objectives where governments have resorted to restrictive policies affecting collective bargaining.

The CEACR has made observations on the subjection of collective agreements to financial and economic policy orientations where it concluded that a law, under the terms of which the provisions of an agreement or accord that are in conflict with the standards governing the Government’s economic and financial policy or the wage policy that is in force shall be declared null and void, restrict the right to collective bargaining. The Committee further stated that any legislative or constitutional provisions which restrict the right to collective bargaining are only admissible as exceptional measures within the context of a serious economic crisis, namely in cases of serious and insurmountable difficulty, for the preservation of jobs and the continuity of enterprises and institutions.

In a case concerning regulations introduced by decree in the context of budget restrictions which allowed the suspension for a specified period of existing collective agreements in the public sector, the Committee concluded that,
Suspension or derogation by decree - without the agreement of the parties - of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining established in Article 4 of Convention No. 98.1033

Furthermore, in a case where the government authorities (the Education Council - CEP) denounced (and terminated) collective agreements in force in the education sector in a province on the justification that there had been a change in the social and economic reality throughout the country and in the province in particular since the collective agreements came into force, the Committee concluded that,

If the Government wishes the clauses of a collective agreement to be brought into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations. The Committee observes that in this case the administrative authority did not act by decree, but simply notified the parties of the denunciation of the collective agreements in force, which has a comparable effect. In these circumstances, while it deplores the fact that the President of the CEP did not respect the agreements freely entered into by the parties and that there has been no attempt to persuade the complainant organisation to take account of economic changes that have occurred, the Committee requests the Government to ensure that the Education Council (CEP) respects the collective agreements that have been concluded and avails itself of legal procedures if it wishes to renegotiate.1034

The case of wage controls is another interesting example. States have intervened in the content of collective agreements in general in an effort to ride out the storm of economic recession,1035 by imposing wage freezes or wage cuts to achieve or ensure economic stability. The CFA has concluded that, if, as part of the stabilisation economic policy, a government considers that wage rates cannot be set freely through collective bargaining, any restriction should be imposed as an exceptional measure, only to the extent necessary and limited to a reasonable period of time and should be accompanied by adequate safeguards to protect workers’ living standards.1036

In the CEACR’s observations for Greece, the government had argued that the austerity measures invoked by the government were on the ground that the international organisations offering financial aid to rescue the Greek economy had chosen measures to enhance labour market flexibility, as being considered the most appropriate method to enhance the competitiveness of the Greek economy. The Greek government legislatively imposed a reduction of the minimum wages constituted in a collective agreement (National General Collective Agreement - NGCA). The reduction of wages was extended to the wages in all collective

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1033 CFA, Case No. 2089 (Romania), 323rd Report, November 2000, para 491.
1034 CFA, Case No. 1899 (Argentina), 307th Report, June 1997, para 84.
1036 CFA, Case No. 2194 (Guatemala), 330th Report, March 2003, para 789.
agreements. In addition, the wages were subject to a freeze, contrary to raises provided in the relevant collective agreement. The CEACR found numerous interventions in voluntary concluded agreements, including the NGCA. The Committee reiterated the same criteria in regards to exceptional measures as during economic strain. Again, while noting the gravity of the economic crisis, the CEACR emphasised the importance of space for social dialogue and the role of the social partners in participating in the determination of measures affecting them and the labour market and urged the government to review with them all the above measures with a view to limiting their impact and their duration and ensuring adequate safeguards to protect workers’ living standards.

Additionally, the CFA has acknowledged that it would not be objectionable in certain circumstances for a government to legislate wage ceilings in the face of debt and deficit pressures. However, the bargaining parties should be free to reach an agreement. If this is not possible, any exercise by the public authorities of their prerogatives in financial matters which hampers the free negotiation of collective agreements is incompatible with the principle of freedom of collective bargaining. In such circumstances, the government should provide a mechanism to ensure that trade unions and employers are adequately consulted. Again, any legislated changes should be “limited in time and protect the standard of living of the most affected workers.”

4.5.2.4.4 The Favourability Principle

The Favourability Principle is a cornerstone of collective bargaining systems. Central to the principle of favourability is the notion that the instrument with the most favourable terms should apply. This principle has been used as a guiding principle for resolving conflicts between concurrent collective agreements that apply at different levels and basically provides that if an employment relationship enters into the scope of more than one collective agreement in force, the agreement containing the terms most favourable to the workers shall prevail. This has been traditionally complemented by a prohibition on lower level agreements (e.g. enterprise agreements) containing provisions which are less favourable to workers than those set out in national general collective agreements.

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1038 Ibid.
1039 Ibid.
1040 CFA, Case No. 2180 (Canada), 330th Report, March 2003, para 290.
1041 Ibid.
1044 Ibid.
In Greece, where the principle was partly abolished due to austerity policies where company-level collective agreements were given general priority over sectoral agreements, the CEACR stated that,

As regards the favourability principle, while observing the indication in the Government’s report that the reinforcement of collective bargaining decentralisation was included in the measures indicated by the Troika including the suspension of this principle, the Committee highlights the importance of the general principle enunciated in Paragraph 3(1) of the Collective Agreements Recommendation, 1951 (No. 91), that collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded. While recalling the importance in the current situation of ensuring that trade union sections can be established in small enterprises, the Committee requests the Government to ensure full respect for this principle.  

The CFA in regards to the same case reiterated the binding effect of and enforceability of collective agreements. More importantly, the CFA explicitly stated the legal implications on freedom of association and collective bargaining associated with favouring decentralised bargaining where exclusionary provisions are less favourable than the provisions at a higher level. This can not only lead to a global destabilisation of collective bargaining, but constitutes weakening of freedom of association and collective bargaining, contrary to the principle under conventions Nos. 87 and 98.

4.5.2.4 Limitations to the Rights under the Convention

Convention No. 98 provides for the limitations to exercising the rights enshrined in the Convention by the members of the armed forces and police and employees engaged in the administration of the State. It provides that the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations. It also provides that the Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way. It is important to state that the Convention does apply to public servants save for those who have been clearly exempted from the enjoyment of the rights, that is, employees engaged in the administration of the State.

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1046 CFA, Case No. 2820 (Greece), 365th Report, November 2012, para 997.
1047 Article 5, Right to Organise and Collective Bargaining Convention, 1949, (No. 98).
1048 Ibid. Article 6, Right to Organise and Collective Bargaining Convention, 1949, (No. 98).
In cases before the CFA, some governments have argued that all public employees are engaged in the administration of the state, and thus are excluded from collective bargaining rights. The Committee has consistently rejected this view. It has stated that the exclusion applies to political appointees and high-level agency executives, not the clerks, technicians, nurses and other subordinate employees - nor, for that matter, to doctors, lawyers, psychologists and other professionals who provide services and carry out policy rather than make policy as top managers. Ruling on a complaint brought by public employees in North Carolina over restrictions on their collective bargaining rights under state laws where the employees had chosen representation by the United Electrical Workers’ Union, but the State refused to bargain with them. The CFA emphasised that the right to of workers to bargain freely with employers, including the government in its quality of employer, constitutes an essential element in freedom of association and the government should refrain from any interference or restriction on the right.

The CFA, in clearly making the distinction between public servants and public servants engaged in the administration of the state, has stated that,

Since the concept of public servant may vary considerably under the various national legal systems, the application of Article 6 [of Convention No. 98] may pose some problems in practice. The Committee has adopted a restrictive approach concerning this exception by basing itself in particular on the English text of Article 6 of the Convention which refers to “public servants engaged in the administration of the State). The Committee could not allow the exclusion from the terms of the Convention of large categories of workers employed by the State merely on the grounds that they are formally placed on the same footing as public officials engaged in the administration of the State. The distinction must therefore be drawn between, on the one hand, public servants who by their functions are directly employed in the administration of the State (for example, in some countries, civil servants employed in government ministries and other comparable bodies, as well as ancillary staff) who may be excluded from the scope of the Convention and, on the other hand, all other persons employed by the government, by public enterprises or by autonomous public institutions, who should benefit from the guarantees provided for in the Convention. In this connection, the Committee has stated that the mere fact that public servants are white-collar employees is not in itself conclusive of their qualification as employees “engaged in the administration of the State”; if this were the case, Convention No. 98 could be deprived of much of its scope.

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1050 See ibid, 375-378 for a discussion of cases on the limitation provided for in Article 6, Right to Organise and Collective Bargaining Convention, 1949.
1051 Ibid, 375.
1053 CFA, Case No. 2183 (Japan), 329th Report, November 2002, para 598.
Additionally, the CEACR provides an objective test for identifying which workers can be categorised as those engaged in the administration of the state. Here, the CEACR also refers to the ECHR Article 11(2) that, restrictions on freedom of association could only be justified by the relevant function of the civil servant, that is, would only be permissible in the case of civil servants who exercise sovereign authority – for example army, police or law enforcement in general, judiciary, diplomats and public administration units at the federal, state or local levels elaborating, implementing and enforcing legal acts. Civil servants who do not exercise sovereign authority, e.g. teachers in public schools, postal workers, railway employees cannot be considered employees engaged in the administration of the State, and they should, therefore, enjoy the right to bargain collectively.1054

Conclusively, the Convention places an onus on the State to ensure that “measures appropriate to national conditions shall be taken where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ with a view to the regulation of terms and conditions of employment by means of collective agreements.”1055 This includes establishing the legal machinery necessary to implement collective bargaining.1056 Legal machinery and processes are especially important for review of worker complaints, because in order to be effective, the processes must be such that the workers believe them to be fair and impartial.1057 One problem with Convention No. 98 is that it does not stipulate how collective bargaining should be organised, and in principle, the ILO is neutral on enterprise versus industry versus national bargaining 1058, as long as the government does not impose the level at which bargaining should take place.1059 The Committee has stated that countries are free to determine the precise way that freedom of association and collective bargaining are institutionalized, as long as national legislation does not violate the spirit of the Convention.1060

4.5.2.4.6 Conclusion

In conclusion, the framework within which collective bargaining must take place if it is to be viable and effective is based on the principle of the independence and autonomy of the parties and the free and voluntary nature of the negotiations; it requires the minimum possible level of interference by the public authorities in bipartite negotiations and gives primacy to employers and their organisations and
workers’ organisations as parties to the bargaining.\textsuperscript{1061} History has shown that the principles contained in this framework have retained their validity ever since convention No. 98 was adopted, despite subsequent radical changes in the world of work.

4.5.3 The Universal Declaration of Human Rights

At the heart of international human rights law is the Universal Declaration of Human Rights (UDHR) of 1948, a unanimous resolution of the UN General Assembly. It is the foundation of human rights law\textsuperscript{1062} and provides the basis for most international human rights norms. The Adoption of the UDHR not only “marked the first time that the rights and freedoms of individuals were set forth in such detail” but it also “represented the first international recognition that human rights and fundamental freedoms are applicable to every person, everywhere”.\textsuperscript{1063} While the UDHR is not in itself a legally binding instrument it has nevertheless inspired a rich body of legally binding international human rights treaties.\textsuperscript{1064} In addition, it is argued that the UDHR is a binding norm as a matter of customary international law by many scholars.\textsuperscript{1065}

The Universal Declaration is, of course, of great importance to the ILO in its work for the promotion and defense of human rights. The ILO’s CEACR has stated,

\begin{quote}
The Universal Declaration ... is generally accepted as a point of reference for human rights throughout the world, and as the basis for most of the standard setting that has been carried out in the United Nations and in many other organisations since then. ... The ILO’s standards and practical activities on human rights are closely related to the universal values laid down in the Declaration, ... [T]he ILO’s standards on human rights along with the instruments adopted in the UN and in other international organisations give practical application to the general expressions of human aspirations made in the Universal Declaration, and have translated into binding terms the principles of that noble document.\textsuperscript{1066}
\end{quote}

Article 20(1) of the Universal Declaration affirms that ‘[e]veryone has the right to … freedom of association’, and Article 23(4) affirms that ‘[e]veryone has the right to form and join trade unions for the protection of his interests’. Although Article 20(1) does not expressly refer to a right to bargain collectively, many if not all of the rights enshrined in the Universal Declaration are rendered binding in conventional international law through several treaties overseen and monitored by UN institutions. Each of these treaties establishes a specialised body charged with the oversight of treaty performance, and imposes regular reporting obligations on state parties to promote a dialogue between each state and the relevant treaty body, in the expectation that such measures will lead to progressive improvements in compliance. Some of these treaties allow for individual complaints to be heard by a treaty monitoring body that possesses the authority to express its views on whether a state is in breach of its treaty obligations.\textsuperscript{1067}

In 1966, the United Nations codified the principles laid down in the Declaration in two seminal texts: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Both Covenants came into force ten years later once they had received a sufficient number of ratifications; they are the most influential international human rights instruments of broad coverage. They also followed the earlier ILO provisions on freedom of association.

4.5.4 The International Covenant on Civil and Political Rights
There is a general consensus that respect for civil and political rights is necessary for the exercise of trade union rights. In the preparatory report prepared for the adoption of Convention No. 87, the International Labour Office stated that “freedom of industrial association is but one aspect of freedom of association in general, which must itself form part of the whole range of fundamental liberties of man, all interdependent and complementary one to another, including freedom of assembly and of meeting, freedom of speech and opinion, freedom of expression and of the press, and so forth”.\textsuperscript{1068}

In so far as labour rights are concerned, the International Covenant on Civil and Political Rights (ICCPR) contains both substantive and process-based rights, which include prohibitions on slavery and forced labour, and freedom of association and collective bargaining. The mention in the ICCPR of freedom of association and collective bargaining is indicative of the historical persecution of trade unions.\textsuperscript{1069} Freedom of association was thus integrated in the ICCPR to

underline its threefold character; it is not only an economic right that protects the freedom of trade unions, but also a political and civil right and therefore grants protection against state and private interferences when an individual wishes to associate with others.\footnote{Christine Kaufmann, Globalisation and Labour Rights, 44.}

Article 22 of the ICCPR is its only detailed article on freedom of association. The first paragraph of that Article is an almost exact restatement of Article 23(4) of the Universal Declaration of Human Rights, providing for everyone’s right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.\footnote{Article 22 (1), International Covenant on Civil and Political Rights, 1966.} The second paragraph states that no restrictions may be placed on the exercise of this right “other than those which are prescribed by law and which are necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of rights and freedoms of others”\footnote{Article 22 (2), International Covenant on Civil and Political Rights, 1966.} and allows “lawful restrictions on members of the armed forces and of the police in their exercise of this right”\footnote{Ibid.} as does Convention No. 87. Entire legislative conformity is guaranteed with Convention No. 87 in this remarkable provision, which was incorporated in its twin Covenant as well.\footnote{Lee Swepston, Human Rights Law and Freedom of Association: Development through ILO Supervision, International Labour Review 137:2 (1998), 172.} There is no mention of the Right to Organise and Collective Bargaining Convention (No. 98) and collective bargaining under this Covenant has been constructively provided for by the monitoring body.

The Covenant creates obligations requiring states to respect and ensure the rights under the Covenant.\footnote{Article 2(1), International Covenant on Civil and Political Rights, 1966.} The obligation to respect indicates the negative character of civil and political rights and thus obligates states to refrain from interfering with these rights, while the obligation to ensure is institutional with a positive character where parties are also required to take positive steps to give effect to the rights.\footnote{Christine Kaufmann, Globalisation and Labour Rights: The Conflict Between Core Labour Rights and International Economic Law (Portland: Hart Publishing, 2007), 42.} This positive duty entails enacting laws, or taking any other measures necessary, to give effect to the rights in the Covenant.\footnote{Article 2(2), ICCPR, 1966. See also Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary 2nd Edition (Kehl: Engel, 2005), para 18-19 on Article 2.}

The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee
requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations”. In addition to the reporting procedure, article 41 of the Covenant provides for the Committee to consider inter-state complaints. Furthermore, the First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the Protocol.\(^\text{1078}\)

The Human Rights Committee, whether due to reluctance or a lack of opportunity, initially had little to say about freedom of association in the context of work.\(^\text{1079}\) In \textit{JB v Canada}, the Committee assessed whether a legislative prohibition on striking public employees constituted a breach of Article 22 of the ICCPR. In its decision, the Committee expressed no view as to whether Article 22 protects the right to bargain collectively, but stated that article 22 does not protect a right to strike.\(^\text{1080}\) The Committee subsequently reversed itself as seen, for example, in its Concluding Comments on Chile’s periodic report on compliance with the ICCPR where it expressed “serious concern” over a Chilean law that imposed a general prohibition on “the right of civil servants to organise a trade union and bargain collectively, as well as their right to strike… under article 22 of the Covenant”.\(^\text{1081}\) The Committee has indicated further elements to trade union protection in Article 22 in its Concluding Comments on Senegal, in which it identified the “lack of full enjoyment of freedom of association, due to the particular fact that foreign workers are barred from holding official positions in trade unions and that trade unions may be dissolved by the executive”.\(^\text{1082}\) The Committee has also constructively recognised the right to strike, which it initially had concluded was not covered by Article 22 of the Covenant.\(^\text{1083}\)

Finally, the Covenant places limitations on the enjoyment of the rights in Article 22 for members of the armed forces and of the police as well as those restrictions which are prescribed by law and where necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.\(^\text{1084}\)

\(^{1078}\) Optional Protocol to the International Covenant on Civil and Political Rights. www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx (accessed 12 March 2017)


\(^{1081}\) CCPR/C/79/Add.104 (30-03-1999), para 25. See also CCPR/C/78/Add.105 (06-04-1999), para 17 (Canada) where the Human Rights Committee in its concluding comments stated that Canada “had not secured throughout its territory freedom of association” in that the Ontario’s “workforce programme, which prohibits participants from joining unions and bargaining collectively”, affects implementation of Article 22.

\(^{1082}\) \textit{1997} UNdoc.CCPR/C/79/Add.82.

\(^{1083}\) See also CCPR/C/79/Add.73.

\(^{1084}\) Article 22 (2), International Covenant on Civil and Political Rights, 1966.
4.5.5 The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains a more detailed treatment of the right to freedom of association and collective bargaining. Article 8 protects the right to form and join trade unions “…for the promotion and protection of their economic and social interest,”1085 as well as the right to establish federations and confederations and to join international trade unions’ organisations.1086 Article 8 is more elaborate and specific compared to the provision in the ICCPR, particularly on the right to strike granted in Article 8(1)(d). The Covenant allows the imposition of lawful restrictions on the freedom of association on members of the armed forces or of the police or of the administration of a state1087 as well as limitations prescribed by law and where necessary in a democratic society in the interest of national security or public order or for the protection of the rights and freedoms of other.1088

The obligations arising from Convention No. 87 are expressly reserved by the saving clause contained in Article 8(3) of the Covenant, which prevents states from relying on Article 8 to prejudice rights enshrined in ILO Convention No. 87, Article 8(3) and thus effectively incorporates Convention No. 87 rights into the guarantee of freedom of association in the ICESCR, at least as it relates to states parties to Convention No. 87.1089 Craven argues that Article 8 is a hybrid provision, granting both individual and collective rights at the same time, and as such, it also protects trade unions from state interference.1090 As with its twin covenant, the ICESCR does not contain any reference to Convention No. 98, although the right to bargain collectively has been constructively provided for by the monitoring body.

The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the (ICESCR) by its States parties. Its counterpart, the Human Rights Committee, was established in Article 28 of the ICCPR and came into existence when the Covenant came into force in 1976. The CESCR was established under the United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the ECOSOC in Part IV of the Covenant. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of

accepting the Covenant and thereafter every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations”. In addition to the reporting procedure, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which entered into force on 5th May 2013, provides the Committee competence to receive and consider communications from individuals claiming that their rights under the Covenant have been violated. The Committee may also, under certain circumstances, undertake inquiries on grave or systematic violations of any of the economic, social and cultural rights set forth in the Covenant, and consider inter-state complaints.  

The Committee has consistently held that the right of a trade union to function freely, as guaranteed by Article 8(1)(c), includes a right to bargain collectively. In its 2001 Concluding Comments on Korea, the Committee reminded Korea that “the provisions of Article 8 guarantee for all persons the right to freely form and join trade unions, the right to engage in collective bargaining through trade unions for the promotion and protection of their economic and social interests, as well as the right to strike”. On the other hand, while this Article recognises the right to strike, it leaves the conditions of its exercise to the discretion of national legislations.

The Committee has also provided that states are not expected to guarantee the right to collective bargaining to every trade union. It is acceptable to limit the right to consultation and negotiation in the collective bargaining process to the “most representative” union, yet, this requirement must not impede the right of trade unions to participate freely in collective bargaining processes, irrespective of their size.

It is crucial to state that Article 2(1) of the ICESCR provides for the progressive realisation of the rights recognised in the Covenant by taking into account available resources. It states that,

Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

1091 See www.ohchr.org
1092 Ibid.
1093 E/C.12/1/Add.59 (09-05-2001), para 39.
The clause on “to the maximum of its available resources” creates a dilemma where it is the state of a country’s economy that most vitally determines the level of its obligations as they relate to any of the rights under the Covenant, providing the state with a wide measure of discretion in ascertaining its abilities to discharge its obligations. The clause on “progressive achievement” is not only the linchpin of the whole Covenant, but also a point of contrast with that of “immediate implementation” required by Article 2 of the ICCPR and thus mirrors the contingent nature of state obligations in so much as to deprive it of any normative significance. In other words, does this clause enable the obligations of state parties to be postponed to an indefinite time in the distant future? The negative response to this question is on the ground that, though the word “progressively” is in itself a limitation, the meaning should not be distorted and should not be invoked by states as grounds for failing to implement a right when resources were available. The CESCR has stipulated that, because the right to join and form trade unions is an integral part of the freedom of association found in Article 22 of the ICCPR, it is not subject to progressive realisation, but rather capable of immediate application and is self-executing, and must therefore be implemented immediately.

Finally, the general limitation clause in Article 4 of the Covenant allows state parties to subject the rights to limitations as determined by law, but only in so far as this may be compatible with the nature of the rights and solely for the purpose of protecting the general welfare in a democratic society. The clause fulfills a dual function of permitting state parties to impose limitations on the enjoyment of rights and of protecting the rights in question by limiting both the purposes for which limitations may be imposed and the manner in which that may be legitimately done, thus acting as a shield and sword. One interesting observation concerning these rights and their incorporation in both civil and political as well as economic, social and cultural rights instruments is that they trouble the boundary between civil and political rights on the one hand and social and economic on the other.

The Covenants use very general terms so that they can serve as a basis for various systems of industrial relations. In summary, each of the two relevant UN human rights instruments guarantees explicitly freedom of association and implicitly a

1097 Ibid, 172.
1098 This argument was raised by Hungary in the preparatory work on the Covenant. See 10. U.N. GAOR at para. 9, U.N Doc. A/2910/Add. 6 (1955); Alston and Quinn (1987), 172.
1101 Article 4, ICCPR, 1966.
1103 Ibid.
right to bargain collectively in the context of work. In recent years, the monitoring
body of each Covenant has interpreted freedom of association to include a right
to bargain collectively. In the face of economic globalisation and the introduction
of transnational flexible production, amid fears that states have begun to or will
abandon their commitment to collective bargaining, recent developments in
international human rights law suggest an enhanced willingness to provide
international legal protection to collective bargaining.1104

4.5.6 Regional Human Rights Instruments
Many scholars have discussed the importance of regional instruments in human
rights, particularly the issue of relativism. These instruments are crucial to
explore, as it is believed that regional instruments provide a framework for highly
integrated states as the states in a region enjoy more or less similar economic,
social and political conditions.

4.5.6.1 American Convention on Human Rights
The American Convention has many times been characterised as a ‘civil and
political rights’ instrument, though it protects a wide range of economic, social
and cultural rights,1105 both directly (by provisions in the Convention) and
indirectly (by reference of the Convention to the OAS Charter). Even the Inter-
American Court of Human Rights, which was established in 1979 as an
‘autonomous judicial institution’ of the OAS and charged with applying and
interpreting the Convention, the principal human rights treaty of the region, has
affirmed that economic, social and cultural rights are the same in substance as
civil and political rights.1106 However, of the Convention’s twenty three articles,
twenty two are placed under Chapter II which is infelicitously titled ‘Civil and
Political Rights’ and only one article under Chapter III titled ‘Economic, Social
and Cultural Rights’.

Article 16 of the Convention provides that,

1. Everyone has the right to associate freely for ideological, religious, political, economic,
   labour, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law
   as may be necessary in a democratic society, in the interest of national security, public
   safety or public order, or to protect public health or morals or the rights and freedoms of
   others.

1105 Tara J. Melish, “The Inter-American Court of Human Rights: Beyond Progressivity” in Social Rights
   Jurisprudence: Emerging Trends in International and Comparative Law, Malcom Langford (ed.), (U.K.:
   Cambridge University Press, 2009), 375.
1106 Inter-American Court of Human Rights, Annual Report of the Inter-American Court of Human Rights 1986,
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

The Convention provides for the right to freedom of association in a more general clause that also includes other association rights such as those of political parties. Article 16 includes the right to form and join a labour union. The Inter-American Commission on Human Rights, the monitoring body of the Convention, has held that Article 16 should not be interpreted as including the negative right not to join a trade union. The Article also provides for limitations to the enjoyment of these rights on members of armed forces and police similar to that of the ILO Conventions without, however, limiting public employees as in Convention No. 98. In Baena Ricardo et Al. v Panama, the Inter-American Court of Human Rights ruled that the government of Panama violated freedom of association guarantees in the American Convention of Human Rights when it dismissed 270 public sector employees for participating in a demonstration for labour rights. In addition, Article 8(1)(b) of the Additional Protocol to the Convention in the Area of Economic Social and Cultural Rights provides for the right to strike.

The Convention gives state members the obligation to respect the rights and freedoms recognised under the convention, which is, as in the other instruments, an application of the principle of pacta sunt servanda established by Article 26 of the Vienna Convention on the Law of Treaties. A second obligation is to take legislative measures to give effect to the rights and freedoms under the Convention. This entails the obligation of member states to adapt their internal/domestic laws in such a way as to harmonise domestic law with the international law contained in the convention.

Finally, The Convention in articulating the limitations as to the enjoyment of the freedom of association rights under the Convention uses the same wording as that of Article 22(2) of the ICCPR.

4.5.6.2 The African Charter on Human and People’s Rights (ACHPR)

One of the unique features of the Charter is the recognition of economic, social and cultural rights on the same footing as civil and political rights. Though the preamble declares the indivisibility of all these rights, it also controversially declares that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Article 10 of the Charter provides that,

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.

The way in which this right is expressed is vague and unsatisfactory, like the other rights in the Charter, as regards specifying its content and the restrictions to which it may be subject. It states bluntly in its first paragraph the right to free association and in the second paragraph, a freedom not to join an association, two inseparable aspects of the same freedom or right. The article does not mention the restrictions to which this right may be subject. There is no doubt that the requirement of lawfulness laid down in the first paragraph means that forming an association must not only comply with certain formal rules (statutes, registration, declaration etc.) but also with certain basic rules traditionally enacted to safeguard public order and morals (lawfulness of the object of association).

The protections guaranteed in this charter are further tainted by the vague reference to the “obligation of solidarity” provided for in Article 29. Indeed the Article can justify all kinds of limitations on such a guarantee although in paragraph 4 of the Article, it provides for social and national solidarity. The safety clause was actually added in Banjul (The Gambia) in June 1980 by the first of the two conferences of Ministers of Justice of the OAU member states entrusted with examining the draft Charter, thus this seems to be a specific concern of the authors. Finally, unlike the other human rights instruments, the Charter does not mention freedom of association and collective bargaining as corollaries of the freedom to associate and contains no provision on freedom of association for workers.

1117 Article 10, African Charter of Human and Peoples’ Rights.
1119 Ibid.
1120 Ibid, 169.
1121 Ibid.
The Charter provides obligations for member states to recognise the rights in the Charter and to undertake to adopt legislative or other measures to give effect to them.1122

The African Commission on Human and People’s Rights is the monitoring body of the Charter and has dealt mainly with freedom of association in regards to political parties. A Protocol1123 to the Charter was adopted in 1998 and came into force in 2004 after the 15th instrument of ratification was submitted, establishing the African Court of Human and Peoples’ Rights, which complements and reinforces the functions of the Commission.1124

The Commission has issued guidelines in interpreting economic, social and cultural rights enshrined in the Charter.1125 However, the right to freedom of association has been excluded under the guidelines, perhaps implying that it is a civil and political right. However, the Commission, taking the approach of the CESCR, has stated that the obligations on the part of the member states consist of the obligations to respect, protect, promote and fulfil.1126 The duty to promote economic, social and cultural rights requires States to adopt measures to enhance people’s awareness of their rights, and to provide accessible information relating to the programmes and institutions adopted to realise them. In this regard, the African Charter explicitly places an obligation on States Parties “to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.”1127

4.5.6.3 European Human Rights Instruments

In the European context there are two important regimes. One is the Council of Europe (CoE) which is concerned with the European Convention on Human Rights and European Social Charter1128 which has gained importance by the case law of the European Court of Human Rights and the Committee on Social Rights respectively. The other is the European Union’s Charter of Fundamental Rights. It has become legally binding by integration into the Lisbon Treaty, which came into force on 1 December 2009. This Charter contains an entire chapter of fundamental social rights (the right to collective bargaining; the right to strike; the

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1124 See www.en.african-court.org
1126 Ibid.
1127 Ibid, 11.
right to information and consultation; the right to working conditions which respect his or her health, safety and dignity; the right to protection against unfair dismissal etc). It particularly reacts to challenges of modern society by guaranteeing the right to integrity of the person, respect for private and family life, the right to protection of personal data, and the right to education and to have access to vocational and continuing training, to give just a few examples.1129

4.5.6.3.1 The Council of Europe

The European Convention of Human Rights

The Council of Europe was formed in 1949 in order to bring together the states of Europe to promote the rule of law, democracy, human rights and social development. It groups together 47 countries and has observer status for five more countries. The CoE adopted the European Convention of Human Rights, which entered into force in 1953. The European Court of Human Rights is the monitoring body vested with ensuring compliance to the Convention. The Court has competence to consider complaints brought by individuals, groups of individuals, or any legal persons alleging violations of the ECHR by a signatory state, provided there is no remedy under domestic law to address such an infringement. It is also possible for a CoE member state to bring an application before the Court against another CoE member state.

Article 11 of the Convention states that,

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The Article construes the right to join and form trade unions as an aspect of the general freedom of association.1130 The provision imposes both negative and positive obligations on states. The negative obligation is not to interfere with individual and trade union freedom of association, save for exceptional grounds detailed in Article 11.2. The positive obligations include the duty to secure the rights of individuals and trade unions against employers and to protect the individual against abuse of power by a trade union, and more importantly to

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1129 Harry Arthurs "Labour Law after Labour", 50.
ensure trade unions can function effectively. In *National Union of Belgian Police Case*, the Court stated,

… what the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members’ interests.  

Crucial to note is that the ECHR, particularly Article 11, does not explicitly mention the right to collective bargaining. Initially, the European Court of Human Rights had interpreted Article 11 restrictively, at least with respect to its reference to ‘the right to form and join trade unions’, where it took the position that collective bargaining and the right to strike were excluded from the scope of protection for freedom of association under its respective instrument.  

Freedom of association within the meaning of Article 11 protected a right to be represented by a union, but did not protect a right to bargain collectively or strike to secure the interests of workers. In addition, the Convention does not specifically spell out negative freedom of association. The case law has, however, broadened the protections given by Article 11. In the landmark case of *Demir and Baykara v Turkey*, the Court held that the right to bargain collectively with the employer has, in principle, become one of the essential elements of the right to form and join trade unions, for the protection of one’s interests - set forth in Article 11 of the Convention. The case law has also included the negative trade union freedom – the right not to belong to a trade union. The right to form trade unions under the convention includes the right of trade unions to draw up their own rules and to administer their own affairs.  

However, the right to freedom of association is not absolute and is subject to restrictions by the state, under Article 11.2, where such interference is prescribed by law, necessary in a democratic society and for the protection of rights and freedoms of others. Again, the exceptions to freedom of association and collective bargaining are the same as those provided for by the ICESCR, that is, members of the armed forces, the police or of the administration of the state.

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1131 1 EHRR 578 para 39 PC.
1133 Schmidt and Dahlström v Sweden, European Court of Human Rights, 1981.
1135 Sigurdur A. Sigurjonsson v Iceland, European Court of Human Rights, Application No. 16130/90. (The case concerned the obligation imposed on the applicant, a taxi driver, to join the Frami Automobile Association or lose his license. The Court ruled that this was a violation of Article 11 as it encompasses a negative right to association - para 35), 30 June 1993; Gustafsson v Sweden, European Court of Human Rights, 25 April 1996.
1136 Associated Society of Locomotive Engineers and Firemen (ASLEF) v UK, Hudoc (2007); 45 EHRR 793, 38.
The European Social Charter (ESC)

In the Council of Europe, the recognition of collective rights has come primarily through the European Social Charter (ESC), which for the first time explicitly provided that all workers and employers have the right to collective bargaining.1137 Before the Charter of 1961, only a few social and economic rights were protected by the European Convention of Human Rights.1138 The Charter was revised in 1996 and the revised Charter expands, improves and deepens the protection of collective rights provided by the ESC.

Article 5 of the European Social Charter establishes the right to organise. Under this Article, contracting parties undertake to ensure that national law does not impair or be applied to impair the ‘freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join these organisations, with the exceptions of police and armed forces’.1139 Interestingly, Article 6 of the Charter spells out the right to collective bargaining as well as the right to strike. It provides that Contracting parties undertake,

(1) to promote joint consultation between workers and employers;
(2) to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
(3) to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:
(4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

The European Committee on Social Rights, the Social Charter’s monitoring body, has interpreted Article 6(2) to mean that employers and workers must, in accordance with legislation or industrial practice, be at liberty to conclude collective agreements.1140 The Article also requires machinery to ensure that employers bound by collective agreements apply their provisions to all persons employed in their enterprise, even if they are not members of a trade union party to the agreement.1141 According to the Committee, although the right to collective bargaining can be limited for public employees, The Article requires the state to afford public employees a measure of participation in determining terms and conditions of work.1142

1138 Ibid.
1141 See Article 6(3), ESC, 1961.
1142 See Conclusions XIV-1-Luxembourg- Article 6-2, 30 March 1998
Article 31 provides for limitations to the rights in the Charter and requires such limitations to be ‘prescribed by law and necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals’. The Committee has stated that direct state intervention in the collective bargaining process is ‘a very serious measure which …should be taken only for the time needed to return to a normal situation in which the exercise of the right to collective bargaining would again be fully ensured’.  

4.5.6.3.2 The European Union

The Charter of Fundamental Rights of the EU (the EU Charter) is unique as, unlike the CoE instruments, it incorporates both civil and political as well as economic, social and cultural rights and does not create a separate monitoring and protection system for social rights. Another important aspect is that fundamental rights in the EU have been granted in a multilevel system. The fundamental rights of the EU Charter are linked to the guarantees of the ECHR, supplemented by the ESC and the ILO Conventions. In more practical terms, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR, thus setting a form of minimum standard.

Unlike the ECHR, both the right to freedom of association and collective bargaining as well as the right to strike are explicitly provided for in two different articles of the Charter. Article 12 provides for the “right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.” Again, collective bargaining is found in Article 28 of the Charter, which states,

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

1143 See for example C XII-1 (Netherlands); C X-1 (Denmark).
1146 Ibid.
1148 Ibid, Art. 12.
Customary International Law

Customary International Law (CIL) is norms that have developed from states’ practice without being codified in treaties. Alternatively, they may have once been laid down in treaties, but as a result of a constant pattern of compliance from all or most states, have gained status as international customary law applicable to all states, including to those that have not ratified the treaty. CIL is one of the sources of international law. It is typically defined as a customary practice of states followed from a sense of obligation. Customary international law is among the most elusive, but most important, sources of law. Yet, CIL remains an enigma as it lacks a centralised law-maker, a centralised executive enforcer and a centralised, authoritative decision-maker.

Customary international law is generally defined as having two elements. The first element consists of an act or actual practice of States. The second element comprises the belief by States that they are acting under a legal obligation, comprising the mental aspects of the law, known as opinion juris and also described as the psychological element of CIL. Different theorists have placed different weights of importance on each of the elements; however, most discussion regarding the definition of customary international law centers around State practice, and, in fact, the name itself denotes the importance of practice. It seems intuitive that if a State practice occurs long enough and is universally applied, despite the fact it did not originate as a legal obligation, it could acquire that designation, especially with those who do not research or have an interest in the historical source of the practice. The other argument supporting the importance of practice concerns the fact that opinion juris becomes too difficult to prove because it really amounts to the "subjective perception of the particular State or States".

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1150 Art. 38(1)(b), Statute of the International Court of Justice.
1153 Ibid.
1158 Ibid.
Thus, State practice constitutes the most concrete element of customary international law. In order to determine if a practice has risen to the level sufficient to become customary law, several factors must be explored. The most obvious factors of State practice include the relevant acts that comprise the norm, the number of States that comply with the norm, and the length of time for which they have been applying the norm. Additionally, the definition of State practice becomes important, as well as the consistency and repetition of the practice. For the issue of State practice to be raised at all, the practice in question must be general enough that it could become an international legal norm. The International Court of Justice (ICJ) in the *North Sea Continental Shelf* has held that “the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law”.

One issue of debate has been whether labour right or which labour rights can be considered customary international law. This does not however imply that labour rights have been argued to also form part of *ius cogens* and are therefore peremptory norms of international law. Although both concepts are meant to protect basic moral values, *ius cogens* invariably refers to norms whereas *erga omnes* refers to obligations. Such obligations derive, for example, in contemporary international law, from the principles and rules concerning the basic rights of the human person. These issues, in relation to IFIs and labour rights, will be addressed in the next chapter.

### 4.5.8 General Principles of International Law

General Principles have been described as principles that constitute the unformulated reservoir of basic legal concepts universal in application, which exist independently of the institutions of any particular country and form the irreducible essence of all legal systems. General principles have also been defined as international common law growing out of the composite concepts, norms and rules of State legal systems.

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1162 Christine Kaufmann, *Globalisation and Labour Rights*, 75.
1163 *Ius cogens* is defined in Article 53 of the Vienna Convention on the Law of Treaties as “A peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.
1165 For a detailed analysis of the two concepts of *jus cogens* and *erga omnes* see Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Oxford Scholarship Online, 2000).
Although Article 38(1) of the Statute of the International Court of Justice (ICJ) includes these general principles as a source of international law, there seems to be no consensus among legal scholars as to the exact quality of the source, which has consequently been perceived as an “ambiguous sources of law.”1168 This is not peculiar considering that the principles are not posited. They emanate from principles of law which are widely accepted in national legal systems or are, in one form or another, recognised in a wide range of national legal systems.1169 However, general principles of international law are considered necessary for the very functioning of the international system as they constitute integrative tools of the system and fill actual or potential legal gaps.1170

4.5.9 International Conventions and National Law

Traditionally, two main approaches explain the relationship between international and national law: monism and the dualism.1171 Dualism emphasises the distinct and independent character of the international and national legal systems where international law is perceived as a law between states whereas national law applies within a state, regulating the relations of its citizens with each other and with that state.1172 Therefore, inclusion of international treaties in the national legal order occurs by transforming or incorporating them in national law through legislation, which gives effect to the treaties.1173 Monism on the other hand, perceived national and international law as parts of a single legal order, thus, once a treaty is duly comes into force (takes effect in international law), it likewise takes effect within the national legal system.1174 In this case, no further specific legislative act is necessary to give the treaty legal effect.1175

Coming to the principles of international law, Article 27 of the Vienna Convention on the Law of Treaties (VCLT) provides that a party may not invoke the provisions of its domestic law as a justification for its failure to perform a

1175 Ibid.
treaty. Other than this, no other rule of international law imposes on states any duty as to how observance of international law obligations should be achieved in national law. The VCLT thus leaves each country freedom to decide how it fulfils, nationally, its international obligation.

As for international conventions emanating from the ILO, the ILO Constitution contains a unique provision. It places an obligation on member states to submit conventions and recommendations, which have been adopted by the International Labour Conference, within a period of twelve to eighteen months “to the competent authorities within whose competence the matter lies, for the enactment of the legislation or other action”. In this way, the ILO promotes ratification and application if its conventions, beyond classic international law. Moreover, members have an obligation to report on the submission made and the decisions of the legislative authorities.

4.6 Conclusion

In conclusion, international law can be determined from several sources, as discussed above. International labour standards are without doubt a component of human rights law. Freedom of association and collective bargaining is indeed an important principle in international human rights law. This is demonstrated by the vast amount of international and regional human rights treaties that incorporate this rights as well as comments and conclusions of various monitoring bodies on the importance of these rights. Moreover, the fundamental principle of freedom of association and collective bargaining reflects not only workers’ rights to bargain for and defend their interests, but also other civil aspects as democracy, security and dignity.

In an era of technological advancement, economic globalisation, liberalisation of the labour market and many other developments, labour rights have become instruments by which the international legal order can mitigate some of the

1176 Article 27, Vienna Convention on the Law of Treaties, 1969. The Article also states that this rule is without prejudice to Article 46 of the treaty which relates to provisions of internal law regarding competence to conclude treaties.
1178 Ibid.
1179 Article 19(5)(b), Constitution of the International Labour Organisation, 1919. In the course of the negotiations on the Treaty of Versailles, the clause “authorities within whose competence the matter lies” replaced “legislature”, aiming at cases in which competence in such a matter belonged to the states making up a federation, not to the federal authorities, as well as countries which had no parliamentary institutions. See Jean-Michel Servais, International Labour Law, 72-73
1180 Ibid.
1181 Article 19(7), Constitution of the ILO, 1919.
adverse consequences of all these forces. Their normative significance transcends the fact that they are workers' rights or human rights and extends to the justice of the international legal order itself. To the extent they protect the interests of workers from state or non-state action that international law - private or public - otherwise authorizes in the name of economic globalisation or flexibility, international labour rights vest the international legal order with a measure of normative legitimacy.\textsuperscript{1182}

However, the role of international labour rights does not end at the international level. The use of international law to inform constitutional interpretation of freedom of association under constitutional law is a growing function of the international instruments.\textsuperscript{1183} Here, the role of international law can be to strengthen a decision based on domestic law or as a guide in interpreting domestic law.\textsuperscript{1184} The ‘strengthen’ or ‘guide’ approach reflects the development of a common international understanding or levelling effect in the use of relevant international law principles.\textsuperscript{1185}

Today, the importance of freedom of association and collective bargaining is challenged due to recent developments. First is the growing informal sector, which has limited the scope of collective bargaining.\textsuperscript{1186} Second, the increasingly tough competition brought about by technological innovation and globalisation has reduced the importance of sectoral agreements and at the same time enhanced collective bargaining at the enterprise level.\textsuperscript{1187} Third and most importantly, collective bargaining has lost some of its contractual freedom and room to maneuver as a result of the ever-growing influence on national economic policy wielded by the international financial institutions like the World Bank and the IMF.\textsuperscript{1188} As the IFIs are international organisations, an inquiry into the international law rules and obligations that apply to them is warranted.

\textsuperscript{1182} Macklem, \textit{International Law}, 82
\textsuperscript{1185} \textit{Ibid.} See also Botswana Public Employees’ Union and Others v Minister of Labour and Home Affairs and Others, MAHLB-000674-11, 9th August 2012. The High Court of Botswana relied upon ILO Conventions 87 and 98 and an ILO Committee of Experts Opinion as a guide in interpreting freedom of association under Article 13 of the Botswana Constitution.
\textsuperscript{1186} Christine Kaufmann, \textit{Globalisation and Labour Rights}, 60.
\textsuperscript{1187} \textit{Ibid.}
\textsuperscript{1188} \textit{Ibid.}
5. International Financial Institutions and International Law

5.1 Introduction
One of the issues raised in this study is the obligations under international law applicable to IFIs, bearing in mind their nature both as international organisations and financial institutions. It has been argued that while global cooperation for development is a major, if not dominant, concern in the operational work of international and regional organisations, it remains among the least regulated parts of international life.\(^{1189}\) As the activities of the IFIs have come into contact with human rights and particularly labour rights, it is crucial to establish their obligations under international law, as human rights form an important part of the general international law framework. The significance of this chapter is highlighted by the controversies regarding to what extent international law binds IFIs, considering their expanded scope of activities which have consequences on human rights. These controversies are amplified by the fact that, in most cases, the constituent documents of the IFIs do not impose such obligations and that these institutions are not parties to the various human rights instruments that form the basis of international human rights standards. This chapter puts forth various principles and sources that address this question as the outcome will influence the analysis of the practical and policy aspects of the IFIs’ activities in subsequent chapters.

5.2 The Nature of IFIs Revisited
One aspect that is necessary to consider when elaborating the nature of international financial institutions is that of legal personality. According to the traditional definition, public international law was exclusively a ‘law between states’ as, being the only subjects of international law, states were the only entities which were capable of incurring responsibility on the international plane as a result of the breach of international rules.\(^{1190}\) With the diversification of subjects of international law and the recognition of a certain measure of international legal personality\(^{1191}\) to other entities, that monopoly has disappeared. It is important to point out that in earlier times, states alone were recognised as legal entities in international law, while other entities were precluded from obtaining the status of


\(^{1191}\) ICJ, Reparation of Injuries Suffered in the Service of the UN, ICJ Reports 1949, 174.
international legal persons.\textsuperscript{1192} In the absence of a clear, objective test, the process of identifying subjects of international law has usually commenced with the state, as the entity everyone recognises as a legitimate subject.

The traditional point of reference with regards to international legal personality of international organisations is the International Court of Justice’s (ICJ) advisory opinion on the\textit{ Reparation for Injuries Suffered in the Service of the United Nations}\textsuperscript{1193} (hereinafter the\textit{ Reparation Case}) where the Court, after referring to the principles and purposes of the UN as contained in its Charter, stated that “to achieve these ends the attribution of international personality is indispensable”\textsuperscript{1194}, thus concluding that the United Nations “is a subject of international law and capable of possessing international rights and duties” and that it “has the capacity to maintain its rights by bringing international claims”.\textsuperscript{1195} Both the premise and conclusion are nowadays undisputed, not only in relation to the UN, but in general.\textsuperscript{1196} It is important to note that the\textit{ Reparation Case} concludes on the legal personality of the UN, whose Charter does not explicitly provide for its legal personality. There are cases in which an international organisation’s legal personality is explicitly provided for in its constituent documents or constitution. The IFIs are an example of such explicit legal personality. The AfDB’s Articles state that, “to enable it to fulfill its purpose and the functions with which it is entrusted, the Bank shall possess full international personality”.\textsuperscript{1197} The two instances highlight the basis of international legal personality of international organisations which Schermer and Blokker identify with a school of thought according to whose view, international organisations are international legal persons not \textit{ipso facto}, but because the status is given to them, either explicitly or if there is no constitutional attribution of this quality, \textit{implicitly}.\textsuperscript{1198}


\textsuperscript{1194} Ibid, 74.

\textsuperscript{1195} Ibid, 179.


\textsuperscript{1197} Article 50, Articles of Agreement, African Development Bank. See also Art. 45, Articles of Agreement of the EBRD which state that the Bank shall possess “full legal personality”. The Articles of all of the other IFIs state that they shall possess full “juridical personality”. See Art. VII, Section 2, Articles of Agreement, IBRD; Article IX, Section 2, Articles of Agreement, IMF; Article VIII, Section 2, Articles of Agreement, IDA; Article XI (2) Articles of Agreement, IDB; Art.49, Articles of Agreement, ADB.

\textsuperscript{1198} Henry Schermers and Niels Blokker, \textit{International Institutional Law: Unity within Diversity}, Fifth Revised Edition (Leiden: Martinus Nijhoff, 2011), 989. Schermers and Blokker also discuss other schools of thought in the debate on the basis of international legal personality, which argue that it exists only if it is explicitly provided for in the organisation’s constitution, reflecting the will of the founders, while other schools take the objective approach, arguing that as long as an organisation has at least one organ with a will distinct from that of member states, then this organisation is \textit{ipso facto} an international legal person. See Ibid, 988-989.
Thus, an international organisation possessing international legal personality is a subject of international law. For an organisation to be a subject of international law implies an entitlement to rely upon legal rights, an obligation to respect legal duties and a privilege to utilise legal processes, independent of the rights and obligations of its members (emphasis added).\(^{1199}\) Therefore, the application of this approach leads to the conclusion that IFIs are intergovernmental (international) organisations with their own international legal personality, thus subjects of international law capable of possessing rights and duties under international law. However, although international organisations are subjects of international law, as are states, they are quite different from states. They have limited powers and powers set out in their constituent instruments,\(^{1200}\) and this makes them different from each other as well, ranging from those with political purposes (UN), to finance and development (WB and IMF), health (WHO), technical (International Telecommunications Union), regional organisations (African Union), to mention but a few. This is not a peculiar situation; the ICJ has stated that “the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights”.\(^{1201}\)

Of course, this conclusion does not in itself determine what rights and obligations such organisations might have under international law. Rather, the substance and scope of international rights and obligations depends principally on the constituent treaty of the organisation concerned and the will of the founding states. This functional relationship was stressed by the ICJ in the *Reparation Case* where it stated that,

> The [international] rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.\(^{1202}\)

In essence, the *Reparation Case* shed light on the crucial element that international organisations are not only subjects of international law, but also capable of bearing duties and rights. However, this ascription of the status of international organisations does not define these rights and duties.\(^{1203}\) In other words, though their status as subjects of international law is clear, their substantive rights and responsibilities are not. This will be discussed later. First, it is important to look into the functional aspect of international organisations, which will apply to the IFIs.

\(^{1201}\) ICJ, *Reparation for Injuries*, 174, 178
\(^{1202}\) ibid, 179
\(^{1203}\) Ian Brownlie, *Principles of Public International Law*, 58-66
5.3 Functional Necessity, Domestic Legal Personality and Immunity

As a doctrine, functional necessity has granted international organisations as much jurisdictional immunity and privilege as they need to exercise their prescribed functions to fulfill their intended purpose in an independent fashion.1204 Considering that international organisations lack an actual territory and rely on (member) states for the practical functional aspects, the basic explanation for the endowment of immunities and privileges is a guarantee of the international status they require to fulfill their functions as without these, international organisations would potentially be vulnerable to interference by the authorities of any state in which they operate.1205 Guaranteeing this independence, which typically encompasses the removal of international organisations’ secretariats and other organs from the direct influence of domestic judicial institutions and expert organs, ensures that individual members do not exercise influence in addition to the influence provided in the rules of an organisation.1206 According to the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, these rules include constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organisation.1207

The legal basis for immunities and privileges in international organisations can emanate from various sources. In some cases, such immunities and privileges are incorporated in the constituent documents of the international organisations. In the case of the IFIs, all the respective articles of agreement provide for the principle of functional privileges and immunities, commonly with the clause “to enable them to effectively fulfill their purposes and carry out the functions entrusted to them”.1208 Another basis of such privileges and immunities is multilateral treaties concluded between the members of international organisations, to which the organisation concerned is not a party.1209 It is crucial to state that in most cases, the immunities and privileges of international organisations are said to be absolute, and in some cases the constituent documents provide for such absolute immunity, providing immunity from “any form of legal

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1204 Schermers and Blokker define immunities as exceptions from the administrative, adjudicatory or executive powers of a state and privileges as exemptions from otherwise applicable substantive law of a state, such as tax law, immigration law etc. See *International Institution Law*, 4th Edition (Leiden: Martinus Nijhoff, 2003), 251.


1207 Article 2(1)(j), The Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 1986.

1208 See Article VII (sections 1-10), World Bank Articles; Article IX (1-10), IMF Articles; Art. XI (1-10), IADB Articles; Chapter VII (Art. 48-58); Chapter VIII (Art. 44-55), EBRD Articles.

1209 See for example, UN Convention on the Privileges and Immunities of the United Nations, 1946; UN Convention on the Privileges and Immunities of the Specialised Agencies, 1947. It is important to note that the World Bank and IMF, among others, are included in the list of specialised agencies. For further details on immunities and privileges on basis of treaties, see August Reinisch, "Privileges and Immunities", 135-136.
process”. As a matter of practice, the prevailing concept of functional immunity often leads *de facto* to absolute jurisdictional immunity.

The functional necessity doctrine has several shortcomings. Foremost is the absence of a precise meaning of the doctrine in regards to the functional needs of the international organisations. It has been argued that the doctrine “means different, and indeed contradictory, things to different people or rather different judges or states” where the determination of the functional needs is essentially in the eyes of the beholder. An interesting case in this regard is that of the *International Bank for Reconstruction and Development and International Monetary Fund v All America Cables and Radio, Inc. and Other Cable Companies*. Here, the plaintiff made a claim for the lowering of rates for telecommunication messages and, basing on the doctrine of functional necessity, argued that the purpose of granting immunities and privileges to international organisations is to “protect the operation of these organisations from unreasonable interference (including protection from unreasonable high rates)”. The defendants, basing on the same doctrine, argued that nothing showed that “the Bank and Fund needed lower-than-commercial rates to carry out their functions”. The acceptance of the IFIs claims by the Commission and granting of the claim to the plaintiffs on the basis of functional necessity demonstrates the “open texture” of the principle of functional necessity that Klabbers has identified.

Another shortcoming in regard to the principle of functional necessity is how the functions of international organisations can be identified. Naturally, this is to be done by referring to their constituent documents. The problem this poses has been discussed earlier in this study: despite the fact that the constituent documents may provide numerous functions, there is the issue of the vague and ever increasing scopes of the functions of IFIs as financial institutions for development. Therefore, the very functional basis is shaky. This is the case when one thinks of the doctrine of implied powers, which recognises that powers of an organisation need not necessarily granted explicitly, but can also be implied. creep”.

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1210 See Art. IX(3), IMF Articles; Art. 50, ADB Articles; Art.52, AfDB Articles. Note that some constituent documents provide for qualified immunity where the organisation can, in specific circumstances, be brought before domestic courts. See Art. VII(3), World Bank Articles; Art. XI(3), IADB Articles; Art. 46, EBRD Articles.
1211 August Reinsch, “Privileges and Immunities”, 138.
1214 United States Federal Communications Commission, Decision of 23rd March 1953.
1215 Ibid.
application of functionalism in this case would extend to powers not explicitly granted, risking applying functionalism to “mission creep” of the IFIs.

In addition to these shortcomings, scrutiny of the immunities of international organisations is a more recent trend. It is important to note that traditionally, international organisations had not come under much scrutiny because they were generally perceived as “good-doers” rather than “wrong-doers”. However, with time, they have become important actors in the international arena and their activities increasingly affect day to day lives of individuals, not always in a good way, while shielded by immunities and privileges. The particular example of the IFIs demonstrated in this study corroborates this notion. There is a shift in this regard where international organisations are seen as les intouchables due to criticism on their use of the principle of functional necessity and the affiliated immunities and privileges of international organisations. In such a scenario, the issue of human rights has surfaced, and calls for accountability in cases of violations of human rights by these organisations have become louder.

Various recent cases as well as scholarly work reflect this concern. In Waite and Kennedy v Germany, the European Court of Human Rights considered that, while immunities of international organisations might pursue a legitimate aim that would consequently restrain the right to access to a court, this should not be absolute. A more recent example is the Haiti Cholera Case, where an outbreak of cholera in Haiti, resulting in about 2,000 deaths, was attributed to the UN peace-keeping troops from Nepal, who were part of the UN Stabilization Mission in Haiti (MINUSTAH). Claims filed on behalf of 5,000 individuals affected by the outbreak were declared “not receivable” by the UN, citing Article 29 of the Convention on the Privileges and Immunities of the United Nations, thus hindering the claim from being heard by the dispute resolution mechanism. Subsequently, claimants filed a class action suit in court for compensation, where the court found that the UN is immune from suit, a position that was upheld by the Court of Appeals.

In the aftermath of this saga, more scholars have raised questions about the immunity of international organisations in the light of international human rights standards. To begin with, the Report of the Special Rapporteur on Extreme Poverty and Human Rights is based on human rights principles and attaches particular importance to obligations to respect human rights, ensure remedies and

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1218 Ibid.
1220 Ibid, 3.
1222 Ibid, 261 at para 73.
to ensure accountability.\textsuperscript{1224} Moreover, arguments on various measures to be taken to deal with such immunity have surfaced. These include suggestions for the lifting of immunities of international organisations, the adoption of national courts’ approaches to immunity to respect human rights principles of access to a court and access to a remedy, the strict recognition of functional immunities, to mention but a few, which have drawn attention to the subject of the immunities of international organisations.\textsuperscript{1225}

In conclusion, it is not suggested that the immunities and privileges of international organisations should be done away with, as this would unleash the very risks associated with the absence of immunity for these organisations and the rationale as to why these entities have immunity in the first place. However, the application of this doctrine certainly needs a facelift, especially where the activities of international organisations violate or have the potential to violate human rights.

\textbf{5.4 Obligation and Responsibility in International Law}

The significance of identifying the obligations and responsibilities of the IFIs under international law is being able to determine where human rights fit, if they indeed do, into the obligations of IFIs. This will encompass international law as it applies to international organisations generally as a matter of doctrine and particularly IFIs as a matter of practice.

It is reasonable to begin this endeavor by simply defining the two concepts. Obligations refer to or are created from primary rules that are found in international agreements that establish international organisations, in treaties to which international organisations are parties etc.\textsuperscript{1226} Responsibility on the other hand addresses secondary rules for international law, that is, the general conditions under international law for a state or an international organisation to be considered responsible for wrongful acts or omissions, and the legal consequences that flow therefrom.\textsuperscript{1227} This is to say that, it is the breach of international obligations that gives rise to responsibility under international law,

\begin{itemize}
  \item \textsuperscript{1224} See Ibid, para 7.
  \item \textsuperscript{1227} Ibid, Art. 3.
\end{itemize}
which determines the legal consequences of failure to fulfill such obligations.\textsuperscript{1228}

The central question here is which international rules of a primary nature bind international organisations? In clarifying this question and placing it in the context of the international organisations particular to this study, the question raised by Daugirdas is relevant, that is, does the IMF have an obligation to ensure that its loan conditions do not impede borrowing states’ efforts to provide an education?\textsuperscript{1229}

Beginning with the concept of obligation, the international law basis of the obligations of international organisations was put forth by the ICJ in the Advisory Opinion on the Interpretation of the Agreement of 1951 between the WHO and Egypt (hereinafter the WHO and Egypt Case), where it asserted that “international organisations are subjects of international law and as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions and under international agreements to which they are parties”.\textsuperscript{1230} Put simply, the legal question entailing this position is therefore whether any of these sources contain human rights obligations in international law incumbent upon the IFIs. These sources of obligations require further inquiry to establish the answer to this question.

5.4.1 General Rules of International Law

General rules of international law emanate from two sources indicated in the ICJ statute: international custom and general principles of law.\textsuperscript{1231} These two aspects of international law can provide insights as to the reach of human rights obligations arising from these sources.

As discussed in the previous chapter, determining the existence of a rule of customary international law and its content depend on whether there is a general practice that is accepted as law, two aspects commonly referred to as state practice and \textit{opinio juris}, as were set forth in the North Sea Continental Cases.\textsuperscript{1232} When it comes to customary international law with respect to international organisations, the traditional view of customary international law that sees it as the product of state action alone would reject its direct applicability to organisations of states, which are not states themselves, even if it binds the individual state members.\textsuperscript{1233} However, there is an increasingly common assertion today from scholars, international bodies and courts that international

\textsuperscript{1228} See Olga Gerlich, “Responsibility of International Organisations under International Law” (unknown source), 2013, 12.
\textsuperscript{1230} ICJ, Advisory Opinion on the Interpretation of the Agreement of 1951 between the WHO and Egypt, 1980, 94, para 46.
\textsuperscript{1231} Article 38, Statute of the International Court of Justice, Chapter XIV, United Nations Charter, 1945.
\textsuperscript{1232} International Court of Justice, 1969.
\textsuperscript{1233} Brian Lepard, Customary International Law (New York: Cambridge University Press, 2010), 42.
organisations are bound by obligations under customary international law.\textsuperscript{1234} When further considering the extent to which particular elements of human rights constitute customary international law and are thus binding on international organisations, complications arise that make it a puzzling issue.

This is mainly due to the question of which human rights can be argued to have attained the status of customary international law. There is more of a consensus that international organisations have the obligation to respect some reach of human rights, but the identification of the sources in customary international law of this human rights obligation is controversial.\textsuperscript{1235} Again, the extent to which international organisations are bound by human rights instruments as a matter of customary international law is an on-going matter of dispute. The requirements of a generalization of state practice accompanied by \textit{opinio juris} are difficult to demonstrate convincingly for many human rights standards without doing violence to the ‘state practice’ requirement.\textsuperscript{1236} However, common acceptance prevails with regard to the notion that international organisations are bound by obligations under customary international law concerning human rights law. This makes customary international law not only relevant to international organisations, but essential, particularly due to the fact that international organisations are unlikely to become parties to human rights conventions.\textsuperscript{1237}

In this regard, it has been argued that the wide adoption and continuous affirmation of the fundamental human rights listed in the UDHR have transformed many of the principles contained therein into customary international law.\textsuperscript{1238} Thus, if the labour rights protected by the UDHR are considered norms of


\textsuperscript{1236} Bruno Simma and Philip Alston, \textit{The Sources of Human Rights Law: Custom, Jus Cogens and General Principles}, \textit{Australian Yearbook of International Law}, 12 (1992), 82.


customary international law, they apply *erga omnes* and form obligations for the international community as a whole.\textsuperscript{1239} Similarly, there is a the view that the Bill of Rights, which includes the UDHR, ICCPR and ICESCR, has customary law status, thus imposing obligations on not only states, but also on “every individual and every organ of society” as stipulated in the UDHR’s preamble.\textsuperscript{1240} One concern that can be brought up with regard to this argument is the progressive implementation associated with the rights under the ICESCR, which acknowledges deviations from the standards in the Covenant due to the available resources in a given member state. To this concern, Kartashkin argues that since the concept of progressive implementation of the rights under the Covenant “is related to the availability of resources, there would be less justification for deferring the recognition of rights whose realisation is not dependent on the allocation of resources, such as the trade union rights provided for in Article 8 of the Covenant”.\textsuperscript{1241}

Furthermore, there are increasingly notions that the ILO’s core labour standards have attained the status of customary international law.\textsuperscript{1242} This is due to the fact that the ILO Declaration of 1998 restating the fundamental ILO conventions in paragraph 1(b) serves as “evidence of general practice accepted as law” as per Article 38(1)(b).\textsuperscript{1243} Again, they prescribe firm obligations and impose a duty of strict compliance with precisely defined standards,\textsuperscript{1244} where non-signatory parties to the conventions are bound and have, particularly in this case, agreed with the principle of freedom of association and collective bargaining laid down in the Declaration of Philadelphia\textsuperscript{1245}, demonstrating the universal application of these norms, regardless of whether a state has consented to them.\textsuperscript{1246} Moreover, the CLS have attained this status due to wide ratification representing various regions and ideologies.\textsuperscript{1247} It suffices to say that international organisations, and

\textsuperscript{1239} Christine Kaufmann, *Globalisation and Labour Rights*, 29.
\textsuperscript{1242} *Contra* see Bob Hepple, *Labour Laws and Global Trade*, 94-95. Hepple argues that among the labour rights, only slave and forced labour are customary international law; Christine Kaufmann, “Trade and Labour Standards”, Max Planck Encyclopedia of Public International Law, 2014, para 17.
\textsuperscript{1247} Arne Vandaele, *International Labour Rights*, 276.
in this particular case IFIs, are bound by customary international law\textsuperscript{1248} as incorporated in international treaties and conventions, because these treaty provisions reflect customary international law or general principles (collectively, general international law) and as such binds international organisations as well as states.\textsuperscript{1249} The identification of CLS as rules of customary international law has a bearing on international organisations and particularly, IFIs in that they are bound by this customary international law\textsuperscript{1250}, including aspects of human rights encompassed therein. and even though this perception does not create specific obligations in relation to the IFIs specifically, it suffices to say that even if this does not mean that IFIs have a specific obligation to enforce or safeguard these rights, as would be true in the case of a state, at the very least they have a duty not to repudiate national efforts to safeguard them.\textsuperscript{1251}

A challenge with regards to customary international law is that it is difficult to clearly identify which rights have attained this status with certainty. This is even more true when the rule emanates from an international treaty as one cannot trace when the crystallisation from a human right to a rule of customary international law has taken place. Consequently, most authoritative lists of rights that have achieved ‘customary’ status are limited to a small number of freedoms (seldom if ever including economic, social or cultural rights) such as prohibition on slavery, genocide, arbitrary killing, torture etc.\textsuperscript{1252}

As for the obligations of international organisations emanating from general principles of international law, intergovernmental organisations are subject to the reach of general rules of international law. Although the establishment of the existence of both international customary rules and general principles of law relies on state practice and state legislation, it is generally accepted that their scope is not limited to states. If it were, then states would be able to evade their international obligations by creating international organisations that could act with impunity. It has been considered that human rights have become general principles of international law through the medium of the “general principles of law recognised by civilised nations” stated in Article 38(1)(c) of the ICJ

\textsuperscript{1250} Contra see Jan Klabbers, \textit{The Sources of International Organisation Law}, xxx.
\textsuperscript{1251} See Andreas Fischer Lescano, “Competencies of the Troika”, 67.
Statute. Additionally, IFIs originate in international law, and it therefore follows that the general rules of that system of law apply.

It is however difficult to determine the exact content of these general rules, thus opening up the space for challenges to the status of the rule because there is no standing mechanism with the authority to review and determine whether specific obligations have achieved the necessary status or not. Again, these rules are primarily concerned with safeguarding against the abuses of state power. Some scholars have made appealing arguments in favour of an approach suggesting that aspects of most civil, cultural, economic, political and social rights have attained the status of general rules.

5.4.2 Constitutions or Constituent Instruments of International Organisations

The constituent documents of international organisations set out the rules of the organisations, which the ILC defines as, “the constituent instruments, decisions, resolutions and other acts by the organisation adopted in accordance with those instruments and established practice of the organisation”. As international organisations are functional entities established by states on the basis of an agreement (constituent instrument), the importance of such constituent instruments is that they provide for the functions, powers and competence, organisational structure, activities and all other important matters of the international organisations. The nature of these constituent instruments is a dual one in that they serve as contracts between sovereign states (international agreements) based on mutual consent and common or shared interests, as well as constitutions to govern the organisations’ own legal order. However, one should not confuse the constituent instruments of international organisations with international contracts such as multilateral conventions as the former confers powers to a new legal person and also creates an autonomous legal order with a will of its own distinct from its constituent parts (members), expressed through the organisation’s organs.

1259 Ibid, 11.
An important aspect with regards to the constituent instruments of international organisations is their interpretation. The Vienna Convention on the Law of Treaties (VCLT) sets forth general rules of interpretation of treaties: a treaty should be interpreted (in good faith) in accordance with the ordinary meaning to be given to the terms (textual meaning); in addition to the text, the context for the purpose of the interpretation including its preamble, annexes and any agreement of instrument which was made between the parties in connection with the conclusion of the treaty; any subsequent agreement or practice between parties on interpretation or application of the treaty and any relevant rules of international law applicable in the relations between parties; and any special meaning given to the terms that the parties intended.1261

When it comes to the IFIs and their methods of interpreting their constituent instruments, they have taken a shift from the traditional textual approach above to a “dynamic-evolutionary method of interpretation”, 1262 where the interpretation of the constituent instruments is extensively stretched. Arato makes an interesting classification of the change international organisations have undergone, not necessarily through formal amendment of their constituent documents, but through more subtle evolutionary processes through the practice of their organs. According to Arato, formal change refers to a willful change of the organisation’s constitution or constitutional amendment through formal procedure1263 whereas informal change occurs more subtly, through practices of the organisation, involving change on the material level, while leaving the formal document or constitution completely intact.1264 This informal change, also called transformation, can occur through the organs’ exercise of delegated power, actions of executive power, long standing usages and customs; what is crucial in this case is the effect of the material change in the constitution legal order, and not the procedure.1265 In other words, the issue is not the intention to change, but rather the consequences, in which case the degree of change can be just as profound.1266 A practical description of this aspect was discussed in Chapter 2


1263 See Art. VIII, WB Articles; Art. XXVIII IMF Articles; Art. XII, IDB Articles; Art. 59, ADB Articles; Art. 60, AfDB Articles; Art. 56, EBRD Articles.


1265 Ibid.

1266 Ibid.
when addressing the interpretation of the mandates of the IFIs as provided for by their respective Articles of Agreement.

Finally, to gain insight into the manner in which the constituent instruments of IFIs are interpreted, reference to the Articles is called for. The WB’s Articles state the following about their interpretation,

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Article V, Section 4(h).

(b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board, the Bank may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.1267

Similar proviso are found in the Articles of all the IFIs in this study.1268 The IFIs indeed have very wide discretion to interpret their respective constituent instruments through the internal organs, whose decision is final. This wide latitude, coupled with the absence of a judicial process which continuously functions to supervise and check, to expand and confine such interpretation1269, has resulted in the ever-expanding interpretation of the IFIs’ constituent instruments.

As for the issue of human rights, there are no references to human rights in the constituent articles of the IFIs, save for the EBRD. However, the informal change or transformation of the IFIs in the manner described above has had the consequence of bringing the IFIs into contact with human rights issues. Although the political prohibition clauses, which are to date still intact, formally excluded human rights from the ambit of IFIs’ activities, informal change has had a rather different or even opposite consequence, where development extends beyond the macroeconomics realm and includes social, environmental, human and institutional components.1270 Therefore, whether the “dynamic-evolutionary” approach to interpretation of the constituent instruments of IFIs is an advantage to the human rights cause is an open question. However, an important factor to this thought is the proviso of the Vienna Convention on the Law of Treaties between States and International Organisations or between International

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1267 Article IX, Articles of Agreement, IBRD, 1945; Article X, Articles of Agreement, IDA, 1960.
1268 See Article XVIII, IMF Articles; Art XIII, IADB Articles; Art. 60, ADB Articles; Art. 61, AfDB Articles; Art. 57, EBRD Articles.
1269 See Frederick Mann, “The Interpretation of the Constitutions of International Financial Organisations” 43 British Yearbook of International Law (1968), 18.
Organisations (VCLT-IO) which articulates that an international organisation may not rely on its rules to justify non-compliance with its obligations.1271

5.4.3 International Treaties
As international legal persons, international organisations have the legal capacity to voluntarily enter into treaties to the extent that the treaties specifically accept international organisations as parties and the rules of the IOs do not prohibit such activity.1272 For example, the WB and IMF enter into headquarter agreements with host states and more commonly, loan and credit agreements with members (and cooperation agreements with other organisations). As long as a treaty entered into by an IO falls within the purposes for which the organisation is established, the legality is not questioned.1273 An exemplary case is the relationship agreement between the IMF and the UN1274, which recognises the IFIs’ specialised mandates and expertise, requiring them to consult with and respect the UN, but does not require IFIs to comply with any instructions from the UN except for Article VII resolutions of the UN Security Council.1275 Despite this relationship, the IMF has managed to carve out room for autonomy and independence through the agreement with the UN which recognises that “by reason of its nature of international responsibilities and the terms of its Articles of Agreement, the Fund is required to function as an independent international organisation”.1276 Thus, the General Counsel of the IMF stated,

The relationship established by the 1947 Agreement is not one of ‘agency’ but one of ‘sovereign equals’. It follows that the Fund’s relationship agreement with the UN does not require it to give effect to Resolutions of the United Nations, such as the resolutions under which the members of the General Assembly adopted the Universal Declaration or the International Covenant (on Economic, Social and Cultural Rights), or to international Agreements, such as the Covenant, entered into by the members of the United Nations.1277

The point of controversy has more to do with the question of whether international organisations can be bound by treaties without their consent. In the case of states, this question is less complicated, as states cannot be bound by treaties without their consent, as stipulated in VCLT,1278 also known as the pacta tertiis rule.1279

1271 Art. 31(1), VCLT-IO, 1986.
1273 The Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations in Art. 6 provides that the capacity of an organisation to conclude treaties is governed by the rules of that organisation.
1275 Ibid, Art. IV and V.
1276 Agreements between the UN and the IMF and the UN and the IBDR/WB, 16 U.N.T.S 328, 346.
1279 For more details, see Christine Chinkin, “Third Parties in International Law”.

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More specific to international organisations is the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (VCLT-IO), which states that “a treaty does not create either obligations or rights for a third State or a third organisation without consent of that state or organisation” \(^{1280}\). It is crucial to note that this convention has not entered into force yet as it has not gathered enough ratifications, \(^{1281}\) but is nevertheless helpful in providing guidance in addressing this issue.

Various arguments have been put forward regarding this notion. It is argued that treaties can, at least sometimes, bind international organisations without their consent in that sometimes international organisations are “transitively bound” by the treaty obligations of their member states, meaning they will be bound by the obligations to which individual states were committed to when they transferred power to the organisation. \(^{1282}\) In addition, states cannot create an organisation that has the capacity to violate the treaty obligations that the states are bound by. \(^{1283}\) Finally, Schermers and Blokker, while pointing out that nonparty status to treaties does not necessarily show a desire not to be bound (multilateral treaties typically allow only states to become parties), argue that treaties can bind international organisations without their consent, although they do not describe treaties that would automatically bind IOs. \(^{1284}\)

It is difficult to specifically pinpoint what treaties, under what conditions, bind international organisations. However, while it may consequently be equally difficult to determine the obligations that would arise in such situations, one aspect of the discussion above can offer a better standing, namely the obligations of the members of an international organisation arising from their status as parties to a particular convention. For example, where a State has ratified an international environmental treaty, the international organisation to which such a state is a member should not engage in activities that would consequently cause the member state to violate its obligations under such a treaty. In a more practical sense, although it is difficult to establish how the proviso of Article 13 of the ICESCR on the right to education can directly create obligations for the IMF, the bottom line is that the IMF should not engage in activities with member states that would influence the member state to violate its obligations emanating from this proviso. In other words, the IMF should not attach conditionalities to its lending that would result in the recipient state violating its obligation to guarantee this right to education.

\(^{1280}\) Art. 34, Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 1986.


\(^{1283}\) Ibid.

5.4.4 Responsibility of International Organisations

Coming to the issue of responsibility, it has been discussed that international organisations are subjects of international law with a separate legal personality from that of their member states. As in any legal system, responsibility is the corollary of such legal personality. In such a case, the breach of an international obligation entails a number of consequences which form the very content of responsibility. Though this phenomenon had been traditionally associated with states or their organs, states are not the exclusive component actors and therefore subjects of responsibility in the international sphere. This is even more so where various events have shown that international organisations have increased roles as actors at the global level and can violate international law in various ways, as opposed to old perceptions where such organisations were guardians of international law. Hence, it would seem inadequate not to hold them responsible when they violate international norms. Here it is important to note that, as previously discussed, the subjects of law in a legal system are not necessarily identical in their nature or the extent of their rights, and similarly the mechanisms of responsibility which are applicable to states may not necessarily be transposed to international organisations. The ILC’s Articles on the Responsibility of International Organisations provide that “every internationally wrongful act of an international organisation entails the responsibility of that organisation”.

As for the wrongful act of an international organisation, this constitutes a breach of an international obligation of that organisation. The ILC Articles further provide that a breach of an international obligation occurs “when an act of that international organisation is not in conformity with what is required of it by that obligation, regardless of its origin or character”. Such an obligation may be established by a customary rule of international law, treaty or general principle applicable within the international legal order. Thus, the constituent instruments of international organisations can no longer be seen as the sole legal

1286 Ibid.
1290 Art. 3, Draft Articles on the Responsibility of International Organisations.
1291 Ibid, Art. 4(b).
1292 Ibid, Art. 9(1).
basis of their activities, hence recourse can be made to the other sources mentioned above.\textsuperscript{1294}

A final aspect is the consequence of a wrongful act. The ILC Draft Articles provide that a responsible organisation is under obligation to make full reparation for the injury caused by the internationally wrongful act.\textsuperscript{1295} This provision reflects a principle of international law, that any breach of an engagement involves an obligation to make reparation and such reparation must wipe out, as far as possible, all the consequences of the illegal act.\textsuperscript{1296}

As convincing as the ILC’s Draft Articles are in regards to the responsibility of international organisations, and particularly IFIs, there are various setbacks with regard to the components of responsibility discussed above. The first obstacle is with respect to the primary norms of international law that bind these organisations, which are unsettled and troublesome.\textsuperscript{1297} As these primary rules are controversial, especially when it comes to human rights obligations of international organisations, addressing the consequences of violations of these rules is “putting the cart before the horse”.\textsuperscript{1298} Another shortcoming is the absence of third party dispute settlement mechanisms that can bind international organisations,\textsuperscript{1299} particularly the IFIs. This will be further addressed in the next section of this chapter. Finally, with regards to the aspect of reparation, the obstacle of funds arises. Unlike states, international organisations have no power to raise taxes or to issue coinage, and only have funds that are allocated to them or emanate from member states, therefore, reparations could have the effect of crippling the international organisations’ original mandates.\textsuperscript{1300} All these factors together create a cumbersome basis in respect to the responsibility of international organisations.

5.5 Accountability Mechanisms in the IFIs

5.5.1 Introduction

Within democratic political systems, accountability is a term used to describe a range of mechanisms which aim to prevent the abuse or misuse of political power.


\textsuperscript{1295} Art. 31, ILC Draft Articles on the Responsibility of International Organisations.

\textsuperscript{1296} Factory at Chorzów, Permanent Court of International Justice, Serie A/17, Judgement No. 13 of 1928, at 29, 47. See also Alain Pellet, “International Organisations are Definitely Not States”, 50.

\textsuperscript{1297} Matthias Hartwig, “International Organisations or Institutions, Responsibility and Liability” Max Planck Encyclopedia of Public International Law, 2011, para 18.


\textsuperscript{1299} Jan Klabbers, An Introduction to International Institutional Law, 292.

\textsuperscript{1300} Alain Pallet, “International Organisations are Definitely Not States”, 50.
The mechanisms range from elections to the appointment of ombudsmen to judicial review. Accountability differs from oversight, monitoring or auditing in that it involves some element of control, exposure and potential punishment.

The increase in the scope of the operations and the reforms brought about through conditionality of IFIs on the economies and political structure of recipient countries has led to the call for greater accountability of the IFIs to their stakeholders and the public at large, and for better transparency of their decision-making processes. The expansion of the mandates of IFIs discussed earlier has raised concerns about their accountability as they have broader impact in member countries due to their engagement in policy making. In this regards, the members are not adequately represented on the Executive Boards as a result of the weighted vote system, making is difficult to raise concerns in the Boards, especially for those members that rely on the IFIs financing, but have no direct representation. Moreover, changes in the international financial system altered the nature of the IFIs relations with their country member states, shifting the balance of bargaining power between international financial institutions and their client states in favour of the IFIs. As a response to these concerns, the IFIs have established accountability mechanisms. It is thus crucial to examine how these accountability mechanisms function in order to establish whether IFIs, as international entities, are indeed accountable (responsible) for adverse impacts of their operations in recipient member states.

5.5.2 The Functioning of the Accountability Mechanisms

The World Bank became the first international financial institution to respond to demands for accountability, thus setting “an important precedent in international law by making an international financial institution directly accountable to citizens for the first time”. In a 1993 resolution of the World Bank’s Executive Directors, the Inspection Panel was created as an independent body within the Bank’s structure. Its creation was prompted by both external and internal

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1302 Ibid.
1304 See IFIs Legal Framework: Mandates and Structure, Chapter 2.4.
demands that the Bank be more transparent and accountable in its operations.\textsuperscript{1310} The external pressures stemmed from disgruntled civil society (especially NGOs in America, Europe and some developing countries) due to poorly-designed and/or environmentally damaging projects.\textsuperscript{1311} Internal pressures were a result of the publication of reports\textsuperscript{1312} on reviews of some WB projects which documented flaws in the Bank’s lending operations. Of great significance is the Sardar Sarovar dam project on the Narmada River in India where there was intense opposition to the project, which was funded by the World Bank, because the building of the dam resulted in, among other things, inadequate resettlement of people displaced by the dam.\textsuperscript{1313} The subsequent independent review and eventual report exposed violations of the Bank’s own policies.\textsuperscript{1314}

The creation of the Panel has been evaluated from several standpoints.\textsuperscript{1315} The legal significance of establishing the Panel particularly attracted scholars’ attention because the Panel was the first forum in which collective private actors could hold an international organisation directly to account\textsuperscript{1316}, something that international law had not explicitly recognised as legally relevant.\textsuperscript{1317}

The Panel has the mandate, in response to requests from “an affected party,”\textsuperscript{1318} to carry out independent investigations of Bank-financed projects to determine whether the Bank is in compliance with its operational policies and procedures, and make related findings of harm.\textsuperscript{1319} A clarification note to the Panel’s mandate adds that the Panel’s mandate does not extend to reviewing the consistency of the Bank’s practice with any of its policies and procedures, but, as stated in the Resolution, is limited to cases of alleged failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or

\textsuperscript{1314} Ibid.
\textsuperscript{1315} Ibid, 199.
\textsuperscript{1317} Sigrun Skogly, The Human Rights Obligations of the WB and the IMF, 181-185.
\textsuperscript{1318} An affected party must be a “community of persons, such as an organisation, association, society or other grouping of individuals, but not a single individual” or the local representatives of such an affected party or another representative of the affected party (when appropriate representation is not locally available or an Executive Director). See World Bank, “How to File a Request for Inspection to the World Bank Inspection Panel: General Guidelines” available at [http://ewebapps.worldbank.org/apps/ip/Documents/Guidelines_How%20to%20File%20for%20web.pdf](http://ewebapps.worldbank.org/apps/ip/Documents/Guidelines_How%20to%20File%20for%20web.pdf) (accessed 12 December 2016).
implementation of projects (emphasis added), including cases of alleged failure of the bank to follow-up on the borrowers’ obligations under loan agreements, with respect to such policies and procedures.\textsuperscript{1320} The rationale for restricting eligibility to groups of two or more appears to have been a sense of caution given the large number of people affected by World Bank projects; there was concern that the mechanism would be overwhelmed with complaints. In particular, if individuals were allowed to file complaints, the inspection mechanism could be flooded with complaints that were trivial, frivolous or in some way unrepresentative of the group of people affected by an operation.\textsuperscript{1321} In relation to ‘harm’, examples include loss of people’s livelihoods, environmental degradation resulting from infrastructure projects, forced relocation resulting from, for example, building a dam, road, pipeline, powerplant etc. However, ‘harm’ excludes issues related to procurement of goods or services, fraud or corruption.\textsuperscript{1322}

The Panel is composed of three members who are appointed to non-renewable 5-year terms by, and are responsible to, the Board of Executive Directors of the World Bank.\textsuperscript{1323} The Directors make their appointments based on nominations from the President of the Bank, who makes these nominations after consultation with the Executive Directors.

There are certain matters that the Panel is not authorized to entertain. These are: requests dealing with actions that are the responsibility of other parties and which do not involve an action or omission of the Bank, requests dealing with procurement decisions, requests filed after the closing date of the loan financing the project, requests filed after the loan is substantially disbursed and requests relating to matters over which the Panel has already made a recommendation based on a prior request for inspection unless there is new evidence or circumstances that were not known at the time of the prior request.\textsuperscript{1324}

Initially, the Panel notified the Executive Directors and the Bank and made a recommendation as to whether or not they should grant a request for inspection. However, a review in 1999 removed the requirement that the Bank’s Executive Board had to decide whether or not an investigation is to take place, leaving such

\textsuperscript{1322} See World Bank Inspection Panel, “General Guidelines”
\textsuperscript{1323} Ibid.
\textsuperscript{1324} Ibid.
a decision to the Panel itself. The Panel may visit the country where the operation is based to verify information and help determine the eligibility of the request, although a limitation to the Panel in this regard is that on-site investigations require the consent of and are at the discretion of the borrowing government, which is a clear obstacle to the investigative power of the Panel. Once the investigation is complete, the Panel submits its report to the Executive Directors and the President of the Bank, with the Panel’s findings on whether the Bank has complied with all relevant operational policies and procedures. The Bank’s management then submits a report to the Executive Directors, indicating its recommendations in response to the Panel’s findings. The Board of Executive Directors then makes the final decision on whether to adopt the management’s recommendations and how to respond to the Panel’s findings. A limitation here is that the Panel’s role ends with its submission of the report. It has no power to monitor the implementation of whatever remedial action the Executive Board may approve, nor can the Panel stop a project.

Though the mechanism was created in response to demands for accountability, it is far from an “accountability mechanism”, especially from a legal perspective and even more so from a human rights perspective. However, the Panel does in some instances make reference to human rights. Even the independent review by Morse and Berger which led to the establishment of the Panel, assessed whether the Bank failed to comply with its internal policies and procedures as well as “international standards of human rights”. What is crucial here is the understanding that while the Panel ordinarily does not assess the veracity of allegations of human rights violations, it does refer to such allegations in its cases. Mere reference to the standards is again not always the case. The assessment of the Panel does touch upon human rights where Bank policies have incorporated human rights standards. For example, the Bank’s Operational Policy 4.10 on indigenous people explicitly states that it contributes to the Bank’s mission of poverty reduction by ensuring that the development process fully respects the dignity and human rights of indigenous peoples.

The Panel’s stance on human rights is illustrated in the controversial Chad-Cameroon Oil Pipeline project in 2003, which involved the development and construction of infrastructure to drill oil as well as an export pipeline.

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1327 Ibid.
requesters complained about an inadequate consultation process, inadequate compensation, disrespect of workers’ rights such as freedom of association, and a deterioration of the health situation, as a consequence of a renewed outbreak of sexually transmitted diseases and HIV/AIDS along the pipeline and around the project’s main bases.\textsuperscript{1332} During the consultation phase, the requestors (“affected party”) had been harassed by local authorities and had been reportedly tortured by the local authorities. The Panel held that, while not attempting to assess the human rights situation in Chad, it “felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank’s policies”.\textsuperscript{1333} The Panel further stated that the policies may not be read in complete isolation from the provisions of core universal human rights instruments.\textsuperscript{1334} It held,

Nonetheless the Panel takes issue with Management’s narrow view, and draws attention in this connection to the United Nations Declaration of Human Rights adopted in December 1948, three years after the Bank’s Articles of Agreement cited above entered into effect.\textsuperscript{1335}

Similar holdings can be found in the cases of World Bank-funded projects and Inspection Panel findings in Honduras\textsuperscript{1336}, the Democratic Republic of Congo\textsuperscript{1337}, Cambodia\textsuperscript{1338}, Uzbekistan\textsuperscript{1339} and Uganda\textsuperscript{1340}. In spite of these findings, the mechanism does not purport to be a judicial system. This limitation has been described in the words of the former senior vice president and general counsel of the World Bank, who wrote,

Violation by the Bank of its policy, even if established by the Panel, is not necessarily a violation of applicable law that entails liability for ensuing damages and since the Panel

\textsuperscript{1332} Korrina Horta, Samuel Nguiffo and Delphine Djiraibe (eds.) \textit{The Chad-Cameroon Oil and Pipeline Project: A Call for Accountability} (U.S.A: Environmental Defense, 2002).
\textsuperscript{1333} Chad-Cameroon Petroleum and Pipeline Project (P044305), The World Bank Inspection Panel, Investigation Report, 17\textsuperscript{th} July, 2002.
\textsuperscript{1334} Ibid.
\textsuperscript{1335} Ibid.
\textsuperscript{1336} Honduras: Land Administration Project (P055991), The World Bank Inspection Panel, Investigation Report, 12\textsuperscript{th} June, 2007.
\textsuperscript{1337} Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (P081850) and Emergency Economic and Social Reunification Support Project (091990), The World Bank Inspection Panel, Investigation Report, 31\textsuperscript{st} August 2007.
\textsuperscript{1338} Cambodia: Land Management and Administration Project (P070875), The World Bank Inspection Panel, Investigation Report, 23\textsuperscript{rd} November 2010.
\textsuperscript{1339} Uzbekistan: Second Rural Enterprise Support Project (P109126) and Additional Financing for the Second Rural Enterprise Support Project (P126962), The World Bank Inspection Panel, Final Eligibility Report and Recommendation, 19\textsuperscript{th} December 2014. The case of Uzbekistan is interesting as it involved the use of child labour and forced labour by local authorities.
\textsuperscript{1340} Uganda, Transport Sector Development Project - Additional financing (P121097), The World Bank Inspection Panel, Investigation Report, 4\textsuperscript{th} August 2016.
is not a court of law, its findings on Bank violations cannot be taken *ipso facto* as a conclusive evidence against the Bank in judicial proceedings.\(^{1341}\)

Thus, the Inspection Panel accords people standing before an independent investigatory body or accountability mechanism, but does not give them the remedy of a legal action in court. The Panel has more to do with identification of failures to comply with policy, which may eventually lead to correction of mistakes through decisions of the Executive Directors, but such decisions are not judicial decisions either in favour of or against affected parties.\(^{1342}\)

Despite these limitations, the Panel has in the more recent cases referred to human rights standards in the Bank’s operations and surely plays a role in the promotion of human rights by complementing and reinforcing the Bank’s role as a transformer of human rights ideals into realities.\(^{1343}\) This is a positive development in the direction toward a more active obligations-based approach to human rights by the IFIs. Although it is concerned with acts or omissions of the Bank in following its own operational policies and procedures, in which case its key limitation is that it deals only with inconsistencies with the Bank’s policies and does not make recommendations on human rights issues in its inspection save for where such are incorporated in the Bank’s policies, the Panel has actively brought up human rights concerns in its reports.

The IMF, on the other hand, does not have an inspection mechanism. It did, however, create an Independent Evaluation Office that conducts selective evaluations of the IMF’s policies and activities.\(^{1344}\) This mechanism, which is closer to an operations evaluation mechanism than an inspection mechanism, offers outside parties some scope for submitting suggestions for evaluations to the office.\(^{1345}\)

Coming to the regional IFIs, these institutions have followed the World Bank’s path in creating accountability mechanisms. The IDB’s Board of Executive Directors established the the Independent Consultation and Investigation Mechanism (ICIM), which was approved by the Bank’s Board of Executive Directors in February 2010.\(^{1346}\) This Mechanism establishes an independent forum and process to address complaints from communities or individuals who


\(^{1343}\) Ibid, 4.


\(^{1345}\) Ibid.

\(^{1346}\) This Mechanism replaced the Independent Investigation Mechanism, which was inefficient and thus reviewed taking into account the lessons learned from the experiences, the developments in the international accountability mechanisms of other multilateral development banks and the input received during the public consultation process for the Mechanism proposal.
allege that they are or might be adversely affected by IDB-financed operations. The ICIM oversees compliance with the IDB’s operational policies. The Mechanism consists of a consultation phase as well as a compliance review phase.\(^\text{1347}\) Likewise, the ADB’s Accountability Mechanism\(^\text{1348}\) is a tool for communities affected adversely by ADB projects and is the only institutional platform through which project-affected people can raise their concerns with the ADB and have them evaluated by an independent and impartial body as to whether the ADB has complied with its policies. The Mechanism has two complimentary functions: a consultation and a compliance review phase.\(^\text{1349}\) As for the AfDB, it commissioned a study in 2003 by an individual consultant, which recommended a "dual approach" of a mechanism that would be problem-solving and compliance review, similar to that of the ADB.\(^\text{1350}\) The AfDB Board of Directors subsequently voted to establish the Independent Review Mechanism (IRM) in 2004, which is similar to the accountability mechanisms found at other IFIs (including the World Bank’s Inspection Panel). The IRM consists of a Compliance Review and Mediation Unit (CRMU) and a Roster of Experts.\(^\text{1351}\) Taking a similar path is the EBRD’s Project Complaint Mechanism (PCM). The PCM consists of a system of processes and procedures designed to provide a venue for an independent review of complaints or grievances from groups that are or are likely to be directly and adversely affected by a Bank-financed project. It is designed as both a compliance review and problem-solving mechanism for both private and public sector projects, but with a focus on compliance review. This means that when the IRM receives eligible complaints, it may engage in problem-solving in order to facilitate the early resolution of the issues which have arisen in connection with the design, appraisal or implementation of a project. The PCM’s compliance reviews are limited to specified EBRD policies.\(^\text{1352}\)

The accountability mechanisms of the regional IFIs all incorporate both problem-solving and compliance functions. The IFIs are also similar in how entities affected by the IFIs' operations can file requests. In all the IFIs, requests may be filed by those who are or are likely to be adversely affected by projects funded by the IFIs-assisted projects. In the EBRD, one or more individuals, groups,

\(^{1347}\) Inter-American Development Bank Policy of the Independent Consultation and Investigation Mechanism, 2015.
\(^{1348}\) The Accountability Mechanism, which took effect in 2003, replaced the Bank’s Inspection Function after its first inspection in the Samut Prakarn Waste Water Project in Thailand proved to have many flaws, including lengthy, confusing and complex processes.
organisations, associations or representatives may file such complaints\textsuperscript{1353} while in the IDB, ADB and AfDB complaints must be submitted by a group of at least two people, organisations or representatives.\textsuperscript{1354}

As for the phases, the problem-solving/consultation phase involves dialogue and participation of those that have been or could be expected to be adversely affected by the IFIs failure to follow its policies in an attempt to resolve the issues raised in the request/complaint without blame or fault.\textsuperscript{1355} It involves the application of consensual and flexible approaches to address concerns of the affected party. The compliance review on the other hand involves the investigation of IFI-funded projects, by independent bodies (panels, rosters etc.), to assess failure by the IFIs to comply with their own policies that affect the complainants in the course of the formulation, processing or implementation of a project.

5.5.3 Conclusion

In view of the mechanisms discussed above, two key characteristics are identified. First, the mechanisms consist of both internal and external aspects of scrutiny displayed by the role of the executive boards and the panels/roster respectively. Second, all these mechanisms investigate compliance with internal policies as opposed to compliance with rules of international law, as would occur in the case of responsibility. A clearer method of identifying the status of the accountability mechanisms of the IFIs as far as international law is concerned is that employed by the International Law Association (ILA), which came up with a model encompassing various levels of accountability in international organisations (as shown in Figure 3).\textsuperscript{1356}

\textsuperscript{1353} Section 1, EBRD Project Complaint Mechanism Rules of Procedure
\textsuperscript{1354} Section 13(a), IDB Policy of the Independent Consultation and Investigation Mechanism; Section 138, Asian Development Bank Accountability Mechanism Policy; Section 6(a), The AfDB Independent Review Mechanism Operating Rules and Procedures.
\textsuperscript{1355} See, for example, "Introduction and Purpose, , EBRD Project Complaint Mechanism Rules of Procedure, 2014
The IFIs have all created accountability mechanisms that play either an investigation role or a problem-solving role or both. However, the mechanisms are all tainted with limitations. The most substantial limitation is that the mechanisms are meant to only deal with complaints arising out of the IFIs’ incompletion with their own policies. This is to say that, if the operations breach human rights, or more particularly workers’ rights, the mechanisms will not attend to these breaches as long as they are not provided for by the operational policies of the IFI. Thus, these mechanisms do not meet the definition of accountability provided above, nor do they remedy the issue of responsibility of the IFIs, as international organisations, discussed previously.

Therefore, in the light of the principle of responsibility in international law, the accountability mechanisms correspond to the first level of accountability in the ILA model, which has to do with the internal procedures of assessment of the institutions’ compliance with its constituent treaties in fulfilling their function. This level of accountability does not give regard to the activities of the IFIs that violate rules of international law, and more particularly, human rights. However, on a more positive note, the establishment of the mechanisms is not only an admission by the IFIs of flaws in the projects and operations, but also a step towards an increased pursuit to the nex logical step of “responsibility” of IFIs.

5.6 The Principle of Non-Interference in Internal Affairs

The principle of non-interference is the mirror image of the principle of sovereignty of states. It is a principle prohibiting interference with “matters which each state is permitted, by the principle of state sovereignty to decide freely. One of these is the choice of a political, economic, social and cultural system and the formulation of foreign policy”.

Sovereignty and sovereign equality require that each state can freely determine its internal affairs without intervention from the outside. Bradlow argues that state sovereignty is the most important legal protection that economically and politically weak countries have against undue influence by stronger countries.

The principle of non-intervention is universally recognised as one of the cornerstones of international law. The ICJ refers to non-intervention as the freedom of choices in in the absence of external coercion, stating,

The principle forbids all states or groups of states to interfere directly or indirectly in internal or external affairs of other states. A prohibited intervention must accordingly be one bearing on matters in which each state is permitted, by the principle of state sovereignty, to decide freely. One of these is a choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrong when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion which defines and indeed forms the very essence of prohibited intervention is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another state.

Since the seventeenth century, the legal framework of the sovereign state has served as the paradigmatic arena for political governance and economic exchange. The very institution of sovereignty gives “formal notice that a people had legally and legitimately self-determined their form of self-rule”, and claims “final authority” over matters within its territorial jurisdiction. Legally speaking, states were sovereign in an almost absolute sense, exercising supreme authority. With the prevalence of the Westphalian doctrine of absolute sovereignty in the nineteenth and twentieth centuries, it was assumed that the autonomous decisional powers of constitutionally independent sovereign states could not and would not...

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1358 ICJ, Nicaragua Case.
1361 Ibid.
1363
be weakened by their activities in international institutions.1364 After World War II, sovereigns began to use mutual consent to establish institutions that, paradoxically, limited the exercise of sovereignty.1365 International criminal law via the establishment of the UN’s ad hoc tribunals is an instance where, as Victor Peskin observes, the UN “continued to trump state sovereignty insofar as targeted states and all other member states were legally bound to comply.”1366

Further developments have rendered assertions of the principle of state sovereignty increasingly problematic as non-state actors such as intergovernmental organisations have assumed greater political and economic importance in the contemporary world. Many of these actors have penetrated deeply into national legal systems1367, furthering a wide consensus that some kind of erosion of sovereignty has taken place.1368 Simultaneous with this erosion, pragmatic non-state actors have contributed significantly to the reinterpretation, redefinition and elaboration of international norms, substantially extending the ambit of otherwise self-possessed regimes of international environmental law, international economic law, international humanitarian law, international investment law etc.1369

With the demise of state sovereignty, various forms of intervention have arisen, be it in the political, economic or social spheres of a state. Of relevance to this study is interference with domestic affairs of international financial institutions through the use of conditionality. The principle of non-intervention has often been mobilised against the conditions for credits and other financial benefits by the WB and other lenders (conditionality).1370 Herdegen argues that, from the angle of international law, conditions for financial assistance do not amount to a violation of the principle of non-intervention in internal affairs.1371 Hence, whenever there is no legal claim to unconditional financial assistance, payments may be tied to certain structural reforms and other conditions, at least as long as they do not affect the core of self-determination1372. He also notes that economic pressure as such, will in principle not be classified as intervention because of a lack of a noticeable physical element.1373

1365 Ibid.
1372 Ibid, 69.
1373 Ibid.
On the other hand, Meng argues that economic intervention in a foreign state may be permissible if it is intended to exert economic pressure to protect the nations’ own interests, but could be considered impermissible if it was intended to coerce the development of internal policies.\(^\text{1374}\) As conditionality places restrictions on sovereign options of political, economic and social policy, it is difficult to see how that does not, in turn, affect not only internal policies, but also elements of self-determination. However, to argue that conditionality is associated with coercion is an exaggeration. The Draft Articles on the Responsibility of International Organisations (DARIO) provide that an international organisation that coerces a state or another international organisation to commit an internationally wrongful act is responsible for that act.\(^\text{1375}\) As the recipient states voluntarily request financial assistance, even where the bargaining power may not be equal, to call such a situation ‘coercion’ is an overstatement. The IMF view with regard to this proviso is interesting. When commenting on the Draft Articles, the Fund enunciated its disagreement with the “blanket application of Article 16 of the Draft Articles on the Responsibility of International Organisations” and further stated that, having been “established, inter alia, to provide financial assistance to its members to assist in addressing their balance of payment problems” the IMF is unable to influence the behaviour of borrowing states,\(^\text{1376}\) even by conditionality.\(^\text{1377}\)

However, there are reasonable arguments in this respect in relation to Article 14 of the Draft Articles, which places responsibility on an international organisation which aids or assists a state or international organisation in the commission of an internationally wrongful act. The issue here is whether the financial assistance by an IFI to build a dam or restructure/reform institutions- which results in violations of human rights makes the IFI responsible. The issue becomes even more interesting where such financing is attached to conditionality that influences the conduct of the recipient state to the extent of committing an international wrong. It is argued that the effect of a state complying with IFI conditionality associated with loans for project financing, could amount to assisting the recipient state in committing an internationally wrongful act, whether it is a breach of human rights or other.\(^\text{1378}\) In this argument, as long as there is a link between the financial

1374 See Werner Meng, “Conditionality of IMF and WB Loans: Tutelage over Sovereign States?”, 263-277.
1375 Article 16, DARIO, 2011.
1378 August Reinisch, “Aid or Assistance and Direction and Control between States and International Organisations in the Commission of Internationally Wrongful Acts” 7 International Organisations Law Review (2010), 68.
assistance and particular circumstances of the wrongful act by the recipient, the international organisation’s responsibility cannot be excluded in principle.\textsuperscript{1379}

It suffices to conclude that when intervention is for the purpose of stopping massive human rights violations, it is easy to argue the legitimacy of such. When intervention is to secure a project, purpose or result not even freely chosen by the relevant state nor a democratic process that results in violations of human rights, it raises questions of legitimacy and, inevitably, responsibility.

5.7 The Principle of Equality of Sovereign States

“Sovereign equality” means at least the equal rights to participate in international negotiations.\textsuperscript{1380} However, the unequal representation and voting power in the governance structures of IFIs are an apt reminder of the cases that challenge this principle. The principle of sovereign equality is a fundamental norm that regulates the conduct of states in the international community. It is incorporated in the UN Charter as one of the principles of the UN.\textsuperscript{1381} This principle is best described by the Declaration on Friendly Relations and Cooperation among states, which provides that,

\begin{quote}
All States enjoy foreign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.\textsuperscript{1382}
\end{quote}

The Declaration further provides for the elements encompassed in the principle, including, among others, the freedom of each state to choose and develop its own political, social, economic and cultural systems.\textsuperscript{1383} Although there is no intention of going into a deep discussion of the principle and its components, it is crucial to state that, the principle itself is a composition of two generally recognised features of the state in international law, that is, the principle of state sovereignty and the principle of equality of states.\textsuperscript{1384} The principle of state sovereignty means the supreme authority of the state as a subject of international law, without subjection to the national law of any other state; that is, legal independence from other states.\textsuperscript{1385} The principle of equality of states means that, by their very existence, states are legally or judicially equal and have equal rights and duties.\textsuperscript{1386} The

\begin{thebibliography}{99}
\bibitem{1380} Henry Steiner, Philip Alston and Ryan Goodman, International Human Rights in Context: Law, Politics, Morals (New York: Oxford University Press, 2008), 686
\bibitem{1381} See Article 2(1), United Nations Charter, 1945, which states that “The Organisation is based on the principle of the sovereign equality of all its Members”.
\bibitem{1382} Declarations on the Principles of International Law, Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 1970.
\bibitem{1383} \textit{Ibid}, para 59.
\bibitem{1385} \textit{Ibid}, 35.
\end{thebibliography}
doctrine of the former has changed from time to time as it reflects the needs and problems of its own particular time.\textsuperscript{1387}

A humorous elucidator of the doctrine of equality of states was Emerich de Vattel who likened the community of states to that of the human community. To Vettel, the notion that all humans are equal in the community independent of size, wealth or social standing applies equally to the community of states.\textsuperscript{1388} Thus, as “a dwarf is just as much as a man as a giant: a small republic is no less sovereign than the most powerful of kingdoms”.\textsuperscript{1389}

Despite the rather positive tone of the principle of sovereign equality, its application in international organisations presents some fundamental conceptual problems. In IOs such as the UN with a system of one-state one-vote portions in the General Assembly\textsuperscript{1390}, there is clear will to protect the principles of sovereign equality of states. This can be said about the WTO as well.\textsuperscript{1391} Despite this, formal sovereign equality does not erase the immense disparities between states in terms of economic wealth, military power, territory population and the ability to exercise political and legal influence in the international community.\textsuperscript{1392} An example of the disparities is demonstrated by the veto power given to the five permanent members of the Security Council, where the principle is “toppled”.

Another example of the inequality of equal sovereigns is best demonstrated by the governance structures of the IFIs. Contrary to the UN one-state one-vote system, the IFIs use a weighted votes system based on member states’ financial contributions, thus giving the economically stronger member states more negotiation and decision-making power. In this context, the only aspect of the principle of equality of sovereign states that applies is the fact that the members are sovereign states that have acceded to the Charter of the IFI’s. The sovereignty of the members as states does not translate into equality in the decision making process.\textsuperscript{1393} Plainly, the effect of this system of voting is to confer much leverage power on the larger creditor nations.\textsuperscript{1394} The weighted voting system thus gives some validity to the realists’ assertions that international organisations serve the

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\textsuperscript{1390} Art. 18(1), United Nations Charter, 1945.
\textsuperscript{1391} Art. IX, WTO Agreement.
\textsuperscript{1392} David Kennedy, “Leader, Clerk or Policy Entrepreneur?” in Simon Chesterman (ed.) Secretary or General?: The UN Secretary General in World Politics (2007), 165.
\textsuperscript{1393} Alex Ansong, “The Operations of the Concept of Sovereign Equality of States in International Law”, 19 available at http://works.bepress.com/alex-ansong/2/.
interests of their most powerful members. The situation is somewhat different in the regional IFIs, where the regional members hold a majority of the voting power.

For public international lawyers, the prospects for multilateral cooperation lie in the promise that IOs such as the IFIs have become international legal persons to some extent independent of the states that establish them, which may encourage the considerations of “community” interests and not merely the interests of self-interested states. In contrast, strict realists regard the notion as a naive myth. For them, international outcomes remain the product of states power and state interests alone even in the age of IOs. A powerful intergovernmental organisation, if it exists at all, is only a tool of “its most influential members”.

5.8 The Autonomy of IFIs

The idea of autonomy of international organisations classically reflects the political independence of the organisation when it comes to making its own decisions. Autonomy as political independence essentially touches upon the different relationships – e.g. of control, subordination, partnership - existing between an organisation and its member states. Being autonomous refers to the degree of impermeability of the organisation’s decision-making process to states acting, for example, as creator (master), member (subordinate) or a peer on the international stage. The aspect of autonomy (also referred to as the separate will or the volontè distincte) is often envisaged together with the question of legal personality. That is to say, the ability to act or to speak autonomously on the international plane is a constitutive element of the legal personality of international organisations. This can be explained more pragmatically by the simple fact that international organisations that can express a separate will from their member states usually constitute organisations endowed with an international legal personality.

The degree of autonomy is an issue of scholarly contention. While some have argued that the legal order of an IO is necessarily embedded in the general

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1395 See, for example, Thomas Oatley and Jason Yackee, “American Interests and IMF Lending”, 41 International Politics (2004), 415-429.
1398 Ibid, 30.
1403 Ibid.
international legal order, others have defended the full impermeability of the legal order by IOs to general institutional law.\textsuperscript{1404} Whatever the position, autonomy touches upon the issue of international responsibility. It is undisputed that international responsibility is the necessary consequence of international legal personality. In this case, member states do not incur responsibility for the wrongful act of the organisation. The ILC has taken this position.\textsuperscript{1405}

As stated before, in assessing the autonomy of an intergovernmental organisation, the role of the state within the framework of the organisation creates a complication. While they are the creators of the organisation, they are also member states and agents of that same organisation.\textsuperscript{1406} This makes it more difficult to evaluate the extent to which states that intervene in the decision making purposes of organisations do so in their capacity as state (furthering their own agenda) or in their capacity as member state (furthering the organisation’s agenda).\textsuperscript{1407}

Realists argue that institutions are a reflection of the distribution of power, are based on the self-interested calculations of the great powers and thus have no independent effect on state behaviour.\textsuperscript{1408} From a functionalist perspective, the staff of intergovernmental organisations is usually most influential in operational decisions.\textsuperscript{1409} Moreover, the rational-legal authority that the staff embody gives them power independent of the states that created them and they then channel that power in a particular direction\textsuperscript{1410}, be it towards development, human rights, trade etc. They therefore act with their own authority, which makes them influence world politics autonomously. When looking at the policy-making behaviour of IFIs, as will be seen later, it is apparent that, as inter-governmental organisations, they do act autonomously to a considerable degree and they have quite independent effects on the international system. Thus, describing the IFIs influence using state-centric approaches is unsuitable.\textsuperscript{1411}

Today, IFIs pose sanctions on states, transform their economies and financial systems and change their political and institutional landscapes, clearly revealing a growing role in policy-making. These institutions, with their influence, act as

\textsuperscript{1406} Jan Klabbers, Introduction to International Institutional Law, 2nd Ed (Cambridge: Cambridge University Press, 2009), 46.
\textsuperscript{1407} Ibid.
\textsuperscript{1411} Alexander Andrew, “To What Extent are International Organisations Autonomous Actors in World Politics?”, accessible at http://dx.doi.org/10.5334/opt.020705

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bureaucracies with their own authority, rules, norms, values and agendas based on their knowledge and expertise. They work transnationally above the level of interstate cooperation and produce independent effects.

5.9 Shortcomings of International Law Principles

Clearly there is an anomaly in the legal position of the IFIs that appears to enable them to operate without being subjected to any effective legal control. This raises concerns, particularly because of the growing impact that the operations of these institutions have on the members who use their services.

IFIs, as international organisations, are clearly subjects of international law. One could assume that this being the case, their rights, responsibilities and obligations would be defined by this body of law and applicable international law principles. However, the issue of specific obligations of IFIs is contentious because, though their status as subjects of international law is clear, their substantive rights and responsibilities are not. As for the issue of responsibility of IFIs, the international legal basis of obligations and of such responsibility is shaky and a definite claim of responsibility in such a situation is difficult to make.

As for functional immunity, it is of course reasonable that IFIs legitimately need immunity to carry out their specific functions. Given the expanding scope of operations and thus responsibility, such immunity is an impediment to any legal accountability, especially in consideration of the fact that sovereign immunity has with time contracted while the IFIs’ immunity from municipal law has expanded. The reach of this immunity is still an ambiguous reality as the extent of immunity necessary for IFIs to carry out their functions is unclear. Thus, in an era where the activities of IFIs increasingly affect human rights and at times are the cause of violations of these rights, it is time to revisit the doctrines and practices of the immunity of international organisations.

As discussed earlier, IFIs are governed by the weighted-votes system and in this regard are heavily influenced by the interests of the key member states and the roles they would like the IFIs to play in international economic governance. Thus, the decision-makers have “power without responsibility”. This is more apparent in cases like the WB and IMF where the members with the most influence due to their majority subscriptions are those members that do not require loans from the IFIs, while those members who actually depend on the IFIs’

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1414 Ibid.
financial packages have little voice in the structure. This structural problem has increased the negative image of the IFIs and raised questions as to the sincerity of their development endeavors.

5.10 Conclusion
The role that international law plays in governing IFIs remains complicated, arguable and unclear. Although these institutions have taken some steps towards assuming responsibility by creating accountability mechanisms that allow people to bring claims against the IFIs when the projects funded by the IFIs are interfering with their basic rights, these accountability mechanisms lack a legal impression. The IFIs still enjoy control over the decision making process, causing ineffective redress and comparatively little ability of individuals and private groups to challenge unlawful deprivations.1416

One can question why the operational policies of IFIs are of importance and how much relevance they really have as far as international labour standards are concerned. This can be viewed in a number of ways. First and foremost, the impacts of IFIs’ decisions and actions have a number of international legal implications, including bearing on international labour standards. The IFIs’ actions, to some extent, suggest that the IFIs are creating a form of ‘lex specialis’ to govern their own operations in regard to their member states. As IFIs implement this soft law, it could lead the stakeholders in these operations to begin to expect the IFIs to comply with this soft law in their operations and anticipate that they can hold the IFIs to account if they fail to comply with the soft law. As evidenced by the trend of affairs with the World Bank and the regional IFIs, the standards set by one IFI have the potential to influence the standards of other IFIs. In these ways, the soft law standards have the potential to ‘harden’, at least within the limited sphere of IFIs.

As discussed earlier, he standards established in IFI policies have the potential to influence other subjects of international law. Since the IFIs operate in a broad range of countries and projects, the standards set out in their policies and procedures often come to be seen as ‘best practices’ in particular areas. As a result, they have the potential to establish functional benchmarks that are then incorporated by other actors - private corporations and states - into their laws, policies and procedures. The implementation of these IFI policies may thus shape state practice in certain areas. In this way, the IFIs policies and procedures have the potential to influence the further development of international law. Interestingly, this can impact the policies and procedures of the IFIs themselves

and make it harder for them to justify changes in the principles and standards established in their own policies and procedures. Thus, through the formulation and implementation of their internal policies and procedures, the IFIs have the potential to play an active role in influencing aspects of international law, which are arguably outside their core mandates, as has been witnessed in this chapter. They also have the potential to influence other international actors and their conduct.

In conclusion, although public international law is likely to endure as a normative “horizontal” form of cooperation,¹⁴¹⁷ there are compelling signs that it is gradually moving away from the restrictions imposed by state-centric principles to a more triadic architecture where third party, non-state actors, international organisations, have a greater role, in addition to the state

6. IFIs’ Labour Conditionality on Freedom of Association and Collective Bargaining Rights

6.1 Introduction

Important matters have been established in the preceding chapters. IFIs certainly enjoy some form of influence in the international arena due to their financing activities and use this influence/leverage to effect change in social (as well as economic and political) policy of member states. Here, conditionality has become a tool through which such change is effected and is the ‘point of contact’ where operations of IFIs and international labour rights converge (i.e. where the operational and normative aspects meet). In addition, influence arises from the general relationship between the member states and IFIs, which is characterised by regular consultations, exchange of information, policy advise, non-lending assistance and technical support, where the IFIs are perceived as experts in this particular field, and their prescriptions are considered authentic. At the centre of this study is the issue of the role of IFIs in promoting and implementing international human rights standards on collective labour rights. Therefore, labour conditionality, meaning conditionalities on labour rights, as well as policy advice and how IFIs apply this advice, will provide a basis for assessing the overall role the IFIs play in promoting and implementing the standards and whether this influences compliance or non-compliance with collective labour rights standards.

The IFIs may not appear an obvious target for those seeking to promote compliance with international labour standards and much more scholarly attention has been devoted to understanding the nexus between trade liberalization and labour standards and the possible adoption of a labour clause at the World Trade Organisation (WTO). Yet, through the use of conditionality and policy advice, IFIs do engage in a wide array of activities that transverse labour issues and particularly collective labour rights. Therefore, the issue of labour rights and IFIs, and the effect the latter has on the former, must be understood in the context of the overall economic philosophy of the IFIs, the policy advice to member states, and the conditions that IFIs attach to their financing for their member countries.

This chapter looks into the application of conditionality by the IFIs and the effect this has on international labour standards on freedom of association and collective

1419 Ibid.
bargaining. In this stance, conditionalities emanating from the financial programs of the IFIs will be viewed from both a legal perspective and a policy perspective, with greater emphasis on the former, in the light of the principles of freedom of association and collective bargaining discussed in chapter 4. Practical examples of cases will be drawn from MoUs, development policy memoranda, letters of intent, loan agreements, policy paper interpretations, relevant implementation and completion reports as well as comments from the ILO supervisory bodies etc. Influence through persuasion and policy advice can be extracted from the same documents and other sources such as strategy papers, consultation papers, non-lending communication or advice etc. The IFIs’ approaches will then be analysed and compared in the light of the labour standards central to this study. It is important to note that the “cases” discussed herein are meant to not only demonstrate, but also exemplify, the ways in which conditionality, as a tool, can be wielded by the IFIs, thus creating legal implications, be they positive or negative, in the light of these labour standards which not only have global coverage and acceptance, but are also legal obligations on the part of the recipient states.

The analysis of the legal implications of IFIs conditionality on collective labour rights will be approached using two categories of the effects of conditionality: the direct effect of labour conditionality and the indirect effect of labour conditionality. Put simply, the direct effect refers to conditionality that affects the rights (freedom of association and collective bargaining) directly. This is to say that the conditionality actually touches the national (recipient’s) legal system directly in such a way as to affect the said rights. In this case, the labour rights are a target, among others, of conditionality itself. The indirect effect, on the other hand, has more to do with conditionality that does not target the rights per se, but rather, the rights are affected in the sense of ‘collateral damage’\textsuperscript{1420} as a result of IFI conditionality. These two categories will be better demonstrated in the analysis.

6.2 Methodological Comments
It is crucial, in the light of the methodological approach this study takes, to comment on some limitations. As noted in the introductory chapter, there is an inherent limitation in conducting research concerning conditionality in IFIs. This

\textsuperscript{1420} This phrase is typically used in international humanitarian law to express the consequential damage caused by military operations to civilians and civilian objects, which are not the target of operations themselves, but are damaged or injured collaterally to the military target. See Victor Condé, \textit{A Handbook of International Human Rights Terminology} (Lincoln: University of Nebraska Press, 2004), 3. It suggests that these collateral effects were not taken into account at the time the operation was planned or that the possibility of such effects was noted and pondered, but was nevertheless viewed as a risk worth taking, considering the importance of the military objective. Usually, the people who decide about the worth of taking the risk are not the ones who will suffer the consequences of taking it. See Zygmunt Bauman, \textit{Collateral Damage: Social Inequalities in a Global Age} (Cambridge: Polity Press, 2011), 4-5.
is due to the opaque nature of these institutions and their undertakings. Therefore, in certain instances, the study has relied on secondary sources. The regional IFIs particularly present a methodological challenge due to the heightened lack of transparency, and scarcity of even secondary material. To overcome this, material has been drawn from available primary sources in the IFIs themselves, as well as the reports of various organs of other institutions and international organisations such as the UN, Human Rights Watch, the ILO etc., as well as secondary sources that contain useful primary information or sources. Having said this, there is a sufficient amount of available information to study these institutions.

The study employs various cases from the IFIs that represent experiences from different regions of the world in order to have good ground of cases for analysis. The cases are mainly from the years after 2000 because some empirical studies have covered the effects of the global IFIs’ structural adjustment programs on labour rights from the 1980s, when conditionality rose to prominence, to the early 2000s. \(^{1421}\) What is unique about the timeframe this study considers is that it is in this era that the IFIs began including social and political factors (post establishment of poverty reduction strategies) in conditionality. Thus, these more recent cases will establish the typical approaches the IFIs have towards collective labour rights in present times. In addition, the documents used stem from the various forms of financing discussed in Chapter Two and as such, classification of these documents as to the form of financing they emanate from is not necessary. Therefore, whether the financing was for institutional reform or budget support is not given much weight, as long as there was a programme. What is to be noted is the discussed functions of the specific IFIs and any cases used should be considered in that light.

It is important to set out the fact that IFIs do not deal with labour market reforms in all of their loan agreements. For example, only 10% of World Bank programs between 2000 and 2007 involved labour markets reforms. \(^{1422}\) In the IMF, from 1994 to 2007, 50% of all lending programmes involved one or more labour-related conditions, although up to 2014, this number had fallen to 25%-40% of IMF programmes.\(^ {1423}\) This is a low number of conditionalities on labour reforms when


compared to the 93% of WB approved loans that included conditions on public sector governance issues in 2004. By 2005, all approved loans had conditions on public sector governance.1424 but is still a considerable part of IFIs activities. The study does not exhaustively cover labour reform conditionality in all financing programs in the IFIs, but rather examines the various ways in which conditionality can be used, and how it affects international labour standards on freedom of association and collective bargaining, by drawing on archetypal cases.

Finally, the differences between the IFIs must be noted. Due to their global membership, the global IFIs are greater in composition size as well as in the resources at their disposal. They are also much older institutions with greater influence and experience in development finance. In contrast, the regional IFIs have smaller membership compositions, their activities are limited to respective regions (consequently limiting their spheres of influence), and their resources are also limited, compared to the global IFIs. The choice of the two global and four regional IFIs not only provides for a wider degree of geographical representation, it also allows the study to take into consideration the various regions that also have various socio-economic challenges in regards to international labour rights. Including regional IFIs in the study is critical to avoid a “one size fits all”1425 approach.

6.3 The World Bank and International Monetary Fund

6.3.1 Introduction

The mandates and functions of the World Bank and IMF as well as the various lending instruments they provide have been discussed. Before discussing labour conditionality practices in the WB and IMF, it is important to look into the Washington Consensus, as it provides a theoretic basis for the policies and practices of the WB and IMF insofar as freedom of association and collective bargaining rights are concerned. The term “Washington1426 Consensus” refers to

1426 To Williamson, “Washington” included the World Bank, IMF, The U.S.A Treasury Department, the Federal Reserve Board, the Inter-American Development Bank etc. that is, political, administrative and technocratic
a set of economic policy reforms to stimulate development introduced by John Williamson, an economist from the Institute for International Economics in Washington, D.C. It encompasses a set of ten economic policy prescriptions that are considered important to the economic growth or development of developing countries. The prescriptions encompassed policies on financial discipline, public expenditure priorities, tax reforms, financial liberalization, exchange rate policy, trade liberalization, foreign direct investment, privatization of public enterprises, deregulation and property rights. It is important to note that the Washington Consensus, as originally formulated, was not written as a general policy prescription for development, but rather for Latin American countries in the economic and financial crisis of the 1980s, although development was the main objective of the countries concerned. Subsequently, it was widely interpreted as offering policy prescription and as being of wider application than in Latin America, and has been commonly accepted within development theory and particularly in the circles of the World Bank and IMF.

As with the case of the interpretation of the mandates of the IFIs discussed previously, the interpretation of the policy reforms in the Washington Consensus has evolved over time to include some elements that were not originally listed in the ‘original Washington Consensus’. Relevant to this evolution is the element of flexible labour markets. The meaning of deregulation in the original Washington Consensus, which referred to abolition of regulations that impede the entry of new firms or restrict competition, has come to also include deregulation of labour, the result of which is creation of flexible labour markets. The meaning of the Washington Consensus has evolved due to various factors such as recognition that market-oriented reforms were ineffective without institutional rejuvenation and that a trickle-down approach to poverty reduction did not prove adequate, thus there was a need for social policies and poverty programs. Table 1 below illustrates the evolution of the Washington Consensus, by pairing the original idea to the present evolved notion of the Consensus.


Ibid.

Ibid.


## Table 1: The Washington Consensus and the Post Washington Consensus

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The Washington Consensus is used as a synonym for neoliberalism or market fundamentalism. It has been argued that the outcomes of the policies under the Washington Consensus were very disappointing when they were implemented in Latin America, former socialist economies and sub-Saharan Africa as they failed to stimulate growth, increased poverty, worsened inequalities, deepened economic insecurity and resulted in frequent and painful financial crises. In this regard, Stiglitz argues that the Washington Consensus represents a set of policies predicated upon a strong *faith* (emphasis added) - stronger than warranted either by economic theory or historical experience - in unfettered markets and aimed at reducing, or even minimising the role of the state. Whatever its original content and intent, the term Washington Consensus has come to refer to development strategies that focus on privatization, liberalization and macro

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and has been used as common wisdom in terms of developmental policy and growth.\

6.3.2 The Direct Effect of Labour Conditionality

6.3.2.1 Labour Market Flexibility

The term flexibility is often used to refer to policies inspired by different economic, cultural and ideological premises, and this contributes towards the rather ambiguous connotations it has come to feature. From a legal point of view, the relevance of law in countries’ economic development is widely accepted; law matters, but how it matters is debated. In recent years, one of the areas where this debate has been particularly intense is labour and employment law.

The “elusive” term flexibility has for some time been advanced as a panacea for all ills within labour markets (and beyond), while defying a watertight definition. From a labour law perspective, flexibility can mean both altering patterns of demand and supply for labour as well as changing (usually removing) protective legislation. On the demand side, flexibility focuses on employers’ strategies concerning the form in which labour is contracted, enabling employers to vary labour inputs according to fluctuations in demand. On the supply side, flexibility manifests itself in terms of the growth of non-standard employment, such as part-time work and temporary employment. Thus, with reference to theoretical studies on labour, in particular labour law, the concept is frequently associated with other concepts, such as atypical work, casual workers, semi-independent workers, deregulation, decentralisation, or privatisation. Therefore, to labour lawyers, the term flexibility has not-so-favourable

1438 Ibid.
1443 Ibid.
1444 Ibid.
1445 Ibid.
connotations, for it suggests the undermining of hard-won legal standards and protection.\textsuperscript{1447}

It is, however, important to highlight that labour flexibility is not necessarily a negative connotation for labour rights \textit{per se}. In some cases, the very same concept of labour flexibility has broadened or extended the application of rigid labour laws to additional groups. Here, flexibility is a means of departure from certain rigidities in employment laws (due to traditions or philosophy such as paternalistic philosophy) in favour of certain groups of workers, such as women. In this case, flexibility has the potential to help bring down many of the barriers, for example, that are preventing women from entering and remaining in work, especially after having children in a scenario where demographic, societal and economic developments have meant that the standard way in which work is scheduled lags behind changing lifestyles, needs and expectations of modern society.\textsuperscript{1448} A more practical example is where flexibility results in the lift of a ban on employment of women in night shifts of manufacturing establishments.\textsuperscript{1449}

Both the World Bank and IMF have prescribed reforms that call for more labour flexibility to enhance competitiveness and viability in the economy.\textsuperscript{1450} Returning to labour flexibility in regards to collective labour rights in light of the legal and practical dimension of the operations of the World Bank and IMF, it is crucial to first take a look at the legal corollaries of the neoliberal market-led policies and ideology associated with the Washington Consensus. The objective, in more practical terms, is to deregulate labour markets so as to reduce the cost of labour. In this context, collective organisation and participatory representation aimed at raising wages and constraining managerial discretion are viewed as rigidities\textsuperscript{1451} that cause economic stagnation. The legal protection of freedom of association, therefore, can be obstructive to development.\textsuperscript{1452} This is to say that as far as these IFIs are concerned, collective labour interests are a constraint to liberated labour

\textsuperscript{1447} Catherine Barnard, "Flexibility and Social Policy" in Constitutional Change in Gráinne de Burca and Joanne Scott (eds.) the EU: From Uniformity to Flexibility, (Oxford: Hart Publishing, 2000), 197.
\textsuperscript{1449} See Klaus Schwab, Global Competitiveness Report 2012-2013 (Geneva: World Economic Forum, 2012), 6. The report names labour flexibility as one of the twelve pillars of competitiveness where effectiveness can take place if the labour markets have flexibility to shift workers from one economic activity to another rapidly and at low cost, and to allow for wage fluctuations without much social disruption.
\textsuperscript{1450} Christine Kaufmann, Globalisation and Labour Rights, 102.
markets.\textsuperscript{1453} Trade unions act as special interest representatives to oppose labour market reforms that seek to liberalise protective labour codes and also use their associative power through the institutions of collective bargaining to raise the price of labour.\textsuperscript{1454} As such it can be predicted that the power expressed by unions will prove an obstacle to reform, and the scene will be set for contestation of key aspects of conditionality, bringing collective labour into dispute not only with the IFIs but also their client states.\textsuperscript{1455}

Being a development institution and a crisis institution respectively, the overall approach of the World Bank and IMF, as far as collective labour rights are concerned, has been a deregulatory one. This is true of some of the policy prescriptions conditioned by these institutions that governments have committed to. The overall approach of these institutions has been that of labour flexibility. According to the World Bank, labour market flexibility means the ability of the labour market to adjust swiftly to changing economic conditions and, in particular, the ability to absorb external shocks with limited adjustment costs.\textsuperscript{1456} From the viewpoint of macroeconomic performance, flexible labour markets tend to deliver better outcomes. For the worker, a flexible labour market means the ability to find gainful employment easily and without too much cost. This entails availability of information on job opportunities, low mobility costs, and a short duration of job search. For the employer, a flexible labour market does not unduly constrain the employer's ability to adjust the size, composition and remuneration of his workforce in response to changes in product demand.\textsuperscript{1457}

Put simply, labour flexibility allows more discretion to employers in hiring and firing workers, relaxes restrictions on the use of non-permanent labour contracts and provides for more latitude in determining working hours. Thus, when labour markets are flexible, employers can adjust to volatile market cycles more rapidly. The condition of labour market flexibility has appeared in memoranda in World Bank and IMF financing programs. For example, the memorandum for Lithuania provided that a more efficient and flexible labour market is critical to reducing Lithuania's long-term unemployment, and to increasing its employment rate. A higher employment rate would stimulate GDP growth and would also allow for a broader and fairer distribution of the benefits from growth. A more efficient and flexible labour market would better match firms with the types of workers they need, and workers with the types of jobs they seek. It would better encourage

\textsuperscript{1453} Friedrich Hayek, Unemployment and the Unions (London: Institute of Economic Affairs, 1980), 2; Martin Upchurch, "The IFIs and Labour Reform in Post Communist Economies 6:2 Globalizations (2009), 298-297-316.

\textsuperscript{1454} Martin Upchurch and Darko Marinković, Workers and Revolution in Serbia: From Tito to Milošević and Beyond (New York: Manchester University Press), 70

\textsuperscript{1455} Ibid.


\textsuperscript{1457} Ibid.
investment in the types of skill that the market demands, and hence improve Lithuania’s long-term competitiveness.\footnote{1458}

Similarly, in the case of Mozambique, the government, in an effort to develop the private sector and thereby reduce the cost of doing business, stated that it recognises the importance of removing a number of obstacles to private sector development, hence steps would be taken to reduce the cost of doing business in Mozambique, particularly by addressing rigidities in the labour market.\footnote{1459}

Likewise, in Kyrgyz Republic, the concluded conditionality provided that the ministry of labour and social protection was to submit a report to the IMF staff on recommended measures to improve labour market flexibility in the country.\footnote{1460}

The requirement for flexible labour markets is the basis for many of the conditionabilities in World Bank and IMF financing relating to freedom of association and collective bargaining rights.\footnote{1461}

\subsection*{6.3.2.2 Freedom of Association}

The World Bank’s initial attitude towards freedom of association and collective bargaining reflects the traditional approach to human rights in general. The Bank stated that it had “a problem with some of the core labour standards, in particular, one which deals with freedom of association which concerns an important human right which has economic dimensions, but most importantly, also has a political dimension”, therefore “this political dimension prevents us (the WB) from simply using it as an instrument during our programs and to impose it on countries, because this would be considered as a breach of our rules.”\footnote{1462} In addition, regarding the economics of freedom of association, the effect of trade unions on

\footnote{1458}Ibid, xvi.
economic development was unsettled. Therefore, key to this position was the political prohibition and economic considerations previously discussed. However, the statement by the WB’s President in 2002 that, “the Bank supports the promotion of all of the four core labour standards but ... does not apply conditionality on these standards in its lending”, shows a departure from this strict traditional interpretation.

However, when one studies the World Bank’s role in promoting freedom of association and collective bargaining, the Doing Business report provides a picture of the Bank’s attitude for many years. This report had been influential and one of the most controversial tools which affect labour law reforms around the world. Launched in 2004, it went on to become the publication with the highest circulation within the World Bank Group. The Report ranks countries according to the ease of doing business in these countries. The ranking consists of a number of indexes dealing with conditions for starting a business, obtaining a license, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts, closing a business and employing workers (employing workers index). As for employing workers, the report has sub-indexes such as rigidity of employment, firing costs, nonwage labour costs, ease of employing workers etc. Therefore, countries with higher union density will be lower in the ranking because unionised workers usually receive higher levels of protection, especially as far as termination of employment is concerned. A practical example is the Doing Business 2007 report where countries like Belarus and Uzbekistan have a better ranking than Western European countries. The index does not explicitly contradict the ILO standards on freedom of association and collective bargaining, however, it sends out a clear message when the countries regarded as the worst violators of international labour standards on union rights are rewarded with high rankings in the report. It is clear that the report’s approach aims to promote more flexible and employer-friendly labour regulations. In addition, the IMF has used the rankings in the Doing

1463 Ibid.
1464 See ‘Economic Considerations Only: No Politics Allowed’, Chap. 2.4.2
1468 The Index on employing workers is actually number 3 in the list.
1470 Yaraslav Kryvoly, “Flexibility and Security”, 54.
Business report to recommend labour deregulation in certain states using its assistance. For example in South Africa, a consultation report dealt with the country’s labour regulation and noted that, on the basis of the Doing Business indicators “South Africa scores particularly high in difficulty of hiring and dismissal procedures”. The report recommended, among other proposals relating to labour matters, “further streamlining dismissal procedures” as a way to “make a significant dent in unemployment”.1473

In 2009, in response to pressure from the ILO and international trade unions, the WB announced that it would stop adversely ranking countries on the basis of higher levels of labour protection legislation in the Doing Business report.1474 In the reports from 2011 onwards, the employing workers index has been removed.

A slow shift in the Bank’s approach is evidenced by the various instances in which the WB and IMF have taken a more positive stance towards freedom of association. In Yemen, the Bank, in consideration of the country’s political economy, found that there was no organised basis for holding the government accountable for securing the collective welfare, and that the right to freedom of association, press freedom, the role of civil society organisations and access to data and information were highly restricted. The WB proposed the removal of all the laws that limit the right to organise, including requirements that associations should obtain government permission.1475 Similarly, in Mauritius, the WB observed that unions are “legal and unrestricted” and collective bargaining is allowed as are strikes, although they are subject to very restrictive conditions and thus rare. It further stated that “Mauritius has recently ratified ILO conventions guaranteeing the right to strike”.1476

A case more specific to workers’ freedom of association is that of the Philippines, where the WB, noting that the rules governing workers’ associations formation were stricter than necessary (long list of requirements and steps, legalism etc.), stated that these rules limit participation and reduce workers’ bargaining power.1477 The Bank further stated that freedom of association should be actively promoted and the rights to freedom of association and collective bargaining need to be guaranteed and can serve as an important bargaining point for agreements on jobs. In addition, the Bank stated that businesses need to extend their corporate

1473 IMF, Article IV Consultation - Staff Report (South Africa), 2005, 19-20.
social responsibility to their own employees, especially with regard to core labour standards, and engage workers in meaningful dialogue on various labour issues to promote mutual trust and understanding. It is interesting that, after the Bank encouraged freedom of association, it stated that businesses need to remain competitive and ensure that future employment prospects of workers are not constrained by firms’ inability to expand due to less flexible labour regulations, and some unions are “open to considering more flexible work arrangements and less reliance on regional minimum wage setting.”

In some instances, the World Bank has taken a neutral position where it has acknowledged labour standards while not proposing reforms that would give these rights effect. The Bank noted Ghana’s significant progress in the implementation of CLS, where labour rights are protected, including the formation of labour unions at the enterprise level, procedures for collective bargaining, as well as several legal and policy instruments aimed at combatting the problem of child labour, including ratification of the ILO convention. In Mauritania, the WB also highlighted that Mauritania has ratified all ILO conventions related to CLS and that the Constitution provides for freedom of association and the right to citizens to join any political or labour organisation. The simple acknowledgement of these rights, from a legal point of view does not do much to promote or implement these rights, nor does it demote them. However, this demonstrates attentiveness to these rights.

As for the IMF, it has been active in labour reforms through its different financing instruments as well as through policy advice from consultations and other technical assistance. It is important to bear in mind that the IMF’s mandate includes contributing to the promotion and maintenance of high levels of employment and real incomes through the expansion and balanced growth of international trade. Thus, given the importance of employment for sustainable and inclusive growth, IMF-supported programs often contain recommendations pertaining to the labour market.

In requesting a stand-by arrangement from the IMF, the Yugoslavian government committed to labour market reforms which would improve the business environment and facilitate economic restructuring. New legislation would be submitted to parliament to, among others, guarantee core labour standards,

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1478 Ibid, 180.
1479 Ibid, 208.
1481 World Bank, Memorandum of the President of the IDA to the Executive Directors on a Country Assistance Strategy of the WBG for the Islamic Republic of Mauritania, 6th May 2002, 9 Report No. 24122MAU.
including freedom of association and participation in collective bargaining for employees and employers.\\footnote{1483}

As for freedom of association and collective bargaining, the IMF has shown its labour market flexibility preference, approaching labour law first as an impediment to labour market flexibility and thus as an obstacle to economic growth and employment, and only second as an instrument to avoid hardship for workers.\\footnote{1484} Despite this, the IMF has acted as a sporadic promoter of freedom of association and collective bargaining. The emblematic case is Indonesia, which was at the time heavily affected by the Asian financial crisis. Here, the IMF’s political and economic leverage appears to have been instrumental in encouraging the ratification of five ILO fundamental conventions that the country had not yet ratified, starting with ILO convention No. 87 on Freedom of Association and the Rights to Organise.\\footnote{1485} In addition, the IMF played an important role in obtaining the release of an imprisoned Indonesian trade union leader.\\footnote{1486} The IMF also reportedly reinforced the ILO’s efforts to push for reform of the domestic laws on freedom of association and collective bargaining relations.\\footnote{1487} On the other hand, a few years later the IMF pushed the government to reduce labour law protection, including by reducing severance pay and facilitating the outsourcing of workers.\\footnote{1488}

\textbf{6.3.2.3 The Right to Collective Bargaining}

As a starting point for the aspect of collective bargaining, it is important to highlight that in 2002, the World Bank commissioned a study of the effects of freedom of association and collective bargaining on economic performance of countries.\\footnote{1489} The comparative study revealed little systematic difference in economic performance between countries that enforce rights to freedom of association and collective bargaining and countries that do not. In addition, the study found no concrete evidence of detrimental effects of freedom of association and collective bargaining on economic performance, in part due to the difficulty of isolating the effects of labour standards from other determinants of economic

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1485 Ibid, 130.
1486 Mac Darrow, Between Light and Shadow, 183.
\end{flushright}
Despite these findings, decentralisation has characterised the WB and IMF prescriptions in recipient countries. Decentralisation embodies the ‘idea of change’. In this context, the change refers to a movement of means of action and decision making power (here, collective bargaining) to regional or local levels. As such, decentralisation does not impose a specific mode of ordering, rather, it describes a form of organisation in which the local dimension plays a significant role. In the labour relations sphere, the phenomenon labeled “decentralisation” generally refers to an increase in collective bargaining at the local level, that is, the widely observed trend towards the decentralisation of bargaining to the company level. Negotiating at this level is aimed at enhancing enterprises’ capacity to adapt to product and labour market requirements. A fully decentralised framework favours the development of a regulatory race to the bottom because there is no countervailing force capable of offsetting the tendency of jurisdictions to compete for instruments and jobs by bringing existing protections to the lowest common denominator. In a nutshell, decentralisation means less bargaining takes place at higher (multi-employer) levels.

The World Bank and IMF have actively supported decentralisation of collective bargaining. As far as freedom of association and collective bargaining are concerned, the World Bank and IMF have at times claimed that these rights are important, but only when they operate on a “leash” can they have a positive impact on development. This is to say that freedoms set forth in the ILO conventions could be beneficial for development and particularly employment creation, through such means as improved productivity, increased equality etc. resulting from unionisation. However, unionisation could also have negative effects such as monopolistic behaviour and opposition of structural reform. Nevertheless, these rights do have positive effects on development under certain conditions. The World Bank, in identifying these conditions, has stated that, Denial of workers’ rights is not necessary to achieve growth of incomes. It is possible to identify the conditions and policies under which free trade unions can advance rather than impede development. Unions are likely to have positive effects…when they operate in an

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1490 Ibid.
1492 Ibid.
1493 Ibid.
1494 European Industrial Relations Observatory Online (EIROOnline) Industrial Relations in the EU, Japan and USA, (2002), 2 http://www.eiro.eurofound.eu (accessed 18 June 2017).
1495 ILO, Organising for Social Justice, 60 para 222.
1496 Ibid.
1497 Ibid.
environment in which product markets are competitive, collective bargaining occurs at the enterprise or plant level, and labour laws protect the right of individual workers to join the union of their choosing, or none at all.  

Emphasis on collective bargaining at the enterprise level has appeared in not only the Bank and IMF’s memoranda, but in various reports and policy papers. In Zambia, conditionality for an economic and social adjustment package from the World Bank, aimed “to support Zambia’s economic reform programme and to aid in the reduction of poverty by promoting growth”, required that the government submit to parliament an amendment to the Industrial and Labour Relations Act, permitting enterprise level collective bargaining as opposed to the previously mandated sector-wide bargaining. The amendment was subsequently passed by parliament and further meant that wages and benefits could now be negotiated between unions and individual firms. In the case of Slovenia, the Bank stated that collective bargaining, as an institutional wage-setting mechanism at various levels including the sectoral level and beyond, is a barrier to flexibility and bargaining at the enterprise level. The Bank further stated that bargaining at the enterprise level can be an appropriate framework for achieving positive economic effects, as indicated by the experience of several countries. 

In the case of Montenegro, the World Bank stated that representation of workers’ voices through unions and collective bargaining can reduce discrimination, reduce arbitrary management decisions, increase job tenure and investment in training, improve work safety conditions and, with the addition of dispute resolution mechanisms, contribute towards greater labour productivity. However, the Bank also stated that new collective bargaining agreements as well as a lack of labour market flexibility resulted in poor labour market conditions. Therefore, measures to improve the institutional framework for labour relations and employment creation included promoting greater decentralisation of bargaining to the firm

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1501 Ibid.
1502 World Bank, Labour Market Issues (Slovenia), Report No. 17741-SLO, 30th March 1998, para 71, 85. See also World Bank, Country Economic Memorandum (Mauritius): Managing Change in a Changing World, Report No. 36196, 29th January 2007. The Bank stated that the system of sector and occupation specific wages is cumbersome and at the same time ineffective because of, among others, collective bargaining. Thus, enterprise level bargaining would be particularly beneficial from the standpoint of increasing flexibility and allowing firms and workers to tailor employment contracts to their particular needs; World Bank, Poverty Report for Argentina: Poor People in a Rich Country, Report No. 19992-AR, 23rd March 2000, 41. The Bank stated that centralised or sectoral collective bargaining agreements limit firms’ abilities to adapt to competitive conditions. Reforms that would facilitate a more orderly operation of the labour market include elimination of centralised or sectoral collective agreements, which are also extended to all workers in a sector even if not signed and even when expired.; World Bank, Development Policy Review (Slovak Republic), June 2003, 30. The Bank provided that the country should reform labour markets, directed at enhancing labour market flexibility by relaxing legal provisions on working arrangements by decentralising collective bargaining.
level. Similarly, in Mauritius the Bank stated that the system of sector and occupation specific wages is cumbersome and yet ineffective because of, among others, collective bargaining on the one hand and non-compliance on the other. Enterprise level bargaining would be particularly beneficial from the standpoint of increasing flexibility and allowing firms and workers to tailor employment contracts to their particular needs.

Interestingly, in Indonesia when the labour market was characterised by rising labour costs, reduced worker productivity and increasing industrial unrest, the problems pointed out by the World Bank were generous, centrally mandated, but unenforceable worker benefits. It was argued that legislation encouraging enterprise-level collective bargaining might help reduce some of these problems. It was also noted that the government greatly limited organised labour, viewing it as a threat to political and economic stability. In addition, the approach of mandating benefits centrally through legislation, without empowering workers to enforce compliance with the legislation or negotiate their own benefits packages with employers, was straining industrial relations in the country. Thus, the Bank recommended that the government should consider allowing effective democratic plant-level worker organisations and legislation to encourage collective bargaining at the enterprise level. This would enable workers and managers to negotiate outcomes that might improve worker productivity. Again, changes in approaches to industrial relations, deregulation, and increased competition in product markets could make unions’ roles more positive while limiting their negative role.

A very interesting case is that of Macedonia where the country was the recipient of a social sector adjustment credit (SSAC) from the World Bank. As conditionality for the first tranche, the government adopted amendments to the country’s Labour Relations Law including improving flexibility in collective

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1506 Similarly, in Vietnam, in addressing problems in the industrial institutions, it was argued that the government should strengthen efforts to increase the capacity of unions and employers’ federations through awareness campaigns and training in collective bargaining etc. See Achim D. Schmitten and Truman G. Packard, “Vietnam’s Labour Market Institutions, Regulations, and Interventions: Helping People Grasp Work Opportunities in a Risky World”, Policy Research Working Paper No. 7587, World Bank, March 2016. See also World Bank, Philippine Development Report: Creating More and Better Jobs, Report No. ACS5842, September 2013, 19 where the World Bank stated that “Procedural barriers that hinder freedom of association and collective bargaining need to be reduced, and alternative forms of organisation for informal workers need to be promoted”.

1507 The adjustment credit was in the equivalent amount of US $29 Million.
bargaining by allowing the enterprise collective agreement to determine greater or lesser rights than the branch collective agreements, but no less than the rights set by law. Subsequently, the country’s Constitutional Court repealed several of the amendments, which the Bank in turn stated was “detrimental to imposing the flexibility of the labour market”. However, the government later redrafted the amendments to the law to bring them in line with the SSAC reform programme. In the end, all SSAC conditions relating to improvements of the Labour Relations Law were met. Regardless of this, the Bank further stated that, despite this progress, additional reforms of the legislation are necessary in order to move towards a more efficient market.

A unique case where the World Bank promoted collective bargaining is that of Croatia, although this was a means of ‘damage control’ and as a mitigating mechanism. In this case the attempted concession of motorway maintenance companies faced very strong civilian opposition, putting the government under close public watch for any decision involving the sector. It was stated that “project support to a retrenchment process may be perceived negatively and implemented with delays, and risks triggering unions”. To mitigate this risk, the WB team verified that the measures taken by companies complied with the law and with collective bargaining agreements.

Coming to the IMF, its approach is similar to that of the World Bank, in that the IMF has also encouraged decentralisation when it comes to freedom of association and collective bargaining. Although the IMF has not criticised freedom of association, collective bargaining at higher levels such as national, industry and sectoral levels has been perceived as having negative effects on employment and productivity. The IMF has argued that these centralised forms of bargaining increase the bargaining power of unions compared with firm-level bargaining with potentially adverse effects on employment. Thus, more flexible wage-setting allows firms and their workers to set wages at levels that reflect firm-level productivity and restore competitiveness while also adjusting wages to specific conditions faced by firms, thus making a move towards decentralisation of collective bargaining necessary.

1509 Ibid.
In Romania, the IMF, after pushing for labour flexibility reforms as well as modification of the labour legislation, commended reforms taken by the government to improve labour market flexibility, including the enactment of the new Labour Code. These reforms comprised making the wage-setting process more flexible by, among other things, raising the thresholds for both trade unions and employers’ organisations to be representative, abolishing collective bargaining at the national level as well as eliminating the automatic *ergo omnes* extension at the sectoral level. Similarly, in Italy, although the government agreed that firm-level bargaining should be more representative, it noted that it would be costly to negotiate all terms of a labour contract at the firm level. However, labour economists highlighted the importance of sufficient flexibility in national-level agreements to allow for the firm level differences linked to productivity. Finally, the IMF urged the government to promote more firm-level wage bargaining together with greater flexibility in national contracts, for example on non-wage terms such as shifts and working hours, in order to allow firms to adopt more quickly to changing economic conditions.

In Greece, the structural conditionality outlined in the Memorandum included tabling legislation to reform the system of collective bargaining to eliminate the automatic extension of sectoral agreements to those not represented in negotiations, and guarantee that firm level agreements take precedence over sectoral agreements without undue restriction. All this was in order to increase the flexibility of the labour market. In a subsequent Memorandum, the government stated that, consistent with previous Memoranda, it had made substantive legislative changes to ease employment protection legislation in order to, among other things, allow firm level agreements to prevail over other levels. The government stated that it would take further measures to reform collective bargaining, including eliminating the automatic extension of sectoral agreements to those not represented in the negotiations.

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1512 IMF, Staff Report for the 2010 Article IV Consultation, Fourth Review under the Stand-By Arrangement, and Request for Modification and Waiver of Non-Observance of Performance Criteria (Romania), July 2010, 26-27.
1513 IMF, First Review under the Stand-By Arrangement and Request for Modification of Performance Criteria - Staff Report (Romania), June 2011, 12.
1514 IMF, Article IV Consultation – Staff Report (Italy), 22nd August 2014, 13. See also IMF, Article IV Consultations – Staff Report (Spain), 10th July 2015. The IMF provided that making sure that wage dynamics reflect differences in firm and sector-specific conditions will boost aggregate productivity and income. To this end, it is important that the existing options for firm-level adjustment are used as needed, and that remaining obstacles to firm-level bargaining and opt-out are removed; IMF, “IMF Executive Board Concludes 2016 Article IV Consultation with Finland” (Press Release), 7th December 2016. In its assessment, the IMF’s Executive Directors commended the recent progress on structural reforms, including the reduction in the maximum duration of unemployment benefits and the agreement of the Competitiveness Pact to reduce labour costs. They recommended closely monitoring the implementation of the Pact to ensure that the wage bargaining process becomes more flexible at the firm level and better aligns wages with productivity.
1515 IMF, Memorandum of Economic and Financial Policies (Greece), 8th December 2010, 18.
In essence, the World Bank and IMF’s stance on decentralisation is that policies that promote decentralisation of collective bargaining negotiations between unions and firms can advance labour productivity. In contrast, work practices bargained at higher national or industry-wide levels that include binding norms for agreements negotiated at lower levels appear to restrict economic efficiency.\textsuperscript{1517}

The CFA has, in various cases including those previously discussed herein, provided that the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and should not be imposed by law as it is these parties that can freely determine the level of collective bargaining.\textsuperscript{1518} Additionally, legislation that unilaterally imposes a level of bargaining or makes it compulsory for bargaining to take place at a specific level may raise problems of compatibility with convention No. 98. With regards to decentralisation itself, the CFA has provided that legislation should not constitute an obstacle for collective bargaining at a certain level and that the elaboration of procedures systematically favouring decentralised bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to a global destabilization of the collective bargaining machinery and of workers’ and employers’ organisations and constitutes in this regard a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos. 87 and 98.\textsuperscript{1519}

In the light of the ILO conventions, labour policy reforms requiring governments to legislatively limit collective bargaining to the firm or enterprise level, thereby decentralising the bargaining structures in recipient states, directly affect the enjoyment of the right of the bargaining parties to determine the level at which collective bargaining is to take place, and are thus inconsistent with the principle of freedom of association and collective bargaining. Therefore, the World Bank and IMF conditionality requiring these legislative decentralising measures has the effect of weakening the bargaining structures in recipient countries, contrary to the international labour standards on freedom of association and collective bargaining.

\textsuperscript{1517} See also Carlos Lamarche, “Collective Bargaining in Developing Countries: Negotiating Work Rules at the Firm Level Instead of the Industry Level Could Lead to Productivity Gains”, 183 IZA World of Labour: Evidence-Based Policy Making (2015), 9.
\textsuperscript{1519} See CFA, Case No. 2403 (Canada), Report No. 338, November 2005, para 600; CFA, Case No. 2326 (Australia) 338th Report, November 2005, para 448.
6.3.2.4 The Bindingness of Collective Agreements

Free and voluntary collective bargaining as a basic element of the principle of freedom of association and collective bargaining has been discussed in previous chapters. The bindingness of collective agreements and the conditions necessary in any adjustment to these rights have also been set forth in previous chapters. The approach of these IFIs in respect of these rights has been one of deregulation. This is not surprising given the neoliberal connotations of the activities of these institutions that has previously been discussed.

To begin with, the World Bank has stated that collective bargaining agreements are an important source of wage rigidities and they need to be more flexible to promote adjustment of wages. This can be achieved, the Bank maintains, by providing for the possibility of cancellation with notice of a collective agreement concluded for a definite term.

The World Bank has required measures to restrict or exclude certain groups of workers from collective bargaining. The case of Bosnia and Herzegovina is relevant, where the World Bank identified that there were high unit labour costs in the country. It stated that factors which may have contributed to these developments included the strong bargaining position of workers with ‘protected’ jobs, and the functioning of the wage negotiation process (collective agreements) in the formal sector. In its recommendations, the Bank provided that with respect to labour relations, and in line with the reforms of the wage determination system for government workers, the government should exclude government workers from general collective agreements as it moves to a statutory regime of employment. In addition, a strict incomes policy should be applied to key state-owned enterprises (SOEs). Finally, the government should reconsider the mechanism governing the determination of the minimum wage, and introduce a low minimum wage that would not jeopardise the competitiveness of the country or hamper the employment of youth and low-skilled workers.

In Tunisia, where the bargaining structure was strong, the Bank provided that collective agreements are detrimental to labour demand for jobseekers. The Bank thus promoted allowing greater flexibility in the setting of industry-wide collective agreements as well as the revisiting the collective agreements every two years (instead of five) in order to take into consideration changing economic

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1520 See “Principle of Free and Voluntary Collective Bargaining”, Chap. 4.5.2.4.2.  
conditions. In addition, the collective agreements should only apply to employers that are members of employers’ associations and are signatories of the collective agreement.  

In Bosnia and Herzegovina, the government in its Letter of Development Policy committed to a number of reforms, including reforming the labour market in order to unleash the potential of the workforce. The government’s Letter includes the statement that “the culture of collective bargaining and social dialogue is underdeveloped and often burdened by unrealistic demands of the social partners and this needs to change”. Subsequently, the government undertook prior action for receiving financing from the World Bank. The government enacted new regulations in the Labour Code to limit the duration of collective agreements, so that the social partners are able to renegotiate agreements on a regular basis. These regulatory changes increased support for a more flexible labour market, in order to contribute to economic growth (this was numbered as prior action #4 in the Memorandum). In addition, the Parliament and National Assembly each adopted changes to the labour legislation to cease the validity of the current collective bargaining agreements and limit the duration of new collective agreements (prior action #5).  

The IMF has also taken a similar road in as far as free and voluntary collective bargaining is concerned. In the case of Portugal, the government, in order to acquire funding from the Troika, committed itself to meeting the various conditionalities stated in the Memorandum of Understanding on Specific Economic Policy Conditionality, which included aspects of labour law. The memorandum provided for revision in the country’s labour legislation, in particular the 2009 Labour Code. The government was required to prepare an

1524 World Bank, Development Policy Review (Tunisia), May 2014, 189.
1527 The Troika is a term used to refer to the three-part commission that has been charged with monitoring the Euro debt crisis, consisting of the IMF, the European Commission (EC) and the European Central Bank (ECB). It has been responsible for making policy recommendations on policy to help solve the crisis, hence wielding a tremendous amount of influence and power.
1528 Specifically, the legislation was to be revised to accommodate labour flexibility in worktime arrangements, including the modalities for permitting the adoption of “bank of hours” working arrangements by mutual agreement of employers and employees negotiated at the plant level; working time arrangements and short-time working schemes in cases of industrial crisis (by easing the requirements employers have to fulfill to introduce and renew these measures); revision of the minimum additional pay for overtime work established in the labour code (the overtime pay was reduced to a maximum of 50% from 50% for the first overtime hour worked, 75% for additional hours and 100% for overtime during holidays); and elimination of compensatory time off (this was 25% of overtime hours worked).
action plan and submit the draft legislation to Parliament with these aspects.\textsuperscript{1529} Moreover, to ensure that the aggregate public sector wage bill as a share of GDP decreases, the government committed to "limit staff admissions in public administration to achieve annual decreases in 2012-2014 of 1% per year in the staff of central administration and 2% in local and regional administration". Similarly, the government committed to freezing wages in the government sector in nominal terms in 2012 and 2013, constraining promotions, and reducing the overall budgetary cost of health benefits schemes for government employees’ schemes by lowering the employer’s contribution and adjusting the scope of health benefits. In addition, the government committed to reducing pensions. The Government also committed to promoting wage adjustments in line with productivity at the firm level. To that purpose, it would promote the inclusion in sectoral collective agreements of conditions under which works councils can conclude firm-level agreements without the delegation of unions.\textsuperscript{1530}

Subsequently, the Portuguese government introduced a set of new policies aimed at generating employment, fostering economic growth and quickly overcoming the crisis in the country and sustaining the national debt. In so doing, the government enacted Act No. 23/2012 which introduced amendments to the Labour Code, thereby removing provisions in collective agreements that were in force prior to the Act. This included cancelling the provisions of collective agreements regarding compensatory leave for overtime on working days, additional weekly days off or public holidays, reducing by three days the extension of annual leave established under collective agreements signed after 1 December 2003 and introducing a two-year suspension of overtime pay exceeding the amounts established in the Labour Code and the pay or compensatory leave established in collective agreements for normal work on public holidays in enterprises not required to close on those days, furthermore halving those provisions, up to the limit established in the Labour Code, where they have not been amended during the suspension period.

Furthermore, the reform policies imposed cuts of 3.5 to 10 per cent on the overall gross income of workers earning more than €1,500 a month\textsuperscript{1531}, reduced overtime pay and suspended the right to compensatory leave during the Economic Adjustment Programme, replacing leave with less favourable provisions.\textsuperscript{1532} In addition, the payment of annual leave or equivalent allowances to workers with monthly wages exceeding €1,100 was suspended and the allowance for those earning between €600 and €1,100 a month reduced. Pay raises were prohibited: (iv) section 35 prohibited all pay rises; (v) section 39 maintained the freeze on the

\textsuperscript{1529} IMF, Memorandum of Understanding on Specific Economic Policy Conditionality (Portugal).
\textsuperscript{1530} Ibid.
\textsuperscript{1531} See Act No. 55-A/2010.
\textsuperscript{1532} See Act No. 64-B/2011 (State Budget for 2012).
food subsidy allowance; and (vi) section 45 again reduced overtime pay in the case of workers whose normal working hours do not exceed seven hours a day and 35 hours a week.\(^{1533}\) It is important to note that a binding collective agreement was in place at the time these austerity measures were being implemented.

In its response to a complaint instituted by the General Confederation of Portuguese Workers (CGTP) with the CFA on violations of the principles of collective bargaining and provisions under Convention No. 98, the government explained that Act No. 23/2012 is part of the set of new policies that are needed to generate employment, foster economic growth, quickly overcome the crisis in the country and sustain the national public debt. It indicated that the measures introduced under this section complied with the Memorandum of Understanding on Economic Policy Conditionality of May 2011, between Portugal, the International Monetary Fund (IMF), the European Commission and the European Central Bank.\(^{1534}\) The CFA cautioned that it is not its role to express a view on the soundness of the economic arguments invoked to justify government intervention to restrict collective bargaining. The CFA further noted the government’s need to react urgently and adopt relevant measures to deal with a very serious economic crisis, and reiterated the position it had in similar cases in other countries by stating that the government should promote social dialogue in regards to measures taken to deal with the crisis to ensure that exceptional measures adopted in the context of a crisis are not perpetuated.\(^{1535}\)

The case of Portugal unveils crucial aspects of conditionality that has a direct effect. The conditionalities set forth in the MoU as far as collective labour rights are concerned were specific to the extent of the particular labour legislation (the Labour Code) that was to be amended by way of enacting legislation on specific clauses. The effect of this conditionality is seen in the government’s subsequent action in legislating acts of law that curb, suspend or cancel terms of employment provided for in collective agreements.\(^{1536}\) The case also highlight the chain of action elaborated in chapter two as far as conditionality is concerned. Here, the IFI (through negotiation with the government) provides for conditionality to be tied to financial assistance (in this case a bailout package). The state on its part takes the necessary measures to put the conditionality into practice. This is by way of legislation enacted in Parliament or unilateral measures such as decrees, as will be further demonstrated. It is at this point that the state, in implementing such

\(^{1533}\) See Act No. 66-N/2012 (State Budget for 2013).

\(^{1534}\) CFA, 376th Report, Case No. 3072 (Portugal) October 2015, para 906. It is crucial to note that some of the measures taken by the government in an effort to fulfill the conditionalities in the MoU were declared unconstitutional by the Constitutional Court and consequently repealed by the government.

\(^{1535}\) Ibid, para 927.

\(^{1536}\) See also Observation (CEACR) - adopted 2012, published 102nd ILC session (2013), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) on Portugal.
measures, potentially violates the labour rights. Thus, it is the state’s acts that are in non-compliance with freedom of association and collective bargaining. The IFI has played the role of influencing this non-compliance.

Serving similar examples are the cases of Spain and Greece where in the same context of economic crises, conditionalities set forth in the Memoranda of Understanding between the governments and the Troika resulted in measures that violated the rights set forth by Convention Nos. 87 and 98. Similar to the case of Portugal, in an effort to comply with the conditionalities laid out in the MoU between Spain and the Troika, the government adopted a royal-decree law as well as agreements that provided for measures for reducing the public deficit. Among the measures was an average reduction of five percent (5%) per annum in the wages of public servants on an oscillating scale between 0.56% and 7%, meaning some officials would have their wages reduced by 8% to 15%. In addition, the decree instituted a wage freeze. It is crucial to state that at the time of the decree, there was a collective agreement between the government and trade unions on wages. Consequently, the collective agreement reached through collective bargaining was eliminated, rendering the binding collective agreement invalid. These measures were carried out unilaterally, although the Secretary of State of the Public Service had called the trade unions to a meeting with no fixed negotiating agenda, aiming to explain the cuts in wages that would be carried out.

In Bosnias and Herzegovina, the government, in agreement with the IMF and World Bank, unilaterally amended individual provisions of the country’s draft Labour Act, which was later adopted by the Parliament. Although the government involved trade union representatives in the negotiations, the negotiation process was hasty and the adoption in parliament took place even though the negotiations had not come to an agreement as to the terms in the draft legislation. The government, in its response, explained that the need to implement labour market reforms in line with the national work and reform programme compelled it to submit the new Labour Act to parliament. The Act in question touched upon and affected free collective bargaining, including the possibility of employers to decide on the representativeness of trade unions with the employer. Although the CFA did not find the adoption process a violation of the principle of freedom of association and collective bargaining, the case illustrates the hasty and usually pressing process that results from conditionality.

Another interesting case is that of Argentina, which was subject to structural adjustment programmes by the IMF during the country’s economic crisis. The

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1537 See Memorandum ... (Greece) and Memorandum ... (Spain). Spain used royal decrees and Greece had emergency acts / decrees.
1538 See the Government and Trade Union Agreement for the Public Sector of 25th September 2009.
1539 CFA, 378th Report, Case No. 3155 (Bosnia and Herzegovina) June 2016.
1540 Ibid.
policy requirements in this scenario included changes to the labour legislation that had the effect of limiting the level at which collective bargaining could take place, extending the probation period in employment, eliminating the after effect of labour contracts and decentralising collective bargaining by giving enterprise-level collective agreements primacy over sectoral-level agreements. The Memorandum stated,

> Important progress has been made in a number of structural reform areas. An especially important achievement in this respect was the approval by Congress of the labour reform in May. This law lengthens the probation period for newly-recruited workers from one to three months (six months by agreement), provides for the gradual elimination of the *ultractividad* clause that currently extends expired labour contracts indefinitely, until modified by mutual agreement; and stipulates the predominance of collective agreements at the enterprise level over sectoral ones. The law aims to promote a better adaptation of the labour market to changing patterns of demand and production, and reduce informality and precariousness in employment.\(^{1541}\)

The Memorandum reflects the direct impact of the IMF’s conditions on labour standards in the “behind the scenes” procedure by which the deregulatory reforms were instituted as conditionalities, to the national adoption process of the reforms and the legal implications of the reforms.

In Greece a law enacted in pursuance of financing from the Troika\(^ {1542}\) had a number of effects. It abolished the general applicability of the mandatory national minimum wage with respect to young workers up to 25 years of age who, if entering the work market for the first time, would be remunerated with 84 percent of the minimum wage. In addition, minors between 15 and 18 years of age under apprenticeship contracts would be remunerated 70 percent of the minimum wage, have reduced social security coverage and be excluded from the protective framework of the national collective agreement (NGCA) and national legislation regarding working hours, rest periods, paid annual leave and time off for school work.\(^ {1543}\) This is another case in which conditionality has resulted in excluding categories of workers from the coverage of collective agreements, other than the categories of workers provided for under Convention Nos. 87 and 98. The cases of Tunisia and Greece, where conditionality required that government workers and young persons respectively be excluded from the coverage of collective agreements, further demonstrate this practice. The ILO conventions and jurisprudence have provided for this circumstance. The CFA has clearly stated that, in the case of public employees, including those working in state owned enterprises (SOEs), the rights to freedom of association and collective bargaining

\(^{1541}\) IMF, Memorandum of Economic Policies (Argentina), 5th September 2000, para 10.

\(^{1542}\) Act No. 3863/2010.

should be guaranteed, save for those engaged in the administration of the state.\footnote{See chapter 4.5.2.4.5 above.} The criteria for this, as previously discussed, are very clear. This exclusion therefore is in variance with the respective conventions. In as far as exclusion of young persons in Greece, which was at the time under a harsh economic recession, the CFA has not directly found that such exclusions, in the context of employment stimulation for youth, are violations of freedom of association and collective bargaining. However, it has set down conditions for the use of such policies, that such measures should be restricted to a limited period that will not restrict the collective bargaining rights of these workers as regards their remuneration for more than twelve months.\footnote{See CFA, Case No. 2820 (Greece), Report No. 365, November 2012.}

Again, conditionality of the WB and IMF has required states to take measures that interfere with or do away with terms and conditions of work in collective agreements that are in force. This has taken the form of unilateral legislative measures instituting cuts and/or freezes in wages, reduction of over-time pay, working hours etc. The cases of Greece, Spain and Portugal have exemplified this situation. Although in all three cases, the measures were taken in a time of crisis to satisfy the conditionality set forth by the Troika, the CFA has ruled that as collective bargaining is a fundamental right, in the context of economic stabilization, priority should be given to collective bargaining as a means of determining the employment conditions rather than adopting legislation to restrain wages. Furthermore, the CFA provided that, if, as part of its stabilization policy, a government believes that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers’ living standards.\footnote{CFA Case No 2918 (Spain) 368th Report, June 2013, para 362.} In addition, in previous cases, the Committee had considered that, if a government wishes to bring the clauses of a collective agreement into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations, without imposing on them the renegotiation of the collective agreements in force.\footnote{CFA, Case No. 2820 (Greece), 365th Report, 2012, para 995.} Moreover, the Committee highlighted the importance of maintaining permanent and intensive dialogue with the most representative workers’ and employers’ organisations and that adequate mechanisms for dealing with exceptional economic situations can be developed within the framework of the public sector collective bargaining system.\footnote{CFA, Case No. 2918 (Spain), 368th Report, June 2013, para 362.} This
also applies to the case of the duration of collective agreements, where the CFA has provided that the duration of collective agreements is primarily a matter for the parties involved.\footnote{CFA, Case No. 2047 (Bulgaria), 320th Report, March 2000, para 361.} However, if government action is being considered, any legislation should reflect tripartite agreement.\footnote{Ibid.} Notably, labour reforms in the above discussed cases took more of a unilateral character by government in implementing the changes.

6.3.2.5 The Favourability Principle

The essence of the principle of favourability in a multi-level bargaining system has been previously highlighted in preceding chapters.\footnote{See “The Favourability Principle”, Chapter 4.5.2.4.4, 164-165} As far as this principle is concerned, the case of Greece offers insight into how conditionality can be and has been used to undermine it. Similar to other continental labour law systems, the system of collective bargaining in Greece had been traditionally based on different levels of regulatory mechanisms, with the national general collective agreement determining the minimum wage, and occupational (national and local), sectoral and firm level agreements providing for additional remuneration. In line with the principle of the “implementation of the more favourable provision”, if different collective agreements were in conflict, the principle of implementing the provisions most favourable to the workers applied.\footnote{Aristea Koukiadaki and Lefteris Kretsos, “Opening Pandora’s Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece”, 41:3 Industrial Law Journal (2012), 290.} In Greece, however, legal interventions in wage bargaining, via a radical restructuring of the system of collective bargaining, was identified as an overriding objective of the reforms.\footnote{Ibid.}

The Troika was of the view that the current collective bargaining structure had led to an upward trend in wages which was not correlated with the country’s productivity and competitiveness. The Greek Minister of Finance clarified that its priority was to improve productivity and ensure that remuneration was aligned to productivity. In order to achieve this, Greece was faced with two choices: reduced salaries in the private sector by law or creating a more flexible bargaining system. The latter option had been chosen and a new collective bargaining system had to be built, based on enterprise level bargaining and not just on national or sectoral collective agreements.\footnote{ILO, Report on the High Level Mission to Greece, Athens, 19-23 September 2011, para 110, available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/missionreport/wcms_170433.pdf.}

First, with the objective of moving wage setting closer to the company level, Article 2(7) of Law 3845/2010 established that the terms of occupational and
Enterprise agreements could derogate *in peius* from the terms of sectoral agreements and even the National General Collective Agreement. However, following negative reactions from the social partners, it was agreed to observe the floor of rights laid down by the national agreement. Any reductions of wage levels are supposed to take place through the introduction of a new type of company-related collective agreement, namely ‘special firm-level collective agreements’.

The government enacted Act 4024/2011, which introduced new measures that would have the eventual effect of deconstructing the industrial relations system that set minimum standards of work for workers through collective agreements concluded after free negotiations. The new measures included provisions that abolish the fundamental protective principle of favourability, as well as prevalence of less favourable firm-level agreements over the uniform standard of pay and work conditions provided in binding sectoral agreements. The CFA noted the Government’s indication that the abolition of the favourability principle in this context supported collective bargaining at the firm level for the regulation of pay and working conditions under the special financial conditions of the individual enterprise. But the CFA further considered that legislation should not constitute an obstacle for collective bargaining at the industry level and signaled its concern that the concordance of all the above measures may severely impede bargaining at a higher level. In any event, the Committee, recalling that meaningful collective bargaining is based on the premise that all represented parties are bound by voluntarily agreed provisions, urged the Government to ensure, as indicated in its reply, the statutory enforceability of every collective agreement among those represented by the contracting parties. The Committee underlined that the elaboration of procedures systematically favouring decentralised bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to a global destabilization of the collective bargaining machinery and of workers’ and employers’ organisations and constitutes in this regard a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos. 87 and 98.

In the case of Spain, the government adopted a Royal Legislative Decree (which was later adopted as legislation and became Act No. 3/2012) on urgent measures for labour market reform. The decree provided for the primacy of application of enterprise collective bargaining agreements, even against the shared desire of unions and employers’ organisations. It prohibited the negotiation of a change in or exception to the rule of the absolute priority of the enterprise agreement.

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1556 CFA, 365th Report, Case No. 2820 (Greece) November 2012, para 825.

1557 Ibid.
wording of Royal Legislative Decree No. 3/2012 with respect to the priority of enterprise agreements was modified with the addition of a statement that such agreements may be negotiated and different working conditions imposed at any time during the period of validity of higher level collective agreements (even prior to their expiration). Thus, voluntary collective bargaining between unions and employers’ organisations is subject and subordinated to the legal precedence of the provisions of enterprise agreements, many of which are negotiated not by unions, but by non-union representatives.

In its response, the government stated that the legislation in question was a response to an unprecedented crisis and to a recession that began in 2008, as well as to accumulated macroeconomic imbalances that required forceful, urgent action in order to address the specific weaknesses of the labour market. The Government explained that the Decree/Act sought to give enterprises greater internal flexibility so that, during periods of change or difficulties, they could adapt to the new conditions in order to retain jobs rather than laying off employees as in the past. It added that the labour reforms were welcomed by the IMF and OECD and were also a response to the urgency arising from a serious recession that had begun in 2008 and had created macroeconomic imbalances that were unsustainable for Spain, and to a serious lack of confidence on the part of the financial markets that had led to a severe tightening of the problem country’s financing conditions. The Government stated that its goal was to reduce the public deficit and take measures to contain public spending and implement the structural reforms agreed.

In its conclusions, the CFA stated that it had taken due note of the need to respond urgently to an extremely serious and complex economic crisis and to address the serious unemployment (the highest unemployment rate in the European Union). The CFA, however, further reiterated that the principle that mutual respect for the commitment undertaken in collective agreements is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground. It stressed that the Act authorized significant changes in working conditions (including, among other things, the length of the working day, working hours and shift work) not only on economic grounds (particularly in the event of current or anticipated losses or where the enterprise has seen a decline in revenue or sales for two consecutive quarters), but also on technical, organisational or production-related grounds without the need, as in the past, for the existence of an emergency or force majeure situation. Under Act No. 3/2012, which applies not only during temporary periods of economic crisis but in perpetuity, where a disagreement arises during consultations and related bargaining, any of the parties may refer the dispute for arbitration. The Committee underlined that the elaboration of procedures systemically favouring decentralised bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to an overall destabilization of the collective bargaining
machinery and of workers’ and employers’ organisations and constitutes in this regards a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos. 87 and 98.\textsuperscript{1558}

Lastly, the IMF has argued that the use of hardship and opening clauses, which allow firms to set less favourable wages and working conditions than those in the applicable sector-level agreement if certain conditions are met, is seen as one of the factors behind the resilience of the German labour market during the global financial crisis.\textsuperscript{1559} By contrast, countries such as Portugal and Spain entered the crisis with bargaining systems that continued to rely on strict application of the “favourability principle”.\textsuperscript{1560}

\textit{6.3.2.6 Representativeness}

The element of representativeness in collective bargaining rights is no exception to the practices of the World Bank and IMF. In Mauritius, the government, in honouring its undertaking with the World Bank and IMF, unilaterally adopted a new salary compensation mechanism in the country. Despite organising for consultations with the workers’ and employers’ organisations, there were irregularities in the consultation process. The consultations did not lead to agreement on the issue of changes in the system of minimum wage setting. In the new bargaining structure, the annual salary compensation would consider other criteria than inflation and include national productivity and competitiveness, national ability to pay and the employment or unemployment rate. The government eventually stopped pursuing consultations on the matter, introduced the amendments administratively and appointed workers’ representatives from outside the representative workers’ organisations in the newly established wage-setting body.

The CFA, displeased with this process, stated that the consultations with the social partners were unilaterally interrupted without giving sufficient time to fully discuss the views of the parties and give every opportunity to arrive at a common position. Furthermore, and that consultations were carried out without having given the social partners a copy of the draft legislation in question, which was problematic as the lack of a written text unavoidably limits the scope of possible discussion and a clear understanding of all the issues that may need to be addressed. The Committee regretted that, faced with the unions’ denial refusal to participate in the new mechanism, the Government had unilaterally appointed representatives from trade unions and one federation representing not more than 2 per cent of the organised workforce. In conclusion, the Committee re-emphasised that any decisions concerning the participation of workers’

\textsuperscript{1558} CFA, 371st Report, Case No. 2947 (Spain), March 2014, para 453.
\textsuperscript{1559} IMF, \textit{Country Report (France)}, No. 16/228, July 2016. See also IMF, \textit{World Economic Outlook}, April 2016, Box 3.2.
\textsuperscript{1560} \textit{Ibid.}
organisations in a tripartite body should be taken in full consultation with all the trade unions whose representativity has been objectively proved. The Committee further and requested the Government to take a renewed initiative aimed at full and frank consultations with representatives of the social partners whose representativity has been objectively proved.1561

In the case of Romania, due to conditionality by the IMF, the government carried out comprehensive labour reforms. These included changes in labour legislation that affected the criteria for the representativeness of trade unions.1562 These reforms, in the Social Dialogue Act, meant that if no union had secured the absolute majority (union membership of 50 percent plus one of the workers of an enterprise), collective bargaining rights were granted to the “representatives designated by the employees”, which included the representatives of the trade union existing at the enterprise level. However, in enterprises without a trade union meeting the representativeness criteria, if an enterprise-level union exists and is affiliated with a federation meeting the representativeness criteria in the relevant sector of activity, the negotiation of a collective agreement will be carried out by the representatives of that federation together with the elected workers’ representatives. Again, in enterprises without a trade union meeting the representativeness criteria, if an enterprise-level union exists but is not affiliated with a federation meeting the representativeness criteria in the relevant sector of activity, the negotiation of a collective agreement will be carried out by the elected workers’ representatives.

Reviewing the Romania case, the CEACR noted some incompatibility with Convention No. 98 and urged the government to remedy these incompatibilities. It underlined that the affiliation with a representative federation should not be required for being able to negotiate at the enterprise level. It further emphasised that direct negotiation between the enterprise and its employees, bypassing representative organisations where these exist, might in certain cases be detrimental to the principle that negotiation between employers and organisations of workers should be encouraged and promoted. The CEACR thus requested the government to amend the relevant legislation to bring it in line with labour standards and principles.1563

Subsequent to the recommendations of the ILO supervisory bodies, the government of Romania took action to bring the relevant labour law in line with Convention No. 98. Surprisingly, the IMF officially endorsed these steps stating,

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1562 For more details see Luminata Chivu et al. The Impact of Legislative Reforms on Industrial Relations in Romania (Budapest: ILO, 2013), 6-9.
Building on the recent reform of the labour market legislation, efforts should now turn to raising the employment rate. It is important to ensure that the new Labor Code and Social Dialogue Law are consistent with core ILO conventions, while efforts to undo the progress made should be firmly resisted. (IMF) staff welcome the government’s intention to address the low labour force participation in Romania and the high unemployment of younger and older workers.¹⁵⁶⁴

This contradictory stance of the IMF leaves one with a sense of confusion as to why in one breath the IMF would place conditionalities on the decentralisation of collective bargaining and laws on representativeness, and in another breath commend the state’s compliance with the same standard that was an obstacle in the first place. This contradiction has been observed in other stances where the IMF, through conditionality, promoted minor improvements of labour standards while subsequently conditioning deregulatory labour reforms, such as Mexico¹⁵⁶⁵ and the previously discussed case of Indonesia.

One argument could be that, as economic considerations are central in these programs, labour deregulation, from an economic perspective, would be desirable as far as the WB and IMF are concerned. However, if a state moves towards compliance with these labour standards, and such a move does not have adverse impacts on the success or continuation of the programme, then the IFIs find no harm and take this opportunity to be the “supporters of core labour rights” as in the case of Romania.

In the Indonesian case, arresting and jailing trade unionists opposing structural reform would do harm to the success of the programme, from an economic perspective. But once the success of the programme was ensured through their release, the IMF went on to promote deregulation. At any rate, it is clear that the World Bank and IMF approach labour law first, as an impediment to labour market flexibility and thus as an obstacle to economic growth and employment, and second as an instrument to avoid hardship for workers,¹⁵⁶⁶ which explains the few cases of “shifty stances” on freedom of association and collective bargaining.

In general, the issue of representativeness is a grey area as to the direct effect of conditionality. Although the reforms were a result of financing from the World Bank and IMF, it is difficult to determine whether representative thresholds of workers unions were specifically required by the IFIs conditionality, or whether the IFIs required decentralisation and the government decided to change

¹⁵⁶⁵ The case of Mexico is such a stance in which an adjustment programme involved conditionality on minimum wage increases while at the same time demanding decentralisation of collective bargaining. See IMF, Memorandum of Economic Policies (Mexico), 15th June 1999, para 17.
representation threshold to further decentralise collective bargaining. However, this does not change the fact that IFIs’ conditionality triggered the reforms.

6.3.2.7 The After-Effect of Collective Agreements

As discussed earlier, the essence of the “after effect” of collective agreements is the protection of terms of employment in an expired collective agreement until a new agreement is negotiated and concluded. The World Bank has associated this aspect of collective bargaining with inflexibility of labour conditions. In the case of Croatia, the Bank stated that flexibility can be achieved by, among other things, limiting extension of an expired agreement (the “after effect”) to a maximum of six months.\(^\text{1567}\) Here, the MoU between Greece and the IMF provides interesting insight into the effect of IFI conditionality on freedom of association and collective bargaining. The Memorandum stated that,

*Length of collective contracts and revisions of the ‘after effects’ of collective contracts.* Changes will specify that: (iii) the grace period after a contract expires is reduced from six to three months; and (iv) in the event that a new collective agreement cannot be reached after three months of efforts, remuneration will revert back to the basic wage plus the following general allowances (seniority, child, education, and hazardous). This will continue to apply until replaced by terms specified in a new collective agreement or in new or individual contract.\(^\text{1568}\)

Subsequently new legislation was adopted in Greece where all collective agreements could only be concluded for a maximum duration of three years and collective agreements that have expired would remain in force for a maximum period of three months. If a new agreement is not reached after this period of time, remuneration would revert back to the basic wage, as stipulated in the in the expired collective agreement, until replaced by those in a new collective agreement or in new or amended individual contracts.\(^\text{1569}\)

Although the CFA has not found this to be a violation from the perspective of freedom of association principles as there is no duty in these principles to extend agreements, it has provided that any extension that may take place should be subject to tripartite analysis of the consequences it would have on the sector to which it applied.\(^\text{1570}\) Additionally, where reduction of the after effect of expired collective agreements comes within an overall context of imposed decentralisation and weakening of the broader framework for collective bargaining, the CFA has cautioned these are likely to leave workers with no minimum safety net for their terms and conditions of work.\(^\text{1571}\)

\(^\text{1568}\) IMF, Memorandum of Economic and Financial Policies (Greece), March 2012, 21.
\(^\text{1569}\) Aristea Koukiadaki and Lefteris Kretsos, “Opening Pandora’s Box”, 300.
\(^\text{1570}\) CFA, Case No. 2820 (Greece), 365th Report, November 2012, para 999.
\(^\text{1571}\) Ibid, para 996.
6.3.2.8 Conclusion

This section has looked into the direct effect of conditionality, where labour standards on freedom of association and collective bargaining rights are a target of policy-based conditionality as well as policy advice. It has also highlighted instances where the WB and IMF promoted freedom of association and collective bargaining. The cases discussed herein illustrate the ability of prescriptions encompassed in IFIs conditionality to penetrate into the borrowing country’s legal system and structures and create a direct “chain of causation” that results in the non-compliance by the member state with rights and its obligations emanating from its international obligations. In other words, the conditionality of these IFIs “sets off” the deregulatory labour law reforms in recipient countries, although the reforms themselves are carried out by the respective recipient countries. As the labour laws in this context are the target of reform, the impact is high because of the specificity of the conditionality.

6.3.3 The Indirect Effect of Labour Conditionality

6.3.3.1 Reorientation/Cuts in Government Expenditure

In as far as development financing by the World Bank and IMF is concerned, cuts in public expenditure have been policy prescriptions commonly used by both institutions in recipient countries, usually affecting wages of public employees. The institutions seek to cut government spending as a way to close and eventually eliminate the shortfall between revenues and expenditures.\textsuperscript{1572} Governments work to reduce expenditures during austerity drives and an obvious place to start is the public sector wage bill, which frequently makes up the single largest budget item.\textsuperscript{1573} In order to consolidate such state budgets, wages in the public sector have been a prime adjustment parameter.\textsuperscript{1574}

The World Bank has stated that a key element in reducing government expenditure is control over wage and salary expenditure.\textsuperscript{1575} This explains why the Bank, in providing for reforms and policy actions needed to improve prospects for sustained growth and help avoid crises, pointed to significant reduction of the growth of the public sector wage bill and avoiding policies that

\textsuperscript{1575} World Bank, Country Economic Memorandum (Jamaica): The Road to Sustained Growth, Report No. 26088-JM, 4th December 2003, 16.
would push up the wage rate.\textsuperscript{1576} In Poland, “sluggish economic growth” was attributed to, among other things, increased government spending including significant increases in public sector wages. With the introduction of fiscal reforms as well as expenditure adjustments, a nominal freeze of the budgeted wage bill was imposed.\textsuperscript{1577}

As for the IMF, cuts in government spending have also formed a part of fiscal policies in recipient countries. The Latvian government, for instance, stated that the improved economic situation in the country reflected continued implementation of the programme, including meeting the indicative target on the public sector wage bill.\textsuperscript{1578} The government further stated that it would consider reducing the public sector wage bill and reduce state subsidies in the effort to cut expenditures.\textsuperscript{1579} Similarly, the Tunisian government stated that the wage bill weighs heavily on government expenditure\textsuperscript{1580}, thus in the fiscal policy reforms, the government would reduce the wage bill to create necessary fiscal space to increase investment.\textsuperscript{1581}

Crucial to note is that there are various ways in which governments can cut costs. These include downsizing/retrenchment, freezing recruitment, incentives-induced retirement, wage reduction, wage containment etc. Wage reduction involves reducing the wages and benefits of current public sector employees. Containing the public wage bill is usually carried out through different ways such as restraining or freezing wages to existing levels in current terms, holding wages steady in constant terms and allowing increases equal to a portion of, but less than the rate of inflation or agreeing that the wage bill cannot surpass a particular ratio.\textsuperscript{1582} The result of these wage restraints has been the overall erosion of salaries and the particular erosion of professional-level wages in the public service in

\textsuperscript{1576} Ibid.
\textsuperscript{1577} World Bank, Poland: Saving for Growth and Prosperous Aging, No. B8624, June 2014, 77. See also World Bank, Country Economic Memorandum (Romania): Reining in Local Government Spending Report No. 57040-RO, 1st February 2011, 1. The Bank provided that in order to address an immediate concern, that is, the government deficit, the government had been debating measures to reduce the local wage bill, cut transfers to local governments, and restrain local arrears; World Bank, Republic of Iraq; Public Expenditure Reviews: Toward More Efficient Spending for Better Service Delivery (Washington, D.C.: World Bank, 2014), 26. The Bank stated that the wage bill growth should be contained by implementing budget ceilings, reducing patronage, strengthening internal audit capacity or drafting new civil service legislation.
\textsuperscript{1578} IMF, Letter of Intent (Latvia), 9th May 2011. See also IMF, Letter of Intent (Grenada), 2nd May 2017, 1.
\textsuperscript{1579} IMF, Memorandum of Economic and Financial Policies, 9th May, 2011, 7. See also IMF, Letter of Intent (Grenada), 2nd May 2017. The government stated that it intended to safeguard and advance reforms to ensure a sustainable public sector wage bill and effective civil service.; IMF, Letter of Intent (Zimbabwe), 17th April 2015. The Zimbabwean government stated that measures it would take to improve the country’s growth prospects and capacity to pay included taking action to reduce the wage bill.; IMF, Memorandum of Economic and Financial Policies (Côte D’Ivoire), 20th October 2011, 8; IMF, Memorandum of Economic and Financial Policies (Honduras), April 29th 2015.
\textsuperscript{1580} IMF, Letter of Intent (Tunisia), 2nd May 2016.
\textsuperscript{1581} IMF, Memorandum of Economic and Financial Policies (Tunisia), 2nd May 2016, 5.
many countries. Again, these measures, agreed upon by the IFIs and recipient government, take place outside the ordinary wage bargaining system of collective bargaining.

An interesting case is that of Romania, which had received finance from the World Bank and IMF (co-financed with EBRD and EU) in 2009. Measures to cut government spending included job cuts, the possibility of compulsory unpaid leave of up to ten days for public sector employees and reduced working hours were introduced. In 2010, salaries of public sector employees were cut by 25% and the thirteenth month bonus was cancelled. All of these measures were taken despite opposition from trade unions. Similar wage cuts have been discussed in the cases of Portugal, Spain and Greece. In these examples, wages were provided for by collective agreements.

The impact of these economic reforms in the light of workers’ rights is an issue that has been a source of much debate in the international arena. In as far as the ILO jurisprudence goes, the case of Chad offers an interesting insight. Here, trade unions went on strike to resist cuts in wages and consequently trade union leaders faced arrest, imprisonment, assault etc. In its communication, the Government explained that Chad was currently experiencing a very serious economic crisis. With a view to financing the restructuring and reconversion of production units, the World Bank and the International Monetary Fund (IMF) had insisted that Chad reduce its expenditures, which essentially consists of salaries for state employees and contractual agents, and increase substantially its revenue. The Government stated that it is aware that the measures recommended by the World Bank and the IMF to enable Chad to overcome the crisis are at the same time detrimental to the already low purchasing power of state employees and agents. It also pointed out that these measures were debatable and not compatible with national sovereignty since they are taken under external pressure. The Government stated that it had been confronted both with the conditions imposed by the World Bank and the IMF and the demands of its people about having to cope with an already high rate of unemployment due to the almost total lack of investment to generate jobs. It had acted responsibly and opted for the least onerous solution by agreeing to reduce its expenditure by freezing new recruitments, clear away unproductive elements and grant early retirement when requested. It had also decided to increase its revenue by a series of measures to monitor receipts and increase income tax. According to the Government, these measures enabled it to safeguard existing jobs and to encourage over the medium and long-term the creation of new jobs to absorb a large part of the unemployed.

1583 Ibid.
1585 CFA, June 1993, Case No. 1669 (Chad), 287th Report, para 313-315.
The CFA in its conclusions stated that,

Given the effect on workers' standard of living of the fixing of wages by the State outside the framework of collective bargaining and more generally of the wage policy of the Government, the Committee emphasises the importance which it attaches to the effective promotion of consultation and collaboration between the public authorities and workers' organisations in this sphere to allow matters of common interest to be examined and as far as possible mutually acceptable solutions to be found. Given the serious nature of the problems which the country as a whole is facing, the Committee believes that it must appeal to all the parties concerned to negotiate in good faith and to endeavour to reach such solutions. As the Committee has already pointed out, satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence.\textsuperscript{1586} The Committee appeals to all the parties to endeavour to negotiate in good faith in the search for mutually acceptable solutions to the serious problems with which the country as a whole is currently faced.\textsuperscript{1587}

Although, through this jurisprudence, the necessary consultations requirements during times of austerity are clear, and are sometimes even stated in the Letters of Intent\textsuperscript{1588}, it is not often that governments follow this requirement. For example, in Ireland, despite a tradition of tripartite agreements from the 1980s, discussions turned contentious when conditions turned sour, and the government then undertook unilateral actions on pay and pensions cuts before an agreement with the unions was reached again in 2010.\textsuperscript{1589}

\textit{6.3.3.2 Privatization}

Another consistent element in the World Bank and IMF programs is the privatization of state-owned enterprises (SOEs). Typically, this means that the government should spin off certain functions to the private sector by privatizing operations and that it should cut back on spending and staffing in the areas of responsibility it does maintain.\textsuperscript{1590} An important aspect of privatization of government-owned enterprises as far as the work force is concerned is that it involves restructuring of the workforce, usually by the government laying off workers to prepare enterprises for privatization. Privatization itself is frequently associated with rounds of downsizing as well as private employer assaults on unions and demands for wage reductions.\textsuperscript{1591}

The World Bank has particularly defended privatization of public-owned enterprises, as necessary economic policy in order to improve the efficiency of

\textsuperscript{1586} Ibid, para 333.
\textsuperscript{1587} Ibid, para 334 (f).
\textsuperscript{1588} For example, IMF, Letter of Intent (Grenada), 2nd May 2017.
\textsuperscript{1591} Ibid, 436.
state enterprises, free up resources for social services and mobilise capital for expansion and modernization. The Bank argues that state-owned enterprises are often characterised by protection from competition and subsidized by their public owners, employment of too many people, providing wages and benefits governed by rigid labour contracts higher than their private sector counterparts, and thus, low productivity and excessive labour costs contributing to inefficiencies and financial losses.1592

Thus, privatization is meant to increase efficiency and competitiveness as well as productivity. Both the World Bank and IMF have been insistent on this reform.1593 However, in some cases, privatization was delayed due to opposition from domestic parties1594 and at times, due to the recipient government’s slow implementation.1595

In the case of the Democratic Republic of Congo (DRC) in the government’s undertakings with the World Bank, the government refused to engage in dialogue with trade unions to deal with issues relating to privatization. In addition, strikes took place due to this refusal and subsequently, arrests, imprisonment and sentencing of trade union officers and members as well as summary dismissals of trade union members for participating in a strike. The CFA stated that, restructuring in the public sector, and especially the privatization of enterprises in the context of the application of a structural adjustment policy, undeniably has a considerable impact on social and trade union matters. It is therefore necessary for the social partners, in particular trade union organisations, to be consulted, at least on the social impact and modalities of the measures decided upon by the authorities. In view of the impact that privatization measures in certain public sector enterprises and, in general, government structural adjustment and privatization policy can have on working conditions, the Committee emphasised the importance that it attaches to the effective promotion of consultation and cooperation between public authorities and workers’ organisations in this area, in accordance with the principles laid down in Recommendation No. 113, with the

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1595 World Bank, Country Economic Memorandum (Benin), Constraints to Growth and Potential for Diversification and Innovation, 18th June 2009.
aim of joint consideration of matters of mutual concern with a view to arriving, to the fullest possible extent, at agreed solutions.\textsuperscript{1596}

Again, as in the other economic reforms promulgated by the World Bank and IMF, the implementation of privatisation is usually carried out in agreement with the recipient country and such reforms are tied to financial assistance in the form of conditionality. The IFIs impose conditionality, but then generally do not concern themselves with the changes to labour rights that can result from the implementation of economic policy stemming from the conditionality.

\textit{6.3.3.3 Foreign Direct Investment}

Foreign Direct Investment (FDI) is another policy prescription that is popular in the WB and IMF. These institutions maintain that FDI helps foster development in recipient economies. The advantages of FDI include transfer of technology, upgraded skills, fostered competition, stimulation of knowledge transfer by training local workers, introduction of new management practices and creation of employment.\textsuperscript{1597} The WB has also established that the benefits of FDI are particularly amplified in economies with good governance, well-functioning institutions and transparent, predictable legal environments.\textsuperscript{1598}

In as far as labour rights are concerned, it has been argued that the impacts of FDI are often limited and in some cases detrimental, particularly the “race to the bottom” effects often related to labour issues (as well as environmental issues).\textsuperscript{1599} In relation to this, it has been argued that low labour standards countries are a haven for foreign investors\textsuperscript{1600} as well as that foreign investors tend to locate where union representation is weaker.\textsuperscript{1601} However, other studies have found that FDI tends to be greater in countries with better workers’ rights.\textsuperscript{1602} In regards to freedom of association and collective bargaining, there have been conflicting arguments about the impact of FDI on collective labour rights. While some argue

\textsuperscript{1596} CFA, 305th Report, Case No. 1870 (Congo), November 1996, para 142.
\textsuperscript{1598} Ibid.
\textsuperscript{1599} Ibid.
that FDI does not have a negative impact on these rights, others argue that FDI has a negative effect, including the effect that foreign takeovers reduce union bargaining power in that country.

It is important to note that within IFIs, loans for FDI are usually covered by the private lending arms such as the IFC of the World Bank Group and the Inter-American Investment Corporation (IIC) of the IDB etc. To elaborate how FDI as economic policy affects labour standards, the IFC offers an interesting insight.

Although this section focuses on the conditionality practices of the public lending institutions of the World Bank and IMF, the IFC, the private sector lending arm of the World Bank Group, serves as a relevant example to this study for three reasons. First, the IFC is one of the agencies of the World Bank Group and second, the President and Board of Directors of the IFC are those of the WB although the two are legally separate, and thus, it would be expected that their approaches to freedom of association would be similar to that of the World Bank. However, the approach this institution has taken towards international labour standards on freedom of association and collective bargaining is interesting. It is also crucial to note that the IFC’s members are states and not private corporations as well as the fact that, to become a member of the IFC, a state must be a member of the World Bank.

In 2003, the IFC took an initiative to link lending conditions to ILO core labour standards. To this end, a CLS toolkit was developed, which excluded freedom of association and collective bargaining while prioritising the other core labour standards. The document states,

Compliance with CLS is not a condition for lending or technical assistance in client countries. The IFC and MIGA however, do have policies forbidding the use of harmful child or forced labour in investor project.

In 2006, the IFC adopted its Policy and Performance Standards on Environmental and Social Sustainability. Labour and Working Conditions is the second of eight Performance Standards (explaining why the labour rights section is dubbed Performance Standards 2, i.e., PS 2). PS 2 spells out the specific obligations of a

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1606 Tonia Novitz, “Core Labour Standards Conditionalities: A Means by which to Achieve Sustainable Development” in International Economic Law, Globalisation and Developing Countries, Julio Faundez and Celine Tan (eds.) (UK: Edward Elgar, 2010), 243.
1607 http://go.worldbank.org
borrowing company in ensuring the protection of basic workers’ rights. The Policy provides that the fundamental rights of workers are those stipulated in the core ILO conventions (listing them) as well as UN instruments. However, while the PS 2 purports to be based on all four CLS, its objectives are limited as follows,

- To establish, maintain and improve the worker-management relationship
- To promote the fair treatment, non-discrimination and equal opportunity of workers, and compliance with national labour and employment laws
- To protect the workforce by addressing child labour and forced labour
- To promote safe and healthy working conditions, and to protect and promote the health of workers

Though the core labour standards on non-discrimination, child labour and forced labour are explicitly incorporated in the objectives, there is no specific mention of freedom of association. Instead the policy document emphasises compliance with national law.

PS2 states that IFC clients are obliged to respect collective agreements with workers’ organisations to which the client is a party. As for freedom of association and collective bargaining, the Policy states that where national law recognises workers’ rights to form and join workers’ organisations of their choosing without interference and to bargain collectively, the client will comply with national law. In addition, “alternative means” to express grievances are to be enabled where national law restricts freedom of association.

Despite this positive development in the IFC, one can detect a sense of ambivalence towards freedom of association and collective bargaining. This is apparent considering the Policy states that the requirements are guided by international conventions negotiated through the ILO and UN, particularly the eight core conventions and the Convention on the Rights of the Child (CRC), and yet emphasises respect for the standards according to national law. An issue that is of concern here is the case where national law has little or no protection with regards to freedom of association and collective bargaining. In addition, referring to international labour standards while implementing national standards beats the very purpose of the international standard-setting role of the ILO conventions.

A further revision of the Policy came into force on the 1st January 2012. The document states,

Performance Standard 2 recognises that the pursuit of economic growth through employment creation and income generation should be accompanied by protection of the fundamental rights of workers.

1609 Ibid, 1.
1610 Ibid, 8
1611 Ibid.
The Revised Policy is not to different from the previous version, particularly with respect to emphasis on respect for workers’ rights in national law. However, it has added the UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families to the international conventions that guide it as well as the protection of vulnerable categories of workers in the objectives.\(^{1613}\) This includes children, migrant workers, workers engaged by third parties and workers in clients supply chains.\(^{1614}\)

Even before the IFC formally adopted PS 2, it had taken some measures to ensure that projects respect fundamental workers’ rights. In January 2004, the IFC agreed to include a freedom of association condition in a loan to the Grupo M clothing manufacturer in the Dominican Republic, after the ICFTU and the International Textile, Garment and Leather Workers’ Federation (ITGLWF) informed the IFC that the company had been implicated in dismissals and beatings of workers who tried to form a union.\(^{1615}\) The loan condition proved to be instrumental in protecting workers at a new Grupo M plant in a Haitian export processing zone (EPZ), when in mid-2004 hundreds were fired after protesting management’s refusal to recognise and negotiate with the union a majority of the workers had joined.\(^ {1616}\) Although it took several months of pressure and mediation, in 2005 the dismissed workers were rehired. By December of that year, Grupo M and the Haitian union approved a collective agreement – the first in the Haitian EPZ – that improved the very low wages and working conditions.\(^ {1617}\)

The IFC also has an accountability mechanism called the IFC’s Compliance Advisor/ Ombudsman (CAO). The CAO receives complaints about projects financed by the IFC and MIGA, the branches of the World Bank Group that provide loans and guarantees to the private sector. All in all, although FDI as economic prescriptions bears more on private businesses, the practice of conditionality by these private branches also has a bearing on international labour standards. In addressing the impact of FDI on core labour standards, the ILO concludes that FDI could either improve the situation by serving as a role model with respect to business ethics and CLS, or it could contribute to deterioration by “engaging in efforts to lobby governments to change labour legislation to a more

\(^{1613}\) Ibid, para 2
\(^{1614}\) Ibid
\(^{1616}\) Ibid.
\(^{1617}\) Ibid.
investor friendly environment”.\textsuperscript{1618} It is important to note that the PS2 have made their way into the policies of various entities, including the EBRD.

\textbf{6.3.3.4 Trade Liberalisation}

The single area most frequently subject to conditionality is trade policy.\textsuperscript{1619} The IMF, the WB and the WTO, in their role as promoters of the international economic order and coordinators for coherence in international policy-making, constitute the powerful triad that is facilitating the re-orienting and re-structuring of the world economy along this neoliberal line, through trade liberalisation.\textsuperscript{1620}

Trade liberalisation, put simply, is a move towards freer trade through the reduction of tariff and other barriers.\textsuperscript{1621} However, trade liberalisation is not simply about the elimination of tariffs and quotas. It also involves a whole apparatus that revolves around maintaining competitive market structures, such as making labour and financial markets more flexible, eliminating barriers to foreign capital and relaxing government control of the market. It therefore strongly affects governments, macroeconomic and social policies.\textsuperscript{1622} More importantly, it involves the free flow of goods, services and movement of capital, but not labour.

The dispute over the relationship between labour rights and trade is not new. The WB argues that trade liberalisation increases employment opportunities and the flow of labour\textsuperscript{1623} as well as increasing real wages, especially of unskilled and informal workers, which is likely to increase the income of poor households. This implies that trade protection is relatively more detrimental for the wages of informal workers and less so for formal workers.\textsuperscript{1624} Again, trade liberalisation reduces wage inequality and creates better wage distribution.\textsuperscript{1625}

\begin{footnotesize}
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\item[1619] David Greenaway and Oliver Morrissey, “Structural Adjustment and Liberalisation in Developing Countries: What Lessons Have We Learned?” 46:2 KYKLOS (1993), 243 (241-261).
\item[1620] See Marianna W. Kamara, “Structural Adjustment, Trade Liberalisation and Women’s Enjoyment of their Economic and Social Rights”, Graduate Institute Publications (2016).
\item[1622] See Marrianna W. Kamara, “Structural Adjustment, Trade Liberalisation and Women’s Enjoyment of their Economic and Social Rights”, Graduate Institute Publications (2016).
\item[1624] See World Bank, Peru Country Economic Memorandum - An Agenda to Sustain Growth and Employment through Greater Economic Integration, Report No. 32532-PE, 16th June 2005.
\end{itemize}
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However, those who argue that trade liberalisation is harmful to labour rights point out that one labour market effect of trade liberalisation is the change in labour market regulations that it engenders. In many cases these changes may weaken the bargaining position of workers *vis-à-vis* wages and social benefits thereby reinforcing existing trends of wage inequalities and increasing hazardous conditions in work places.\textsuperscript{1626} Critics of trade liberalisation have also blamed it for a host of ills, such as rising unemployment and wage inequality in the advanced countries, increased exploitation of workers in developing countries and a “race to the bottom” with respect to employment conditions and labour standards.\textsuperscript{1627}

### 6.3.3.5 Conclusion

One can deduce from the discussion above that, although conditionality and policy prescription and advice arising from economic policy, such as privatisation, trade liberalisation and the like, do not directly target labour legislation, these forms of conditionality do touch upon labour legislation and thus indirectly affect labour rights. However, as the cases have illustrated, even where conditionality does not explicitly mentions labour market reforms, other types of reforms can still have an adverse effect on labour standards in the recipient country. The effects, are not as defined and evident as in the case of the direct effects of conditionality. This is due to the fact that the target policy in such cases is not the labour rights or labour reforms. The labour rights are affected more coincidentally as a result of implementing these economic policies. Yet, they reflect policies that have been conditioned on financing from the World Bank and IMF and, as they have some margin of effect on collective labour standards, they are nonetheless important to study.

### 6.3.4 The WB and IMF and CLS: The Bigger Picture

The World Bank and IMF’s approach to collective labour rights has been discussed, with vivid examples of the approach in practice and the impacts in the light of collective labour rights. However, in order to present a fair picture of this approach, consideration of the other three core labour standards on child labour, forced labour and anti-discrimination is important because they differ from standards on collective labour rights in that they have not been perceived as having political connotations. They in turn reflect the evolution of the concept of development in the IFIs where the economic rationale has led to the IFIs adding or incorporating social considerations in their activities.

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\textsuperscript{1627} ibid.
In the 1990s, the World Bank’s position in regards to labour standards was still not a very positive one. In 1995, the Bank took its first look at the relationship between core labour standards and macroeconomic stability with the 1995 World Development Report, in which the Bank’s President emphasised that "work - safe, productive and environmentally sound - is key to economic and social progress everywhere". This was step towards better approaches to labour standards by the Bank because working conditions were the focus of this report. It is important to state that engagement in dialogue between trade unions and the Bank started as early as 1990, with the Bank being reluctant in the early stages to accept CLS, not to mention establishing measures of compliance in its projects. The Bank’s reasoning was that CLS might inhibit achieving the macroeconomic goals that the Bank is bound to pursue. The Bank clearly stated that,

As is the case with any organisation, the Bank must address substantive questions - including core labour standards - from the perspective of its mission which is to reduce poverty and promote economic and social development.

In 2000, the Bank, in addressing core labour standards argued that the debate surrounding CLS is highly relevant for the Bank. However, as the Bank is obliged by its legal framework to base lending considerations based on their demonstrable economic effects, the Bank supports the standards related to child labour, forced labour and gender equality. The Bank further stated that,

Articles of Agreement instruct staff to take only economic considerations into account in its decisions. Furthermore, it is prohibited from interfering in the political affairs of any member or being influenced by the political character of the member(s) concerned. These provisions of the Bank’s charter have implications for how the Bank can address the issue of labour standards. As a general rule, it cannot act as an enforcement agency for international or national law. The Bank could attach conditions on labour standards to loans, but only to the extent that lack of compliance with the standard undermines the economic development objective of its programs. Additionally, such conditions must not interfere in the domestic political affairs of the borrowing country.

Subsequently, in 2002 the World Bank’s President stated that, “…the Bank supports the promotion of all of the four core labour standards but … does not apply conditionality on these standards in its lending”.

1630 World Bank.
1632 Ibid.
1633 World Bank, Transcript of Town Hall Meeting with NGOs (Washington, D.C., 2002).
The Bank has indeed played a more positive role in the promotion and implementation of the other three core labour standards, as compared to freedom of association and collective bargaining. As for child labour, the Bank has been highly involved in efforts towards elimination of child labour and systematically started addressing these rights in the 1990s when child labour began to receive increased international attention. One of the Bank’s substantial gestures in this regard was the establishment of the Global Child Labour Programme (GCLP). The objectives of this programme are to identify and strengthen the comparative advantage of the World Bank on this issue, engage the World Bank to proactively address the issue of child labour in its lending and non-lending operations, and have the World Bank facilitate greater cooperation among the multilateral agencies. 

One of the Bank's substantial gestures in this regard was the establishment of the Global Child Labour Programme (GCLP). The objectives of this programme are to identify and strengthen the comparative advantage of the World Bank on this issue, engage the World Bank to proactively address the issue of child labour in its lending and non-lending operations, and have the World Bank facilitate greater cooperation among the multilateral agencies. Through the programme the Bank has, by utilising the Bank's comparative advantage in mainstreaming child labour into broader poverty alleviation strategies, been able to apply rigorous analytical and policy focused research, and to support the collection and development of quantifiable data and statistics. This undertaking has been aimed at understanding the causes underlying child labour and linking these to the harmful economic and developmental impacts of child labour (emphasis added). The Bank in this stance has also collaborated with other relevant international organisations such as the ILO and UNICEF.

Despite this encouraging position, the World Bank has not disguised its primary approach to labour rights, even child labour which it has so diligently taken account of. The Bank has stated that,

Outside groups have raised the possibility that the Bank use lending conditionalities to pressure governments to do more to curb child labour through stricter legislation, more stringent enforcement, or other means. Issues of conditionality must be addressed in the light of the Bank's mandate to promote economic and social development. The Bank cannot assume the role of an enforcement agency for the requirements of national or international law, which have no bearing on its specific operations. Requiring its member countries as a general proposition to enforce certain labour law standards regardless of their relevance to Bank operations would raise broader issues with respect to the Bank's mandate and cannot be limited only to the subject of child labour. Therefore, the Bank can only impose conditionalities in this area to the extent that an absence of consistency with child labour standards undermines the execution or the developmental objective of its specific programs and projects (emphasis added). This would mean that a provision that the borrower would undertake to enforce its laws would be included in loan agreements where there are good

1634 Christine Kaufmann, Globalisation and Labour Rights, 108.
1637 Ibid.
reasons to believe that exploitative child labour with negative developmental effects may occur.\textsuperscript{1638}

Here, the ever-apparent instrumental approach of the Bank is explicit, in that child labour can be applied in conditionality only where it factually or potentially adversely affects the execution of the Bank’s programs and projects. This is to say that eliminating child labour is not an objective or aim in itself, rather, it is a variable in implementation of development policy and thus relies on an economic rationale.\textsuperscript{1639} The economic considerations, even in this case, prevail over human rights and more specific labour rights considerations.

All in all, the World Bank’s take on child labour has pushed some borrowing members to address this issue\textsuperscript{1640} and has imposed conditions regarding child labour standards in its financial assistance, particularly when there are good reasons to believe that exploitative child labour may undermine the execution or developmental objective of its programs.\textsuperscript{1641} Thus, for example, clauses on combatting child labour have been incorporated in poverty reduction strategy papers. In Benin, the government in its papers provided that,

\textbf{Employment.} The educational policy assigns priority to technical and vocational training to fill the jobs that will be created by the development of clusters of structuring projects with multiplier effects. The SCRP also emphasises: (i) the development of income-generating activities; (ii) the integration of young people into economic activity; (iii) promotion of the social economy (including the assignment of a monetary value to domestic labour); and (vi) the generalization of social security registration and efforts to combat child labour.\textsuperscript{1642}

It is however crucial to state that conditionality is not the only means through which the World Bank has addressed child labour. For example, the Bank established a programme in Brazil where, if families committed to enroll all their school aged children in school and the children had satisfactory attendance (did not miss more than two school days in a month) and academic performance, the family received a stipend. The aim was to reduce the incentive for children to work and increase school enrollments among poor children.\textsuperscript{1643}

\textsuperscript{1639} See Mac Darrow, \textit{Between Light and Shadow}, 164.
The more recent case of Uzbekistan highlights the increased positive role of the WB in regards to child and forced labour. Here, the World Bank had an on-going project, the Rural Enterprise Support Project, for financing improvement and diversification in the agricultural sector when there was widespread use of child labour and forced labour in cotton harvesting, usually organised and supervised by local authorities. After an outcry from the international community, community-based organisations and international organisations, as well as a complaint lodged with the Bank’s Inspection Panel that the Project was causing harm to people forced to pick cotton, the Bank took measures to address this issue. The Bank acknowledged that the organised recruitment of a large number of people to contribute to cotton production poses certain risks linked to workers’ rights that need to be addressed. Subsequently, in cooperation with the ILO and the government, the Bank instituted a Third-Party Monitoring and Feedback Mechanism, where the ILO would monitor the problem as well as provide feedback to the WB on the progress on efforts to eliminate child and forced labour. The ratification of conventions Nos. 182, 29 and 105 was an early measure, as was the promulgation of the respective provisions in national law. Subsequently, the Decent Work Country Programme was established, which assisted the government in implementing the standards under the conventions. Following the 2015 cotton harvest, the ILO concluded that there was no longer systematic use of child labour, but concerns remained about forced adult labour and required further action to reduce and eliminate it. Important to note is that the World Bank Group signed a MoU stipulating that the ILO would carry out monitoring in the WBG-financed project areas in 2015 and 2016 as agreed with the government.

In January 2017, the ILO submitted to the WB an assessment on the use of child and forced labour in the country, where it found that child labour had been eliminated and that “no incidences of child labour and forced labour were identified in regards to WB-supported agriculture, water and education projects, although forced labour remains a risk for certain categories of workers”. In conclusion, the Bank stated that partnership with standard-setting organisations, such as the ILO, as well as close coordination with other development partners, enabled the WBG to use its leverage to facilitate the policy change process.

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1645 Ibid, 27.
This incident turns the page on the strict instrumentalist approach of the World Bank towards labour rights. It marks an important turning point where policy coherence with international labour standards is gaining momentum as a crucial aspect of development. As most labour reform in the World Bank and IMF is on the basis of measures that enhance employment and productivity, addition of the concept of decent work (promulgated by the ILO) to the work of these IFIs facilitated the Uzbekistan project’s continuity.

The IMF has taken a similar approach as that of the World Bank in regards to child labour, although it is important to note that the IMF has not dealt much with child labour. The IMF has stated that it fully supports ILO efforts in promoting CLS aimed at reducing worker exploitation, especially the practices of child or forced labour. However, while helping countries put in place policies that make globalisation work (macroeconomic policies, structural policies that help markets function, social safety nets)\footnote{IMF, “Debt Relief, Globalisation, and IMF Reforms: Some Questions and Answers”, IMF Staff Paper, 12th April 2000.}, the IMF has not used conditionality as a means to combat child labour. Instead, the IMF draws on the findings of the World Bank, which has taken more action in this regard, where they share the same deregulatory thrust in as far as labour standards as a whole are concerned and draw upon each other on grey areas of mutual concern.\footnote{See for example World Bank, World Development Report 2013, Jobs (2012).}

As for gender equality, the situation is not too different from that of child labour. The Bank adopted an operational policy with the aim to "reduce gender disparities and enhance women’s participation in the economic development of their countries by integrating gender in its country assistance programs."\footnote{World Bank, Advancing Gender Equality - World Bank Action Since Beijing (Washington, D.C.: World Bank, 2001), 2.} As a result, the Bank has institutionalised a gender perspective in its lending activities.\footnote{Christine Kaufmann, Globalisation and Labour Rights, 111.}

Insofar as the IMF is concerned, gender equality has involved efforts to increase participation of women in employment. In this regard, raising female labour participation rates not only improves gender equality, but also helps boost and maintain growth rates.\footnote{Chad Steinberg, “Can Women Save Japan (and Asia Too)?” 49:3 Finance and Development (2012), 4. The publication is IMF’s quarterly magazine which publishes analysis of the international financial system, economic development and other global economic issues.} An IMF staff discussion note states,

> Women have demonstrated a stronger preference for expenditure on child welfare than men. Accordingly, better opportunities for women could be an important contributing factor to broader economic development in poor countries, for instance through higher school enrollment for girls. However, while the relationship between gender equality and growth is
often assumed to be positive, more research will be needed to prove its robustness and determine causality.

Again, the IMF looks at gender equality, as with the other labour rights, from an economic perspective and the impact it has on economic development rather than as an objective in itself.

What is striking about this picture is that, although the values (other than freedom of association and collective bargaining) correspond to those in the eight ILO fundamental conventions, the WB and IMF rarely refer to or use these conventions as the standards for these values. This is perhaps to avoid implying that they have committed to these rights, which would forsake the neoliberal and instrumental approach. However, the case of Uzbekistan sheds some light on the path towards further observance and incorporation of CLS in financing activities in a more rights-oriented approach.

6.3.5 Social Safeguards Policy

It is essential to state that the World Bank and IMF’s involvement in social protection issues was influenced by concerns that structural adjustment programs, as applied in Africa and Latin America, had adverse social effects on the populations. With the addition of the crisis in East Asia, Russia and Brazil, social policy was acknowledged as a critical element of sustainable poverty reduction strategy. Confirming this is the World Bank’s Social Protection Sector Strategy which states,

We have learned from these experiences that social protection projects and programs are needed and in demand by the World Bank’s client countries and have, by and large, been effective. However, as the world has evolved, so has the need for the World Bank to modify its approach to social protection…Our experience has shown the need for a new, integrated conceptual framework that builds on previous knowledge but better reflects the world situation at the beginning of the 21st century – a situation where risks and opportunities are on the rise, where it is recognised that neither the state nor the market alone will provide the best solution, and where the plight of more than a billion poor people poses the question of how to manage risk better, not providing handouts after a shock has occurred.

Before looking into the social policy of the World Bank, it is crucial to recap that the Articles of Agreement of the World Bank provide that all policies and activities of the Bank are to be in line with (guided by) the purposes of the Bank. The same Article also mentions labour conditions in the purposes of the Bank by stating that one of the purposes is to promote the long-range balanced

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1657 Christine Kaufmann, Globalisation and Human Rights, 103.
1659 See Article 1, Agreement Establishing the IBRD, 1944.
growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories.1660

Despite this hopeful stance where the World Bank has the purpose of raising the conditions of labour in its constitutional document, the Bank’s practices have a conflicting approach and effect. As a matter of the Bank’s ambivalence to collective labour rights, various factors can be used to explain the Bank’s policies in regards to freedom of association and collective bargaining. First is the Bank’s ideology agreeing with the Washington Consensus, where deregulation of labour and labour market flexibility are key elements of economic growth. Moreover, economic thought, research and arguments related to the effects of unionisation and collective bargaining on economic efficiency and growth have further contributed to this approach.1661 Research has addressed the question of the relationship between collective labour rights and economic growth and efficiency. As previously discussed, Aidt and Tzannatos did not find evidence of detrimental effects of freedom of association and collective bargaining on economic performance, but rather found that respect for these rights results in a more equal distribution of income and reduction of earnings inequality.1662

Stiglitz challenges the Washington Consensus’ narrow objectives which focus on GDP and the instruments of development promoting trade liberalisation, privatisation and stabilization. Recognising that the objectives of development go beyond simply increase of GDP, he argues that workers’ rights should be a central focus of a development institution, such as the World Bank.1663 In addition to the positive effect of worker participation on productivity, collective bargaining can bring about distribution that might not otherwise be achieved.1664 Moreover, advocating for workers’ rights and representation at every level—from the local, regional, national to the international level can result in improvement in efficiency. Interestingly, Stiglitz argues that some of the disastrous economic decisions that were made in responding to the East Asian economic crisis would not have occurred had workers had a voice in the decision-making.1665

Regarding the political nature of freedom of association and collective bargaining rights the World Bank has maintained that it cannot impose conditions of these rights due to the political prohibition in its Article of Agreement. This position

1660 Article I (iii), Articles of Agreement IBRD, 1944.
1663 Joseph Stiglitz, “Democratic Development as the Fruit of Labour” 4:1 Perspectives on Work (2000), 31
1664 Ibid, 34.
1665 Ibid, 35.
has been emphasised by the Bank’s role in promoting the abolition of child labour as well as gender equality,\textsuperscript{1666} in that the Bank has played a vital role in implementing these non-political (core) labour rights, but has been hesitant on the issue of the political nature of freedom of association and collective bargaining.

The World Bank’s position on freedom of association is further demonstrated by its most recent social policy. The Bank’s Executive Board adopted the new \textit{Environmental and Social Framework} (ESF) on the 4\textsuperscript{th} August 2016.

The new framework embodies the World Bank’s commitment to environmental and social protections and responds to new and varied development demands and challenges that have arisen over time. It also introduces comprehensive labour and working condition protection; an over-arching non-discrimination principle; community health and safety measures that address road safety, emergency response and disaster mitigation, land acquisition, indigenous people, cultural heritage and a responsibility to include stakeholder engagement throughout the project cycle.\textsuperscript{1667}

The Framework, which consolidates the Bank’s individual safeguard policies and its policy on borrower systems into one policy of ten environmental and social standards (ESS1-ESS10), provides for labour and working conditions in standard ESS2. Here, the Bank “recognises the importance of employment creation and income generation in the pursuit of poverty reduction and inclusive economic growth” and that, “borrowers can promote sound worker-management relationships and enhance the development benefits of a project by treating workers in the project fairly and providing safe and healthy working conditions”.\textsuperscript{1668}

The policy goes on to specify the requisites in forced labour, child labour and minimum age, non-discrimination and equal opportunity as well as freedom of association and collective bargaining without any mention of the ILO standards or conventions.\textsuperscript{1669} In regards to freedom of association and collective bargaining, the Framework states,

\begin{quote}
In countries where national law recognises workers’ rights to form and to join workers’ organisations of their choosing and to bargain collectively without interference, the project will be implemented in accordance with national law. In such circumstances, the role of legally established workers’ organisations and legitimate workers’ representatives will be
\end{quote}

\textsuperscript{1666} The Bank occasionally included child labour issues in its programmes, but began addressing them more systematically when child labour began to receive increased international attention in the late 1990s. In 1998, the Bank established a special child labour initiative, the Global Child Labour Programme, and recognising that it does not have the expertise to devise its own definition of exploitative child labour, referred to specialized agencies and the existing legal framework established by the UN and ILO. The Bank has also played an active role in promoting gender equality and non-discrimination. See Christine Kaufmann, 109.


\textsuperscript{1669} \textit{Ibid}, 33-34.
respected, and they will be provided with information needed for meaningful negotiation in a timely manner. Where national law restricts workers’ organisations, the project will not restrict project workers from developing alternative mechanisms to express their grievances and protect their rights regarding working conditions and terms of employment. The Borrower should not seek to influence or control these alternative mechanisms. The Borrower will not discriminate or retaliate against project workers who participate, or seek to participate, in such workers’ organisations and collective bargaining or alternative mechanisms.\textsuperscript{1670}

The qualified provision of freedom of association and collective bargaining rights on basis of national law, which is not provided in respect to the other labour rights, is questionable. It belies the significance of reference to international labour standards\textsuperscript{1671} as the internationally accepted point of reference as far as these rights are concerned. Again, as national labour standards are susceptible to being lowered by governments for various reasons, such as attracting FDI, economic policies etc, these rights cannot be based on national standards. To gain more perspective into this notion, it is crucial to bring up the discussions that took place during the consultation phase of the Framework. In the discussions on the third draft of the Framework, the World Bank stated that the standard “builds on borrower countries’ existing commitments to international labour laws and conventions”, focusing on requirements related to non-discrimination, child labour, forced labour, freedom of association and the right to collective bargaining. The draft further indicated that it reflects the core principles of ILO’s Fundamental Principles and Rights at Work.\textsuperscript{1672} However, the final draft eliminated mention of the ILO standards.

This again raises concerns. To begin with, as the draft provides, national law should be looked at with a wider perspective. It is not to be limited to obligations strictly arising from laws enacted by national legislative bodies. Of course, when one considers the difference between the status of international treaties in monoistic and dualistic states, it is well established that in monoistic jurisdictions, ratified international treaties form a part of the national law framework, and in such a case, to refer to national law would be less problematic. However in dualist countries, this creates the problems with referring to national law previously discussed, as the national and international systems are two separate aspects.\textsuperscript{1673} Despite this, as long as a country has ratified a convention, obligations on the part of the state arise regardless of whether they have been incorporated in national law. Therefore, respect for national labour law encompasses respect for those obligations placed on a country that emanate from international labour law treaties and conventions, something the WB (and IMF) clearly seem to disregard in this

\textsuperscript{1670} Ibid, 33.


\textsuperscript{1673} For further details on monoism and dualism, see “International Conventions and National Law, Chap. 4.5.9
case, the manner in which World Bank conditionalities have affected national labour laws, as discussed earlier. The World Bank does have the ability (and uses it) to shape national labour law. It is not surprising if one is to argue that the Bank lays emphasis on national law because it is the level at which the Bank has the possibility to influence change, as opposed to international standards that are not prone to maneuver. In addition, as far as freedom of association and collective bargaining rights are concerned, this requirement poses a problem in countries where there is little or no protection of the rights.

Again, the third draft clearly states that the standards in the Framework (ESS2) reflect the ILO core labour standards. Therefore, as the ILO is the standard-setting body when it comes to labour standards, it would only seem appropriate to refer to these internationally accepted fundamental values, the subjects of which are the very borrower states covered by the policy. However, the Bank’s refusal to make any mention of the ILO standards in the final Framework perhaps stems from the possibility that referring to the ILO standards in the policy would amount to making a commitment and this would trickle down to the other operational standards as well as the accountability mechanisms (e.g., the Inspection Panel). The Safeguard will become fully operational in 2018 and in the meantime, the Bank will engage in intensive preparation and training as well as preparation of Guidance Notes that will provide specific instructions to WB staff and borrowers on how the labour and other safeguards must be interpreted and applied.

Despite this setback, the incorporation of the values in the Framework marks a positive step towards the realisation of the ILO standards on freedom of association and collective bargaining, as well as the other core labour standards, in the policies of the World Bank. Even with this considerable progress, one concern that is raised is that rhetorical advances of the Bank have not always been matched by the Bank’s operations and country-level policy advice, creating a continuous challenge for trade unions, civil society and the ILO.1674

On the other hand, the IMF does not have an incorporated social policy like the WB’s Framework. However, it has recently released a staff paper titled “Social Safeguards and Programme Design in PRGT and PSI-supported programs”, which considers how poor and vulnerable groups can be protected in Fund-supported programs in low-income countries using measures to safeguard and improve public spending on these groups.1675 The paper was the issue of an IMF

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Executive Board discussion on social safeguards. The paper and discussions do not address workers’ rights.

6.3.7 Conclusion
The World Bank and IMF’s ability to influence compliance with international labour standards in recipient countries through conditionality has been demonstrated through the various cases discussed in this section. In addition, the WB and IMF’s ability to persuade states to pursue particular polices on labour reforms through consultation, policy advice and publication has been addressed. Both of these methods have been used to promote and demote the labour standards and to implement and dismantle as well.

The World Bank and IMF do affect international labour standards on freedom of association and collective bargaining in their activities, particularly in member states that receive financial assistance from the institutions. The role they play in the promotion and implementation of these rights, as the cases discussed herein demonstrate, is not a “black or white” one, meaning these IFIs do not play a wholly positive role in promoting and implementing these rights or a wholly negative role. Rather, it is a spectrum with two opposite ends and a grey zone in between. Therefore, it is no surprise that there are cases where the two institutions actively promoted freedom of association and collective bargaining in recipient countries and cases where they undermined and dismantled these rights. In some cases, they have required flexibility in general without specifying how this is to be achieved. There are also cases where they have remained quite neutral, neither promoting nor undermining these rights. This contradictory result can be explained by a number of possible arguments.

First is the economic rationale coupled with the instrumentalist approach. Here, in adhering to a narrow interpretation of their mandates, both the IMF and World Bank foremost apply economic rationale to their activities. In such an approach, labour rights are to be pursued only if they contribute to objectives defined in economic terms. This instrumentalist approach is at odds with the human rights approach\(^{1676}\), as rights such as freedom of association and collective bargaining with alleged controversial economic effects are discouraged or excluded. In the discussed examples, child labour and gender equality are approached from economic perspectives, overlooking the fact that economic theories cannot define the values to be protected nor provide a concept that is universally accepted - unlike international law,\(^{1677}\) and even more so international labour law. However, an important observation that the approaches to child labour and gender equality bring to surface is the fact that, indeed, social issues are embedded in economic

rationale and economic development cannot be achieved in total isolation from these social vectors. The Bank’s practice corroborates this aspect in that the ever increasing scope of social issues that the Bank needs to embrace for its operations to have the desired outcomes proves that pure economic rationale is only a mythical phenomenon.

It is entirely possible that the recipient governments, in some instances, use or take advantage of the WB and IMF’s approach to freedom of association and collective bargaining as a means to limit these rights in the domestic context of their own will. A government that views trade union activities as burdensome to social dialogue due to unrealistic demands may readily accept conditionality that decentralises collective bargaining, although this is mere speculation because of the hidden nature of negotiations.

Even the core labour standards embraced by the World Bank and IMF have not been based on sources of international labour law. Instead, the IFIs have relied on their internal interpretations, the rationale for international standards and national law, which is usually insufficient on its own. Moreover, with the neoliberalism informing the doctrinal approach of these institutions, freedom of association and collective bargaining are found to be impediments to economic development. Despite marked changes in the approach of these institutions to collective labour rights, their programs still generally pose adverse effects on the implementation and promotion of these rights.

In sum, although the WB and IMF have taken some steps towards playing a positive role in promoting and implementing freedom of association and collective bargaining, the overall effects on the rights associated with their operations and policies is negative. This is to say that the WB and IMF, through their lending programs and advice, have mostly played an adverse role towards the promotion and implementation of these rights. The factors below provide an analysis of this finding.

6.3.7.1 Promotion of Freedom of Association and Collective Bargaining

The cases discussed above have illustrated the few instances where the WB and IMF have promoted freedom of association and collective bargaining. However, one observation has been that these institutions promote freedom of association to a greater extent as compared to collective bargaining. The flexible labour markets that these IFIs promote are more concerned with the decentralisation of collective bargaining and encouraging bargaining at the enterprise level. However, this does not shake the foundation of the right to freedom of association itself, but rather affects the collective bargaining mechanisms and the level at
which such bargaining takes place. In general, the end result of promoting flexible labour markets is demoting freedom of association and collective bargaining. Therefore, the promotion of freedom of association by these IFIs is an exception to their general tendency to promotion of flexible labour markets. Despite this sporadic promotion of the labour standards, it is a step towards playing a more positive role in promoting these rights.

6.3.7.2 Undermining and Dismantling International Labour Standards on Freedom of Association and Collective Bargaining

Aside from the few cases discussed above, labour conditionality in the World Bank and IMF has generally taken a deregulatory nature. When labour standards are the target of conditionality in the recipient country, the result of the WB and IMF’s programs has been the dismantling of the labour standards, mostly due to emphasis on labour market flexibility affiliated with the neoliberal approach these institutions take. Other policy conditionalities such as privatization and cuts in government spending have had indirect negative effects on the labour standards. In this case, the prescriptions by the WB and IMF have the effect of undermining these labour standards. This undermining extends also to the WB and IMF policy consultations and advice which persuade states to adopt these policy measures, despite their obligations arising from international labour standards.

Despite arguments that conditionality on national policies is meant to enhance economic growth, it is clear from the cases discussed herein that conditionality generally has negative effects on collective labour rights. It is crucial to state, however, that conditionality usually does not explicitly negate the rights to freedom of association and collective bargaining, nor does it negate the rights of these institutions to exist. However, advocacy of policies, especially labour flexibility, has an impact on collective bargaining and is often synonymous with obliterating legal protections for workers.1678 The indirect effect of labour conditionality is seen in the case of economic conditionality, such as privatisation and trade liberalization, where labour rights are not the target of conditionality, but the (perhaps) coincidental side effect of economic conditionality. Although such economic conditionality carries the spirit of labour flexibility, the impact is less substantively defined. Here such conditionality is not the direct cause of incompliance with human rights standards, but the conditionality is nevertheless a collaborator because its drive for deregulation of labour markets. The general effect in both cases is the undermining of collective labour rights. Indeed, the contrasting norms associated with the World Bank and IMF reflect a fundamental tension that has lingered throughout the history of the institutions - the struggle between global norms and laws that call for greater respect for socio-economic

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rights, and neoliberal ideologies that embrace market-based policies and principles.¹⁶⁷⁹

Although not all agreements between the IFIs and member states specifically involve labour reforms, and labour market flexibility does not contradict collective bargaining rights a priori, the conditionality embedded in the programs undermines freedom of association and collective bargaining rights both in terms of legal protections afforded to labour as well as the extent these rights are maintained in practice. In other words, labour flexibility comes at the cost of undermining such fundamental rights. Although flexibility may be necessary for short-term adjustment, it should not be used as a justification for dismantling or denying labour rights.

Again, although labour rights are not always directly challenged in the policies, such policies establish a political environment detrimental to a labour rights regime.¹⁶⁸⁰ In such a scenario, the overall level of respect for labour rights would decrease as both labour laws and practices change to match the goals and objectives of the programs.

Another observation from the cases is that labour conditionality in the World Bank and IMF does not always impact the very core of the labour rights. For example, at the core of freedom of association is the right to join and form unions of one’s own choosing, which the IFIs have not affected with their conditionality. That is, labour flexibility may not explicitly negate the right of collective bargaining organisations to exist. Another example is in regards to the level of bargaining previously illustrated in the cases above. Where conditionality requires that the level of bargaining be decentralised from national or sectoral level to enterprise level, the core of collective bargaining (that is the right to negotiate work conditions with employers) is not obliterated, just the level at which this should take place. The effect here is the weakening of the structure and unions as stated by the CFA¹⁶⁸¹, but not total deprivation of the right to bargain. However, these weakening effects still have serious implications for the enjoyment of the rights.

This undermining role can be observed in two ways. For those borrowing states that have strong bargaining structures where freedom of association and collective bargaining principles are respected, the WB and IMF play a dismantling role. In those borrowing member states where these rights and the relevant structures are weak, the WB and IMF inhibit these countries from taking steps towards the full realisation and respect for these rights. The role of the World Bank and IMF in the elimination of child labour and non-discrimination rights, particularly the

¹⁶⁸⁰ Ibid.
¹⁶⁸¹ See CFA, Case No. 2820 (Greece), Chapter 4.5.2.4.4,165
enhancement of women’s rights, has also been discussed. Although in these special cases, the IFIs have played a positive role compared to their role regarding collective labour rights, their approach has been more *ad hoc* and instrumental, in that the rights have been considered on the basis of economic rationale and only come into play where they affect the success of the programme or fall within the economic considerations that IFIs take into account.

### 6.3.7.3 Non-Compliance with Obligations under International Labour Standards

WB and IMF operations in member states have been a direct cause of member states’ non-compliance with international labour standards on freedom of association and collective bargaining due to the labour rights impact of the IFIs’ conditionalities. This has occurred in two ways, which Bradlow calls the operational and institutional aspects.\(^{1682}\) The operational aspect has more to do with ensuring that the design and implementation of the IFIs’ projects, programs, policies and in-country activities are consistent with internationally recognised human rights standards, and in this case international labour standards.\(^{1683}\) The WB and IMF programs and affiliated conditionality, as discussed, have had the effect of causing deregulation of the labour standards. Again, in implementing the programs, there have been cases where this has been done without consulting social partners. Therefore, the design and implementation of the IFI programs have caused non-compliance with international labour standards in recipient countries.\(^{1684}\) The institutional aspect pertains to the IFIs’ internal rules and procedures and focuses on the responsibility of the IFIs to ensure that such rules and procedures are consistent with the ILO conventions on freedom of association and collective bargaining. Again in this case, the WB’s policies have been discussed. Although they refer to child labour and forced labour, these are not based on the ILO standards. There is no mention of the ILO conventions in the policy. The operational guides also lack reference to these standards. However, despite the fact that the labour standards are not incorporated in policies and operational rules in this situation, what is crucial is that the World Bank and IMF should not undermine the ability of their Member states to live up to their international legal obligations when implementing WB and IMF programs, meaning that they should take regard of the borrowing countries’ obligations under, amongst others, the ILO conventions and not undermine efforts by these countries to abide by these standards.

An important aspect revealed by the cases studied herein is the extent of non-compliance with international labour standards on collective labour rights caused

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\(^{1683}\) Ibid.

\(^{1684}\) Ibid.
by the conditionalities and policy advice of the WB and IMF. The direct effect of labour conditionality is illustrated in cases such as Greece, where IFI conditionality is the cause of the non-compliance with international standards on these rights by the borrowing state. This direct cause is brought about by labour conditionality which specifically targets the legal system and structures or institutions relating to the rights, that is, due to conditionality, states embrace practices and principles that directly impact relevant labour laws and in particular, collective bargaining protections such as wage and employment safeguards.1685 Here the impact of labour conditionality is clear and defined. Again, the bindingness of collective agreements is a core aspect of collective bargaining, and where conditionality requires that binding collective agreements that are in force be negated, it touches the core of the right to bargain collectively. Wherever in this spectrum the rights are affected, there is no doubt that the World Bank and IMF labour conditionalities push for deregulation of ILO standards on freedom of association and collective bargaining in borrowing countries.

In the midst of arguments in favour of economic growth and prosperity, even at the expense of collective labour rights, one must not lose view of the recipient countries’ legal obligations. All of the cases discussed in this study involve countries that are members of the ILO and have ratified both conventions No. 87 and 98, although the issue of ratification is not an impediment in the case of these two conventions, as they are binding by virtue of membership to the ILO.

6.3.7.4 Consultation with Social Partners

Tripartite consultations among representatives of workers, employers and government form an important aspect of the ILO standards, as discussed earlier, and even more so in times of financial crises. The ILO bodies have highlighted the importance of this in its jurisprudence. As the operations of the IFIs have ramifications for people who do not have access to the decision-making processes, consultation, particularly in times of crises, could be a means to negotiate settlements, tradeoffs and agreements that would be difficult to imagine during economic stability and growth.

In some cases, in pursuance of implementing WB and IMF conditionalities, there have been tensions between the recipient government and domestic social partners because of the lack of consultation prior to the reforms arising from conditionality. This issue was more prevalent, but not exclusively, in the countries that were facing economic crises, such as Greece and Spain. Unilateral action on labour policies cannot be justified by the urgency of the need for financial support in times of a crisis, particularly since economic downturns do affect the social partners as well. Furthermore, as has been established by the ILO bodies,

Consultation is the sound way to agree upon the accurate measures necessary during such times. This is the case especially since the ILO’s jurisprudence on freedom of association and collective bargaining explicitly recognises the possibility of member states falling into economic peril, but provides the procedures and role of social partners in such times.

Consultation with employers’ and workers’ organisations in World Bank and IMF programs is desirable because, as reflected in the conditionality, labour reforms in these programs impact workers in profound ways such as job losses, wage and benefits rollbacks, workplace disruptions etc. In such times, the functions of these organisations as the representative voice of those most affected by such reforms, should not be taken lightly on the part of the IFIs and the recipient countries. Short of this, one can note that collisions between IFIs, particularly the World Bank and IMF, and social movements in recipient countries are not unheard of. These take place both over the content of their policies and the form of institutions (including the structure of the institutions and decision-making procedures).

The issue of the relationship between IFIs and member states arises in this context as well. The primary obligation to consult with social partners is on the part of the state. Some countries have shown explicit willingness to carry out consultations with social partners on policy reforms affiliated with lending, in light of the ILO standards. In Tunisia, the WB, while analysing the labour market reforms the country would launch, highlighted that in order to build a broad based consensus around the launch of structural reforms of the labour market and in the social sectors more generally, the Government and social partners had launched a social dialogue process, including the main trade union and main business confederation, with the support of the ILO. A new ‘social contract’ was signed, which was a form of consensual action plan which would pave the way for a reform of the Labour Code.

In some cases, recipient governments carry out consultations, but with the IFIs and other “programme partners” instead of the social partners. The Cypriot government, with a view of preventing possible adverse competitiveness and employment effects, committed that (over the programme period) any change in the minimum wage covering specific professions and categories of workers should be in line with economic and labour market developments and would take

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1687 In Indonesia, cuts in subsidies agreed to by the government and the IMF resulted in social unrest. Unions in South Korea engaged in strikes in order to combat IMF and WB restructuring prescriptions.
place only after consultation with the programme partners.\textsuperscript{1689} This departs from
the consultation required under international labour standards because, although
on the surface it seems like the required consultation, the parties amongst whom
the consultation takes place are not those stipulated by the standards. The onus of
consulting with social partners in adopting policy reforms is on the government
and the study has not been able to locate a case where the IFIs disallowed
consultation with social partners.

It is crucial to highlight that over the past few years, the WB and IMF have
promoted consultation with social partners in their lending activities. As a rapid
shift from the traditional and secretive manner in which reforms were negotiated,
creating PRSPs increasingly involves social partners in designing and committing
to reforms. The Sudanese government, for instance, stated that in a departure from
the top-down culture of decision-making of the past, the PRSP process will be
designed to open up considerable space for participation by all major
stakeholders, including civil society organisations (even those which may be out
of favour with the government), private sector representatives, trade unions,
women’s groups, donors etc.\textsuperscript{1690}

Finally, the WB and IMF have undertaken efforts to broaden their interaction with
labour at the international and national levels. Subsequent to a conference on “The
Challenges of Growth, Employment and Social Cohesion” in 2010, cosponsored
by the IMF and ILO, the IMF committed to jointly support a series of tripartite
social consultations in several countries between governments, employers and
trade union representatives in which labour market and employment issues are to
be discussed frankly and possible adjustments to existing policies considered.\textsuperscript{1691}
The World Bank engages with trade unions in various ways, including
international policy dialogue on economic and social issues, research on economic
effects of collective bargaining and training programs for Bank staff and trade
unions.\textsuperscript{1692}

\textbf{6.3.7.5 Adverse Standard Setting}

First and foremost, it is crucial to state that the concept of “international
standards” is intended to connote some universally, or at least generally, accepted

\begin{footnotes}
\item[1689] IMF, Memorandum of Understanding on Specific Economic Policy Conditionality (Cyprus), 29 Aug, 2013, 46
\end{footnotes}
canons of behaviour for states, corporations and individuals. As discussed earlier, the IFIs, and particularly the WB and IMF have, at least as far as development financing is concerned, become crucial standard setting entities. Although this standard setting role cannot fully compare with the ILO standards due to the issue of legal bindingness (where IFIs policies are not legally binding as opposed to ILO standards which are), the IFIs nevertheless set standards in the international as well as national contexts. This is to say that the policies that they promote have a normative dimension. The adversity in standard setting by these institutions occurs when the WB and IMF standards, such as labour flexibility, negate the ILO standards, which provide basic legal protections for workers.

The concluding remarks of the ILO’s First High Level Meeting on Employment and Structural Adjustment stated that, “the ILO should, of course, remain vigilant in ensuring that full respect for its standards on employment, human rights and tripartism - including freedom of association and collective bargaining - form an integral part of adjustment policies”. The follow through of this notion has not been as quick as one would expect because the WB and IMF adjustment policies have continued to perceive that international labour standards on freedom of association and collective bargaining hinder the process of structural adjustment, employment growth and economic growth. However, from the time of the High Level Meeting, there have been some small advancements towards taking account of labour standards in adjustment programs of the IFIs.

When discussing issues of international standards, one cannot avoid the discussion about the status or quality of such standards on a legal plane. For the most part, international standards have been developed and disseminated as norms or principles for voluntary acceptance by countries or other entities. On the one hand, international standards can take the form of legally non-binding norms generally viewed as soft law. On the other hand, they can take the form of legally binding rules established by international treaty on national legislation, constituting hard law.

The “hardening” of soft law is not a new phenomenon. The UDHR provides a good example of such hardening where it had originally been a non-binding proclamation of human rights and values, but led to the eventual adoption of the two Covenants of 1966, encompassing the rights and creating binding legal obligations for states. Thus, with widespread understanding and acceptance of the norms, the gradual move from soft law to hard law occurs.

Whether the standards created by the World Bank and IMF can be considered soft law is debatable. However, taking into consideration the notion that the central character of “soft” law appears to be the intended vagueness of the obligations it
imposes or the weakness of its commands\textsuperscript{1695}, the IFIs standards cannot be discarded entirely as they do have some soft law components. A better example would be the standards in regards to environmental protection and anti-corruption, which have gained universal acceptance and “hardened” with time. Given the substantive effects of these standards created by the WB and IMF, which have found their way into national policies and legislation, one cannot simply discard their relevance. The issue with the standards emanating from the WB and IMF is the “general acceptance” element. Conditionality is not a subtle concept and acceptance by states cannot be argued to be voluntary due to the means by which conditionality is transmitted and the manner in which reforms pursuant to these standards take place.

Moreover, the international standard setting role of the ILO in developing labour standards to safeguard workers’ rights such as the right to organise, collective bargaining, safe working conditions, protection of women workers and prohibition of child labour was in place even before the UN was established. The effect of the adverse standard setting is a hindrance to the ability of a country to live up to its legal obligations. As noted earlier, both entities play a standard-setting role, but what sets them apart is that the WB and IMF standards, adopted through conditionality, are not of a legally binding nature, while the ILO standards are legally binding. By setting standards that are adverse to labour standards on freedom of association and collective bargaining, the WB and IMF’s role is undermining as states deviate from their obligations in pursuit of financial assistance. Of course faced with the difficulties of deficiency in capital or crises, the states face limited options. In addition to all this, as noted in the discussions above, development of international standards involves other actors than states. These actors include international organisations, financial institutions, NGOs etc. Thus, international law is facing new challenges to address the new global order, which now encompasses other important actors\textsuperscript{1696} whose activities cannot be ignored. The same thread applies to the issue of promotion. The policies and standards that the WB and IMF advocate or promote are in conflict with the ILO standards on freedom of association and collective bargaining. Although at this point, it is more a matter of persuasion, the impact, regardless of how subtle, is negative.

6.3.7.6 Inconsistency

The impact of conditionality on labour standards depends on various factors, some at the national level. As has been discussed, in some cases in IFI financing


programs, national labour laws are subject to direct criticism as constraints to effective adjustment. In other cases, the criticism might be implicit, but national labour laws are not addressed directly. Instead, there are more general requirements for labour flexibility. In yet other cases, national labour standards as regulations may not figure at all in adjustment negotiations, though there may be concerns that affect the broader parameters of employment and social policies.\footnote{1697}

Although the general approach of the WB and IMF has been deregulatory as far as freedom of association and collective bargaining are concerned, there has been a fair share of inconsistency, particularly when it comes to promoting these rights. Where at one point the IFIs push for deregulation and then later promote the same deregulated rights, or vice versa, the inconsistency sends a message of the unserious attitude the IFIs take towards these labour standards. The cases of Romania and Indonesia highlight this inconsistency.\footnote{1698} However, the real force behind this shifting approach is the economic rationale, which allows these institutions to draw in or cast out labour rights, as long as they have some economic impact on the project or programme.

All in all, with the few exceptions highlighted herein, the general role of the World Bank and IMF as far as freedom of association and collective bargaining rights are concerned is a deregulatory one, characterised by legal interference in the form of dismantling, undermining and deregulation. However, it is encouraging that the IFIs are showing a slow, but sure shift in their approach towards these rights. There is surely light at the end of this tunnel.

### 6.4 The Inter-American Development Bank

#### 6.4.1 Introduction

The IDB took on policy-lending ten years later than the WB, although there were concerns about the technical ability to undertake these operations, about the overlap with the BWIs and the risk that the image or identity of the IDB could be impaired in contentious issues.\footnote{1699} The World Bank took on a temporary training role as the IDB moved into policy-based lending. Consequently, the IDB adopted the identical macro conditionality as the WB, but used its own country analyses and objectives to spell out different conditions.\footnote{1700} It has been argued that the IDB has “played an enthusiastic role” in the promotion and legitimisation of neoliberal reforms.\footnote{1701} The international-domestic conditions within which the IDB’s
interventions took place led to a focus on its institutional capabilities on lending as the central component of its development function, subordinating its role to buttressing fragile microeconomic stability, conditional upon the execution of major reforms.\footnote{1702}

In practice, the IDB has followed the WB and IMF’s application of conditionality based on neoliberalism and labour flexibility. It is crucial to bear in mind that the U.S.A. is a major shareholder and a regional member in the IDB. Though the IDB traditionally provided loans for specific projects (i.e., used only project lending), when a U.S.–backed proposal was made to initiate “structural adjustment” type loans carrying macroeconomic policy conditions similar to those of the WB and IMF, it was met with opposition by many member countries due to the controversies about conditions imposed by these institutions in policy-based loans, which had already been associated with harsh austerity measures.\footnote{1703} The compromise reached was that the IDB would use structural loans, but only on a sectoral basis and with a limit (25% of the IDB lending at the time), and conditionality would focus on economic policies in the sector concerned, including termination of subsidies to state-owned enterprises etc.\footnote{1704}

6.4.2 The Direct Effect of Labour Conditionality
The IDB’s practical use of labour conditionality is not too different from that of the WB. After the IDB introduced policy-based lending in 1989, the projects it financed were characterised by the Washington Consensus prescriptions including privatisation, cuts in public spending, enactment of laws to protect foreign investors etc.\footnote{1705} Between 1990 and 1994, among the IDB’s main areas of policy reforms was the labour market, where labour market deregulation was required by the Bank.\footnote{1706} The period between 1994-1996 saw further deepening of labour deregulation, considered as vital to the needs of pro-market development, whereby existing labour legislation, institutions and access to political power created economic rigidities.\footnote{1707} Argentina provides an interesting case for analysing the legal implications of conditionality requiring deregulation of the labour market during the financial crises in South America in the 1990s.\footnote{1708} A recent IDB strategy paper for Argentina states that Argentina’s business climate does not favour investment or productivity due to, among others, labour regulations as the main obstacle to doing business. In addition, the strategy paper

\footnotesize{\footnote{1702} Ibid.}
\footnotesize{\footnote{1703} Overseas Development Institute, “The Inter-American Development Bank and Changing Policies for Latin America”, Briefing Paper, April 1991, 3.}
\footnotesize{\footnote{1704} Ibid.}
\footnotesize{\footnote{1705} Ibid.}
\footnotesize{\footnote{1706} See Ernesto Vivares, Financing Regional Growth and the Inter-American Development Bank: The Case of Argentina, (Oxon: Routledge, 2013), 67.}
\footnotesize{\footnote{1707} Ibid, 87.}
\footnotesize{\footnote{1708} Ibid, 91.}
\footnotesize{\footnote{1709} See Ibid, for a detailed discussion of the labour market reforms in Argentina during the crisis.}
refers to the country’s rank in the WB’s *Doing Business* report.  

Similar cases of deregulation have taken place in Colombia, where labour reforms included lowering the costs of firing workers in the formal sector. Similarly, in Peru the reforms included lowering the minimum wage.

The case of Costa Rica provides a glimpse into conditionality in the IDB. In the case the National Association of Insurance Brokers (ANDAS) stated that, in order to avoid paying their social obligations, the National Insurance Institute (INS) arbitrarily and unilaterally dismissed insurance brokers selling insurance policies, including the executive committee of ANDAS; it partially annulled the rights of these brokers to severance pay and disavowed the existence of the trade union organisation and the collective agreement, declaring that the employment contracts had changed to being commercial contracts. According to ANDAS, the political machinations of the INS, using the President’s Office and the Attorney-General’s Office of the Republic, led, in a fraudulent evasion of applicable law, to the employment relationship of those workers being considered a commercial relationship, leaving the insurance brokers unprotected with regard to their social rights and guarantees. Furthermore, a trade union official was arrested for defamation charges against a senior official of the INS.

In its response, the government stated that the restructuring carried out at the INS in the insurance policy sales area is based on Act No. 7454 of 14 November 1995, which approves various international agreements in 1993 and 1994 between Costa Rica and the Inter-American Development Bank. The agreements include loans and sectoral programmes for investment and structural adjustment that envisage, among other things, breaking up monopolies, dynamic competition in the insurance and re-insurance sectors, participation of the private sector and the restructuring of the INS in this sector. The reorganisation of the INS hoped to tackle increasing competitiveness in the field of insurance, insure the sustainability and the increase of sales and achieve better management of client services, providing services to those insured at lower intermediary costs, create a framework for monitoring and control and modernize the regulatory framework of insurance activities.

In its conclusion for the case, the CFA stated that the right to express opinions through the press or otherwise is an essential aspect of trade union rights. The Committee also indicated that it can examine allegations concerning economic rationalisation programmes and restructuring processes, whether or not they imply redundancies or the transfer of enterprises or services from the public to the private sector, only in so far as they might have given rise to acts of discrimination.

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1710 Andrew Powell, *Rethinking Reforms*, 35.
1711 Ibid.
or interference against trade unions.\textsuperscript{1712} Although the CFA did not find violations of the rights to freedom of association and collective bargaining, the case still displays the role of the IDB and its conditioned structural and sectoral adjustment in affecting trade union rights through influencing certain government action.

It is important to note that, as a regional IFI, the IDB does not apply labour conditionality emphasising labour deregulation to the extent of, for example, the WB, in whose footsteps it seems to follow. This is arguably because much emphasis has been placed on what seems to be a common problem in the IDB member states, particularly the Latin American and Caribbean countries, of an unskilled labour force,\textsuperscript{1713} informal labour,\textsuperscript{1714} and participation of women in the labour force.\textsuperscript{1715} To this end, much of the country strategy papers by the IDB focus more on this problem and emphasise policies for training or education of the workforce. Consequently, labour market reform has been one of the more neglected areas for reform in the region, with more focus on trade and the financial sector.\textsuperscript{1716} In addition, perceptions have grown in the post-90s period that the agenda advised by Washington and the multilaterals did not represent the interests of the region.\textsuperscript{1717} However, the few cases where reforms required by the IDB have touched upon labour rights can provide an indication of the Bank’s approach regarding collective labour rights.

However, despite the cases discussed above, as far as promotion of labour standards on freedom of association and collective bargaining is concerned, the IDB offers an interesting contrast. As stated earlier, the IDB has been influenced by the World Bank and IMF in various ways. However, in more recent times, as far as promoting collective labour rights, the Bank departs from the WB and IMF approach to these rights. The Bank has explicitly rejected the deregulation

\textsuperscript{1712} CFA, 333rd Report, Case No. 2272 (Costa Rica) March 2004, para 539.


\textsuperscript{1714} The ILO has defined informal labour as comprising all jobs in unregistered and/or small scale private unincorporated enterprises that produce goods or services meant for sale or barter. This entails absence of legal identity, poor working conditions, lack of membership in social protection systems, higher incidences of work-related accidents and ailments and limited freedom of association. See International Labour Office, \textit{Key Indicators of the Labour Market}, 9\textsuperscript{th} Edition (Geneva: ILO, 2016), 16, 84. Some have defined formal employment as a subset of the labour force covered by contributory social insurance - comprising the bundle of benefits such as retirement benefits, disability benefits etc. and the method of financing them, that is, wage taxes. Therefore, the subset not covered by this is considered informal. See Santiago Levy and Norbert Schady, \textit{Latin America’s Next Challenge: Social Policy Reform} (Washington, D.C.: Inter-American Development Bank, 2013).


solution and called for institutions to help markets work better by stating that “…labour regulations are not cost-free, but deregulation is not the answer …Unions are neither the sand in the wheels of the labour market nor the solution to low wages …better labour market performance is compatible with lower earnings inequality …” The new agenda requires a strengthened labour authority and a complex network of public and private institutions.1718

In addition, it is important to point out that the IDB has signed a MoU with the ILO, committing itself to, among other things, promoting the fundamental principles and rights at work. The Memorandum states that,

The Parties also will, make efforts to promote fundamental principles and rights at work and the strengthening of labour institutions (labour ministries, training institutions, employment services, social security administrations, among others), as well as workers’ and employers’ organisations, through capacity building…Further, the Parties may explore and foster cooperation in a range of aspects including: compilation of relevant statistics for policy making; exchange of information, data and knowledge on good practices, relevant experiences and flagship activities and publications; policy analysis and evaluation; training and capacity building; dialogue and consultation; implementation of technical assistance projects at regional, sub regional and country levels.1719

The Memorandum does not explicitly provide for the labour standards or conventions it commits to promoting, but rather vaguely states the fundamental principles and rights at work, which one can argue is meant to refer to the core labour standards. However, this vague commitment to the promotion of the rights leaves one with the same dilemmas associated with interpreting such commitments discussed in previous chapters. The IDB is not specifically committing to promoting the rights embodied in the core convention, including freedom of association and collective bargaining, but rather committing to promoting the principles at work. Again, from a legal point of view, the Memorandum does not create any legal obligations on the Bank to seriously implement the fundamental principles in its activities. The problem associated with this Memorandum is the seriousness of the IDB in taking action to put into play commitments that have no legal force and create no obligation whatsoever. Despite this, it is a positive step toward further realisation of the international labour standards by the Bank.

6.4.3 The Indirect Effect of Labour Conditionality

6.4.3.1 Privatisation

The rationale behind privatisation as one of the reforms conditioned by IFIs has been previously discussed. Coming to the IDB, although no cases of


1719 See Article 2, Memorandum of Understanding between the Inter-American Development Bank and the International Labour Organisation, 22nd April 2013.
conditionality on privatisation could be found, it has, as indicated in its country strategy papers, shown a tendency towards encouraging privatisation. The IDB has stated that facilitating private investment in the delivery of public services is essential to meeting a country’s growing infrastructure need and can also be instrumental in increasing investments in the social environment and other areas.\textsuperscript{1720} Therefore, in as far as the IDB is concerned, privatization has been more of a consistent condition in the Bank’s reform prescriptions for member countries.

Most conditionality on privatisation arose in the structural reforms that accompanied stabilization measures necessary to deal with the balance-of-payments crisis in the 1980s, for example in Mexico and Chile, as well as in the 1990s during the Latin American crisis. \textsuperscript{1721} These reforms include cases of privatization of water sanitation as well as electricity. For example, a $95.2 million loan to Brazil in 2002 included conditionality requiring opening a public water company (SANEAGO) to private sector bidding for the management contract; a $40 million loan to Ecuador for a water and sewer authority (ECAPAG) funded the rehabilitation and upgrade of the public water company in preparation of privatization where conditionality required downsizing the number of employees and preparing a bidding document for privatization.\textsuperscript{1722} A similar situation occurred in the privatization of the public electricity sectors in some recipient countries such as Argentina. \textsuperscript{1723}

Privatisation as economic policy has been justified by various arguments. One has been that private firms are more efficient than state-owned enterprises. State-owned enterprises’ inefficiency may be a natural result of political meddling as governments use them to achieve political objectives, leading to excessive employment, insufficient investments and inappropriate location of production sites.\textsuperscript{1724} However, privatisation also has effects on workers, as labour cost reductions through layoffs and cuts in wages and benefits\textsuperscript{1725} usually follow privatisation. Further general effects of privatisation on workers’ right to freedom of association and collective bargaining have been discussed in the case of the WB and IMF.

\textsuperscript{1720} Inter-American Development Bank, Country Strategy 2016-2018 (Brazil), February 2016, 54.
\textsuperscript{1721} See Manuel Sánchez and Rossana Corona, Privatisation in Latin America (Washington, D.C.: Inter-American Development Bank, 1993).
\textsuperscript{1725} Ibid.
Despite the lack of cases on conditionality on privatisation, it is important to state that the IDB has focused on enhancing and promoting the private sector and public-private partnerships.\textsuperscript{1726}

\textbf{6.4.4 Social Safeguard Policy}

The IDB was the first IFI to adopt social policy, specifically an environmental policy, in 1979,\textsuperscript{1727} mandating the institution to ensure the environmental quality of its operations and support environmental projects in the region. The Bank has also played an active role in the process of the Rio Declaration. However, when it comes to issues of human rights, and particularly labour rights, the Bank lags well behind international environmental law.\textsuperscript{1728}

In 2004, the Bank formed a panel\textsuperscript{1729}, which was an external advisory group tasked with advising the Bank on draft environment and safeguards compliance policy, recommending how the Bank could make a greater contribution to achieving sustainability in the region, and identifying priority areas for the Bank to develop capacity and strengths to implement the policy. The Panel’s recommendations included the need for the Bank’s standards to be consistent with those of the IFC and the Equatorial Principles\textsuperscript{1731}, both of which contain comprehensive labour clauses referring to the ILO core labour standards. The Bank’s response is quite interesting; it stated that given that the scope of the Bank’s draft Environment and Safeguards Compliance Policy is limited to environmental dimensions of sustainability, the Management will identify other ways in which to address Panel recommendations falling outside the scope of that particular document, including labour standards and disputed areas. Management supports the principles held up by the International Labour Organisation. The Private Sector Department of the IDB applies relevant standards of ILO conventions to its operations. The IDB has been working to support the implementation of the core labour standards through specific assistance to

\begin{footnotesize}
\begin{enumerate}
\item See Operational Policy, Mac Darrow, Between Light and Shadow, 167.
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member countries and supports expanding such assistance and developing management principles to guide its operations.\textsuperscript{1732}

The Bank adopted the Environment and Safeguards Compliance Policy in 2006, making the Bank socially and environmentally responsible within its own activities. The Gender Equality Policy, adopted in 2010, prioritises gender equality in the labour market.\textsuperscript{1733}

Additionally, as a result of pressure from trade unions, the IDB’s Private Sector Department (PRI) drafted the Environmental and Social Guidelines. These are a set of guidelines meant to assist in the management of environmental, social, health and safety, and labour aspects particularly related to private sector infrastructure and capital market investments in Latin America and the Caribbean.\textsuperscript{1734} In its introduction, the guideline states the importance of respect for internationally recognised workers’ rights as vital for sustainable development. It goes on to provide that all projects and their associated companies must comply with any applicable in-country legal labour requirements, including all ILO conventions that the respective country has ratified. In addition, the mere existence of a legal framework cannot alone guarantee protection of workers. Therefore, to achieve this, all projects must respect and protect the fundamental labour rights enunciated by the core ILO conventions.\textsuperscript{1735} The requirements provided for in section 2.1 of the guideline go on to specifically spell out the requirements for freedom of association and collective bargaining, doing so in line with and as provided for by ILO conventions No. 87 and No. 98. Although this appears to be a positive step toward the recognition of union rights by the Bank, the guidelines contain a clause stating that the guidelines do not reflect specific requirements for financing by the IDB, nor do they reflect the official position of the Bank.\textsuperscript{1736}

Finally, the Inter-American Investment Corporation (IIC), the private lending arm of the IDBG, has adopted a policy that incorporates the ILO core labour standards. It not only states that the IIC is committed to good international practices in all the projects it finances including human rights, but also requires clients to practice, without limitation, good labour relations and practices including a worker grievance redress mechanism guided by the core ILO conventions and other ILO standards.\textsuperscript{1737}

\textsuperscript{1733} See IDB, Environment and Safeguards Compliance Policy, 2006; IDB, Operational Policy on Gender Equality in Development, 2010. The latter also refers to the CEDAW.
\textsuperscript{1735} Ibid.
\textsuperscript{1736} Ibid.
\textsuperscript{1737} Inter-American Investment Corporation, IIC Environmental and Social Sustainability Policy, 1 September 2013, 2 (7)(ii).
6.4.5 Conclusion
As a result of the influence of the WB and IMF, the IDB had initially taken a position similar to that of the WB and IMF in terms of pursuing the neoliberal approach. However, the extent to which this approach still has an impact on freedom of association and collective bargaining rights is not well defined, particularly since the IDB has diverted from the neoliberalist approach to freedom of association and collective bargaining. In addition, the IDB more recently has placed more emphasis on the nature of the workforce in the region and how to improve this through policy reforms. It is quite clear that freedom of association and collective bargaining are not a policy target in the Bank, and if they are, then it is in isolated instances that cannot be detected or analysed as causing a general measurable effect on these rights.

6.5 The Asian Development Bank

6.5.1 Introduction
The Asian Development Bank, when shifting from purely project-based lending to policy-based lending, and being a “follower” of the WB and IMF, to a large extent followed the WB and IMF’s neoliberal approach to development. Although the Bank does not explicitly show this approach, one can deduce this by looking into the various operations of the Bank. Like the World Bank and IMF, the ADB has used conditionality to affect policy change in the recipient countries as well as structural adjustment lending.

6.5.2 The Direct Effect of Labour Conditionality

6.5.2.1 Freedom of Association and Collective Bargaining
ADB loan agreements are routinely accompanied by policy matrices that outline the policy measures or conditionalities that a borrowing government must agree to in order to get the loan. These include: passing laws and regulations that favour private sector involvement in key economic sectors and services (such as energy, transport, water and urban basic services); market-friendly restructuring and reforms in all major economic and governance sectors (e.g., finance, energy, water, justice etc.); corporatization, privatization of public enterprises and utilities which in turn involve full cost recovery through user fees, the elimination of

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subsidies etc.; creating a flexible labour force; and commercialisation of agricultural production.\textsuperscript{1740}

The Bank’s approach to freedom of association and collective bargaining has taken the flexible labour markets approach. It has stated that promoting labour-intensive industries to increase job creation is important, including improving the agriculture and services sectors, which absorb more than 80\% of the workforce.\textsuperscript{1741} Here, more active labour policies have been desirable, including finding the right balance between productive and protective employment policies, as well as developing more flexible labour market conditions.\textsuperscript{1742} In the case of Indonesia, the government identified major causes of labour market rigidity and acknowledged that the current situation is far from meeting the government’s goals of (i) a decentralised system of labour markets with strengthened union movement and collective bargaining, and (ii) replacement of government regulations with legislated safeguards.\textsuperscript{1743}

The ADB has stated in its reports that improvements to institutional variables which proxy for such things as government effectiveness and labour market flexibility\textsuperscript{1744}, can also lift potential economic growth. In this case labour laws are a barrier or obstacle to trading opportunities\textsuperscript{1745} and economic dynamism, as are judicial bias and corruption.\textsuperscript{1746} What is interesting is, as opposed to the WB and IMF that have clearly provided for what flexible labour markets encompass, the ADB has not clearly elaborated this concept. However, the ADB has demonstrated in its lending activities the importance of competitive labour markets by reducing structural rigidities in the labour market.\textsuperscript{1747}

The ADB’s stance on freedom of association and collective bargaining can be identified from its lending activities. An interesting case is that of Pakistan, where a technical and financial support agreement reached between the government and the Asian Development Bank (ADB) led to a ban on trade union activities in the Karachi Electric Supply Corporation (KESC) due to ongoing financial and organisational restructuring. The government argued this could improve KESC’s financial situation, and thus restoration of trade union rights in KESC would


\textsuperscript{1742} Ibid.

\textsuperscript{1743} Ibid.


\textsuperscript{1745} ADB, Asian Development Bank Outlook Update: Meeting the Low-Carbon Growth Challenge (Manila: ADB, 2016), 20.


\textsuperscript{1747} ADB, Philippines: Increasing Competitiveness for Intensive Growth Programme, Completion Report, June 2016.
depend on a favourable change in its financial situation. The ban had been put in
place by two Presidential Ordinances of 27th May 1999, which excluded the
KESC from the purview of the Industrial Relations Ordinance of 1969. In
addition, KESC union officials were forcibly pre-retired.

The CFA, reiterating the conclusions of the CEACR, stated that, with respect to
the Government’s argument that it would restore trade union rights in KESC as
soon as the enterprise became viable and productive again, the freedom of
association Conventions do not contain any provision permitting derogation from
the obligations arising under the Convention, or any suspension of their
application based on a plea that an emergency exists. Furthermore, the Committee
provided that the viability or productivity of an enterprise must not be a
precondition for the guarantee of the fundamental rights of freedom of
association. As a result, the Committee urged the Government to lift the ban on
trade union activities in KESC and to take the appropriate measures to ensure that
the right of the KESC Democratic Mazdoor Union as collective bargaining agent
is restored without delay.1748 This case demonstrates once again the complicated
relationship between the IFIs and recipient states, where it is the government that
violates its obligations under the international labour standards, even if the
financing and its terms emanate from the IFIs.

An interesting case that sheds light on the ADB’s negative stance towards
freedom of association and collective bargaining is a project in India. In the
project papers, it is stated that, in implementing the project, the government will
ensure that bidding and contract documents include specific provisions requiring
contractors to comply with all applicable labour laws and core labour standards
on prohibition of child labour, equal pay for work of equal value regardless of
gender ethnicity or caste and elimination of forced labour.1749 The agreement
paper refers to the core labour standards, but excludes freedom of association and
collective bargaining. This indicates that, although the agreement does not have
an explicit clause on the rights, it shows the Bank’s ambivalence towards
incorporating these rights along with the other core labour standards.

6.5.3 The Indirect Effect of Labour Conditionality

6.5.3.1 Privatisation of State-Owned Enterprises

Beginning in 1984, the ADB integrated privatisation into its strategies for
developing countries as it had identified privatisation as a desirable strategy to
help meet economic growth objectives.1750 The Bank found that privatisation

1749 ADB, Himachal Pradesh Skills Development Project (India), Project Administration Manual, September
2017, 37.
1750 See ADB, “Privatisation of Public Sector Enterprise” https://www.adb.org/documents/privatization-public-
raises revenue for the government, raises investment capital for the industry or company being privatised, reduces the government role in the economy, increases efficiency, introduces greater competition and decreases government subsidies. Consequently, privatisation has become a part of numerous operations in the ADB.

However, when considering the effects of privatisation on workers’ rights, the ADB has an interesting approach. In a loan agreement with Pakistan, the conditions included factors to be taken into account in the privatisation process. These included conducting adequate consultation with key stakeholders, including civil society, labour unions and associations representing employees and relevant public sector employees and recording these consultations accordingly. In addition, the loan agreement required that principles on gender equity are followed during the implementation of the project, including equal pay to men and women for work of equal value and gender sensitivity in communication and labour-related issues.

6.5.4 The Asian Development Bank and CLS: The Bigger Picture

When it comes to the other CLS as has been discussed in the case of the World Bank and IMF, the ADB does not follow the World Bank’s lead on forced and harmful child labour. While the ADB does not apply core labour standards to its project evaluations, it is committed to promoting respect for these standards (especially with child labour and gender equality) through a series of dialogues and engagement with its member states. The Bank states,

> These labour standards are closely related to the achievement of ADB’s overarching goal of poverty reduction and its strategic development objectives of improving the status of women, human development, and protection of the environment. Because poverty is a major cause of child labour, ADB’s emphasis on poverty reduction is closely linked with efforts to end the worst forms of child labour as well as to take child workers out of harmful activities, and raise awareness of such issues. Similarly, awareness of issues of gender discrimination in employment as well as improving occupational health and safety in small-scale enterprises, and efforts to address these in future ADB operations, are important in strengthening women’s economic participation, and improving the well-being of the working poor. They are interconnected with the success of ADB’s policies and operations in the region and are also relevant to social protection, which is a more recent area of concern for ADB, and which is an essential component of a comprehensive social policy. Under this, priority issues include among others, labour market policies and programs designed to facilitate adjustments and

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1754 Ibid.

Although the Bank’s policy seems promising and specifically refers to the ILO’s CLS in the policy as well as strategy papers, the practice it is not so well-defined.

An example of the Bank’s practical approach of CLS is the case of Uzbekistan. In September 2012, the ADB’s Board of Directors approved a $220 million loan for the Modernisation and Improved Performance of the Amu Bukhara Irrigation System (ABIS) Project in Uzbekistan. The project was meant to benefit the cotton industry. In the project, the Bank did not adequately address the grave human rights concerns in the industry the project will support, including the government’s practice of forcing over a million children and adults (its own citizens) to pick cotton during the annual harvest. The harvest was carried out in abusive conditions under threat of punishment. The regional authorities, police and school administrators, reporting to the prime minister and other cabinet ministers, transported busloads of children and adults to the country’s cotton fields. There was a set quota (of 60 kilograms of cotton per day for adults and a slightly lower quota for children). The workers lived under unsanitary conditions, worked long hours for little or no pay, some suffering serious injuries, illness or even death. Children and youths missed school.\footnote{1757}{Human Rights Watch, “Asian Development Bank: Reconsider Uzbekistan Project, 11th September 2013, available at https://www.hrw.org/news/2013/09/11/asian-development-bank-reconsider-uzbekistan-project (accessed 20 January 2018).}

The CEACR, having noted communications of such forced child labour in Uzbekistan by other UN bodies\footnote{1758}{CESCR expressed its concern at the situation of school-age children obliged to participate in the cotton harvest instead of attending school during this period (24 January 2006, E/C.12/UZB/CO/1, paragraph 20); the Committee on the Rights of the Child expressed concern at the serious health problems experienced by many school children as a result of this participation (2 June 2006, CRC/C/UZB/CO/2, paragraphs 64–65); the Committee on the Elimination of Discrimination Against Women expressed its concern regarding the educational consequences of girls and boys working during the cotton harvest season (26 January 2010, CEDAW/C/UZB/CO/4, paragraphs 30–31); the UN Human Rights Committee stated that it remained concerned about reports that children are still employed and subjected to harsh working conditions, in particular for cotton harvesting (7 April 2010, CCPR/C/UZB/CO/3, paragraph 23).}, concluded that there was deep concern in regards to the use of forced child labour in Uzbekistan and urged the government to take immediate and effective time-bound measures to eradicate the forced labour of, or hazardous work by, children under the age of 18 in cotton production as a matter of urgency.\footnote{1759}{ILO, Committee of Experts on the Application of Conventions and Recommendations, Observation (Uzbekistan) adopted 2012 available at https://www.ilo.org/dyn/natlex/docs/econ/docs/uzb/7219717237/uzb-e.pdf (accessed 20 January 2018).} Despite all these efforts, the ADB did not take positive measures to curb the government’s practices of child labour.
However, with respect to non-discrimination, the Bank has played a rather positive role, although the main focus has been the inclusion of women in the labour market or workforce, where it has been stated that “women being denied access to employment…is unacceptable”.\(^\text{1760}\) The ADB’s Country Strategy Papers with member countries indicate increased sensitivity to the inclusion of women in the labour market and employment. In Myanmar, the Bank has placed emphasis on reforms that promote women’s entry into modern sector wage employment, gender sensitivity in curriculum reforms for the workforce and promoting entry by females into traditionally male-dominated occupations.\(^\text{1761}\)

In Bangladesh, the Bank’s policy recommendations included the design and implementation of projects to promote the employment of skilled women workers and labour contracting societies.\(^\text{1762}\) Interesting in this case is the ADB-funded City Region Development Project (July 2011-December 2016) where the bid documents included a clause that required compliance with core labour standards and payment of equal wage for equal work for women and men.\(^\text{1763}\) Despite this positive stance, the meaning of core labour standards refers to the protections under national law\(^\text{1764}\) (not the ILO core labour standards). In fact, the document does not contain any mention of the ILO standards.

In the case of Sri Lanka, the ADB explicitly outlined the investment activities that are prohibited by the Bank. These include production or activities involving harmful or exploitative forms of forced labour or child labour as provided for by the ILO Minimum Age Convention, 1973 (No. 138).\(^\text{1765}\)

Finally, it is important to highlight that, when it comes to labour reforms in its programs, the ADB, like the IDB, focuses more on the particular challenges needs of the workforce in the region. With this regard, the Bank has focused on

\(^{1760}\) Speech by ADB Managing Director General Rajat Nag at the Indian Institute of Management; C.K. Prahalad Memorial Annual Lecture, Kozhikode, India, 18th March 2011.


\(^{1763}\) Ibid, Appendix 1: Gender Features of Five Urban Development Projects Studied, 21. A similar clause on core labour standards has been included in the Third Urban Governance and Infrastructure Improvement (Sector) Project (July 2014-June 2020).

\(^{1764}\) Ibid, 13.

\(^{1765}\) ADB, Environmental and Social Management Framework, Skills Sector Development Programme (Sri Lanka), March 2014.
enhancing and matching workers’ skills with the labour market and participation of women in the workforce.

6.5.5 Social Safeguard Policy

In 2001, the ADB adopted its Social Protection Strategy. It defines social protection as “the set of policies and programs designed to reduce poverty and vulnerability by promoting labour markets functioning, diminishing people’s exposure to risk, and enhancing their capacity to protect themselves against hazards and the interruption or loss of income.” The Strategy provides that appropriate steps are to be taken to ensure that the project actors in the borrowing country (contractors, subcontractors, consultants, procurement of goods) comply with the country’s labour legislation (e.g., minimum wages, safe working conditions, social security contributions etc.) as well as with the ILO core labour standards. The strategy has been updated several times to improve commitments towards environmental protection as well as indigenous communities. However, the implementation of the strategy was quite slow or non-existent, thus in 2002, the Bank signed a Memorandum of Understanding with the ILO to put the policy into practice. This effort, as with the strategy, did not bear any fruit.

In 2006, the ADB, in collaboration with the ILO, launched the Core Labour Standards Handbook. It provides information about CLS, explains the differences between CLS and other labour standards and presents examples of good practices in the application of CLS in ADB operations. The handbook is not a policy, nor does it introduce a new policy requirement, but instead gives practical knowledge on how CLS can be taken into account by ADB staff and their government counterparts.

In 2008, the Bank adopted the Strategy 2020, where it committed to complying with the internationally recognised CLS and related labour laws in the design, formulation and operation of its loans. The Bank, in Strategy 2020, highlights that it will follow three complementary strategic agendas of inclusive growth, environmentally sustainable growth and regional integration. It further mentions that, to bring forth inclusive growth, the ADB shall give prime importance to participation of civil society organisations, trade unions and other

1771 Ibid.
key stakeholders in ADB operations. Participation, according to the ADB, is essential for building strong relationships between a state and its citizens for mutual accountability, responsive public service delivery, and social and economic inclusion of disadvantaged groups. Finally, in December 2013, the Bank concluded the Social Protection Operational Plan 2014–2020. This is again not a new policy, nor does it institute any new policy requirements. It is merely a plan with regards to the future operations of the Bank. One of the issues contained in the Plan is that the Bank is to ensure that ADB operations comply with CLS. This is the biggest leap the ADB has taken in the promotion of international labour standards on freedom of association and collective bargaining, including in the Bank’s short and long-term strategy papers. Again, the publication of the Handbook has been a positive step towards the promotion of freedom of association and collective bargaining, particularly with the staff of the Bank.

6.5.6 Conclusion
The ADB has taken some positive steps towards instituting international labour standards on freedom of association and collective bargaining in its operations. It has promoted the rights and adopted some strategies that push for realisation of these rights in the Bank’s lending activities. However, with regard of the material studied herein, there is no solid evidence that the Bank has actually instituted freedom of association and collective bargaining in its lending, even in an ad hoc manner. Again, even the commitments it has made to the labour standards are not legally binding as in the case of the IDB, and are loose commitments. In addition, although its conditionalities reflect more of a neoliberal approach, and the Bank’s ambivalence towards these rights has been presented, the specific use of labour conditionality is not apparent and freedom of association and collective bargaining rights do not appear as central labour market issues as far as the development activities of the Bank are concerned. Finally, the Bank concentrates on labour issues that are a challenge in the regions.

6.6 The African Development Bank

6.6.1 Introduction
Upon its establishment, the AfDB provided loans almost without any conditionality whatsoever, save for that in regards to the repayment of the loan. Those that applied usually received funding with few pre-conditions attached, making supervision and evaluation of implementation difficult. However, with the expanded professional capability of the Bank’s staff in the 1970s and the addition of the non-regional members in the 1980s, the Bank began to consider the range of techniques available to try to influence state policy. Subsequently,
the Bank began using conditionality in its lending activities, although such conditionality focused on strategies for economic development.

In general, the Bank has shied away from imposing explicit conditionality as identified with the World Bank and IMF.\textsuperscript{1774} In most cases, the Bank officials suggest that if a government does not undertake measures leading in a certain direction, then the country is warned that they will have difficulty in obtaining future loans from the AfDB.\textsuperscript{1775} Thus, the Bank takes more of a non-coercive approach where policy dialogue and later conditionality involves less direct interference with a government’s internal affairs, leaving national decision-makers to retain the ability to undertake independent action.\textsuperscript{1776}

The AfDB’s stance on conditionality has been addressed by the World Bank, whose goal of seeking AfDB involvement in imposing conditionality has been made explicit in stating that,

\begin{quote}
We would expect the AfDB to support, through its resources and dialogue, the WB in its role of stimulating policy reform in Africa.
\end{quote}

At present, the AfDB provides both project loans and policy-based loans. However, to obtain these highly competitive loans, priority is given to countries under IMF arrangements as monitored by the WB. A 1998 Bank position paper found a "direct link between the principles underlying the (core labour) standards, and the Bank’s fundamental development objectives", noting that standards are "intertwined with the cross-cutting programmes on poverty alleviation, gender, governance and democracy." On freedom of association, the Bank concluded that effectively functioning employer and worker associations play a key role in governance issues and democracy, an important issue for the Bank.\textsuperscript{1777} It stated,

\begin{quote}
These types of organisations create a focus for the coalescing of opinions and values related to democracy and governance. They also serve as a means of articulating and disseminating views and awareness, which can diffuse within the society. When well-structured, assisted and trained, they can help to create positive countervailing power which is crucial to the democratic process, and which helps in diluting dictatorship and promoting accountability and participatory approaches.\textsuperscript{1778}
\end{quote}

The Bank identified the following strategies and arrangements to implement core labour standards: Country Strategy Papers (CSPs) are to include discussion on

\begin{flushright}
\textsuperscript{1774} Ibid.
\textsuperscript{1775} Ibid, 70.
\textsuperscript{1776} Ibid, 74.
\end{flushright}
labour standards with the social partners (government, labour and employers’ associations, NGOs) and a section of the CSPs is to be devoted to a review of institutions, policies and programmes, legal framework, implementation progress, problems and future prospects on the theme; Industry Sector Policy is to pay close attention to issues contained in labour standards, including mechanisms for implementation; Education Sector Policy is to take into consideration issues relating to education and training in all aspects of core labour standards, since they are relatively new issues in regional member countries, and many stakeholders may have little or no formal education; it also notes that an educational programme covering near or all primary age children will play an important role in undermining child labour; The cross-cutting themes of gender, environment and poverty alleviation are to incorporate relevant aspects of labour standards in their policies and guidelines. For example, gender policies should have a section on equal opportunity for employment for women, equal conditions of service and equal chances of upward mobility, and on sexual harassment.1779

In this case, the AfDB sets forth a positive posture in the use of its facilities to further recognition and respect for core labour standards. Thus, in determining the solemnity of the Bank’s intentions, only practice can tell.

6.6.2 The AfDB and Core Labour Standards: The Bigger Picture
The AfDB has shown a trend similar to the Banks discussed previously with regards to core labour standards other than freedom of association and collective bargaining. The Bank has mainstreamed gender equality as a cross-cutting theme in all existing and future Bank projects.1780 An example of this effort is the inclusion of gender clauses in contracts for road projects funded by the Bank where at least thirty percent of the workforce is to be women.1781 Interestingly, in Malawi, the issue of gender equality is approached in the language of equality rights, citing constitutional guarantees.1782

As for child labour, the Bank has, through research and policy prescriptions, played an active role in dealing with this problem in the region. Special attention has been paid to child labour for girls in the context of traditional antidotes on the role of girls in the domestic sphere. The Bank has actively promoted schooling for children as a method of dealing with child labour in South Sudan.1783

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1779 Heather Gibb, Labour Standards and Poverty Reduction.
1781 Ibid, 5.
6.6.3 Social Safeguard Policy

As stated before, the AfDB did not employ conditionality as a central tool for policy change as with the WB. The African Bank’s position on the use of labour rights conditionality rapidly changed in 2013.

In 2013, the AfDB adopted the Integrated Safeguards System Policy Statement and Operational Safeguards, which is a policy statement consisting of operational safeguards. Part III of this policy provides for operational standards in which Section 5 of the operational standards (OS 5) is on labour conditions, health and safety. The Policy states the objectives of this chapter is to protect workers’ rights. Although this is further elaborated as promoting compliance with national legal requirements, it specifically provides that another objective of the policy is to align Bank requirements with ILO core labour standards, and the UN Convention on the Rights of the Child, where national laws do not provide equivalent protection.

The Policy makes it a requirement for the borrower to allow workers to form, join and participate in workers’ organisations, such as trade unions or alternative organisations of their own choosing, to express their joint requests and grievances and protect their rights regarding working conditions and terms of employment. The borrower is further prohibited from exerting influence on or trying to control these workers’ organisations. Furthermore, the borrower is required to allow the workers to freely choose their representatives and to engage in collective bargaining as well as to refrain from union discrimination. The policy defines collective bargaining as defined by the ILO collective bargaining convention No. 98 of 1949.

In furtherance to the policy, the AfDB, in a publication, has recommendations for member states concerning labour market reforms in line with this policy. A good example is the recommendations of the Bank in five North African countries in the vital period after the Arab Spring. Here, the Bank provided that for greatest efficiency and coverage, any labour market reforms should include a wide range of partners and stakeholders. As for promoting the rights, the AfDB signed a cooperation agreement with the ILO in 2004, replacing that of 1977. However, the cooperation agreement makes no specific mention of core labour standards or their promotion, but rather relies on research and exchange of information. After that there was not much coming from the Bank in regards to these rights. The adoption of the Integrated Safeguard System gave the Bank a boost in

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1785 Ibid.
1786 Ibid.
1787 See AfDB, Algeria, Egypt, Tunisia, Morocco.
promoting the CLS and including freedom of association and collective bargaining.

6.6.4 Conclusion
The AfDB is unique in that it has not adopted the use of conditionality as compared to the other IFIs. However, this does not mean that it has not played a role in the promotion and implementation of international labour standards. The Bank has taken these standards into consideration in its operations, even if through other ways than conditionality. The AfDB has adopted the Integrated Safeguards, incorporating therein the right to freedom of association and collective bargaining as provided by the ILO conventions No. 87 and 98. In practical terms, however, there is yet to be a case where such conditionality was implemented by a borrowing country. Perhaps as the policy itself is recent, it will take a while before any concrete cases surface.

6.7 The EBRD

6.7.1 Introduction
In relation with the other IFIs discussed in this study, the EBRD is certainly a unique case. It is the most recent of the IFIs in this study, and it has taken a unique approach to international labour standards and to human rights.

6.7.2 The Direct Effect of Labour Conditionality
As stated earlier in this study, the EBRD does not use policy-based conditionality. In fact, the use of conditionality by this IFI is minimal. The bank has a clear political mandate and its policy reflects these principles. As a result, the states wishing to access financing by the Bank automatically have accepted the political mandate as conditions of membership, as well as the more practical policy, so there is no need for conditionality. To become a member, a state has to meet the institutional criteria provided by the Articles, and as a result conditionality specific to each loan would have no additional effect.

It is crucial to state that the EBRD does encourage privatisation as a means to enhance economic growth. In the strategy paper for Belarus, the EBRD stated that,

The Bank’s operational focus on supporting the private sector and promoting privatisation of state-owned companies presents opportunities for improved environmental and social performance and reduction of carbon emissions. Through its environmental and social (E&S) assessment and monitoring process, the Bank will guide companies towards application of better standards in line with national and EU standards, ILO core labour conventions and other good international practices. Labour management, occupational safety and public health also will be given special attention in the projects that entail major construction and modernisation works, in particular for transport and traffic safety... Key social challenges
include issues relating to freedom of association, non-discrimination, fair treatment and equal opportunities of workers, as well implementation of adopted labour legislation.1789

The wording of the strategy paper reflects a “parting in ways” with the World Bank and IMF in regards to privatisation. Although the aim of increasing efficiency is similar, what makes the EBRD’s approach unique is the explicit aim of adherence to the ILO core labour standards, even in privatisation processes.

More specifically, the case of Georgia provides an interesting view of how the EBRD, with its clear human rights and particularly labour rights mandate, uses its leverage to influence compliance with ILO standards. The country’s strategy stated that,

The constitution and law provide for freedom of association and labour and trade union rights are generally respected in practice. The labour code provides for the right of most workers to form and join independent unions and to strike and bargain collectively...Georgian labour laws have been revised and amended on various occasions since 2008, culminating in the adoption of a new labour code in June 2013. Despite recent modifications in consultation with the ILO, gaps still persist between Georgian legislation and EBRD PR2 requirements with respect to child labour, collective bargaining, retrenchment, worker accommodations, gender discrimination and non employee workers. EBRD will continue its efforts to ensure that clients’ HR policies and labour practices are compliant with relevant ILO conventions as ratified by Georgia.1790

A final case is Ukraine which clearly demonstrates the Bank’s human rights approach. Here, the Bank not only cites the ILO supervisory bodies, but also the International Trade Union Confederation (ITUC). It states,

Ukraine is a member of the International Labour Organisation (ILO) and has ratified 55 ILO Conventions, including the 8 core Conventions. However, their practical implementation is not always compliant with ILO’s standards. Thus, Ukrainian legislation allows under-18s to perform hazardous work under certain circumstances. The ILO’s Committee of Experts (2008) has raised concerns that the legislative controls on this work do not comply with C138 (Minimum Age Convention, 1973). According to the Committee of Experts, children as young as 14 years may perform hazardous work in connection with vocational training. According to the International Trade Union Confederation (2008), there is a general lack of good faith bargaining, and employers often refuse to enter into collective bargaining...The Bank adopts a rigorous approach to labour and working conditions issues. The application of a specific Performance Requirement 2 under 2008 E&S Policy covers assessment of such areas as labour conditions, fair wages, non-discrimination, gender equality, retrenchment policies, trade unions and collective bargaining practices.1791

Indeed the EBRD stands out in as far as the role of the IFIs in the promotion and implementation of freedom of association and collective bargaining is concerned. It takes a human rights approach as opposed to the usual instrumental approach to international labour rights in the other IFIs. In measuring compliance with these

1789 EBRD, Strategy for Belarus as Approved by the Board of Directors, 7th September 2016, 28.
1790 EBRD, Strategy for Georgia Approved by the Board of Directors, 14th December 2016, 35, 31.
standards, the EBRD turns to the competent bodies for interpretation and assessments of compliance.1792

There is no need to discuss the EBRD’s approach to the other core labour standards as, in studying the strategy papers, there is clear influence of equal compliance with all the CLS in the borrowing member states. In addition to freedom of association and collective bargaining, the papers take account of non-discrimination (gender equality) and child labour, as well as forced labour.1793 As a final point, the case of Uzbekistan, which had been discussed earlier in the light of the WB and ADB practices, is interesting. In Uzbekistan’s strategy paper, the EBRD stated that there was no substantial change in the area of labour rights. As in previous years, there was a widespread practice of compulsory mobilisation of students and schoolchildren helping with the cotton harvest. The 2005 International Crisis Group (ICG) report recommended urgent action to end child labour in cotton fields, by calling on the government of Uzbekistan to adhere to the ILO Convention C182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; make clear public statements against the activity; punish officials who continue to turn a blind eye to child labour; and establish monitoring bodies to ensure that the laws against child labour are actually implemented. The ICG called to end the use of students and government employees as forced labour in the cotton fields and recommended inviting the ILO to investigate labour abuses in the cotton industry.1794 The strategy paper also draws references from the UN, the EU, the U.S. State Department etc in pointing out the various human rights abuses and violations that were prevalent in the country.

What is interesting about the case of Uzbekistan is that three different IFIs have been involved in development activities in the country. However, despite the fact that the same problem of child and forced labour existed in the country, the three IFIs took different approaches in dealing with this problem. The EBRD reflects its human rights mandate by referring to international conventions in the strategy.

6.7.3 Social Safeguard Policy

In the EBRD, the policies regarding labour conditionality are similar to those of the IFC. The Bank’s Environmental Policy established in 2003 required that, where the Bank invests directly in a project, that project must comply with the ILO’s fundamental conventions concerning abolition of child labour, the elimination of forced and compulsory labour and the elimination of discrimination at the workplace.1795 Freedom of association and collective bargaining were completely omitted from the requirements. The Environmental Policy was later

1792 See Ibid.
1794 Ibid.
1795 The EBRD, Environmental Policy, 2003.
replaced by the Environmental and Social Policy of 2008, which makes a specific commitment that projects are required to comply, at a minimum, with all four of the ILO core labour standards.\(^\text{1796}\) Moreover, the Policy states that the labour standards on freedom of association and collective bargaining to be applied are those embodied in the ILO conventions No. 87 and 98, thus respect of the right to freedom of association and collective bargaining is a condition for receiving funds.

The conditions attached to any project funded by the Bank are found in the Performance Requirements. These requirements cover a range of areas such as environmental protection, labour and working conditions, community development and indigenous people. Performance Requirements 2 specifically deals with working and labour conditions. Evenmore impressive is the Bank’s position in regards to the work force in a project. Article 1 of the Policy states,

EBRD believes that for any business, the workforce is a valuable asset, and that good human resources management and a sound worker-management relationship based on respect for workers’ rights, including freedom of association and right to collective bargaining, are key ingredients to the sustainability of the enterprise. By treating workers fairly and providing them with safe and healthy working conditions, clients may create tangible benefits, such as enhancement of the efficiency and productivity of their operations. Conversely, failure to establish and foster a sound worker-management relationship can undermine worker commitment and retention, jeopardise a project and damage the client’s reputation.

The Policy states that the objectives of the Performance Requirements are, “…to respect and protect the fundamental principles and rights of workers…ILO Convention 87 (freedom of association), 98 (right to collective bargaining)…”\(^\text{1797}\)

Thus, the EBRD Policy, unlike some of the other IFIs in this research, not only requires compliance with national law in regards to the right to freedom of association and collective bargaining, but also international standards set by the ILO. Article 7 of the Performance Requirements 2 (PR2) provides for the minimum standards to be complied with by any client, be it a state or a non-state client, in order to obtain funding.

Most importantly, PR2 section 13 provides for workers’ organisations. It states,

The client will not discourage workers from forming or joining workers’ organisations of their choosing or from bargaining collectively, and will not discriminate or retaliate against workers who participate,

\(^{1796}\) The EBRD, Environmental and Social Policy, 2008. The policy’s predecessor, the Environmental Policy, was reviewed in 2007. During the review process, civil society organisations expressed concerns about serious shortcomings in the policy with respect to social safeguards and public access to environmental information. They advocated clear requirements for assessing and mitigating the adverse impacts of EBRD projects on the rights and living conditions of workers and local communities. They also lobbied the EBRD to provide greater access to environmental assessments, particularly in the early stages of planning and development of its projects.

\(^{1797}\) Performance Requirement 2, Section 2, EBRD, Environmental and Social Policy, 2008, revised 7 May 2014.
or seek to participate in such organisations or bargain collectively. In accordance with national law, the client will engage with such workers’ organisations and provide them with information needed for meaningful negotiation in a timely manner. Where national law substantially restricts the establishment or functioning of workers’ organisations, the client will enable means for workers to express their grievances and protect their rights regarding working conditions and terms of employment.

Another important content of the 2008 policy is the PR 10 on ‘Information Disclosure and Stakeholder Involvement’. In this chapter, the ‘stakeholder engagement plan’ is a procedure whereby interested parties have an opportunity to contribute their views about environmental and social issues associated with a client’s investments. This involves meaningful consultation during both project preparation and implementation.1798

6.7.4 Conclusion
The EBRD is a unique case indeed. With its explicit political mandate concerning human rights, and international labour standards, the Bank “breaks away” from the other IFIs in this study. Its Articles state that its purpose is to contribute to economic progress. However, it is obvious that, in its human rights approach, economic factors do not transcend respect and compliance with human rights and particularly labour rights. The EBRD thus plays a positive role in the promotion and implementation of freedom of association and collective bargaining.

6.7.4.1 Incentives for Policy Reform
One cannot deny the fact that poor policy choices by governments can be a source of many problems, including the dearth of enjoyment of rights by the communities. Labour conditionality can serve as an incentive for policy change and act as a catalyst in accelerating the changes. This is particularly useful where governments are intentionally reluctant to commit to these rights. The downside to this is that where a government changes its labour policy for the sake of financial assistance, the incentive is not always sufficient to encourage the state to maintain the reforms, especially when the period of assistance has lapsed (any loan grant has an expiry date). This is to say that, labour conditionality is positively correlated with reform if there is a pre-existing intention on the part of the government to improve its policy. Thus, the greatest challenge to conditionality as an incentive to policy reform is ensuring post-implementation irreversibility of reforms and policies.1799 Hence, conditionality only works as an incentive for policy reform where it creates effective and lasting or irreversible incentives to take certain actions.1800 As for the EBRD, this lasting incentive lies in the fact that it has a human rights approach to these rights which ensures consistency in all its programs. This is to say that, as opposed to the

1798 Ibid, Performance Requirement 10, Section 11-12.
1800 Ibid.
instrumentalist approach where the importance of these rights differ from one project to another depending on the economic impacts they have on the success of the project, the human rights approach employs a level and consistent inclusion of these rights in all projects, making reversibility unlikely.

6.7.4.2 Implementation Tool

The case of the EBRD points out an important function of conditionality, particularly in view of the strategy papers discussed above. Although ratification of labour rights instruments is not much of a problem, implementation of these rights is the bigger problem in practice. This is sometimes due to the lack of administrative structures for effective implementation, not to mention lack of will by governments. As conditionality is a strong leverage mechanism, it can be useful for the observance of CLS and act as a “home remedy” to weak implementation of international labour standards. This can be useful as a way to fill in for the weakness of the international legal framework, which might lack adequate implementation of these rights.\textsuperscript{1801} In brief, conditionality can be said to be an implementation tool which “has teeth and can bite, and bite hard.”

6.7.4.3 Impact on Adherence

As labour conditionality creates a linkage between receiving financial support and adherence to labour rights, it has the potential to have a major impact in ratification as well as adherence to these standards. The EBRD provides a glimpse into this positive effect of labour conditionality.

6.8 Comparison

The IFIs have indeed become important actors in the international arena, not only in regards to their traditional role as providers of development finance, but in their ever-expanding roles as policy and normative actors. As previously discussed, their activities have legal implications in as far as international labour standards on freedom of association and collective bargaining are concerned. In order to comparatively assess the extent to which the IFIs, in their operations, comply with ILS, it is crucial to look at the extent to which such rights are embedded in their constituent documents (Articles of Agreement) as well as in their operational policies, because it is only through these that one can prove compliance as opposed to sporadic or isolated incidences or cases. As has been elaborated in preceding chapters, the IFIs enjoy a substantial amount of influence in issues of policies of member states, particularly borrowing member states. Through the use of conditionality, particularly labour conditionality, they are able to influence compliance or non-compliance with the standards on freedom of association and collective bargaining. In this case, it is crucial to compare how the IFIs have

\textsuperscript{1801} Arne D. A. Vandaele, International Labour Rights and the Social Clause: Friends or Foes.
applied conditionality to influence such compliance or non-compliance. Finally, the evaluative criteria, as discussed in the introductory chapter, will be the ILO standards on freedom of association and collective bargaining (Conventions No. 87 and 98) as these have been incorporated in most international human rights treaties and have gained universal recognition, as discussed in chapters three and four herein.

6.8.1 Reflection of Mandates: Economic Considerations vs. Political Considerations

It is crucial to revisit the mandates of the IFIs and the interpretation thereof because this aspect has much to do with the approach the IFIs take in regards to human rights. The clause that bears the most in this respect is the “economic considerations only”. All the IFIs have clauses in regards to whether political issues, such as human rights, fall under the ambit of their activities. Here, there is an interesting trend. On one end is the WB and IMF that have clearly taken the “economic considerations only” path, making any political issues, such as human rights, only relevant where they have economic connotations, that is, they can or do affect the WB/IMF programs. Their actions are characterised by the instrumentalist approach, which as discussed earlier, considers labour rights if and where they have some kind of bearing on the success of a programme. This economic rationale coupled with the neoliberal approach places labour rights on freedom of association on the deregulatory side of the implications spectrum previously discussed. The WB and IMF have, however, taken some measures in their lending activities that show a slow shift from the stance, where collective labour rights are an impediment to their activities and have embraced some labour standards, even if in an instrumental approach. This is a hopeful sign with regards to further moving towards incorporating the fundamental labour standards in the lending activities of the WB and IMF.

Similarly, the IDB, ADB and AfDB have the “economic considerations only” clauses. However, these regional institutions’ approaches depart from that of the WB and IMF. These institutions have taken a softer approach towards human rights by constructively referring to them in their documents and operations. In addition, the instrumentalist approach so apparent in the WB and IMF is rather subtle in these regional institutions. Both the ADB and AfDB have made deliberate efforts to incorporate core labour standards, which include freedom of association and collective bargaining, in their operations. This defies, to some extent, the “economic considerations only” approach.

On the other end is the EBRD. The mandates of this institution clearly provide for its political mandate and its rights-based approach to development. Consequently, it is not surprising that the Bank has incorporated the core labour standards, with specific reference to the ILO standards, in its operations. The EBRD is a unique departure from the instrumentalist approach common in the other IFIs.
6.8.2 Influencing Compliance or Non-Compliance through Labour Conditionality

There is no doubt that IFIs have influence on member states, and especially borrowing member states, on a broad spectrum of issues, as has been discussed previously. This is to say that, through their use of leverage along with the use of labour conditionality, they can influence those member states that use their financial assistance to comply or not to comply with the standards on freedom of association and collective bargaining. What is common in all of the IFIs is that they use conditionality to effect policy change in borrowing members, although the extent to which conditionality is the central tool for this differs. For example, the WB and IMF use conditionality extensively while the AfDB does not. The effect this conditionality has also differs.

In the case of the WB and IMF, conditionality has been mainly used to the detriment of international labour standards on freedom of association and collective bargaining. As elaborated in the discussions above, the WB and IMF, with regards to their neoliberal, instrumentalist approach, have been a driving force towards deregulation of labour protections, particularly freedom of association and collective bargaining. In the cases used in this study, the extent to which conditionality has been a direct cause or point of influence for non-compliance with international labour standards is considerable, compared with the IDB, ADB and AfDB.

The other banks have not really relied on labour conditionality to effect changes in labour policy in borrowing countries. The IDB, although otherwise following in the footsteps of the WB, rarely applies labour conditionality to its lending activities. The ADB has not substantially used conditionality in as far as collective labour rights are concerned. Instead, although its approach may not condition deregulation, it does not take any regards for those labour rights that the other Banks have taken on such as child labour and forced labour. The ADB’s activities with Burma and Uzbekistan are examples of this. Although it has embedded freedom of association and collective bargaining in its operational policies, the AfDB does not often employ conditionality as a means to influence certain behaviour on the part of the recipient. The AfDB initially began using policy-based lending and thus conditionality due to pressure from the non-regional members. As the AfDB’s policy including labour rights was adopted recently, it will take time to truly see if its labour conditionality indeed influences or implements freedom of association and collective bargaining rights in member states. The EBRD, as expected, has directed its conditionality towards the realisation and respect of international labour standards on freedom of association. Though this is a much-welcomed stance, the extent to which its conditionality has been a direct cause or point of influence for compliance with the ILO standards is limited, due to the Bank’s focus on the private sector.
Various factors can explain the difference with which conditionality has influenced compliance or non-compliance. The first reason is the membership base. The BWIs have a global membership base where almost all the countries are members of both the WB and IMF, especially since in order to become a member of the WB, a country must also be a member of the IMF. This global membership in turn provides a global sphere of influence, thereby affording the BWIs the possibility of influencing labour policy to a greater extent compared to the regional IFIs. The regional IFIs have smaller membership bases, even when the non-regional members are taken into account. This means that the regional institutions have a very limited sphere of influence compared to the BWIs. Furthermore, the activities of the regional institutions are limited to their respective regions, which limits the sphere of influence even more.

The level of resources each IFI has is another factor that has affected how influential the conditionality has been. With a global membership, the World Bank and IMF have substantial resources at their disposal. As many countries still require the financial assistance of these institutions, the WB and IMF are able to “throw their weight around” more in comparison to the regional institutions, where lack of resources is quite common (this lack of resources in the regional institutions is what led to the acceptance of non-regional members).

Another interesting factor that can explain the different approaches as well as the different ways in which conditionality has been used to affect collective labour rights, particularly with regard to the regional IFIs, is the relative needs of the regional members vs. those of the members in the global IFIs. As has been discussed earlier, the regional IFIs have more knowledge of the development needs of their regional members. As a result, the regional IFIs focus conditionality on labour rights more on the needs peculiar to their regional members. For example, in the case of the IDB and ADB, there is more focus on the conditionality of vocational or other forms of training for unskilled workers to deal with the problem of unskilled labour forces, which are seen as an obstacle to economic development. Therefore, the approaches the regional IFIs take are more sensitive to regional challenges to development. This is not the case with the global IFIs, which have a more of a paternalistic approach. Hence, the regional IFIs are “closer” to their member states and adjust conditionality to the needs of such members, as opposed to the global IFIs that set standards of action and impose them in recipient countries, while not paying much attention to the specific regional circumstances and needs. It is no wonder that conditionalities that were imposed in developing countries by the World Bank and IMF in the 1990s with regard to deregulation of labour legislation have some resemblance to the conditionalities imposed on the countries that received financing from the IMF during the economic and financial crisis in Europe.

Finally, as the WB and IMF were the first development financial institutions, they enjoy more influence compared to the regional institutions because they are
perceived as the sound of reason. After many years of research and involvement in developmental activities on a global scale, there is no doubt that these institutions enjoy more influence than the regional IFIs.

These factors have placed the WB and IMF in an optimum position of influence compared to the regional institutions, which explains why the labour conditionalties applied by the global institutions have a greater impact. These reasons can also explain the influence the World Bank and IMF enjoy in respect to the regional IFIs. Regardless of these factors, all the IFIs discussed in this study have some impact on the promotion and implementation of international labour standards on freedom of association and collective bargaining.

6.8.3 Compliance with International Labour Standards on Freedom of Association and Collective Bargaining in Operational Policies

As far as IFIs’ compliance in operations and projects with ILS is concerned, it is important to examine whether these rights are incorporated in the operational policies of the IFIs. This is crucial because the operational policies serve as benchmarks or guidelines that the IFIs comply with in their lending activities. This explains why the accountability mechanisms are available to ensure that the institutions’ policies are complied with and where there is incompliance, there is a mechanism to deal with grievances arising from such incompliance. This is to say that, if and where an IFI has embedded the labour standards in its Articles or social safeguard policy, for the sake of this discussion, then it is in compliance. Where the IFI has not embedded the standards in its Articles or operational policies, then it is not in compliance.

To begin with, the WB, IMF and IDB have not incorporated the international labour standards on freedom of association and collective bargaining in any of their Articles or operational policies. This is not surprising given these institutions’ emphasis on the neoliberal approach to the rights to freedom of association and collective bargaining. In the consultation phase of the WB’s most recent policy, the Environmental and Social Framework, there was a lot of pressure from trade union federations to incorporate freedom of association and collective bargaining in the policy.\(^1\)\(^2\) However, their policy does include standards (though not the ILO standards) on child labour, forced labour and anti-discrimination. The incorporation of the other three standards (that correspond to the CLS) is a positive step towards further compliance of the Bank with standards on freedom of association and collective bargaining. Again, it is crucial to state that both the WB and IDB have made progress in embedding freedom of association and collective bargaining standards in the activities of the private-

lending entities (the IFC and the IIC). The IFC has incorporated the standards (Performance Standards 2) and the IIC is working towards this.

The ADB provides an interesting position. First, the ADB has not embedded freedom of association and collective bargaining rights in its operational policies. Although the Bank has a somewhat neoliberal stance similar to the WB, it, to a small extent, has broken away from a pure neoliberal approach and at least considers mention of labour rights in its activities. This is demonstrated by a MoU with the ILO as well as the development of the Handbook on Core Labour Standards. The Bank’s strategies also show its position towards incorporating freedom of association and collective bargaining rights in its policy. Therefore, as far as the extent of compliance with freedom of association and collective bargaining rights in operations is concerned, the ADB is a step ahead towards compliance, in comparison to the WB, IMF and IDB.

The final category contains the AfDB and the EBRD, both of which have explicitly embedded freedom of association and collective bargaining rights in their policies. Both the Integrated Safeguards System and the Performance Requirements of the AfDB and the EBRD respectively specifically refer to ILO conventions No. 87 and 98. Thus, as a matter of policy, the two institutions are in high compliance with the standards in their operational policies. Although these two institutions fall under the same category of compliance, they depart on the part of approach in the light of their mandates. While the EBRD has a clear political mandate embracing human rights, the AfDB on the other hand has a political prohibition like the other IFIs, which has been interpreted to place human rights in the prohibited political considerations. As a result, the AfDB takes an instrumental approach. Consequently, it is likely that the implementation of these rights at the operational level may not have as much an impact in the AfDB because they are more a means to an end and not an end in themselves.

In identifying the positions of the IFIs in regards to the incorporation of the core labour standards in their operational policies, one can envision a continuum where one side (the right) marks complete incorporation of the core labour standards in operational policies while the other (the left) marks no incorporation of core labour standards in the operational policies. The EBRD and AfDB would lay further to the right on the continuum, the WB and IMF would lay near the left side, with the IMF further left than the WB (as opposed to during the late 1980s and early 1990s, when the WB and IMF would be in the far left side of the continuum). The ADB would be near the left side as well, perhaps further right than the WB and IMF and the IDB would be further left than the ADB and WB.

6.8.4 Conclusion
The IFIs certainly approach collective labour rights very differently. While some, such as the EBRD, have taken a human rights approach, others, like the WB and IMF, have taken a neoliberal approach to these rights. These approaches inform
the way these institutions deal with the rights at the operational or practical level. Where labour conditionality influences compliance, one can think of it as a useful tool towards the implementation of these rights. However, when it influences non-compliance with the rights, one is reminded of the troubling nature of this conditionality. The contradiction is also highlighted in regards to the overlapping IFI memberships. The IFIs have member states that are members of more than one IFI. If the AfDB and WB have projects in the same country (which is quite common), which IFIs’ conditionals apply? Such contradiction reflects the difficulties with conditionality as a tool for implementing labour rights due to its discretionary nature. It can be a tool for further realisation and implementation of labour rights but it also can be a tool for diminishing or inhibiting genuine efforts by states to comply with these standards.

One major conclusion can be drawn from this contradiction, that is, conditionality can be a useful tool to implement ILS on freedom of association and collective bargaining only where and when it is sensitive to or considerate of the recipient state’s obligations in international law and, in this specific case, obligations arising from the international labour standards on freedom of association and collective bargaining embodied in various international human rights instruments. In order for such consideration to be practically feasible, it is necessary to take more participatory approaches to conditionality, as the EBRD has attempted to do.

6.9 General Conclusion

In conclusion, IFIs operational standards create normative and procedural prospects and contribute in many ways to forging and developing accepted practices under international law. This occurs through the incorporation of ‘policy requirements’ - including relevant operational standards - into loan conditions that the borrowing state is required to fulfill. Accompanied by a number of IFI safeguards against non-compliance, the policy requirements become enforceable. More importantly, according to the extent to which their operational standards reflect or otherwise have a bearing upon the scope of operation of international human rights standards, the requirements can have significant human rights implications.

IFIs do indeed enjoy influence over issues of labour policy, and have the ability to shape the industrial relations’ systems. Though some IFIs promote and implement freedom of association and collective bargaining in their programs and some do not, the ways which these institutions do this differ depending on various factors such as theoretical approaches and economic rationale, and the effect of

these rights on development in the light of such factors. There are instances of a high degree of promotion and implementation where the standards are incorporated in policy papers and practical operations and programs, there are instances where the rights are promoted but not incorporated in the operations, there are instances of neutrality and there are cases of dismantling and undermining collective labour rights where policies and practical operations defy these rights. As was mentioned before, the roles the IFIs play are not clear cut, but rather range across a spectrum of possible roles and effects.

Conditionality can be both a positive tool used to implement collective labour rights and it can also be a tool for the undermining of the same. Whether it is a positive or negative tool for the cause of labour rights substantially depends on the approach of each specific institution. The reasonable solution to this is embedding or incorporating the labour standards into the activities of the IFIs. This incorporation of standards would act as a net baseline for the protection of the standards.

Before finally concluding, attention must be brought to the fact that conditionality has some repercussions in the wider policy space in which it operates. The increased use of conditionality has attracted a great deal of criticism in recent years. In particular, it has been argued that conditions infringe on the sovereignty of countries, that the Fund is exceeding its jurisdiction, and that conditions have not been effective in inducing economic reform.\footnote{Ofer Eldar, Reform of IMF Conditionality: A Proposal for Self-imposed Conditionality, 8:2 Journal of International Economic Law (2005).} The conditions have come not only to include general macroeconomic factors, but to also involve direct interference in issues, such as tax rates, banking regulation, labour regulation and even prices of commodities. There has been a shift from pure macroeconomic factors to microeconomic structural reforms. As appropriately pointed out by Lowenfeld, ‘the boundary between international and internal concern seems to have largely disappeared’.\footnote{Andreas Lowenfeld, The International Monetary System and the Erosion of Sovereignty, 25:2 Boston College International and Comparative Law Review (2002), 13.} Several problems with conditionality are particularly pertinent. It has been argued that the legitimate political institutions of the country, not the IFIs, should determine the nation’s economic structure. A nation’s desperate need for short-term financial help does not give these institutions the moral right to substitute its technical judgments for the outcome of the nation’s political process.\footnote{Martin Feldstein, “Refocusing the IMF”, 78 Foreign Affairs (1998), 20.} In Moreover, conditionality has focused on drafting new rules instead of trying to enhance the convergence between formal rules and practice by pressing borrower governments to act according to their own rules.\footnote{Mac Darrow, Between Light and Shadow, 245}
An important issue at hand is the fact that questions about the legitimacy of the regulation resulting from the conditional policies of these institutions. The legitimacy of conditionality is a controversial issue and criticism about legitimacy has pointed in several directions. First and foremost is that of a country’s (economic) sovereignty. Conditionality is contrary to the UN Charter of Economic Rights and Duties of States which provides for a state’s sovereign rights to determine its economic, social, political and cultural systems without interference, coercion or threat in any form. Another point of criticism is that conditionality lacks the democratic legitimacy that comes with legislative enactment and thus, it cannot command the coercive power of the state. Again, it is argued that IFIs are unelected, unrepresentative bodies which do not represent the interests of the citizens in a state, therefore the policy reforms they induce lack a legitimate element as they surpass democratic processes, proving to be incompatible with democracy. The lack of dialogue and exclusion of civil society in social policies demonstrates a lack of procedural fairness where, at least the perception of fairness to all stakeholders would possibly lend legitimacy to the resulting policies of these institutions. Legitimacy concerns also relate to the extent to which IFIs are perceived as impartial, given that their ownership structure and policy making are skewed in favour of some nations. It has been argued that the most powerful countries (such as the U.S.A. and European Countries) have undue influence on IFIs policies, policy advice and allocation of funds. Their influence is so great that IFIs advice cannot be trusted to be impartial, but is instead infected by political and ideological bias.

In addition IFIs are insufficiently accountable. As was discussed previously, IFIs are not subject to the jurisdictional influence of national or international laws and adjudicative bodies. IFIs have resisted external justifiability of their operations, particularly of conditionality, preferring instead to rely on internal administrative processes as opposed to external adjudication of disputes arising between them and member states and/or stake holders. These institutions have always reserved for themselves the right to interpret their own constitutions and by-laws.

A crucial issue in regards to the concept of conditionality is the issue of consistency. Conditionalities (which include major domestic policy and regulatory reforms) are not applied consistently across recipient member states in

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1810 Stephan Koerberle, Conditionality Revisited, 59.
1813 See “IFIs Accountability Mechanisms, Chap. 5.5
need of IFI assistance. Although the conditionalities may constrain domestic policy, they do not do so equally in all countries. Instead, they require more extensive policy reforms in some countries than in others.\textsuperscript{1815} Clearly, IFI conditions are not imposed exogenously on borrowing countries. They depend, among other things, on the severity of a crisis, the quality of domestic policies, and the past relationship of the borrower with the IFI. More importantly, they depend on the relative bargaining power of various stakeholders, including national politicians, interest groups and foreign banks.\textsuperscript{1816} It has been alleged that politically weak countries have to accept stronger conditionality than more influential ones.\textsuperscript{1817}

Conditionality also touches the issue of democracy. The question of the relationship between democracy and IFI conditionality is a contentious one, to say the least.\textsuperscript{1818} Democratic development has not been an original goal of the IFIs (except for the EBRD). It has even been claimed that the IMF historically favoured authoritarian regimes over democracies when deciding on loans, perhaps because dictators are more capable of carrying out unpopular reforms.\textsuperscript{1819} At any rate, conditionality is obviously deleterious to democracy as it entails a reduction of government sovereignty in several policy areas\textsuperscript{1820} hand in hand with the elimination of any domestic input into the policy process. While this loss of control may be consented to by the government, it is still undemocratic.\textsuperscript{1821} Again, as the loan agreements are negotiated between the government/executive and IFI officials, without the input of the legislature\textsuperscript{1822} which is most strongly linked to constituent demands, the loan negotiation process effectively circumvents the mechanism by which the electorate can realise their policy preferences.\textsuperscript{1823} Equally critically, there is concern that the way the changes are effected undermines democratic processes\textsuperscript{1824}. Several examples have been discussed where conditionality by the IFIs hampered decisions by courts or interfered with domestic law-making bodies and processes. Collier warns against the abuse of conditionality, stating that “the extension of the practice of conditionality from

\textsuperscript{1815} Teri Caraway and Mark Anner, “Negotiations and Domestic Politics: The Case of IMF Labour Market Conditionality”, \textit{International Organisation} 66 (2012), 27.
\textsuperscript{1818} Chelsea Brown, “Democracy’s Friend or Foe? The Effects of Recent IMF Conditional Lending in Latin America”, \textit{International Political Science Review} 30:4 (2009), 434.
\textsuperscript{1819} See Preworski, A. and Vialand, J.K. (2000), The Effects of IMF Programs on Economic and Domestic input into the policy process.
\textsuperscript{1820} Chelsea Brown, 434.
\textsuperscript{1821} Ibid.
\textsuperscript{1823} Chelsea Brown, 434.
the occasional circumstances of crisis management to the continuous process of general economic policy-making has implied a transfer of sovereignty which is not only unprecedented but is often dysfunctional.\textsuperscript{1825} It has further been argued that conditionality constitutes an “undue influence over debtor states” and that the substantive contents of conditional loans betray “the ideological biases of multilateral lending agencies” based on an exclusive preoccupation with macroeconomic austerity and fiscal rigor, even in times of recession.\textsuperscript{1826} There is increasing evidence that conditionality has not been effective - good policies cannot be bought, at least in a sustainable way. Additionally, since ‘good governance’, as understood by the IFIs, clearly implies better democratic processes - as underlined by the emphasis on accountability, transparency and participation - undemocratic means of implementation contradict the objective.\textsuperscript{1827}

In discussing conditionality, the argument for self-determination is inevitable. Article 1.2 of the UN Charter provides for relations among states based upon the “principal of equal rights and self-determination of people: The right’s high standing in the hierarchy of international law norms is shown by recognising of the right in what some regard as the constitution document of present day international systems-the UN Charter”.\textsuperscript{1828} In fact, the International Court of Justice characterised the right to self-determination in the Barcelona Traction Case as a norm of the nature of jus cogens, derogation from which is not permissible under any circumstances.\textsuperscript{1829} This is further articulated in the Declaration on Principles of International Law Governing Friendly Relations, which states that “all peoples have the rights freely to determine without external interference, their political status and to pursue their economic, social and cultural development and every state has the duty to respect this right.\textsuperscript{1830} Similarly, Common Article 1(1) of the ICCPR and ICESCR provides for all peoples’ right to self-determination of their political status and freedom to pursue their economic, social and cultural development.

Another problem with conditionality is that agreements on such conditionality are reached in non-transparent discussions between groups of government officials and IFI representatives without due consideration and participation by

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\textsuperscript{1825} Paul Collier and Jan Gunning, “The IMF’s Role in Structural Adjustment”, The Economic Journal 109 (1999), 635. \\
\textsuperscript{1826} David Barlett, “International Financial Institutions and Conditionality in Eastern Europe”, in Herman Hoen (ed.), Good Governance in Central and Eastern Europe: The Puzzle of Capitalism by Design (UK: Edward Elgar, 2001), 91. \\
\textsuperscript{1827} Devesh Kapur and Richard Webb, Governance-Related Conditionalities of the IFIs, G-24 Discussion Paper Series No. 6, August 2000, 7. \\
\textsuperscript{1829} ICJ Reports, 1970, para 72. \\
\textsuperscript{1830} Friendly Relations Declaration, UNGA Resolution 2625 (XXV), 1970.
\end{flushleft}
stakeholders, including civil society.\textsuperscript{1831} The IFIs internal decision-making processes suffer from a lack of transparency as well. Several defects have been identified as a result. There is often uncertainty regarding the reasons for particular decisions and the facts on which they are based. There is also a lack of clarity as to why a particular decision has been reached. The absence of clear rules has led to excessive reliance on discretion, which in turn creates an environment of great uncertainty and unpredictability.

As labour standards are increasingly featured in projects of IFIs, thereby creating an overlap of mandates with international labour agencies, the risk increases that ILS will be fragmented. Although most often reference is made specifically to ILO instruments (e.g., Conventions No. 87 and No. 98) there is no guarantee that the IFIs will interpret the standards, to the extent that they overlap with their own mandates, in a manner that corresponds to the ILO’s own vision.\textsuperscript{1832} Therefore, the risk of competing mandates and resulting fragmentation in the application and interpretation of these labour standards is more prominent as the IFIs have their own interpreting mechanisms that have little or no cooperation with each other or with the ILO organs.

As a final note, one cannot ignore the positive roles that the IFIs have played at times in promoting and implementing the rights of freedom of association and collective bargaining. There are surely promising changes in the IFIs to approaches to development that incorporate social as well as political factors, particularly human rights, in financing. Some IFIs have not yet adapted a policy on labour standards. These IFIs can be inspired or influenced to do so in the light of positive developments or experiences of other IFIs. An example of this effect is the Performance Standards 2 (PS2) discussed earlier, which have found their way into the policies of some of the IFIs, including the EBRD after being adopted by the IFC.

In conclusion, although economic growth is typically thought of as the way to reduce poverty, its effectiveness depends on how different sectors of the economy and workers benefit from growth. Economic growth is a necessary condition for the reduction of poverty, but it may not be sufficient. For poverty to be reduced, productivity and earnings (real wages, as well as earnings from self-employment) must increase sufficiently to increase the incomes of the poor. Even then, poverty reduction strategies need to be complemented by supportive economic and social policies, such as the construction of transport and communication networks, investments in health and education, and policies to boost the incomes of the poor. In countries with large informal economies, employment guarantees can provide


much needed income security for the poor. In countries where formal labour markets are more developed, traditional labour institutions such as minimum wages, social security systems and collective bargaining can help to ensure that the gains from economic growth are better distributed, thus lowering the incidence of poverty.\footnote{Sandrine Cazes and Sher Verick, \textit{Perspectives on Labour Economics for Development} (Geneva: International Labour Office, 2013), 59.} In the words of Stiglitz, \textit{development cannot be limited to raising the GDP but must involve transformation of society and a change in mindsets and in such a case, workers’ institutions can be key institutions in the development process (emphasis added).}\footnote{Joseph Stiglitz, “Democratic Development as the Fruits of Labour”, Keynote Address, Industrial Relations Research Association, Boston, January 2000, 2.}
7. Conclusions and Reflections

7.1 Introduction
In the scientific study of collective labour rights today, it is not possible to ignore or exclude the various international standard-setting entities, and particularly the international financial institutions. This is even more since labour policy or reform has become part of these institutions’ policies and operations. This study has examined the role of these institutions in the promotion and implementation of international labour rights, with focus on freedom of association and collective bargaining. Central to the research has been the analysis of the use of conditionality as a tool for regulation of these rights through the financing activities of the IFIs as well as various means of policy advice and technical assistance. The analysis has been carried out in the light of international labour standards on freedom of association and collective bargaining. This chapter summarises the findings and conclusions reached in light of the research questions set forth in the study, and sets forth recommendations in line with the findings.

7.2 Summary of Findings
Each chapter in the study covered a specific issue that arose in an attempt to meet the objectives as well as to answer the research questions in the study.

Chapter two focused on the IFIs. The starting point was examining the IFIs’ mandates by studying the respective constitutions (Articles of Agreement) of the IFIs and the interpretation of these mandates, particularly in relation to the protection of human rights. The composition of the IFIs and how they are governed was also discussed. The most interesting finding has been that the vague and in some cases ambiguous mandates of the IFIs leave room for expansion and flexibility in interpretation, which is carried out internally by the IFIs. Consequently, the IFIs use the vagueness of the mandates to expand their activities and this has resulted in the IFIs engaging in areas that were not originally considered as part of their mandates. The “political prohibition” clause, which is relevant to the human rights obligations of the IFIs, was used as an example to illustrate how the mandates are interpreted and how the same clauses change meaning and scope over time. A crucial conclusion in the chapter is that the bygone notion that the protection of human rights falls outside the ambit of the mandates of the IFIs has in interpretation and practice been deserted by the IFIs as they increasingly engage in human rights issues. Therefore, the political prohibition rhetoric, which had initially been used as a shield against any responsibility on human rights has been proven obsolete and the IFIs have acknowledged, through practice and constructive interpretation, that their primary
mandate of economic development cannot be achieved in complete isolation from other factors, particularly human rights. While the expansion of mandates of the IFIs can be an advantage or disadvantage, the advantage is that this expansion has brought some human rights issues into the ambit of IFIs lending activities. However, the value of human rights in this respect is another important finding in this chapter. Save for the EBRD which has a human rights mandate, the IFIs have more of an instrumentalist approach to human rights, where human rights are not an end or goal, but rather a means or a variable. The problematic result of this approach is that human rights are taken into account when they have an effect on the lending activities of the IFIs. In addition, the effect itself is determined by economic rationale.

The rise to prominence of conditionality was a result of a shift of development financing from project lending to policy-based lending, which brought the IFIs in closer contact with the national policy space, and marks a period when IFIs became active in issues of labour reforms and labour policy. This is corroborated by the transitioning of various lending instruments in the IFIs from lending which focused on specific projects to more policy-oriented instruments. An important issue in understanding the nature of the IFIs is the cumbersome way in which they are governed and the weighted voting system that places decision-making power in the hands of the more economically powerful countries, which are the ones less likely to use the financial services of the IFIs. This has raised concerns on fair representation of borrowing countries in the IFIs’ structures. Finally, with the assistance of international relations theories, the chapter finds that IFIs indeed have the ability to create standards that influence actors in their spheres and transmit these standards through their financing activities. Here, the example of the IFIs’ roles in developing and transmitting standards on anti-corruption demonstrates this crucial aspect.

Chapter three dissected the concept of conditionality to identify its inner components. It looked into the definition as well as the process by which conditionality is created and the underlying domestic interests in such processes as well as what it means from a legal point of view. The chapter also discussed conditionality from a legal point of view, which provided important insight given that conditionality is not a legal concept. The chapter provided understanding and better acquainted the reader with the concept through a typology as well as its application in various contexts, which was necessary for future analysis as it is one of the central themes of the study. The chapter found conditionality to be a tool for change which marks the interface between IFIs on the one hand and ILS on the other. It concluded that conditionality is a mechanism for change, that is, a tool or a medium through which norms are inserted into a jurisdiction, usually bypassing the democratic procedures through which norms are created at both international and national levels. One important aspect of conditionality is that conditionality is closely affiliated with leverage and influence arising from the
IFIs status as both international lenders with vast resources and capital and also standard-setting entities with regard to development. However, the non-legal status of MoUs renders conditionality an apprehensive tool, as it is not susceptible to legal regulation. Another interesting aspect in the findings in this chapter is that the IFIs do not only influence policies through conditionality alone, but also through persuasive means by providing regular policy advice and persuading members, even without a lending programme in place, to take certain policy measures that bolster economic growth. Even though this is a more subtle means as compared to conditionality, it plays a significant role as well in promoting changes.

Chapter four provided both a theoretical and substantive framework for international labour rights. The various theories surrounding the conception of labour rights, particularly on their relevance to development or economic prosperity were discussed. A comprehensive study into the institutional framework of freedom of association and collective bargaining, identified the international sources of these rights on both the international and regional levels (as these are also the two levels of IFIs studied). The chapter also discussed various international and regional human rights instruments and how the rights to freedom of association and collective bargaining have been interpreted by the respective supervisory or complaints mechanisms. Being the benchmark of rights in the study, a comprehensive discussion on the ILO system and conventions provided the underlying components of the rights while the jurisprudence of supervisory bodies provided more insight to the practical aspects. In addition to setting forth the role that international labour standards have played in international law as international legal norms of great importance to the world of work and even more so, in the context of development, was a discussion of the shortcomings of the international and ILO systems. One of these limitations is the state-centric subjectivity of the instruments and the disregard of other international actors in the framework, alongside poor enforcement and implementation mechanisms and inefficient supervisory systems.

Chapter five turned to public international law in search of the principles of international law that apply to IFIs and their operations and relationships with states. On basis of their nature as international organisations and subjects of international law, it sought to reveal the reach of international law in providing for the human rights obligations of IFIs. In this regard, it became clear that, although IFIs are subjects of international law, their human rights obligations are not clearly provided for. This uncertainty as to the human rights obligations of IFIs, other than what is provided for in their constituent documents, coupled with the functional immunity they enjoy as international organisations make it

1835 The reach of the IFIs functional immunity is not certain. For a detailed discussion, see “Functional Necessity, Domestic Legal Personality and Immunity”, Chap. 5.3, 214.
difficult to establish their obligations and responsibility in case of a violation of such obligations. These are shortcomings of international law. The discussion on the IFIs accountability mechanisms in the view of international law, found that the accountability mechanisms, though a positive step towards holding IFIs accountable for violations of human rights, and labour rights specifically, only deal with violations of internal procedures and policies of IFIs and hence do not provide sufficient forums for addressing human rights violations resulting from the IFIs activities. It suffices to say that the IFIs are actors in the international arena without much legal limit to their activities and to impose responsibility where their activities have adverse impacts on people and the human rights of such people is difficult due to the issues discussed above.

Chapter six analyses the ways in which IFIs have applied conditionality on labour rights (labour conditionality). This is done by analysing practical cases through examining lending documents, advice documents, IFIs’ policy documents, country strategy papers, evaluation reports etc. To begin with, the ways in which the IFIs use conditionality on freedom of association and collective bargaining differs. While the global institutions use conditionality more as a means to change labour policies, the regional IFIs use conditionality to deal with member-specific needs of the workforce focused more on employment creation, promoting the participation of women in the workforce, unskilled labour forces, mismatched skills for employment, the private sector etc. In the specific case of freedom of association and collective bargaining, the WB and IMF have in many cases used conditionality to promote flexible labour markets and decentralisation of collective bargaining. As for the operational policies, some of the IFIs, like the AfDB and EBRD, have incorporated ILO standards on freedom of association and collective bargaining in their policies while others, like the ADB and IDB have made cooperation commitments with the ILO to promote these rights, while other, as the WB and IMF have not incorporated them nor committed to the ILO standards. The comparative analysis of the IFIs’ approaches identifies various factors for this variation. The approach the IFIs have towards human rights in general have a bearing on their willingness to promote of implement the labour standards. The WB and IMF that follow a neoliberal and instrumental approach are more ambivalent towards the labour standards and apply them when they affect the success of a project or programme. Again, the EBRD has a clear human rights approach and hence has incorporated the ILO conventions on freedom of association and collective bargaining in its policy. The AfDB has also incorporated the standards, although it cannot be said to have a human rights approach. Although the IDB and ADB arguably take the neoliberal approach, they do not seem to employ this strictly in their programs as in the WB and IMF, and have, although in a vague sense, made a voluntary (but non-binding) commitment to the rights. Another reason for the variation is that, while the WB and IMF have a vast global membership, the regional IFIs are more oriented to the specific
regions, even though they have non-regional members. This is to say that, because the development needs of the regions differ, the regional IFIs preferences differ from one another and from the global IFIs. While the WB and IMF focus on competitiveness and flexible labour markets as a means to stimulate employment and economic growth, the IDB and ADB focus on educating the labour force and instituting women in employment as the path to economic growth. Similarly, the EBRD focuses on promoting and enhancing privatisation and the private sector and free market economies in Easter Europe as a means to achieve economic growth.

7.3 Outcomes and Reflections

7.3.1 The Role of International Financial Institutions in Promoting and Implementing ILS on Freedom of Association and Collective Bargaining

The first research question inquired into the role IFIs play in the promotion and implementation of international labour standards, drawing attention to the question of the ways in which conditionality influences compliance with international labour standards. The IFIs play an important role in the implementation and promotion of the international labour standards on freedom of association and collective bargaining. Their ability to regulate and affect national labour policy and labour laws arises from the influence they enjoy due to their resources and common status as development doctors, which also afford them the possibility to create standards or norms in the area of development. The use of conditionality as well as other forms of influence enables IFIs to insert these various standards into national legal systems, influencing states to act in a particular way towards international labour standards.

The identification of the role that IFIs play in relation to conditionality is elaborated by looking at both the direct and indirect effect of conditionality.\textsuperscript{1836} In the direct effect, where labour conditionality targets the national legal framework, the IFIs have used conditionality to effect labour law reforms in recipient countries. In some cases, conditionality has been used by the IFIs as a deregulatory tool. The WB and IMF conditionality which focuses on more flexible labour markets has demonstrated the use of conditionality to influence non-compliance with the freedom of association and collective bargaining. The case of Zambia, where WB conditionality specifically required that the government submit to parliament an amendment to the labour code to permit enterprise-level collective bargaining as opposed to the previously mandated sector-wide bargaining, illustrates this.\textsuperscript{1837} The effect of this is the decentralisation of bargaining structures. In Bosnia and Herzegovina

\textsuperscript{1836} For details on the meaning of these two aspects, see “Introduction”, Chapter 6.1, 228.

conditionality required the Parliament and National Assembly to adopt changes to the labour code to cease the validity of the current collective agreements and limit the duration of new collective agreements.\textsuperscript{1838} Again, the IMF’s conditionality in Greece is another example of the deregulatory effect of conditionality which has been discussed in depth.\textsuperscript{1839} Moreover, the promotion of labour market flexibility by reducing labour law protection of workers and using more flexible types of employment such as fixed term employment, has deregulatory effects. The legal implications associated with this is the undermining and dismantling freedom of association and collective bargaining.

In some instances, conditionality has been used to effect labour reforms that promote and implement labour freedom of association and collective bargaining. The cases of Yugoslavia\textsuperscript{1840} and the Philippines\textsuperscript{1841}, where the right to freedom of association and collective bargaining was highly restricted, present examples of this role. Here, conditionality required the governments to respect and guarantee these rights. The legal implications in such cases were that the labour rights were promoted and implemented in the recipient countries.

The study has also highlighted cases where the IFIs, though instituting labour reforms, did not touch on freedom of association and collective bargaining and had no effect. Most examples are found in the ADB and IDB where conditionality on labour reforms focuses on specific needs of the respective regions, such as an unskilled labour force and participation of women in the workforce. Here, there were no detectable legal implications.

As for the indirect effect conditionality, it reflects conditionality that does not specifically target labour reforms, but nonetheless has impacts on freedom of association and collective bargaining. Reforms such as reorientation of government, cuts in government expenditure and privatisation are examples of such. These reforms have sometimes resulted in cuts in wages provided by in collective agreements, freeze of wages and benefits etc., as has been demonstrated in the cases of Romania and Portugal.\textsuperscript{1842} Here, the legal implications included undermining labour standards, especially those on collective bargaining, considering the non-consultation fashion in which such reforms usually occur. However, the EBRD presents a different approach to privatisation, which, contrary to the other IFIs, involves consideration of freedom of association and collective bargaining. The examples of Ukraine and Georgia present examples of how the EBRD institutes these rights in its lending activities.\textsuperscript{1843}

\textsuperscript{1838} See “The Bindingness of Collective Agreements”, Chapter 6.3.2.4, 248
\textsuperscript{1839} See “The Right to Collective Bargaining”, Chapter 6.3.2.3, 245.
\textsuperscript{1840} See “Freedom of Association”, Chapter 6.3.2.2, 236.
\textsuperscript{1841} See “Freedom of Association” Chapter 6.3.2.2, 239.
\textsuperscript{1842} See “Reorientation/ Cuts in Government Expenditure”, Chapter 6.3.3.1, 263.
\textsuperscript{1843} See “The Direct Effect of Labour Conditionality” Chapter 6.7.2, 312
The various cases present a picture of the different effects conditionality can have on labour standards. It suffices to say that conditionality is a 'double edged sword' that can influence compliance with as well as non-compliance with labour standards. The effect it has on freedom of association and collective bargaining depends on the IFI that wields such conditionality.

However, the legal implications of conditionality, whether direct or indirect are not clear a clear-cut case of positive or negative implications. Indeed conditionality has been used to promote freedom of association and collective bargaining rights, but also to undermine them. It has sometimes been used to implement the rights and sometimes to dismantle them. In some cases, conditionality has not played any specific role in relation to these rights. Therefore, the legal implications are more of a spectrum of possible effects with two ends, one of positive implications, the other of negative implications and a grey area in between. Conditionality that clearly and explicitly requires reforms that undermine labour rights fall more on the negative side of the spectrum. Conditionality that explicitly requires compliance with labour standards falls more on the positive side. The grey zone consists of conditionality that does not have a determinable positive or negative effect, but has some implication on the rights.

Different factors can be used to explain the different legal implications that conditionality causes. First is the IFIs approach to freedom of association and collective bargaining in the context of their development ideology and financing. The IFIs play a destructive role where they approach labour standards in adverse ways, perceiving them as a hindrance to development and not taking regard of them in operational guides and policies. In such a case, conditionality is used as a tool to influence non-compliance with obligations of recipient states arising from the international labour standards, resulting in risks such as dismantling, undermining and demoting international labour standards in recipient states. This has been demonstrated by the World Bank and IMF which are more towards the negative side. On the other hand, they play a constructive role where they approach labour standards as an important aspect of development, while also instituting them in their operational guidelines and policies. In such a case, conditionality is used as a tool to influence compliance with obligations by recipient states arising from the international labour standards, resulting in promotion and implementation of labour standards. This has been demonstrated by the EBRD, which is more towards the positive side. The AfDB, which has also incorporated freedom of association and collective bargaining in its social safeguard policy is also more towards the positive side, though not further than the EBRD. The IDB and ADB are in the more in the grey area, with no clear implications on freedom of association in their lending, although this is not to say that there is no effect at all on the rights in their activities.
Finally, although conditionality has been used as a tool for promoting and implementing labour standards and has potential in being a useful tool, it also has risks. The manner and process in which conditionality is formulated coupled with the decision-making mechanisms in the IFIs which approve conditionality in lending programs make it objectionable. This makes it difficult, from a legal point of view, to reconcile it with international labour standards as a suitable tool to further these rights in various countries which are recipients of the IFIs lending and financial assistance. Furthermore, conditionality is shadowed with issues of legitimacy, self-determination, interference in domestic affairs of member states, undermining democracy, sustainability etc., which reflect the risk of using conditionality.

Despite all this, conditionality can be a useful tool in promoting and implementing international labour standards on freedom of association and collective bargaining. This is where it is used in a context where the IFIs take into consideration the recipient countries’ human rights obligations under international law, particularly on freedom of association and collective bargaining, in their activities. This also means that the IFIs themselves respect these rights.

7.3.2 International Law and International Financial Institutions

The second question in this research explored the general international law framework in an effort to identify the rules of international law that apply to the IFIs, particularly in relation to human rights based on the fact that international labour standards are part of the general human rights framework. The question explores what kind of accountability or responsibility IFIs face where their activities or operations contradict or violate human rights. It is clear that the IFIs have a legal personality separate from the member states and are subjects of international law. However, their duties and responsibilities are not very clear, as they are governed by the international rules that govern international organisations in general. As this is the case, the obligations of the IFIs are primarily those stipulated in their constituent instruments, that is, their respective articles of agreement. This creates a problem where the constituent documents do not contain any human rights clauses, as is the case in all the IFIs except for the EBRD. As the IFIs are not signatories of the international human rights treaties, including the ILO conventions, it is difficult to construct direct obligations on the IFIs, arising from such sources of international law. Again, obligations emanating from general principles of international law and customary international law, which are binding on international organisations in general, are inexact. Particular difficulty is in determining whether core labour standards have crystallised into customary international law norms, thus creating obligations for IFIs.

Another aspect of international law that makes it difficult to establish the human rights obligations of IFIs is functional immunity. The All American Cables
Case shows how the reach of the principle of functional necessity is not clear. These factors make it problematic to clearly establish the human rights obligations of the IFIs under international law, and to hold them accountable. Here, the principles of international law are seen to have several weaknesses and loopholes for IFIs. One of the outstanding weaknesses is that traditionally, international law has been based on states as subjects of international law. However, even with the rise of international organisations as subjects of international law, the international principles have not evolved enough to accommodate this development and much of it is still based on state-centric assumption and principles, thus leaving the general framework for IFIs with lacunas, that are more often than seldom exploited to avoid specific and legally binding human rights obligations for IFIs.

In addition, despite the fact that all the IFIs have accountability mechanisms, they are internal mechanisms and procedures with the main aim of ensuring compliance of IFIs projects or programs with the IFIs policies and procedures. These are more of review mechanisms than accountability mechanisms. The only way these mechanisms can further international labour standards and human rights in general is where these rights are instituted in the IFIs’ policies, in which case they would be subject to these mechanisms. The minimum is that the IFIs should at least respect the human rights obligations of their members. This is discussed in the ensuing section.

7.3.3 Sustainable Approaches to Conditionality and Development

The research questions reflected above show two important aspects of IFIs conditionality that require a sustainable resolution. The first aspect that has to do with the IFIs role in promoting and implementing freedom of association and collective bargaining is the matter of approach. The diverse approaches the IFIs have to human rights, including labour rights, have a lot to do with the contradictory legal implications they have on freedom of association and collective bargaining. This shows the unsustainable character of IFI conditionality and calls for a common approach that will accommodate respect for human rights in a more sustainable way in the IFIs in context of their development activities. The second aspect has to do with the uncertainty surrounding the human rights obligation of the IFIs. These two aspects reflect most of the problems associated with the use of conditionality by the IFIs.

To begin with, sustainability means actions taken in the present to improve the human condition in which we live to be lasting and benefit future generations. This phenomenon has become popular when referring to development.

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Sustainable development is defined as a process of change in which the exploitation of resources, the direction of investment, the orientation of technological development, and institutional change are made consistent with future and well as present needs.\(^{1846}\) Indeed the cases discussed herein have illustrated the contradictory, backlashing, secretive, unsustainable antidote for development which characterises the IFI operations. This raises the need for a sustainable approach to the IFIs development activities as well as human rights by the IFIs.

Reflecting on the activities of IFIs from their inception to present times indicates that the term ‘development’ is indeed a malleable term with different meanings in different contexts.\(^{1847}\) Again, their traditional notion of development which has been attached to economic development, which had been the main measure of achievement, lacked a holistic concept of development which ignored other values and how economic growth is correlated to other variables\(^ {1848}\), that are social, political etc. Again, save for the EBRD, the instrumental approach to labour standards is common in the IFIs. The problematic aspect of this approach is it defines the question of respect for human rights as an option or a variable, that is, a matter of choice rather than as a matter of legally binding obligations.\(^ {1849}\) This approach, as concluded earlier, has proven to be unsustainable, particularly with regard to labour standards.

Central to sustainable approach to development is Sen’s view that, “in judging economic development, it is not adequate to look only at growth of GNP or some other indicators of overall economic expansion. We have to also look at the impact of democracy and political freedoms on the lives and capabilities of citizens.”\(^ {1850}\) This interesting approach links development to rights and freedoms, creating a base for the human rights-based approach to development.

In 2003, UN agencies came together to adopt a Common Understanding on the Human Rights-Based Approach to Development. The document states that “all programmes of development cooperation, policies and technical assistance should further the realisation of human rights as laid down in the UDHR and other international human rights instruments”.\(^ {1851}\) In much of the traditional discourse on development, economic growth was the central fixation of the IFIs, to the extent that the adverse effects of their programs on human rights were

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\(^{1850}\) Amartya Sen, Development as Freedom (New York: Anchor Books, 1999), 150.

disregarded. With time, the IFIs have, at least through practice, demonstrated the inseparability of human rights issues and the effort to promote economic development. However, despite the evolution of the mandates and activities, drawing in various human rights, the IFIs, save for the EBRD, have not fully acknowledged their fundamental two-way relationship with human rights, that is, sustainable development is impossible without human rights and the recognition and advancement of an inter-connected set of human rights is impossible without development.1852

The human rights-based approach to development is an approach that can combine development and respect for human rights in a more sustainable manner. This approach has been defined as,

A human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress. Mere charity is not enough from a human rights perspective. Under a human rights-based approach, the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law. This helps to promote the sustainability of development work, empowering people themselves—especially the most marginalized—to participate in policy formulation and hold accountable those who have a duty to act.1853

This approach is both a goal and a method. As a method, it is a way of implementing human rights in a development context.1854 As a goal, the approach is related to normative values, particularly those espoused in the Declaration on the Right to Development. This human rights characteristic and values that forms the basis of the approach make it a promising way forward as far as development is concerned.

It is crucial to state that this approach gained prominence internationally in response to the development discontents following structural adjustment engineered by the IFIs. Naturally, this approach is at odds with the traditional economic theories discussed herein, which base development, not on human rights, but on expanding markets, increasing production, deregulating etc. to foster economic growth. What is important when looking into these theories is their effect on human rights, on core labour rights, on freedom of association and collective bargaining. Clearly, economic growth that is at the expense of universally accepted human rights standards, such as freedom of association and

1853 UN Office of the High Commissioner on Human Rights, General Assembly Resolution 41/128 (14th preambular paragraphs), Art. 2, 2.3
collective bargaining, where such economic growth becomes synonymous to neglecting, curtailing or violating these rights, has no place in this approach to development.1855

As for the second aspect of human rights obligations of IFIs, a sustainable approach would require two things. Respect for human rights obligations of member states as well as the extraterritorial application of human rights. It is farfetched to argue that IFIs are required to safeguard human rights or even to enforce them. What is important is to respect these rights by incorporating them as minimum standards in their operations. The aspect of respect means that the IFIs should not take measures that violate human rights. In the specific case of freedom of association and human rights, the IFIs activities have substantial effects, making respect for these rights even more crucial. However, to ensure that the IFIs indeed respect these rights, it is crucial that they are embedded in the policies of the IFIs, as in the case of the EBRD.

One of the characteristics of international organisations is that the obligations of their member states do not automatically transfer to them, as they are legal entities, separate from their member states. However, as for the IFIs where the members (especially the most powerful ones) play important roles in the decisions and day to day activities of the IFIs, the question of their human rights obligations haunts one’s mind. The question that arises here is whether the actions of states with majority votes, for example, that decide on matters that have effects on individuals to the detriment of realisation of human rights can be said to violate human rights. Here, the concept of extraterritorial application of human rights comes into play. Central to this notion is a state’s human rights obligations outside its territory. This suggests that state parties’ human rights obligations can extend to their relationships with other actors such as IFIs and transnational corporations (TNC), as these are vehicles through which extraterritorial violations occur.1856 Thus, powerful states exercising large degrees of influence or control over IFIs may trigger extraterritorial human rights duties when designing and creating international financial agreements in other countries.

The CESCR has provided insights into extraterritorial application of human rights. According to its jurisprudence, the Committee has stated that parties to the ICESCR that are members of the IFIs, particularly the WB and IMF and regional development banks, should pay due regard to the protection of rights under the Covenant in influencing the lending policies, credit arrangements, structural adjustment programmes and international measures of their institutions. In addition, the strategies, programs and policies adopted by state parties under


1856 Ibid.
structural adjustment programmes should not interfere with their core obligations and adversely impact rights under the Covenant. The Committee’s position highlights the expectation that human rights will be integral to decision-making in IFIs where such decisions may impact the rights under the convention and give rise to corresponding obligations to act collectively towards meeting Covenant obligations.

7.4 The Way Forward

In light of the objectives, questions, findings and outcomes, the dissertation has highlighted various aspects in relation to the role of international financial institution in promoting and implementing international labour standards on freedom of association and collective bargaining. The positive and negative aspects of IFIs and conditionality with respect to freedom of association and collective bargaining have been discussed. Below are some recommendations on various ways in which conditionality, as used by the IFIs in development lending can be a useful and sustainable tool and the ways the lending activities can play a enhanced role in the promotion and implementation of these rights.

7.4.1 Embeddment of International Labour Standards in IFIs Policies

Today, IFIs play a vital role in industrial relations in general and particularly with regard to freedom of association and collective bargaining. To begin with, it is crucial to state that the importance of labour standards to economic development in the larger purposes of the IFIs is not coincidental. Going back to the Articles of Agreement of the IFIs, there are both explicit as well as implied clauses that institute labour conditions as part of the purposes and functions of the IFIs. Some Articles specifically state the IFIs’ respective purpose to be “…raising productivity, the standard of living and conditions of labour.” When it comes to raising conditions of labour, one would think that the point of reference would be the ILO standards.

Although, as concluded in the study, the IFIs have moved in a positive direction towards accepting core labour standards and human rights in general, there has been a lack of commitment, as the memoranda of understanding between the ILO and the regional IFIs are voluntary and have no legally binding effect. Moreover, inconsistent and at times conflicting policies of IFIs with labour standards and the adverse effects of this can be remedied by the incorporation of the core labour

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1859 See Chapter 7.3.1 herein, 333.
1860 See Article I (iii), IBRD Article of Agreement, 1944; Article 2(iii) EBRD Articles of Agreement.
standards in the policies of the IFIs. This will facilitate explicit commitments¹⁸⁶¹ to respect labour standards on freedom of association and collective bargaining in their financing activities and policies.

This incorporation does not only mean re-organising, improving and evaluating policy processes so that the actors who are normally involved in policy-making incorporate a labour rights perspective in the policies¹⁸⁶², but also means making labour rights considerations in the various phases when implementing programs or projects. This can also lead to better approaches to these labour standards as they can then be subject to impact assessments as well as evaluations where the goals go beyond fiscal and economic goals, to social policy goals, including labour rights, making more room for social dialogue with those who can be potentially affected by these programs. Again, incorporation of the labour standards in the policies of the IFIs would expand the scope of the accountability mechanisms in the IFIs to include receiving and addressing grievances on violations or adverse effects of these operations on labour standards from those affected. This will entail a shift from managing negative labour rights effects caused by the policies and conditionality to avoiding policies that pose risks to these rights¹⁸⁶³.

As the IFIs have in one way or another attempted to consider these standards in their policies, this does not seem to be a precarious task. (For example, the World Bank’s Operational Policy incorporates standards on forced labour, child labour and discrimination, although not making any reference to the ILO standards, which are the internationally accepted standards with regard to these aspects of labour rights). This is even more so considering that the few IFIs that have incorporated these standards in their policies are yet to signal any negative impacts of these standards to their financing activities.

It suffices to say that, short of incorporation of the core labour standards in the IFIs’ policies, thereby ensuring that the affiliated conditionality is in line with these standards, it is unlikely that the institutions can play a positive role in the promotion and implementation of freedom of association and collective bargaining.

¹⁸⁶² Christine Kaufmann, Globalisation and Labour Rights, 90
7.4.2 Policy Coherence

It is without a doubt that the goals of human rights and development are inextricably linked and mutually reinforcing.\textsuperscript{1864} This is to say that, one cannot be attained without the other. This shows the importance of cooperation between all agencies that are specialised in these areas to ensure sustainable development where one agency does not undermine the work and achievement of another. In this particular case, cooperation between the IFIs and the ILO is crucial in ensuring that the financing activities of the IFIs do not adversely affect those of the ILO, particularly since they have the same membership base. It is important to note that all the constituent documents of the IFIs, ILO and UN, to mention but a few, contain a clause stating that the organisations shall cooperate with other international organisations working in related fields.\textsuperscript{1865} This provides an important legal basis for cooperation and policy coherence as it forms part of the purposes and functions of these organisations.

Coming to policy coherence between the IFIs and ILO, the challenge in attaining policy coherence is not in the want of such standards, but rather a lack of will of the IFIs to indulge into human rights aspects. Though there have been several attempts to coordinate these policies in line with the ILO standards, there has been a lack of commitment. Surely there have been considerable developments in these policies, as demonstrated by the AfDB and EBRD as well as the bigger picture in all of the IFIs. However, the absence of these minimum standards in the policies of the other IFIs maintain the conflicting activities of those with policies encompassing the ILO core labour standards and those not, which in a more general or collective stance inhibits the implementation of these rights in the IFIs activities. In such a scenario, mutually implementing labour policies can ensure effective development and policy outcomes. However, when the IFIs with the common goal of development and/or economic growth, while responding to different imperatives, have contradictory policies in a common policy space, the effectiveness is simply compromised. It is thus absolutely necessary to promote a coherent legal order\textsuperscript{1866} in the IFIs activities at the operational level where such policy coherence is an objective in its own right.\textsuperscript{1867}

It is important to state that policy coherence does not limit cooperation to the IFIs alone, but extends to cooperation with other organisations. After all, the call for

\textsuperscript{1865} See Article V section 8 (a), World Bank Articles; Article 2(2), AfDB Articles; Article 2(v), ADB Articles; Article XIV section 2, IDB Articles; Article 2(2),EBRD Articles ; Article 12, ILO Constitution ; Articles S5 and S8, UN Charter.
policy coherence has been echoed by various organisations.\textsuperscript{1868} What is more
consoling is that there already exists a rich array of cooperation agreements and
joint activities among the IFIs and other organisations.\textsuperscript{1869} The key is to identify
the gaps and find ways to fill these lacunas.

The solution to this would be the embedment of the core labour standards in the
IFIs’ operational policies. After all, the activities of the IFIs have consistently
proved a move towards the inclusion of the standards encompassed in the ILO
core labour standards, although they have not always used the ILO standards as the
benchmark. Such a case is illustrated by the WB’s new policy where the
standards are similar to the core labour standards, but provided by the Bank’s own
definitions. More importantly, the standards already bind the recipient countries,
thus embedment of the core labour standards in the operational polices would not
only create policy coherence, but also move all the IFIs further in the direction of
playing and positive role in promoting and implementing these standards in their
development activities/operations and ultimately in their member states.

Policy coherence as a solution to the clashes that occur between the activities of
the IFIs and the ILO’s labour standards is not wishful thinking. The case of
Uzbekistan has demonstrated that these two kinds of organisations (IFI and human
rights organisation) can coherently work in the same policy space and produce the
intended results. In this case, both the development goals of the World Bank in
Uzbekistan were achieved as were the efforts of the ILO in eliminating child
labour in the country. Indeed, labour rights became, not an obstacle, but an
important factor to the success of the financing agreement between the World
Bank and Uzbekistan.

7.4.3 Streamline Conditionality

Conditionality can be a potentially useful tool. As for financing or lending
activities in IFIs, it is an important aspect to ensure that various practical goals are
reached. Therefore, conditionality as it is cannot be “wished away”.\textsuperscript{1870} However,
the practice of conditionality can be bettered. One way to achieve this is to create
a framework of best practices on how conditionality should be designed and
coordinated\textsuperscript{1871} among various donors. It is crucial that such a framework take

\textsuperscript{1868} See for example, United Nations General Assembly, Keeping the Promise: United to Achieve the Millenium
Development Goals, UN Document No. A/RES/65/1, 19th October 2010 where the UNGA stated that “We call
for increased efforts at all levels to enhance policy coherence for development”. See also ILO, A Fair
Globalisation : Creating Opportunities for All, Report of the World Commission on the Social Dimension of
Globalisation, Geneva, 2004, which calls for policy coherence across international organisations; OECD, Better
European Commission, Policy Coherence for Development 2015 EU Report (Luxembourg: European Union,
2015)

\textsuperscript{1869} Examples have ben discussed herein. For example, the cooperation between the ILO and the ADB, the ILO
and the EBRD, the EBRD and the EU, The WB and IMF and the UN etc.

\textsuperscript{1870} Benedicte Bull et al. The World Bank and IMF’s Use of Conditionality, 47

\textsuperscript{1871} See Stefan Koeberle, Conditionality Revisited, 3
coordinated among various donors. It is crucial that such a framework take consideration of the human rights of the populations the conditionality affects, which is one of conditionality’s main deficiencies, at least in the IFIs that do not have a specific human rights mandate in the articles of agreement. Some of the IFIs have attempted to create such best practices with regard to conditionality. The World Bank, for example, launched a review of its conditionality in 2005 which resulted in the adoption of the Bank’s Good Practice Principles, which provided the principles that are to govern conditionality in the Bank, including ownership, coordination, customization (tailoring to circumstances), criticality and transparency.\footnote{See Stefan Koeberle, \textit{Conditionality Revisited}, 3}

In the specific case of international labour standards, best practices and benchmarks on conditionality would certainly need the involvement of not only the IFIs, but also the ILO and other relevant agencies. As demonstrated that Corruption Perception Index of Transparency International has been a source of wisdom for the IFIs’ anti-corruption conditionality, the ILO could serve a similar purpose with regards to labour standards.

Such an attempt to streamline conditionality has been invoked in Europe where in 1992, the Association of the European Development Institutions (EDFI) was created. This is an association of bilateral financial institutions operating in developing and reforming economies, mandated by their governments to achieve development and poverty reduction by promoting sustainable development through financing and investing in profitable private sector enterprise.\footnote{See World Bank, \textit{Good Practice Principles in the Application of Conditionality: A Progress Report, 2006}} In 2009, the members signed a declaration on “Principles for Responsible Financing”, which commits members to working with client companies in order to progressively realise the standards contained in a number of international instruments, including the ILO Fundamental Conventions. Again, the EDFI adopted “Harmonised Environmental, Social and Governance Standards as well as the UN Declaration of Human Rights, the IFC Performance Standards and the IFC’s Environmental and Health and Safety Guidelines. While these do not harmonise the content of labour provisions in DFI policies, they contain social category definitions, certain technical standards for due diligence, social contractual requirements and exclusion list for joint investment projects.\footnote{See www.edfi.be} Although these are smaller, bilateral financial institutions, the movements provides a good example of attempts to coordinate the activities and policies of institutions operating in the same space.

Of course a regulatory consensus on labour conditionality on a global level would be difficult to achieve because of the varying approaches and traditions of the

defined (that is, there is no clear and agreed definition of the term conditionality). Nevertheless, a streamlining code and framework coupled with an accountability or complaints mechanism could assist in aligning the conditionality of IFIs and solving the pluralistic approach to social policy in general and labour rights specifically.

7.4.4 Organisational Responsibility

Human rights and development interact in a variety of ways and have evolved towards similar goals. The study has discussed the manner in which the IFIs have slowly shifted from a stance of no relevancy nor responsibility as to human rights in their development activities to the more recent stance of the importance of human rights to development. However, despite this positive achievement, the relevancy of human rights to the IFIs is more constructive than actual. This is to say that, with the exception of the EBRD which has a clear human rights mandate, the other IFIs have not incorporated human rights into their articles of agreement, which, as discussed, provide for their obligations under international law. This makes it rather cumbersome to establish their legal responsibility when they have influenced or caused violations of human rights. The relevance and bindingness of customary international law or general principles of international law on IFIs provides an avenue for their responsibility, to the extent that freedom of association and collective bargaining can fall within these sources, which is not a matter of absolute certainty. Although IFIs are subjects of international law, the rules of international law and in particular, human rights are not a clear-cut case. Therefore, while their scope of activities increases, consequently affecting human rights, international law has not developed at a similar pace, leaving a shaky basis of obligations and responsibility on the part of IFIs and international organisations in general.

However, it is about time that the IFIs accept the relevance of human rights to their operations and accept the applicability of human rights to them, in view of the fact that their projects can, and indeed do, affect the human rights of populations in recipient countries. Most discussion on the human rights obligations of the IFIs have pointed to the human rights obligations of the member states to the IFIs and their legal obligation to ensure that they do not partake in activities that violate their human rights violations. The ILC’s Draft Articles on the Responsibility of International Organisations are one step in the rights direction in instituting responsibility on international organisations. However, the Articles are more general in that they provide for responsibility due to an internationally wrongful act, which is basically a breach or violation of an obligation arising from the various sources discussed in chapter 5. This brings one

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back to the challenge of certainty as to the human rights obligations incumbent on IFIs in international law.

With the ever-increasing scope of the IFIs activities and their direct impact on human rights in member states, a fresh attempt to endow direct human rights responsibility on IFIs is overdue. Such an attempt to promote the direct human rights responsibility of IFIs can be found in the Tilburg Guiding Principles on the World Bank, IMF and Human Rights, which purport to “relate to human rights obligations for IFIs (like the WB and IMF), link these legal obligations in the field of human rights to the economic and political realities the organisations are confronted with and discuss the possible redress of adverse human rights impacts of the activities of the financial institutions.”1876 The principles also state that, when member states decide upon policies, programs and projects that impact a State, they must take into account and respect the relevant national and international human rights law that apply to that state. Member states should not agree to measures that will impede their ability to comply with their national and international human rights obligations.1877 These principles are not binding, nor are they international guideline. However, they provide a fresh approach to the organisational responsibility of IFIs.

7.4.5 Participation and Consultation with Social Partners
Conditionality as a tool is in dire need of new approaches. New approaches to conditionality can also make it a “more legitimate” tool for as far as IFIs are concerned. This calls for fuller partnership between the borrowing state and IFIs and involves the broader participation of and consultation in the design and implementation of reforms and programs. This implies—more by their tone than explicit assertion—that these changes will ease the tensions and resentments caused by strong external pressures for reform, including extensive conditionality.1878 In consideration of the undemocratic nature of conditionality on labour market reforms, an antidote for these challenges, referring to this new approach to conditionality, is one of simplicity which has been one of the backbone principles of the ILO; tripartite consultation. The cruciality of tripartite consultation has been discussed in Chapter Four. However, in the light of conditionality by the IFIs, tripartite consultation by the recipient government, employers and workers on the content of conditionality that touches upon labour rights would be a more productive and sustainable means of negotiating labour conditionality.

1877 Ibid, para 27
It is crucial to note that the ILO does in fact “support, in principle, structural adjustment linked to the promotion of dynamic and sustainable growth with a view to establishing the conditions for achieving the Organisation’s fundamental objective of social justice”. However, what is significant is that it has shown that structural adjustment efforts involve various important elements, one of which is actively promoting dialogue and involvement of the social partners in the design and implementation of structural adjustment programs and policies with a view to achieving social consensus, while working to strengthen the capacity of workers’ and employers’ organisations to play an effective role in the reform activities. This stance is corroborated by the ILOs jurisprudence on structural reforms in the light of structural adjustment and economic crises. What is essential to this process then, is that it lends some legitimacy to the labour market reforms encompassed in the conditionality of the IFIs and can be a possible solution to the tensions that such reforms are accustomed to.

From more of a human rights approach, the aspect of participation is highlighted in the Declaration on the Right to Development, which states,

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

It is crucial to state that participation has increasingly been understood to be central to sustainable development policies and as an example, has been instituted in the World Bank’s Poverty Reduction Strategies as well as the African Development Bank’s strategy papers. The term participation has been associated mainly with empowerment, equality and inclusion. It generally refers to the process by which stakeholders influence and share control over priority setting, policymaking, resource allocations and/or programme implementation. Consultation thus forms an important component of participation in IFI programs.

7.4.6 Reforming the IFIs

The issue of reforming the IFIs has been a concern for quite some time. The first point of reform that is desirable is the structure of the IFIs. The underlying structure of the IFIs, as discussed previously, allows for an unequal and disproportionate control by the more powerful members of the IFIs. In such a

case, those countries that are less powerful and which need the financing the IFIs provide have the least say in crucial matters. Of particular importance is the executive boards which deal with day to day aspects, particularly with regard to approving loans, wherein the borrowing members are least represented. This creates a problem in a situation where the operations of the IFIs, which have expanded profoundly, mostly affect those member states which are least represented. Reforms that give more voice to those actually affected by the IFIs operations are crucial. Again, with regards to the structure of the IFIs, even with the limited representation, the deliberations and decisions are made at a table that only gives seats to finance ministers and bankers, while allowing for much of their business to be conducted in a non-transparent way, evading any accountability. One would think that as the structures themselves lack any democratic accountability, then alternative control mechanisms are to be sought, one of which is transparency, allowing public scrutiny to put a check on abusive practices. This would also increase the likelihood that policies of general interest to the recipients are pursued as opposed to the interests of just the government or other actors (at times, the interests of the population and that of the government differ). This issue brings us to the second aspect of reform, that is, transparency.

The issue of transparency has haunted the IFIs for quite some time. The fact that the deliberating and decision-making in the IFIs is done behind closed doors, particularly when the activities of the IFIs have increasing impacts on local populations, has tarnished the IFIs’ image and reputations. The essence of transparency is that it is the basic element for participation in decision-making and enables people to participate meaningfully in public decision-making by providing information they need to understand and evaluate the decisions of decision-makers. This lack of transparency makes it difficult to hold the IFIs accountable, as there is lack of awareness of the IFIs’ guidelines, policies, reports etc. Again, transparency is crucial in ensuring that there is inclusion on the part of those mostly affected by the IFIs operations. It is the key to involving civil society and local populations in the process of development. As an example, the “good governance” standards preached by the WB and IMF include promoting transparency, accountability, efficiency, participation, fairness, ownership and flow of information between governments and their citizens. This aspect should be given consideration within the IFIs’ structures.

Again, in order to facilitate inclusion and participation, it is crucial that activities to ensure meaningful civil society involvement are encouraged, including oversight mechanisms that include such civil society. The main reason

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1884 Ibid.

participation in a transparent setting is important in reforming the IFIs is that while their activities have increased and conditionality has broadened, their accountability is still quite narrow, limited to internal procedures.

It is important to note that in recent years, the IFIs have taken steps to make themselves more transparent\textsuperscript{1886}, for example, by publishing internal research of their own, disclosure of some agreements, policies and MoUs. This step is also visible from the extensive resources available in the IFIs’ respective websites. The EBRD, in as far as inclusion and transparency are involved, offers a good example as it collaborates with civil society, trade unions etc.

\textbf{7.4.7 Country Ownership}

In the 1990s, scrutiny over conditionality increased—precisely related to the idea that money can “buy” hard policy reforms, even in the absence of country ownership.\textsuperscript{1887} Ownership is a willing assumption of responsibility for an agreed programme of policies by officials in a borrowing country who have responsibility to formulate and carry out those policies based on an understanding that the programme is achievable and is in the country’s own interest.\textsuperscript{1888} Country ownership, partnership and participation are perceived and presented in the development discourse as the key components in paradigm shift of the development strategies. They are considered as opposites to the previous practice of conditionality governing the relationship between givers and recipients of development financing.\textsuperscript{1889} The development of these principles gives the power of decision-making back to the recipient countries. In the legal domain, these principles, save for participation which has been discussed above, are rather unclear since they are not anchored in any conventional legal doctrine and essentially stem from the language of development institutions. However, some of them, such as the principle of ownership, may effectively relate to the concept of state sovereignty.\textsuperscript{1890}

\footnotesize
\begin{itemize}
\item \textsuperscript{1886} See Ngaire Woods, "Making the IMF and World Bank Accountable" 77:1 International Affairs (2001)
\item \textsuperscript{1887} IDB, Technical Note on Design and Use of Policy-Based Loans at the Inter-American Development Bank (New York: IDB, 2016), 4
\item \textsuperscript{1888} Mohsin Khan and Sunil Sharma, “IMF Conditionality and Country Ownership of Programs”, IMF Working Paper No WP/01/142, 2001, at 13. See also IMF 2001, 6
\item \textsuperscript{1889} Tahmina Karimova, “Human Rights and Development”, 67
\item \textsuperscript{1890} Ibid.
\end{itemize}
Sammanfattning på Svenska

Denna avhandling undersöker den roll som internationella finansinstitut spelar i varnandet och genomförandet av internationella arbetsnormer om föreningsfrihet och kollektiva förhandlingar, som är mänskliga rättigheter enligt ILO:s konvention (nr 87) angående föreningsfrihet och skydd för organisationsrätten och ILO:s konvention (nr 98) angående tillämpningen av principerna för organisationsrätten och den kollektiva förhandlingsrätten. Internationella finansinstitut, till exempel Världsbanken, ger sina medlemsstater ekonomiskt stöd för utvecklingsändamål i form av lån, politisk rådgivning och tekniskt bistånd, samtidigt som dessa lån är förenade med villkor. Villkoren innebär att mottagarländerna måste genomföra politiska reformer som ibland inbegriper reformer på arbetsmarknaden, och påverkar därmed arbetsnormer i mottagarländerna. På så sätt är villkorligheten ett verktyg eller en mekanism för att driva igenom ändringar i den nationella rätten eller politiken. Mot bakgrund av deras möjligheter att påverka arbetsnormer, studerar avhandlingen de rättsliga implikationerna av internationella finansiutstituts lånevillkor och politiska råd för föreningsfriheten och rätten till kollektiva förhandlingar i två globala och fyra regionala finansinstitut: Världsbanken, Internationella valutafonden, Interamerikanska utvecklingsbanken, Asiatiska utvecklingsbanken, Afrikanska utvecklingsbanken och Europeiska banken för återuppbyggnad och utveckling.

Avhandlingen har tre huvudsyften. Det första är att identifiera de rättsliga implikationerna av de internationella finansiutstitutens lånevillkor i ljuset av internationella arbetsnormer om föreningsfrihet och kollektiva förhandlingar. Detta görs genom att undersöka lånevillkor, policydokument, strategidokument och andra handlingar som hörer från institutens låneverksamhet, för att se om lånevillkoren är ägnade att främja och tillämpa föreningsfrihet och kollektiva förhandlingar, eller tvärtom.

Det andra syftet är att utforska det internationella rättsliga ramverket inom vilket de internationella finansiutstituten verkar för att se om och hur internationell rätt är tillämplig på dem, och försöka slå fast vilka skyldigheter de har som aktörer på den internationella arenan när det gäller mänskliga rättigheter, och om deras politik och användning av olika lånevillkor är förenliga med den internationella rättens principer. Detta syfte bygger på finansiutstitutens ställning som internationella organisationer.

Det tredje syftet är att finna ett mer hållbart förhållningssätt till hur lånevillkor ska användas av de internationella finansiutstituten, vilket inbegriper respekt för dessa grundläggande arbetsnormer.

Olika typer av material från de internationella finansiutstituten har använts för att analysera hur de förhåller sig till föreningsfrihet och kollektiva förhandlingar, och för att ta reda på om lånevillkoren påverkar staternas efterlevnad eller brist på
efterlevnad av arbetsnormerna. Materialet innefattar låneavtal, samförståndsavtal (*memorandum of understanding*), ländernas ekonomiska rapporter, avsiktsförklaringar, policydokument, strategidokument, utvärderingar, forskningsrapporter etc.


Variationerna beror på olika faktorer, som vilken inställning finansinstituten har till föreningsfrihet och kollektiva förhandlingar. I fall då deras inställning är instrumentell och bygger på ekonomisk rationalitet, beaktas rättigheterna enbart om de har någon effekt på programmets framgång. Då finansinstitutens rationalitet utgår från mänskliga rättigheter, är rättigheterna del av de politiska kraven och främjas och tillämpas i institutionens aktiviteter, ekonomiska rationalitet etc.

I exempelvis Världsbanken och Internationella valutafonden, som driver en neoliberal politik, ses föreningsfrihet och kollektiva förhandlingar som hinder för flexibilitet på arbetsmarknaden, en viktig aspekt för att främja ekonomisk utveckling. Därför främjas dessa rättigheter enbart om de kan påverka ett projekt eller programme. Detta är en instrumentell inställning där dessa rättigheter är en variabel att främja och tillämpa enbart i vissa situationer, men inte ett mål i sig. Även om dessa institutioner har spelat en positiv roll när det gäller de andra kärnkonventionerna om barnarbete, tvångsarbete och icke-diskriminering, har deras övergripande inställning och villkorlighet haft en generellt avreglerande effekt. Å andra sidan har vi Europeiska banken för återuppbyggnad och utveckling som har i uppdrag att värna mänskliga rättigheter och har införlivat arbetsnormer i sin operativa verksamhet och på så sätt spelat en positiv roll i främjandet och tillämpningen av föreningsfrihet och kollektiva förhandlingar.

När det gäller det rättsliga ramverk som reglerar internationella organisationer kom studien fram till att även om internationella finansinstitut omfattar av internationell rätt, är det oklart vilka skyldigheter de har enligt denna. Det är ännu mer oklart vilka skyldigheter de har när det gäller mänskliga rättigheter. Trots att de internationella finansinstituten har mekanismer för ansvarsutkrävande dit de
som påverkas negativt av deras verksamhet kan klaga, är dessa begränsade till klagomål som beror på att instituten inte har följt sina interna procedurer, vilket gör att de snarare är system för tillsyn av att regelverket efterlevs än mekanismer för ansvarsutkrävande. Den funktionella immunitet som de internationella finansinstituten åtnjuter gör det dessutom svårt att ställa dem till ansvar för brott mot mänskliga rättigheter som orsakas av deras låneverksamhet. Även om den internationella rätten har utvecklats från sin statscenterade karaktär återstår det fortfarande brister i det rättsliga ramverket när det gäller aktiviteter av andra subjekt än stater, till exempel internationella finansinstitut.

Slutligen diskuteras olika förhållningssätt som skulle förbättra de internationella finansinstitutens verksamhet och deras användning av lånevillkor för att spela en mer positiv och hållbar roll i främjandet och tillämpningen av internationella arbetsnormer om föreningsfrihet och kollektiva förhandlingar och mänskliga rättigheter i allmänhet. Det viktigaste är att synen på utveckling utgår från mänskliga rättigheter, vilket innebär ett mer holistiskt utvecklingsbegrepp som erkänner sambandet mellan ekonomisk tillväxt och andra variabler som är sociala, politiska etc. Det speciella med detta synsätt, i ljuset av de utvecklingsuppdrag som de internationella finansinstituten har, är att det kombinerar utveckling och respekt för mänskliga rättigheter på ett mer hållbart sätt.

Därutöver kan extraterritoriell tillämpning av mänskliga rättigheter, en konsekvent politik I linje med andra internationella organisationer som FN och ILO, förankring eller inkorporering av internationella arbetsnormer i de internationella finansinstitutens politik och respekt för internationella arbetsnormer i deras aktiviteter leda till ett mer hållbart angreppssätt på de lånevillkor som tillämpas av finansinstituten. Slutligen bör den internationella rätten utvecklas för att förstärka organisationernas ansvar så att det är anpassat till dagens förhållanden.
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