

**International Financial Institutions  
and International Law**



**KLUWER LAW INTERNATIONAL**

**International Financial Institutions  
and International Law**

Edited By

**Daniel D. Bradlow and David B. Hunter**



**Wolters Kluwer**

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

*Published by:*

Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*

Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@aspublishers.com](mailto:customer.service@aspublishers.com)

*Sold and distributed in all other countries by:*

Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

*Printed on acid-free paper.*

ISBN 978-90-411-2881-2

© 2010 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.  
Email: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com)

Printed in Great Britain.

# Summary of Contents

<b>Acknowledgements</b>	<b>xv</b>
<b>List of Abbreviations</b>	<b>xvii</b>
<b>About the Authors</b>	<b>xxi</b>
<b>Introduction</b>	<b>xxv</b>
<b>Chapter 1</b> <b>International Law and the Operations of the International Financial Institutions</b>	<b>1</b>
<i>Daniel D. Bradlow</i>	
<b>Chapter 2</b> <b>International Financial Institutions and International Law: A Third World Perspective</b>	<b>31</b>
<i>B.S. Chimni</i>	
<b>Chapter 3</b> <b>Responsibility of International Financial Institutions under International Law</b>	<b>63</b>
<i>Eisuke Suzuki</i>	

*Summary of Contents*

<b>Chapter 4</b> <b>International Financial Institutions before National Courts</b> <i>August Reinisch and Jakob Wurm</i>	<b>103</b>
<b>Chapter 5</b> <b>Rethinking International Financial Institution Immunity</b> <i>Steven Herz</i>	<b>137</b>
<b>Chapter 6</b> <b>Regulation and Resource Dependency: The Legal and Political Aspects of Structural Adjustment Programmes</b> <i>Celine Tan</i>	<b>167</b>
<b>Chapter 7</b> <b>International Law and Public Participation in Policy-Making at the International Financial Institutions</b> <i>David B. Hunter</i>	<b>199</b>
<b>Chapter 8</b> <b>International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations</b> <i>Siobhán McInerney-Lankford</i>	<b>239</b>
<b>Chapter 9</b> <b>Indigenous Peoples and International Financial Institutions</b> <i>Fergus MacKay</i>	<b>287</b>
<b>Chapter 10</b> <b>Worker Rights and the International Financial Institutions</b> <i>Jerome I. Levinson</i>	<b>321</b>
<b>Chapter 11</b> <b>International Environmental Law, the World Bank, and International Financial Institutions</b> <i>Charles E. Di Leva</i>	<b>343</b>
<b>Conclusion: The Future of International Law and International Financial Institutions</b> <i>Daniel D. Bradlow and David B. Hunter</i>	<b>387</b>
<b>Index</b>	<b>399</b>

# About the Authors

## Co-editors

### *Daniel D. Bradlow*

Daniel D. Bradlow is the SARCHI professor of International Development Law and African Economic Relations at the University of Pretoria in South Africa and Professor of Law at American University Washington College of Law. He is a member of the Roster of Experts for the Independent Review Mechanism at the African Development Bank. In addition, he is co-rapporteur of the International Law Association's study group on responsibility of international organizations, a member of the board of directors of ILEAP (International Lawyers and Economists against Poverty), and a member of the editorial advisory board of the *Journal of Law, Social Justice, and Global Development*. He served as a member of the International Law Association's Committee on Accountability of International Organizations and as an advisor to the Rethinking Bretton Woods Project. Professor Bradlow holds degrees from the University of Witwatersrand in South Africa, and Northeastern University and Georgetown University in the USA, and is a member of the New York and District of Columbia Bars.

### *David B. Hunter*

David B. Hunter is an associate professor, director of the Program on International and Comparative Environmental Law and the Washington Summer Session on Environmental Law, and acting director of the International Legal Studies Program at American University Washington College of Law. He is the former executive director of the Center for International Environmental Law and was previously an associate with the law firm of Skadden, Arps, Slate, Meagher, and Flom. He currently serves on the boards of directors of the Environmental Law Alliance Worldwide-US, the Project on Government Oversight, the Bank Information Center, and Greenpeace-US. Additionally, Mr Hunter is a member scholar at the Center for Progressive Reform, a member of the Steering Committee of the IUCN Commission on Environmental Law, and a member of the Environmental Law

## *About the Authors*

Expert's Group to the Organization of American States. Professor Hunter holds degrees from the University of Michigan and the Harvard Law School.

## **Author Contributors**

### *Bhupinder S. Chimni*

Dr B.S. Chimni is a professor of International Law and Chairperson of the Centre for International Legal Studies, at the School of International Studies, Jawaharlal Nehru University, New Delhi. He is the former vice chancellor of W.B. National University of Juridical Sciences, Kolkata. He has been a visiting professor at Brown and Tokyo Universities and a visiting scholar/fellow at Harvard, York (Canada), and Cambridge Universities. He has been teaching international economic law for the last twenty-five years and is the author of *International Commodity Agreements: A Legal Study*. He has also published a number of articles on different aspects of international economic law in leading journals. He self identifies as a member of a group of scholars engaged in articulating a critical third-world approach to international law. He is a general editor of the Asian Yearbook of International Law.

### *Charles E. Di Leva*

Mr Di Leva is chief counsel of the Environmental and International Law Unit of the World Bank Legal Department. He has been a director of the IUCN Environmental Law Program. He has also been a trial attorney with the Department of Justice's Environmental Enforcement Section and senior programme officer in the United Nations' Environment Program Environmental Law Unit. He received a B.S. degree from the University of Rhode Island and his J.D. from Vermont Law School.

### *Steven Herz*

Steven Herz is a lawyer and consultant based in Oakland, California. He advises global civil society organizations on international environmental and human rights law, and sustainable development policy. One focus of his work has been increasing public participation and accountability in the environmental decision-making of the World Bank and other international financial institutions. He is the author of a number of articles and reports on these subjects. He currently focuses on climate finance with Greenpeace International. He holds a B.A., M.A., and J.D. from the University of Virginia.

### *Jerome I. Levinson*

Jerome Levinson is Distinguished Lawyer in Residence at American University Washington College of Law. He specializes in the legal aspects of foreign direct



investment. Levinson is well known for his knowledge of international financial issues and workers' rights. He recently published *Who Makes United States Foreign Policy?*

*Fergus Mackay*

Fergus Mackay is a human rights lawyer and coordinator of the Human Rights and Legal Programme of the UK-based organization, the Forest Peoples Programme. He has worked as an attorney for indigenous people in Alaska and was legal advisor to the World Council of Indigenous Peoples for five years. He has litigated a number of cases before the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, and before the United Nations treaty bodies, including the 2007 *Saramaka People v. Suriname* case, decided by the Inter-American Court. He previously served as an expert advisor to the Organization of American States concerning its proposed American Declaration on the Rights of Indigenous Peoples and as a member of the advisory panel on the World Bank's Extractive Industries Review.

*Siobhán McInerney-Lankford*

Dr Siobhán McInerney-Lankford is counsel in the Environment and International Law Group of the World Bank LEGVPU. She works on human rights law and safeguard policies, advising on policy issues and coordinating research, analytic work, and consultations relevant to human rights. She leads the World Bank LEGVPU's research project on human rights and climate change, and supports the Nordic Trust Fund on human rights. Additionally, she is the World Bank's representative on the OECD Development Assistance Committee Human Rights Task Team, which she chaired for two years, and she represents the World Bank on the UN High-Level Task Force on the Right to Development. Dr McInerney-Lankford holds an LL.B. from Trinity College, Dublin, a B.C.L. from Oxford University, an LL.M. from Harvard Law School, and D.Phil. in EU human rights law from Oxford University.

*August Reinisch*

August Reinisch is a professor of international and European law at the University of Vienna and an adjunct professor at the Bologna Center of SAIS/Johns Hopkins University in Bologna, Italy. From 2004 to 2006, he was Dean for International Relations of the Law School of the University of Vienna. He currently serves as arbitrator on the In Rem Restitution Panel according to the Austrian General Settlement Fund Law 2001, dealing with Holocaust-related property claims; as president of an United Nations Commission on International Trade Law (UNCITRAL) investment arbitration tribunal; and as an arbitrator and expert in other investment cases. He has widely published in international law, with a recent focus on investment law and the law of international organizations. Additionally, he has

### *About the Authors*

served as an expert advisor in Austrian and foreign courts and as an international arbitrator. He holds Master's degrees in philosophy and in law as well as a doctorate in law from the University of Vienna and an LL.M. from NYU Law School.

#### *Eisuke Suzuki*

Eisuke Suzuki is professor of Policy Studies in the School of Policy Studies at Kwansai Gakuin University, Sanda-Kobe, Japan. In 2003, he was the principal architect of ADB's Accountability Mechanism and has held many leadership positions in the Asian Development Bank, including the Director General, Operations Evaluation, 2003–2005; Special Advisor to the President, 2003; and Deputy General Counsel, 1996–2003. He received his J.S.D. in 1974 from the Yale Law School, where he founded and served as editor-in-chief of *Yale Studies in World Public Order* from 1974 to 1978 (now *Yale Journal of International Law*).

#### *Celine Tan*

Celine Tan is a lecturer in Law at the Birmingham Law School at the University of Birmingham. Prior to this, she taught law at Warwick, was a consultant researcher with the Third World Network, and worked at a variety of international and non-governmental organizations relating to social and economic development and human rights. Dr Tan received her LL.B. from the University of London, and LL.M. and PhD from the University of Warwick.

#### *Jakob Wurm*

Jakob Wurm is a project assistant at the Department of European, International and Comparative Law at the Law School of the University of Vienna, in Vienna, Austria. He received an LL.M. from the University of Vienna, a European Master in Law and Economics from the Rotterdam Erasmus University, and was a visiting scholar at Boalt Hall, School of Law at the University of California, Berkeley. In addition to his position as an Austrian national reporter for the database, 'International Law in Domestic Courts' (ILDC), he is an ILDC associate editor. His research interests include International Economic Law (WTO dispute settlement), the Law of International Organizations (immunities and privileges of international organizations in Austria), Austrian judicial practice in international law, and European Law.

## Chapter 4

# International Financial Institutions before National Courts

*August Reinisch and Jakob Wurm*

### I. INTRODUCTION

International financial institutions (IFIs)<sup>1</sup> usually operate on the international level, by engaging in lending operations with states or regulating their monetary policies. Because some credit operations also involve contacts with private actors, IFIs must be endowed with legal personality under national law in order to enter into contracts and be able to pursue their rights before national courts. Of course, such private law lending operations may also result in claims being brought against IFIs. These practical needs are usually addressed by specific rules concerning domestic legal personality and by limiting the immunity from legal process normally enjoyed by international organizations.

Nevertheless, IFIs are, in general, fairly rare ‘clients’ before national courts. This chapter will look at the case law involving IFIs before national courts, as far as it is available, and will try to structure it according to typical kinds of cases. Before doing so, it is necessary to briefly analyse the applicable legal provisions conferring personality and immunity on IFIs.

---

1. The present analysis refers to IFIs as international organizations that address financial and monetary issues such as development banks and monetary institutions.

## II. APPLICABLE LEGAL PERSONALITY AND IMMUNITY PROVISIONS

Like for most other international organizations, the constituent instruments of IFIs usually expressly provide for their domestic legal personality, enabling them to enter into private law relationships for their procurement needs, settle delictual claims, and appear in courts. A typical provision of such domestic legal personality can be found in the Articles of Agreement of the International Monetary Fund (IMF) and the World Bank: International Bank for Reconstruction and Development (IBRD) which both provide:

The Fund/Bank shall possess full juridical personality and, in particular, the capacity: (i) to contract; (ii) to acquire and dispose of immovable and movable property; and (iii) to institute legal proceedings.<sup>2</sup>

Similar provisions are included in most other IFI constituent instruments<sup>3</sup> and can also be found in headquarters agreements as well as in other treaties addressing the status of IFIs.<sup>4</sup>

In contrast to the immunity provisions of most other international organizations, international development banks, such as the World Bank and others, usually do not enjoy ‘full’ functional immunity or other broad grants of immunity from legal process before national courts.<sup>5</sup> Instead, the typical ‘indirect’ immunity clause for such IFIs reaffirms the possibility to sue these organizations before

2. Articles of Agreement of the International Monetary Fund, 2 U.N.T.A. 40 (27 Dec. 1945), Art. IX(2) (hereinafter IMF Articles of Agreement); Articles of Agreement of the International Bank for Reconstruction and Development, 2 U.N.T.S. 134 (27 Dec. 1945), Art. VII(2) (hereinafter IBRD Articles of Agreement).
3. See Articles of Agreement of the International Development Association, 439 U.N.T.S. 249 (26 Jan. 1960), Art. VIII(2) (date is the day Executive Directors of IBRD approved it for submission to the governments) (hereinafter IDA Articles of Agreement); Agreement Establishing the Inter-American Development Bank, 389 U.N.T.S. 69 (8 Apr. 1959), Art. XI(2) (hereinafter IDB Articles of Agreement); Agreement Establishing the European Bank for Reconstruction and Development, 1646 U.N.T.S. 97 (29 May 1990), Art. 45 (hereinafter EBRD Articles of Agreement); Agreement Establishing the Asian Development Bank, 571 U.N.T.S. 123 (22 Aug. 1966), Art. 49 (hereinafter ADB Articles of Agreement); Agreement Establishing the African Development Bank, 1276 U.N.T.S. 3 (7 May 1982), Art. 50 (hereinafter AfDB Articles of Agreement); Convention establishing the Multilateral Investment Guarantee Agency, 24 I.L.M. 1605 (11 Oct. 1985), Art. 1(b) (hereinafter MIGA Convention); Articles of Agreement of the International Finance Corporation, 264 U.N.T.S. 118 (25 May 1955), Art. VI(2) (hereinafter IFC Articles of Agreement).
4. See, e.g., Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Bank for Reconstruction and Development, 1656 U.N.T.S. 264 (15 Apr. 1991), Art. 3 (hereinafter EBRD Headquarters Agreement); Agreement between the Republic of Austria and the OPEC Fund for International Development Regarding the Headquarters of the Fund, Austrian Federal Law Gazette No. (BGBl. Nr.) 248/1982, 1291 U.N.T.S. 210 (21 Apr. 1981), Art. 7.
5. See, e.g., IBRD Articles of Agreement, *supra* n. 2, Art. VII(3). For further discussion, see Steve Herz, ‘Rethinking International Financial Institution Immunity’, Ch. 5 herein.

national courts. The reason for this limitation is evident: International development banks finance their lending operations substantially through borrowing operations on the financial markets. In order to attract lender confidence, they have to ensure that private parties have access to the courts. Thus, international development banks are usually amenable to suit before the national courts of Member States. The archetypical example is Article VII, section 3 of the IBRD Articles of Agreement, which provides:

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.<sup>6</sup>

A less restrictive immunity can be found in more recent instruments, such as the Articles of Agreement of the African Development Bank (AfDB) or of the Asian Development Bank (ADB). For example, Article 52 of the AfDB Articles of Agreement provides:

1. The Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers when it may be sued only in a court of competent jurisdiction in the territory of a member in which the Bank has its principal office, or in the territory of a member or non-member State where it has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members.

2. The property and assets of the Bank shall, wherever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.<sup>7</sup>

Similarly, Article 50(1) of the ADB Articles of Agreement provides:

The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the territory of a country in which the Bank has its

---

6. IBRD Articles of Agreement, *supra* n. 2, Art. VII(3); similarly EBRD Articles of Agreement, *supra* n. 3, Art. 46; MIGA Convention, *supra* n. 3, Art. 44; IFC Articles of Agreement, *supra* n. 3, Art. VI(3).

7. AfDB Articles of Agreement, *supra* n. 3, Art. 52.

principal or a branch office, or has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.<sup>8</sup>

These general immunity clauses contained in the constituent documents of IFIs are sometimes reproduced or made more precise in headquarters agreements.<sup>9</sup> For example, the Headquarters Agreement for the European Bank for Reconstruction and Development (EBRD) qualifies the limited immunity of the Bank in the following terms:

Within the scope of its official activities the Bank shall enjoy immunity from jurisdiction, except that the immunity of the Bank shall not apply:

- (a) to the extent that the Bank shall have expressly waived any such immunity in any particular case or in any written document;
- (b) in respect of civil action arising out of the exercise of its powers to borrow money, to guarantee obligations and to buy or sell or underwrite the sale of any securities;
- (c) in respect of a civil action by a third party for damage arising from a road traffic accident caused by an Officer or an Employee of the Bank acting on behalf of the Bank;
- (d) in respect of a civil action relating to death or personal injury caused by an act or omission in the United Kingdom;
- (e) in respect of the enforcement of an arbitration award made against the Bank as a result of an express submission to arbitration by or on behalf of the Bank; or
- (f) in respect of any counter-claim directly connected with court proceedings initiated by the Bank.<sup>10</sup>

As opposed to the international development banks, other IFIs like the IMF enjoy the ‘usual’ functional immunity. The rationale for the broad immunity usually enjoyed by international organizations is the ‘functional necessity’ of protecting the independent functioning of international organizations. This requirement is usually seen as necessitating an exemption from the jurisdiction and possible interference of national courts in the affairs of international organizations.<sup>11</sup>

---

8. ADB Articles of Agreement, *supra* n. 3, Art. 50(1).

9. In the case of the ADB, Art. III, s. 5 of the Agreement Between the Asian Development Bank and the government of the republic of the Philippines Regarding the headquarters of the Asian Development Bank provides as follows: ‘The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the Republic of the Philippines.’ Agreement between the Asian Development Bank and the government of the republic of the Philippines regarding the headquarters of the Asian Development Bank, 615 U.N.T.S. 375 (22 Dec. 1966), Art. III(5) (hereinafter ADB Headquarters Agreement).

10. EBRD Headquarters Agreement, *supra* n. 4, Art. 4(1).

11. See C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edn (Cambridge: Cambridge University Press, 2005), 316; Jan Klabbers, *International Organizations* (Aldershot, England & Burlington, VT: Ashgate & Dartmouth, 2005), 351;

Thus, the majority of the constituent instruments of international organizations provide for functional immunity, that is the immunity necessary for the fulfilment of their purposes.<sup>12</sup> Often this immunity is made more precise in general privileges and immunities treaties or headquarters agreements providing for an unqualified, hence absolute, immunity from suit.<sup>13</sup> In the case of the IMF, a provision that corresponds to the broad immunity clauses applicable to many international organizations states:

The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.<sup>14</sup>

What is remarkable is the fact that this clear difference in the applicable immunity provisions has played a less important role than one might expect. However, before addressing such immunity issues, it is interesting to see that the (logically preceding) issue of legal personality has led to rather extensive litigation before national courts.

### III. THE STANDING OF IFIS TO PURSUE THEIR RIGHTS IN NATIONAL COURTS – THE *HASHIM v. AMF SAGA*

The domestic legal personality of IFIs is usually provided for in the constituent instruments of such organizations and often reaffirmed in headquarters agreements.<sup>15</sup> Thus, in practice, it rarely poses any problems in Member States or in the headquarters state. The recognition of the legal personality of an IFI may, however, become an issue in third countries where the organization is also active. In these situations, the legal personality of an IFI, usually based on a clear treaty provision providing for the ‘juridical personality and, in particular, the capacity:

---

Frederic Kirgis, *International Organizations in their Legal Setting*, 2nd edn (St Paul, Minnesota: West Publishing Co., 1993), 26; August Reinisch, *International Organizations before National Courts* (Cambridge: Cambridge University Press, 2000), 234; Philippe Sands & Pierre Klein, *Bowett’s Law of International Institutions*, 5th edn (London: Sweet & Maxwell, 2001), 486; Henry Schermers & Niels Blokker, *International Institutional Law: Unity within Diversity*, 4th edn (Boston: Martinus Nijhoff Publishers, 2003), 252, 1020.

12. *E.g.*, Charter of the United Nations, 1 U.N.T.S. 993 (26 Jun. 1945), Art. 105(1) (‘The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.’) (hereinafter UN Charter).

13. *Cf.* Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15 (13 Feb. 1946), Art. II(2) (‘The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.’).

14. IMF Articles of Agreement, *supra* n. 2, Art. IX(3).

15. *See* discussion in s. II, *supra* nn. 2–10.



(i) to contract; (ii) to acquire and dispose of immovable and movable property; and (iii) to institute legal proceedings',<sup>16</sup> may be doubtful.

The international cause célèbre in which the (alleged lack of) domestic legal personality of an IFI was in issue is the UK case of *Arab Monetary Fund v. Hashim (No. 3)*.<sup>17</sup> The Arab Monetary Fund (AMF), headquartered in Abu Dhabi, United Arab Emirates, was created in 1976 by an international agreement between twenty Arab states and the Palestine Liberation Organization (PLO).<sup>18</sup> According to Article 2 of the 1976 Agreement, 'the Fund shall have an independent juridical personality and shall have, in particular, the right to own, contract and litigate'.<sup>19</sup>

This was given effect in the domestic legal systems of the Member States. When AMF instituted legal proceedings before English courts in order to recover sums allegedly embezzled by its former director-general, the defendant sought the dismissal of the action on the ground that the Fund 'did not exist in English law and therefore could not sue [him]'.<sup>20</sup> Thus the central issue in this litigation was the domestic legal personality of an IFI of which the forum state was not a member. The controversial nature of this issue is reflected in the different outcomes at three levels of English courts. The Court of First Instance, Chancery Division, held that:

[w]here [an] international organisation had been accorded legal personality under a foreign system of domestic law of a contracting state [*i.e.*, to the treaty establishing the international organization] it was to be regarded as being constituted under that law as a separate persona ficta and as such was entitled to recognition under English conflict of laws rules as an ordinary foreign juridical entity.<sup>21</sup>

The Court of Appeal<sup>22</sup> reversed and found that it was prevented from applying the conflict of laws approach adopted by the lower court since the Fund was created by public international law and not by the law of the United Arab Emirates:

An international organisation constituted under international law by a treaty between foreign sovereign states to which the United Kingdom was not a party

16. See IBRD Articles of Agreement, *supra* n. 2, Art. VII(2).

17. *Arab Monetary Fund v. Hashim (No. 3)*, Chancery Division, 9–12 Oct., 14 Nov. 1989 [1990] 1 All E.R. 685; [1990] 3 W.L.R. 139, Hoffmann J; Court of Appeal, 26, 27 Mar., 9 Apr. 1990, [1990] 2 All E.R. 769; [1990] 3 W.L.R. 139; House of Lords, 26, 27, 28 Nov. 1990, 21 Feb. 1991, [1991] 1 All E.R. 871; [1991] 2 W.L.R. 729; see also the case notes by Ilona Cheyne, 'Status of International Organisations in English Law', *International & Comparative Law Quarterly* 40 (1991): 981; Jonathan Hill, 'International Corporations in the English Courts [AMF v. Hashim]', *Oxford Journal of Legal Studies* 12 (1992): 135; Edmund M. A. Kwaw, 'International Organizations as Foreign Entities: AMF v. Hashim (No. 3)', *Banking and Finance Law Review* 7 (1992): 453; F.A. Mann, 'International Organisations as National Corporations', *The Law Quarterly Review* 107 (1991): 357.

18. Articles of Agreement of the Arab Monetary Fund, 85 I.L.R. 671 (27 Apr. 1976) (hereinafter AMF Articles of Agreement).

19. *Ibid.*, Art. 2.

20. [1990] 1 All E.R. at 685.

21. [1990] 1 All E.R. at 686.

22. [1990] 1 All E.R. at 769; [1990] 3 W.L.R. at 139, C. A.



and which was not the subject of any United Kingdom legislation would not be recognised as a foreign juridical person with the capacity to bring proceedings in the English courts, even though it had been accorded independent juridical personality as a *persona ficta* by one of the signatory states in line with its obligations under international law to give direct effect to the treaty as part of its own municipal law, since, as a matter of English private international law, the legislation conferring personality under the law of the signatory state was to be regarded as purely territorial in scope, its purpose being solely to give effect to the treaty within that state's own territory and not to create a separate entity capable of recognition abroad. Accordingly the plaintiff was not entitled to recognition as a foreign municipal juridical person with the capacity to bring proceedings in the English courts. The appeals would therefore be allowed and the plaintiff's action struck out.<sup>23</sup>

The House of Lords again reversed and held that there was no rule under English law that would prevent the courts from recognizing an international organization without the legislative authority of the International Organisations Act 1968<sup>24</sup> or any other enactment.<sup>25</sup> While the 1976 AMF Articles of Agreement as such were not sufficient to create personality under English law, the foreign incorporation led to the application of the normal conflicts rule that English courts recognize legal persons created under the law of foreign states. The House of Lords held that:

[a]lthough when sovereign states entered into an agreement by treaty to confer legal personality on an international organisation the treaty did not create a corporate body with capacity to sue and be sued in English courts, the registration of that treaty in one of the sovereign states conferred legal personality on the international organisation and thus created a corporate body which the English courts could and should recognise, since by comity the courts of the United Kingdom recognised corporate bodies created by the law of a foreign state recognised by the Crown.<sup>26</sup>

The outcome of this case was dependent on a number of peculiar features of English law. On the one hand, under a 'dualist' legal system requiring domestic 'incorporation' of international law, English courts were not in a position to directly 'enforce' international agreements.<sup>27</sup> Pursuant to English law, '[t]he making of a treaty is an act of the executive, not of the legislature, and it is therefore a fundamental principle of [the] constitution that the terms of a treaty do not by virtue

---

23. [1990] 1 All E.R. at 769.

24. 'International Organisations Act 1968 (c. 48)', Halsbury's Statutes of England, 4th edn, vol. 10, Constitutional Law (1968), Pt. 5.

25. [1991] 1 All E.R. at 871; [1991] 2 W.L.R. at 729, H.L.

26. [1991] 1 All E.R. at 871-872.

27. Robert Jennings & Arthur Watts (eds), *Oppenheim's International Law*, 9th edn (London: Longmans, 1992), 58 et seq.

of the treaty alone, have the force of law in the United Kingdom'.<sup>28</sup> On the other hand, *Arab Monetary Fund v. Hashim (No. 3)* was largely decided on English private international law principles governing the recognition of 'foreign' corporate entities.<sup>29</sup> The issue was further complicated by a decision handed down by the House of Lords in the course of the *Tin Council* litigation<sup>30</sup> while *Arab Monetary Fund v. Hashim (No. 3)* was pending. That precedent was understood to establish the principle that an IO created under international law could not be treated as having legal personality in English law without statutory authorization.<sup>31</sup> The final decision of the House of Lords in the *AMF* case, based on a private international law-recognition of a 'foreign' international organization, was a pragmatic solution to a problem that may have otherwise lead to a rather surprising result, that is that the AMF, while engaged in a number of actual operations, did not legally 'exist' in the English legal order. In spite of the ultimate 'common sense' resolution of the personality issue by the House of Lords, the *AMF* case demonstrates an inherent risk posed to the practical operation of IFIs in non-member countries: the danger that national courts may abstain from adjudicating disputes involving international organizations because they do not recognize the legal personality of such a 'foreign' international organization under domestic law.

The well-known English *AMF* case should be contrasted with the less known 1995 US decision *In Re Jawad Mahmoud Hashim et al.*<sup>32</sup> This case was in many respects a continuance of the English *Arab Monetary Fund v. Hashim (No. 3)* litigation. After the English courts had entered judgment in favour of the AMF in 1993 and 1994, Dr Hashim and his family left England and finally settled in Arizona where they voluntarily filed for bankruptcy protection before the AMF could bring suit to enforce the English judgment. They listed the Fund as a creditor whose claims they disputed and – relying on arguments similar to those brought

---

28. *In re International Tin Council*, High Court, Chancery Division, 22 Jan. 1987; 77 ILR 18 (1988), at 26.

29. Cf. James Fawcett & Peter North, *Cheshire & North: Private International Law*, 11th edn (London: Butterworths, 1987), 173, 901 et seq.

30. See Iona Cheyne, 'The International Tin Council', *International & Comparative Law Quarterly* 38 (1989): 417; Iona Cheyne & Colin Warbrick, 'The International Tin Council', *International & Comparative Law Quarterly* 36 (1987): 931; Carsten Thomas Ebenroth, 'Shareholders' Liability in International Organizations – The Settlement of the International Tin Council Case', *Leiden Journal of International Law* 4 (1991): 171; Christopher Greenwood, 'Put Not Your Trust in Princes: The Tin Council Appeals', *Cambridge Law Journal* 48 (1989): 46; Christopher Greenwood, 'The Tin Council Litigation in the House of Lords', *Cambridge Law Journal* 49 (1990): 8; Romana Sadurska & Christine M. Chinkin, 'The Collapse of the International Tin Council: A Case of State Responsibility?', *Virginia Journal of International Law* 30 (1990): 845; Ignaz Seidl-Hohenveldern, 'Failure of Controls in the Sixth International Tin Agreement', in *Towards More Effective Supervision by International Organizations. Essays in Honour of Henry G. Schermers*, ed. Niels Blokker & Sam Mueller (Dordrecht: Martinus Nijhoff, 1994), 255.

31. *J H Rayner (Mincing Lane) Ltd v. Department of Trade and Industry*, House of Lords, 26 Oct. 1989, [1990] 3 W.L.R. 969, 81 ILR (1990), 670.

32. *In Re Jawad Mahmoud Hashim et al.*, 188 Bankr. 633 (D. Arizona 1995); 27 Bankr. Ct. Dec. 1161 (D. Arizona 1995); 107 ILR (1997), 405.

forward in the English proceedings – they specifically contended that the AMF lacked capacity to sue in the United States and that it could not participate in any way in the debtors’ bankruptcy cases. In a special order concerning ‘standing and capacity of Arab Monetary Fund’, a US bankruptcy judge rejected the Hashims’ arguments. The American judge basically followed the reasoning of the House of Lords and combined a private international law and a customary personality concept. It was clear that the AMF, as a regional international organization – in which the US did not participate and which was not specifically designated under the International Organizations Immunities Act (IOIA)<sup>33</sup> – could not derive its legal status from domestic legislation. The court held, however, that ‘the AMF is a juridical person (a corporation, a persona ficta, an entity capable of legal battle) under U.A.E. law [...] Once this has been decided, capacity follows under American law as a matter of “customary law”’,<sup>34</sup>

This precedent suggests it is unlikely that judicial de-recognition might threaten a ‘foreign’ IFI in the United States. In fact, the ‘recognition’ of international organizations as entities possessing domestic legal personality, even in non-Member States usually does not encounter serious difficulties. Many legal systems also appear ready to accept the domestic legal personality of such ‘foreign’ international organizations.

#### IV. IFIs AND THEIR ‘IMPLICIT’ IMMUNITY IN EMPLOYMENT DISPUTES

Based on the fact that IFIs regularly enjoy legal personality, including the right to institute legal proceedings, they may be parties to lawsuits in domestic courts. Their rather exceptional ‘immunity clauses’<sup>35</sup> have led to a rich jurisprudence concerning employment-related disputes brought against IFIs. The normal ‘functional’ or ‘absolute’ immunity of international organizations usually implies that staff members cannot bring an action against their employer organization. Instead, they have to pursue such claims before internal mechanisms, usually ending before administrative tribunals. This exclusion of employment disputes from domestic courts is, however, less clear in the case of IFIs, which do not enjoy such broad immunity. Thus, in a number of cases, domestic courts had to address the issue to what extent such immunity from employment-related actions must be presumed or read into the governing texts. More recently, the tendency to accord immunity in

---

33. International Organizations Immunities Act (IOIA), 59 Stat. 669, 22 U.S.C.A. §§ 288 et seq. (1945) (hereinafter IOIA 1945). IOIA, Title I, s. 1 provides: ‘For the purposes of this title, the term “international organization” means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive Order as being entitled to enjoy the privileges, exemptions, and immunities herein provided.’

34. *In Re Jawad Mahmoud Hashim et al.*, 188 Bankr. at 649.

35. See s. II of this chapter and associated footnotes.

employment cases has met a countertendency stressing the need of access to justice that may sometimes override immunity considerations.

The development before American courts aptly demonstrates the problem of a general possibility to sue IFIs, on the one hand, and the need to shield them from employment disputes in order to ensure their independent functioning, on the other. The leading case that limited the broad possibility to sue IFIs according to their constituent instruments and excluded ‘internal’ administrative disputes from the jurisdiction of US courts is *Mendaro v. The World Bank*.<sup>36</sup> In this case, the D.C. Court of Appeals interpreted Article VII, section 3 of the IBRD Articles of Agreement<sup>37</sup> to permit lawsuits only in respect of external affairs of the Bank. Thus, it held the Bank immune from suits in employment disputes.

The case was instituted by a former employee of the World Bank whose employment as a researcher had come to an end in 1979. She alleged that she had been the victim of sexual discrimination and harassment and filed a complaint with the US Equal Employment Opportunity Commission alleging that her rights under Title VII of the US Civil Rights Act of 1964 had been violated. The Commission dismissed for lack of jurisdiction. The D.C. District Court and, on appeal, the D.C. Court of Appeals affirmed the dismissal.

The appellate court addressed this issue primarily from the point of view of the applicable US immunity legislation concerning international organizations, the IOIA. This statute, with regard to immunity, provides that:

[i]nternational organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.<sup>38</sup>

For the court the crucial issue was whether Article VII, section 3 of the IBRD Articles of Agreement,<sup>39</sup> which can be regarded as a ‘functional waiver’, encompassed employment-related disputes or not. The court refused to read this provision as a blanket ‘waiver of immunity’ from every type of suit not expressly prohibited by Article VII, section 3. According to a systematic reading of this provision and taking into account the ‘functions of the Bank’ and the ‘underlying purposes of

---

36. *Mendaro v. The World Bank*, 717 F.2d 610 (D.C.Cir. 1983); case notes by Norman G. Abrahamson, ‘International Organizations – International Organizations Immunity Act – Waiver of Immunity for World Bank denied, *Mendaro v. The World Bank*, 717 F.2d 610 (D.C.Cir. 1983)’, *Suffolk Transnational Law Journal* 8 (1984): 413; Frances W. Henderson, ‘How Much Immunity for International Organizations?: *Mendaro v. World Bank*’, *North Carolina Journal of International Law & Commercial Regulation* 10 (1985): 487; Monroe Leigh, ‘Immunity of International Organizations – Waiver of Immunity – International Organizations Immunities Act, *Mendaro v. World Bank*, 717 F.2d 610. U.S. Court of Appeals, D.C. Cir., Sept. 27, 1983’, *American Journal of International Law* 78 (1984): 221.

37. See IBRD Articles of Agreement, *supra* n. 2.

38. IOIA 1945, *supra* n. 33, Title I, s. 2(b).

39. See IBRD Articles of Agreement, *supra* n. 2, Art. VII(3).

international immunities', it was evident, in the court's opinion, that the Bank's members only intended to waive the organization's immunity from suit by its:

debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have subject itself to suit in order to achieve its chartered objectives. Since a waiver of immunity from employees' suits arising out of internal administrative grievances is not necessary for the Bank to perform its functions, this immunity is preserved by the members' failure expressly to waive it.<sup>40</sup>

The *Mendaro* court heavily relied upon policy arguments concerning the jurisdictional immunity of international organizations as they had already been formulated in its *Broadbent v. OAS* decision.<sup>41</sup> With regard to staff disputes it stated in particular that, 'the purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory'.<sup>42</sup>

The court found that this immunity had already become 'an accepted doctrine of customary international law'.<sup>43</sup> Against this background it concluded that:

the Bank's articles waive the Bank's immunity from actions arising out of the Bank's *external* relations with its debtors and creditors. However, a waiver of immunity to suits arising out of the Bank's *internal* operations, such as its relationship with its own employees, would contravene the express language of Article VII section 1.<sup>44</sup>

While one may doubt whether this distinction was indeed that clear as a matter of the Bank's constituent agreement, it was cogently reasoned as a matter of policy and has been followed by US courts since.

In *Chiriboga v. IBRD*,<sup>45</sup> a US district court expressly followed the *Mendaro* and *Broadbent* precedents. The case arose from the death of a World Bank employee in an aircraft accident while on home leave. A personal representative of the deceased and beneficiaries of her World Bank employees' benefits plan brought proceedings against the Bank and her insurer to recover under her travel accident policy. Without any in-depth analysis, the court qualified this dispute as

---

40. *Mendaro*, 717 F.2d at 615.

41. *Broadbent v. OAS*, 628 F.2d 27, 35 (D.C.Cir. 1980) ('An attempt by the courts of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organizations. Denial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of the international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability or the organization to function effectively.').

42. *Mendaro*, 717 F.2d at 615.

43. *Ibid.*

44. *Ibid.*, 618. Art. VII, s. 1 of the IBRD Articles of Agreements provides: 'To enable the Bank to fulfill the functions with which it is entrusted, the status, immunities and privileges provided in this Article shall be accorded to the Bank in the territories of each member.'

45. *Chiriboga v. IBRD*, 616 F. Supp. 963 (D.D.C. 1985).

an employment dispute in which the Bank enjoyed immunity: '[t]he dispute focuses on what the Bank did or did not contract to provide to its employees. It is difficult to imagine a suit that touches more closely on the internal operations of an international organization'.<sup>46</sup> It thus dismissed the action.

Further, a law suit brought by a World Bank employee alleging age discrimination led to the same result. The court in *Novak v. World Bank*<sup>47</sup> relied on *Mendaro* and upheld the Bank's immunity.

The immunity-friendly approach of US courts towards IFIs was even expanded in *Morgan v. IBRD*<sup>48</sup> in which a US court held that the 'employment-related immunity' of the Bank also extended to persons working at the Bank on placement from a temporary employment agency. In the court's view, 'employee relations of any kind cannot be the subject of litigation against the Bank'.<sup>49</sup> The case was no ordinary staff dispute. Rather, it was a tort action claiming intentional infliction of emotional distress, false imprisonment, libel, and slander. The plaintiff, who was an employee of a temporary employment agency and had been placed in a position at the World Bank, alleged that he had been forcibly detained by security guards of the Bank, accused of stealing money, and exposed to subsequent acts of harassment. His action was dismissed because the court found that '[p]ursuant to applicable provisions [of the IOIA] and principles of international law, international organizations such as the World Bank are, absent waiver, absolutely immune from suits arising out [of] their internal operations'.<sup>50</sup> While the *Morgan* case is certainly atypical, it is clear that US case law generally recognizes the immunity of IFIs in staff disputes.

However, not all courts have consistently followed this approach. In *Margot Rendell-Speranza v. Edward A. Nassim and the International Finance Corp.*,<sup>51</sup> a sexual harassment law suit by an International Finance Corporation (IFC) staff member against her supervisor as well as against the employer organization, a D.C. district court denied the IFC's claim to immunity. The court based its reasoning only on the wording of the applicable statutory law, the IOIA. In a first decision, distinguishing *Morgan v. IBRD*,<sup>52</sup> the court held that the acts complained of did not involve a policy judgment on the part of the IFC which would confer immunity from suit under the Foreign Sovereign Immunities Act (FSIA) discretionary function exception to the tort exemption from immunity.<sup>53</sup> In a second decision the same court even more specifically addressed the nature of the IFC's immunity

---

46. *Chiriboga*, 616 F. Supp. at 967.

47. *Novak v. World Bank*, 703 F.2d 1305 (1983).

48. *Morgan v. IBRD*, 752 F. Supp. 492 (D.D.C. 1990); case note by Daniel Hammerschlag, 'Morgan v. International Bank for Reconstruction and Development', *Maryland Journal of International Law and Trade* 16 (1992): 279.

49. *Morgan*, 752 F. Supp. at 494.

50. *Ibid.*, 493.

51. *Rendell-Speranza v. Nassim & the IFC (Rendell-Speranza I)*, 942 F. Supp. 621 (D.D.C. 1996); *Rendell-Speranza v. Nassim & the IFC (Rendell-Speranza II)*, 932 F. Supp. 19 (D.D.C. 1996).

52. See generally *Morgan*, 752 F. Supp. 492.

53. *Rendell-Speranza I*, 942 F. Supp. at 627.



from suit under US law. The court noted that the issue of whether ‘the IOIA incorporates the subsequently enacted FSIA [. . . ] is an unsettled question’, and went on to hold that it had to ‘adhere to the plain language of the IOIA, which affords to international organizations only the immunity of foreign governments’.<sup>54</sup> Consequently, the Court of First Instance denied the IFC’s immunity from suit. On appeal, however, this result was reversed, although the DC Circuit Court managed to avoid deciding the ‘delicate issue’, whether the enactment of the FSIA in 1976 also implied that the immunity provided for international organizations in the IOIA had to be regarded as restrictive immunity.<sup>55</sup> The appellate court held that the claim against the IFC was time-barred and thus dismissed the case.

The ‘delicate issue’ alluded to in the *Rendall-Speranza* case stems from the wording of the IOIA which clearly indicates that state immunity principles should be relevant for deciding on the jurisdictional immunity of international organizations.<sup>56</sup> US courts had difficulties in determining whether the reference to state immunity – made at a time when absolute immunity for foreign states was the accepted principle – was ‘frozen’ in time and thus implied absolute immunity for international organizations, or was dynamic and thus referred to the principles of state immunity at the time proceedings are brought. Since the acceptance of a restrictive immunity doctrine by the US judiciary<sup>57</sup> and the adoption of the FSIA,<sup>58</sup> restrictive state immunity has been firmly established in US law. This would imply that international organizations should also enjoy only restrictive immunity.<sup>59</sup>

Only in 1998, after a number of cases had managed to avoid this crucial issue by holding that even under a restrictive state immunity standard a particular action would be inadmissible against an international organization,<sup>60</sup> did the US Court of Appeals for the District of Columbia Circuit clarify the matter.

---

54. *Rendell-Speranza II*, 932 F. Supp. at 24.

55. *Rendall-Speranza v. Nassim & the IFC (Rendell-Speranza III)*, 107 F.3d 913 (D.C. Cir. 1997) (‘[. . . ] the issues raised by the IFC’s various claims of immunity, and particularly the issue of the effect (if any) that the FSIA has upon the IOIA, are both difficult and, because of their implications for the foreign relations of the United States, delicate. If they can be avoided merely by advancing the time at which the court reaches its decision upon the statute of limitation defense, then they should be.’).

56. See discussion of Title I, s. 2(b) of IOIA 1945, *supra* n. 33, which is discussed at n. 38.

57. Cf. US State Department, ‘Tate Letter’, 26 Dep’t State Bull. (1952), 984; see also *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682 (1976).

58. US Foreign Sovereign Immunities Act 1975, 90 Stat. 2891, 28 U.S.C.A. §§ 1330 et seq. (1976), 15 I.L.M. 1388.

59. One of the rare older cases leading to this result is *Dupree Associates, Inc. v. Organization of American States and the General Secretariat of the Organization of American States*, 63 I.L.R. 92 (1977).

60. *Morgan*, 752 F. Supp. 492; *De Luca v. United Nations Organization, Perez de Cuellar, Gomez, Duque, Annan, et al.*, 841 F. Supp. 531 (S.D.N.Y. 1994); *Tuck v. Pan American Health Organization (Tuck I)*, 668 F.2d 547 (D.D.C. 1980); *Tuck v. Pan American Health Organization (Tuck II)*, 668 F.2d 547 (D.C.Cir. 1981), UNJYB (1981), 177. See also Reinisch, *International Organizations before National Courts*, *supra* n. 11, 197 et seq.

In *Atkinson v. Inter-American Development Bank*,<sup>61</sup> an ex-wife of an employee of the Inter-American Development Bank (IDB) instituted garnishment proceedings against the IDB after her ex-husband had defaulted on a judgment on alimony and child support. The IDB invoked immunity. In its analysis, the court turned to statutory provisions for the determination of the bank's exemption from domestic jurisdiction and specifically addressed the question of whether the immunity of the IDB was absolute by virtue of the IOIA's reference to 'the same immunity from suit and from every form of judicial process as is enjoyed by foreign governments'.<sup>62</sup>

It rejected the view that a correct interpretation of the IOIA had to take into account the recent developments in the field of immunities of international organizations, and should be interpreted to restrict rather than to broaden the immunity granted to IFIs:

In light of this text [of the IOIA] and legislative history, we think that despite the lack of a clear instruction as to whether Congress meant to incorporate in the IOIA subsequent changes to the law of immunity of foreign sovereigns, Congress' intent was to adopt that body of law only as it existed in 1945 – when immunity of foreign sovereigns was absolute.<sup>63</sup>

In line with the court's support of an absolute immunity protection, it rejected the view that the enactment of the 1976 FSIA altered the immunity understanding of the IOIA. It did not accept the interpretation that Congress had been aware of the impact of the restrictive immunity doctrine on the IOIA, and that choosing not to revise it also demonstrated Congress's intent to apply a restrictive immunity understanding to the IOIA. Rather, the IOIA did not incorporate post-1945 changes because 'the Congress does not express its intent by a failure to legislate and even if it did, the will of a later Congress as to the meaning of a law enacted by an earlier Congress is of little weight'.<sup>64</sup> Thus, the *Atkinson* case was the first that clearly stressed that an international organization's immunity under the IOIA was absolute and corresponded to the absolute immunity accorded to foreign states in 1945.

The necessary flexibility to respond to changes required of the immunity of international organizations is ensured by a different approach in the US context. The IOIA provides for 'executive orders' by the US President, which allow the executive branch 'to modify, condition, limit and even revoke the otherwise absolute immunity of a designated organization'.<sup>65</sup> For this reason, IFIs claiming immunity before US courts usually refer not only to the *Atkinson* interpretation of the IOIA (which is typically combined with a reference to the FSIA), but also

---

61. *Atkinson v. Inter-American Development Bank*, 156 F 3d. 1335 (D.C.Cir. 1998).

62. See IOIA 1945, *supra* n. 33, Title I, s. 2(b) (a discussion of which correlates to n. 37).

63. In the footnote to this paragraph, the court 'accordingly disapprove[s] of the contrary holding in *Rendall-Speranza v Nassim*'. See *Atkinson*, 156 F 3d. at 1341.

64. *Ibid.*, 1342.

65. See IOIA 1945, *supra* n. 33; *Atkinson*, 156 F.3d at 1341.



invoke the appropriate presidential executive order that recognizes the IFI in question as an ‘international organization’ under the IOIA.

For an additional reason, the *Atkinson* case is remarkable. It advanced the so-called *Mendaro*-test concerning the scope of a waiver of immunity of IFIs. Referring to the rationale of ‘functional immunity’, the *Mendaro* court had pointed out that:

[s]ince the purpose of the immunities accorded international organizations is to enable the organizations to fulfil their functions, applying the same rationale in reverse, it is likely that most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization’s goal.<sup>66</sup>

This test could imply that a Bank’s immunity should be considered waived unless it would impair the bank’s objectives. However, the *Atkinson* case clarified that, on the contrary, ‘the Bank’s immunity should be construed as not waived unless a particular type of suit would further the Bank’s objectives’.<sup>67</sup> It referred to this understanding as an ‘opposite default rule’.<sup>68</sup> This test puts the Bank’s objectives into the centre of the examination as they become decisive in determining whether the immunity of an IFI can be lifted. Because they are of crucial importance, it is clear why courts seek additional elements for their determination and apply a cost-benefit assessment. In *Atkinson*, the relevant part of this test was worded as follows:

Here, waiver of immunity from garnishment proceedings, unlike waiver of immunity from employment suits, provides no conceivable benefit in attracting talented employees; in fact, garnishment of an employee’s wages makes the (prospective) employee worse off [ . . . ]. This clear lack of benefit – indeed disadvantage – of a waiver of immunity from garnishment proceedings compels the conclusion that Section 3 of the agreement should not be construed to waive the Bank’s immunity in this case.<sup>69</sup>

The ‘corresponding benefit’ test<sup>70</sup> clarified that the waiver was to be read narrowly. This approach is now regularly applied by US courts.<sup>71</sup>

Also in the employment context, the *Dujardin v. IBRD*<sup>72</sup> case illustrates that US courts regularly refer to this ‘functional purpose’ approach when they examine the waiver of immunity. In this instance, a defamation suit was brought by a former

---

66. *Mendaro*, 717 F.2d at 617 (cited at *Atkinson*, 156 F.3d at 1338).

67. *Atkinson*, 156 F.3d at 1338.

68. *Ibid.*, 1338.

69. *Atkinson*, 156 F.3d at 1339.

70. One of the recent US court decisions that explicitly uses this term is *Bro Tech v. EBRD*, 2000 U.S. Dist. LEXIS 17049 (E.D. Pa. 2000), *see infra* n. 158.

71. Cases applying the *Atkinson* test in the field of financial activities of IFIs are, for instance, *Ashford v. World Bank Group et al.*, *infra* n. 119; *Atlantic Tele-Network v. Inter-American Development Bank*, *infra* n. 123 and the recent case of *Salah Osseiran v. IFC*, *infra* n. 129.

72. *Dujardin v. IBRD*, 9 Fed. Appx. 19, 2001 U.S. App. LEXIS 13893 (D.C. Cir. 2001).

employee of the IBRD whom the Bank allegedly recruited to work for the borrower. The court found that this particular type of suit did not further the bank's objectives, nor did it enhance IBRD's ability to participate in commercial transactions. Therefore, immunity of the IBRD was upheld.

In *Weinstock v. Asian Development Bank*,<sup>73</sup> an ADB employee advanced numerous vague allegations. They included not only violations of his constitutional rights because other ADB employees had allegedly assisted in his arrest on the occasion of a child-custody dispute in Manila, but also stressed that he had been denied a promotion by the ADB subsequent to these incidents. He had unsuccessfully filed an appeal with the ADB's Administrative Tribunal regarding the denial of the promotion and instituted proceedings before the US district court. The US court unsurprisingly denied a waiver because this dispute did not fit into the limited category of exceptions to the immunity of the ADB.<sup>74</sup> It specifically stressed that the 'dissatisfaction with the efficacy of the administrative remedy [offered by the ADB] is insufficient to dissolve [the] Defendant's immunity as an international organization or [to] create an exception through which the Court can retain jurisdiction'.<sup>75</sup>

Sometimes staff members try to avoid the immunity of IFIs by instituting legal proceedings not directly against their employer organization, but rather against other staff members who are their superiors. For instance, in *Kissi v. De Larosiere*,<sup>76</sup> a US national brought an employment discrimination suit against the managing director of the IMF alleging that he had been unlawfully denied a position within IMF. Noting the functional immunity of IMF officials with respect to acts performed in their official capacity, the DC District Court dismissed the action because the 'law could not be clearer as to the defendant's immunity from this suit, which undeniably involves action by defendant, in rejecting plaintiff's employment applications, in his official capacity'.<sup>77</sup>

English courts also generally accord immunity to IFIs in employment suits. In *Mukoro v. European Bank for Reconstruction and Development and Another*,<sup>78</sup> an English labour court affirmed the EBRD's immunity from suit brought by a potential employee who had alleged that the rejection of his job application resulted from unlawful racial discrimination. According to the applicable immunity regime laid down in the headquarters agreement, the EBRD was to enjoy 'functional' immunity for 'official acts'.<sup>79</sup> The court held that the activity relevant to be qualified as 'official' was the selection of staff for employment and not the alleged unlawful discrimination which concerned only 'the mode of performance of the activities and the consequences of performance'. This precedent was

---

73. *Weinstock v. Asian Development Bank*, 2005 U.S. Dist. LEXIS 16870 (D.D.C. 2005).

74. See ADB Articles of Agreement, *supra* n. 3, Art. 50(1).

75. *Weinstock*, 2005 U.S. Dist. LEXIS 16870 at 13.

76. *Kissi v. De Larosiere*, No. 82-1267 (D.D.C. 1985) (unpublished opinion from 23 Jun. 1982).

77. *Ibid.*

78. Employment Appeal Tribunal, 19 May 1994, [1994] ICR 897; 107 ILR 604.

79. EBRD Headquarters Agreement, *supra* n. 4, Art. 4(1) ('Within the scope of its official activities the Bank shall enjoy immunity from jurisdiction [...]').

followed in *Bertolucci v. European Bank for Reconstruction and Development and Others*,<sup>80</sup> a sexual discrimination claim dismissed because of the EBRD's immunity from suit. The court expressly held that:

staff management falls within the acts performed by managers in their official capacity, whether or not it was performed in a discriminatory manner, and the employment of staff and management of staff relations falls within the official activities of the Bank.<sup>81</sup>

A similar result was reached in the Nigerian case of *African Reinsurance Corporation v. Abate Fantaye*.<sup>82</sup> The African Reinsurance Corporation is an international organization set up between the Member States of the Organization of African Union and the AfDB headquartered in Nigeria. The applicable immunity provision stated that '[l]egal actions may be brought against the Corporation in a court of competent jurisdiction in the territory of a country in which the Corporation has its Headquarters, or has appointed an agent for the purpose of accepting service of process, or has otherwise agreed to be sued'.<sup>83</sup> In a lawsuit by a former employee of the Bank who claimed damages for wrongful termination of his employment contract, the defendant organization's plea of immunity was initially rejected both by the High Court of Lagos and the appellate court. The Supreme Court, however, reversed and held that the Nigerian Government had conferred upon the corporation the status of a recognized international organization and that as such it enjoyed diplomatic immunity and had immunity from suit and legal process. Although the treaty establishing the corporation did not contain an express immunity from suit, Nigerian domestic legislation provided for its immunity from suit and legal process. It further stated that the immunity provision in question was no waiver of immunity that – according to domestic legislation – had to be express and positive.

The result that IFIs generally enjoy immunity in employment disputes can be found in other jurisdictions as well. Good examples are the Argentine cases of *Araya v. Institute for Latin-American Integration/Inter-American Development Bank*<sup>84</sup> and *Ezcurra de Mann v. Inter-American Development Bank*<sup>85</sup> in which the

---

80. Employment Appeal Tribunal, 19 Aug. 1997, EAT/276/97 (Transcript) Lexis file.

81. *Ibid.*

82. Supreme Court, 20 Jun. 1986, [1986] 3 *Nigerian Weekly Law Reports* 811; 86 ILR 655.

83. See Ch. IX on 'Status, Immunities, Exemptions and Privileges', Art. 48 of the Agreement Establishing the African Reinsurance Corporation, 1197 U.N.T.S. 76 (24 Feb. 1976). The Agreement was concluded between the African States' members of the Organization of African Unity and the African Development Bank.

84. Argentina, Labor Court, 1974, cited in Andrew N. Vorkink & Marilou C. Hakuta, *Lawsuits against International Organizations: Cases in National Courts Involving Staff and Employment*, World Bank Legal Department (Washington, DC: IBRD, 1 Jul. 1985), 25 (hereinafter Vorkink & Hakuta, 'Argentina Labor Court 1974').

85. Argentina, Labor Court, 15 Aug. 1978, Court of Appeals, 11 Jun. 1979, cited in Andrew N. Vorkink & Marilou C. Hakuta, *Lawsuits against International Organizations: Cases in National Courts Involving Staff and Employment*, World Bank Legal Department (Washington, DC: IBRD, 1 Jul. 1985), 36.

deciding courts interpreted the restricted immunity of an international lending institution broadly. In the latter case the appellate court decided that it lacked jurisdiction because the Bank enjoyed ‘diplomatic immunity’, which could only be waived by express consent. It found that Article XI, section 3 of the IDB Articles of Agreement<sup>86</sup> did not constitute a ‘waiver of immunity’,<sup>87</sup> but rather that the Bank ‘may or may not accept such service or notice’.<sup>88</sup> The court then affirmed the lower court’s decision holding that the appointment of an agent alone would not suffice to subject the Bank to the jurisdiction of Argentine courts but rather that such agent ‘is empowered to accept service or notification of process or, conversely, not to accept same’.<sup>89</sup>

In a few cases, national courts have refused to accord immunity from suit to IFIs. Such refusal may be based on very formalistic reasons, as was evident in the Philippines case of *Velasquez v. Asian Development Bank*.<sup>90</sup> In this employment dispute, a domestic labour arbitrator upheld jurisdiction because the defendant IFI had failed to show that the Bank’s constituent treaty and headquarters agreement had been ratified by the Philippines. On the basis of such law, he ordered reinstatement of the Bank’s employee and the payment of back wages. Only after diplomatic representations made by the ADB did the Philippine Foreign Ministry advise the Ministry of Labor that the latter had no jurisdiction to decide on the matter.

More recently, another strand of national case law has developed which sometimes leads to a denial of immunity of IFIs in employment disputes. This is based less on formal than on substantive reasons in the interest of the right of access to court of employees, and reflects a general tendency of many national courts, in particular in Europe, to restrict the immunity of international organizations where such immunity would lead to a denial of justice.<sup>91</sup> This trend has its roots in the jurisprudence of the European Court of Human Rights, which held in *Waite and Kennedy*<sup>92</sup> that ‘a material factor in determining whether granting [ . . . ]

---

86. See IDB Articles of Agreement, *supra* n. 3.

87. Cf. the US waiver of immunity cases *Lutcher*, *infra* n. 105; *Mendaro*, *supra* n. 36.

88. Vorkink & Hakuta, ‘Argentina Labor Court 1974’, *supra* n. 84, 36.

89. *Ibid.*

90. Philippines, Ministry of Labor, Region IV, Manila, 25 Nov. 1979 Case No. RB-IV-AB-1841-79, cited in Andrew N. Vorkink & Marilou C. Hakuta, *Lawsuits against International Organizations: Cases in National Courts Involving Staff and Employment*, World Bank Legal Department (Washington, DC: IBRD, 1 Jul. 1985), 38.

91. See Nicolas Angelet & Alexandra Weerts, ‘Les immunités des organisations internationales face à l’article 6 de la Convention européenne des droits de l’homme’, *Journal du droit international* 134 (2007): 3; August Reinisch & Ulf Andreas Weber, ‘The Jurisdictional Immunity of International Organizations, the Individual’s Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement’, *International Organizations Law Review* 1 (2004): 59.

92. *Waite and Kennedy*, Application No. 26083/94, European Court of Human Rights, 18 Feb. 1999, [1999] ECHR 13, 116 ILR 121, 134; case note by August Reinisch, ‘Case of Waite and Kennedy v. Germany’, Application No. 26083/94; *Case of Beer and Regan v. Germany*, Application No. 28934/95, European Court of Human Rights, 18 February 1999’, *American Journal of International Law* 93 (1999): 933.

immunity from [...] jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention'.<sup>93</sup> The case involved the European Space Agency and led to the acceptance of the organization's immunity from suit before German courts because an internal staff dispute mechanism was available.

Subsequent national cases have come to different conclusions. For instance, in *Siedler v. Western European Union*,<sup>94</sup> a Belgian appellate court found that the internal procedure for the settlement of employment disputes within the Western European Union (WEU) did not offer the guarantees inherent to a fair trial. Thus, it denied the organization's claim to immunity because such limitation of the access to the normal courts was incompatible with Article 6(1) of the European Convention on Human Rights (ECHR).<sup>95</sup>

In a similar way, French courts are increasingly questioning the appropriateness of a general immunity of international organizations in employment matters in which no alternative remedy is available and have applied this scepticism to IFIs. The French Supreme Court decision in *Banque africaine de développement v. M.A. Degboe*<sup>96</sup> illustrates this well. It arose from a claim brought by a former employee of the AfDB who could not access the organization's administrative tribunal because it was set up after his dismissal and thus lacked jurisdiction over his claim. The Cour de Cassation held that the impossibility of access to justice constituted a denial of justice. Therefore, the defendant organization was not entitled to immunity from suit.<sup>97</sup> In this case, the French court relied less upon ECHR Article 6(1)

---

93. *Waite and Kennedy*, *supra* n. 92, para. 68.

94. *Siedler v. Western European Union*, Brussels Labour Court of Appeal (4th chamber), 17 Sep. 2003, *Journal des Tribunaux* 2004, 617, ILDC 53 (BE 2003); case notes by Eric David, 'L'immunité de juridiction des organisations internationales', *Journal des Tribunaux* (2004): 619; Jan Wouters & Maarten Vidal, 'Internationaal recht voor de Belgische rechter: een bloemlezing uit de recente rechtspraak', in *Internationaal en Europees Recht, Themis Cahier no 31*, ed. Koen Lenaerts & Jan Wouters (Brussels: Die Keure, 2005), 55.

95. Article 6(1) of the European Convention on Human Rights provides: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1953), Art. 6(1) (adopted 4 Nov. 1950, entered into force 3 Sep. 1953).

96. *Banque africaine de développement v. M.A. Degboe*, Cour de Cassation, Chambre sociale, 25 janvier 2005, 04-41012, 132 *Journal du droit international* (2005) 1142; case note by Isabelle Pingel-Lenuzza, *Rev. crit. dr. int. pr.* (2005), 477.

97. *Banque africaine de développement v. M.A. Degboe*, Cour de Cassation, Chambre sociale, 25 janvier 2005, 04-41012, 132 *Journal du droit international* (2005): 1142 ('Mais attendu que la Banque africaine de développement ne peut se prévaloir de l'immunité de juridiction dans le litige l'opposant au salarié qu'elle a licencié dès lors qu'à l'époque des faits elle n'avait pas institué en son sein un tribunal ayant compétence pour statuer sur des litiges de cette nature, l'impossibilité pour une partie d'accéder au juge chargé de se prononcer sur sa prétention et d'exercer un droit qui relève de l'ordre public international constituant un déni de justice fondant la compétence de la juridiction française lorsqu'il existe un rattachement avec la France [...]'). In the follow up to this litigation, the Cour de Cassation reaffirmed its earlier decision that '[...] l'absence de toute juridiction du travail au sein de la banque [...] mettait

than on the concept of 'ordre public international' encompassing the prohibition of a 'déní de justice', or 'denial of justice'. This approach demonstrates that the idea of a 'forfeiture' of immunity in case no alternative remedy is provided for is not limited to cases in which the right of access to justice is derived from the ECHR. Rather, it indicates that the notion of a 'conditional' immunity may be 'transferable' to other jurisdictions where it may be based on due process or the prohibition of denial of justice, which could be regarded as elements of an 'ordre public international' or equally of customary international law.<sup>98</sup>

In fact, this concern had already been voiced in connection with the leading American case of *Mendaro v. The World Bank*.<sup>99</sup> Critics of the immunity decision concluded that in the particular case, the US court should have exercised jurisdiction 'especially since Mendaro had nowhere else to turn due to the World Bank's lack of an internal dispute settlement mechanism at the time'.<sup>100</sup> Moreover, in 1985, the then newly established World Bank Administrative Tribunal<sup>101</sup> rejected Mendaro's complaint as inadmissible because most events giving rise to applicant's complaint had occurred before the entry into force of the Tribunal's Statute and because, to the extent they arose subsequently, the complaint was filed three years after the time-limit had expired.<sup>102</sup>

It is too early to state with any reasonable certainty whether the trend evident in cases like *Banque africaine de développement v. M.A. Degboe* and *Siedler v. Western European Union* will develop into a dominant jurisprudence.<sup>103</sup> But it is

---

le salarié dans l'impossibilité d'exercer son droit à un tribunal pour connaître sa cause [...]. *M.X v. Banque africaine de développement*, Cour de Cassation, Chambre sociale, 11 janvier 2007, 05-40157.

98. Cf. American Law Institute, *Restatement (Third) Foreign Relations Law of the United States* (St Paul, Minnesota: American Law Institute, 1987), s. 711 Reporters' note 2.B; Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005), 134 et seq.

99. *Mendaro*, *supra* n. 36.

100. Abrahamson, *supra* n. 36, 422.

101. The World Bank Administrative Tribunal was established by a resolution adopted by the Boards of Governors of the IBRD, IDA, and IFC on 30 Apr. 1980.

102. *Mendaro v. IBRD*, World Bank Administrative Tribunal, 4 Sep. 1985, World Bank Administrative Tribunal Reports [1985], Decision No. 26.

103. Obviously inherent to this development is the requirement not only for the availability, but also for the de facto effectiveness of the alternative remedy provided by an international organization. The *Yacyretá* case is an illustrative example. The overly time-consuming construction of the Yacyretá Hydroelectric Project financed by the IDB and World Bank on the border between Argentina and Paraguay raised considerable protest in the mid-1990s by the local population affected by the non-enforcement of the banks' own environmental and resettlement policies. Complaints were brought before the newly established Independent Investigation Mechanism (IIM) of the Inter-American Development Bank and the World Bank Inspection Panel, which, in May 1997, urged the Board of the Inter-American Development Bank to even allow a parallel investigation before these tribunals in order to address the allegation of inadequate remedies. Cf. Richard Bissell, 'Current Development: Recent Practice of the Inspection Panel of the World Bank', *American Journal of International Law* 91 (1997): 742.



obvious that there are valid arguments in favour of a restriction of immunity where such immunity may lead to a denial of justice.

V. IFIs AND THEIR LACK OF IMMUNITY IN  
BORROWING AND LENDING OPERATIONS

As outlined above, most IFIs do not enjoy the same broad jurisdictional immunity as other international organizations. According to their constituent agreements most international development banks can be sued before domestic courts by private parties, but not by Member States.<sup>104</sup> The rationale of this provision is obvious: it would have a negative effect on the creditworthiness of a financial institution if its creditors had no access to court in order to recover their claims. This justification has been aptly addressed in *Lutcher v. Inter-American Development Bank*<sup>105</sup> in which a US appellate court remarked:

Just as it is necessary for the Bank to be subject to suit by bondholders in order to raise its lending capital, it may be that responsible borrowers committing large sums and plans on the strength of the Bank's agreement to lend would be reluctant to enter into borrowing contracts if thereafter they were at the mercy of the Bank's good will, devoid of means of enforcement.<sup>106</sup>

Interestingly, only a limited number of reported cases involve straightforward creditor claims against IFIs. This may, of course, result from the fact that the lack of immunity is so clear that the immunity issue is regularly not litigated. It may also stem from the fact that IFIs manage to avoid disputes from reaching a litigious phase. All this is speculation, and it is thus from the few available cases that one has to draw conclusions.

One of the rare court cases concerning lending operations of IFIs is the US decision in *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*<sup>107</sup> in which the DC Circuit Court, in principle, permitted a borrower to bring suit against the IDB. The case was not a simple contract claim involving loans given by the defendant IFI, but rather, it involved an alleged breach of an implicit agreement combined with a tort action. Lutcher, a Brazilian corporation sought damages and an injunction against the IDB, arguing that loans made or about to be made to its competitors violated an 'implied obligation' of its own loan agreement with the Bank to act prudently in considering loan applications from competitors. The federal appellate court affirmation of the district court's dismissal for failure to state a claim ended the dispute. What is interesting, however, is the fact that the Court of Appeals disagreed with the lower court's alternative reasoning that the

---

104. See IBRD Articles of Agreement, *supra* n. 2, Art. VII(3).

105. *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454 (D.C.Cir. 1967), 28 Mar. 1966; 42 ILR (1967): 183, 337.

106. *Lutcher*, 382 F.2d at 459.

107. *Ibid.*, 454.

Bank enjoyed immunity from suit. The applicable immunity provision of the IDB, Article XI, section 3 of the Bank's Articles of Agreement, was identical to Article VII, section 3 of the IBRD Articles of Agreement.<sup>108</sup> The Bank had argued that this provision, allowing suit in competent courts of the Member States, permitted only actions brought by 'bondholders, creditors, and beneficiaries of its guarantees' because only this exception from immunity would contribute to the effectiveness of the Bank's operation.<sup>109</sup> The Court of Appeals, however, stressed the precise wording of Article XI, section 3 that contemplated suits brought in 'the territories of a member in which the Bank has an office' and which excluded only suits by Member States or persons acting for or deriving claims from members.<sup>110</sup> In the court's view, '[p]rovision for suit in *any* member country where the bank has an office must have been designed to facilitate suit for some class other than creditors and bondholders, *i.e.* borrowers'.<sup>111</sup>

As a result, the court affirmed that IFIs with 'immunity clauses' like the IDB do not enjoy broad immunity from suit in domestic courts. One can only speculate whether national courts would uphold this reasoning in similar cases brought against IFIs like the ADB or the AfDB. Because their constituent instruments provide for jurisdictional immunity except for actions involving the banks as 'borrower', the banks as lenders could still be regarded as immune from suits of the type in issues in the *Lutcher* case.

There is some support for such a restrictive interpretation of the 'borrowing exception' to the immunity of the AfDB in the Belgian case of *Scimet v. African Development Bank*.<sup>112</sup> The case was instituted by a Belgian company that had provided services to an AfDB-financed rainwater purification project in Chad. The court held the case inadmissible as a result of the Bank's immunity from jurisdiction. The claimant had tried to rely upon Article 52 of the AfDB Agreement which provided for 'immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers'.<sup>113</sup> According to the Belgian court:

the only exception to the immunity of the African Development Bank provided for in Article 52 of the Agreement concerns cases where the Bank obtains its own finance on the international capital markets in the Member States in question or elsewhere [ . . . ]. This exception has absolutely nothing to do with the present dispute. The broad interpretation of Article 52 proposed by the claimant cannot be accepted.<sup>114</sup>

---

108. See IDB Articles of Agreement, *supra* n. 3, Art. XI(3); IBRD Articles of Agreement, *supra* n. 2, Art. VII(3).

109. *Lutcher*, 382 F.2d at 456.

110. *Ibid.*, 458.

111. *Ibid.*

112. *Scimet v. African Development Bank*, Court of First Instance of Brussels, 14 Feb. 1997, 128 I.L.R. 582.

113. AfDB Articles of Agreement, *supra* n. 3, Art. 52 (*see* related text).

114. *Scimet*, 128 ILR at 585.



The *Scimet* case is also interesting because it discussed another possible restriction of the immunity of international organizations. The claimant argued that the Bank's immunity was in fact functionally limited and that because it had acted outside the performance of its functions it should not enjoy immunity. The claimant tried to derive the functional limitation of the Bank's jurisdictional immunity from a provision in the Bank's Agreement that referred to the functional rationale of its immunity. Article 50 of the AfDB Agreement provides:

To enable it to fulfil its purpose and the functions with which it is entrusted, the Bank shall possess full international personality. To those ends, it may enter into agreements with members, non-member States and other international organizations. To the same ends, the status, immunities, exemptions and privileges set forth in this chapter shall be accorded to the Bank in the territory of each member.<sup>115</sup>

The Belgian court, however, held that:

the text of Article 50 clearly indicates that the immunities conferred on the African Development Bank are intended to enable it to achieve its purpose and perform its functions but that the drafters of this provision thereby merely indicated the reason for granting the immunities in question, without intending to restrict their scope.<sup>116</sup>

Thereby it refused to read a functional limitation of immunity into the text of the AfDB Agreement, which speaks of a clearly unqualified immunity (with the exception of the Bank's borrowing powers), and merely linked it to the policy reason of why the bank should enjoy immunity in the first place. In addition, the court rejected the *ultra vires* argument as a matter of substance; it found that:

by participating in a project with the object of furthering the economic and social development of Chad (purification of rainwater in the city of N'Djamena), and by cooperating with the African Development Fund, the defendant acted within the limits of its objects and functions.<sup>117</sup>

Also, the more recent US case law hints at a restrictive approach regarding the determination of the scope of the immunity waiver. As in the case of employment-related disputes, disputes relating to the core financial activities of IFIs raise the question whether a 'waiver of immunity' should be assumed in order to further the IFI's objectives as stated in the constituent agreements.<sup>118</sup>

---

115. AfDB Articles of Agreement, *supra* n. 3, Art. 50 (*see* related text).

116. *Scimet*, 128 ILR at 584.

117. *Ibid.*

118. *See* IMF Articles of Agreement, *supra* n. 2; IBRD Articles of Agreement, *supra* n. 2; IDA Articles of Agreement, *supra* n. 3; IDB Articles of Agreement, *supra* n. 3; EBRD Articles of Agreement, *supra* n. 3; ADB Articles of Agreement, *supra* n. 3; AfDB Articles of Agreement, *supra* n. 3; MIGA Convention, *supra* n. 3; IFC Articles of Agreement, *supra* n. 3.

For instance, in *Ashford v. World Bank Group et al.*<sup>119</sup> attention was paid to the benefits connected to a possible ‘waiver of immunity’ of the IBRD and the IDA, as members of the World Bank Group, and the IDB. The case related to the exercise of control over loan receiving nations during a bidding process. The international company Ashford was active in the field of information technology and participated in the bidding on contracts offered by nations that received loans from the IBRD, the IDA, and the IDB. Ashford alleged to have been disqualified despite having submitted the lowest bids and, therefore, accused the banks of having neglected their duty to monitor and oversee the bids, resulting in their liability for its disqualification.

Before the US court dismissed the action due to Ashford’s failure to state an actionable claim, it elaborated on the scope of immunity to conclude that it was ‘unlikely that the [banks] waived their immunity to suit’.<sup>120</sup> The analysis of the existence of an implicit waiver of immunity resulted in the rejection of the plaintiff’s argument that this ‘suit furthers [the banks’] stated objectives by holding [the banks] to their prescribed methods of overseeing the bid selection process’.<sup>121</sup> Rather, the court concluded that it ‘seems more probable that it would not further each of the Bank’s objectives to subject its internal policies relating to the selection process to oversight by the courts of one of its members’.<sup>122</sup>

The rather extraordinary *Atlantic Tele-Network v. Inter-American Development Bank*<sup>123</sup> case shares similarities to the *Lutcher* decision.<sup>124</sup> A telecommunications company, Atlantic, contested a loan agreement between the IDB and the Republic of Guyana. The case concerned the financing of a telecommunications system in addition to an already operating system built by Atlantic. The company feared that it would be deprived of recovering sums linked to the exclusive operation of the system in place since it was granted a fixed percentage on the return on capital investment of the exclusively operating local Guyanese telecom operating company. Accordingly, Atlantic sued the Republic of Guyana, the IDB, and two officials exercising control over the IDB lending activities for breach of contract. Although Atlantic acknowledged that the IDB enjoyed absolute immunity according to the IOIA,<sup>125</sup> it invoked a ‘lending exception’, that is a limited waiver of IDB’s immunity according to Article XI, section 3 of the IDB Agreement.<sup>126</sup>

The court, however, rejected Atlantic’s argument that ‘this suit will aid the IDB in attracting responsible borrowers as well as encouraging American investment in developing nations generally’.<sup>127</sup> Rather, in the course of the

---

119. *Ashford v. The World Bank Group et al.*, 2006 U.S. Dist. LEXIS 17286 at 10 (N.D.Ga. 2006).

120. *Ibid.*

121. *Ibid.*, 11.

122. *Ibid.*

123. *Atlantic Tele-Network v. Inter-American Development Bank*, 251 F. Supp. 2d 126 (D.D.C. 2003).

124. *See Lutcher*, 382 F.2d 454.

125. *See IOIA 1945, supra* n. 33, Title I, s. 2(b).

126. This provision corresponds to IBRD Articles of Agreement, *supra* n. 2, Art. VII(3).

127. *Atlantic Tele-Network*, 251 F. Supp. 2d at 133.

assessment of costs and benefits of subjecting IDB to jurisdiction, it supported IDB's view that 'were this suit to be allowed, virtually any U.S. citizen with a commercial grievance against a debtor nation could challenge an IDB loan to that nation without any "corresponding benefit" accruing thereby to the IDB whatsoever'.<sup>128</sup>

One of the few cases where a US court ruled in favour of a waiver of immunity was the recent *Salah Osseiran v. IFC*<sup>129</sup> decision. A private investor alleged that the IFC was in breach of an agreement on the purchase of shares since it postponed its execution and finally entered into a stock-selling agreement with a third party. As a result, the investor alleged that this impeded his ability to gain the controlling shares in a merchant banking and investment company. Because the IFC had not explicitly waived its immunity, the court referred to Article VI, section 3, of the IFC Articles of Agreement<sup>130</sup> for its analysis of a possible implicit waiver. It examined the connection between the IFC's negotiations to obtain capital from a sale of stock and the IFC's overall purpose to 'contribute to the development of its member countries by making investments', to bring 'together investment opportunities, domestic and foreign private capital, and experienced management', and 'to stimulate, and to help create conditions conducive to, the flow of private capital, domestic and foreign, into the productive investment of member countries'.<sup>131</sup>

The court found that in accordance with *Atkinson*,<sup>132</sup> a '[w]aiver of immunity for litigation arising from transactions involving a sale of stock to a private investor provides a clear benefit in attracting additional investors willing to engage in financial transactions with IFC which would further development objectives'.<sup>133</sup> Thus, due to the 'innumerable benefits' which 'furthered [IFC's] objectives',<sup>134</sup> linked to the negotiation and consummation of sales of stock, the IFC immunity was regarded as waived. The material claim for the breach of a sales contract was rejected, as no binding sales agreement had been entered into by the parties. Yet, the court ruled in favour of the additional claims for the breach of the confidentiality agreement and for promissory estoppel.

Finally, an extraordinary decision by a US District Court directly addressed lending operations of an IFI. *Concesionaria DHM v. IFC*<sup>135</sup> supports the argument that immunity is not invoked in cases in which the lack of immunity is too obvious. In a dispute on the (unsubstantiated) failure to further disburse according to a loan agreement for a toll road construction project in Ecuador, the defendant, IFC, and the other lender, the Corporación Andina de Fomento, in fact, focused on possibilities other than immunity as the means by which to argue for dismissal of

---

128. *Ibid.*

129. *Salah Osseiran v. IFC*, 498 F.Supp. 2d 139 (D.D.C. 2007).

130. See IFC Articles of Agreement, *supra* n. 3, Art. VI(3).

131. The court explicitly referred to the IFC objectives as stated in Art. I of the IFC Articles of Agreement. *Osseiran*, 498 F.Supp. 2d at 144.

132. See *Atkinson*, 156 F 3d. 1335.

133. *Osseiran*, 498 F.Supp. 2d at 145.

134. *Ibid.*

135. *Concesionaria DHM v. IFC*, 307 F.Supp. 2d 553 (S.D.N.Y. 2004).

the claim. Yet, neither their improper venue contention nor the closely related forum non conveniens argument led to the dismissal of the breach of contract suit by the borrower *Concesionaria*, an Ecuadorian special purpose company.

## VI. SPECIFIC CIRCUMSTANCES INVOLVING IFIs BEFORE NATIONAL COURTS

Obviously, the special status of IFIs may also be relevant in cases that neither fall into the category of employment disputes nor of typical ‘core’ financial activities of IFIs.

The early US case *International Bank for Reconstruction and Development and International Monetary Fund v. All America Cables & Radio, Inc. and Other Cable Companies*<sup>136</sup> defined the functional scope of an IFI and thus, implicitly, its breadth of immunity protection in the specific field of the determination of telecommunication rates payable by these organizations. The IMF and IBRD argued that privileges and immunities granted to international organizations served ‘to protect the operation of these organizations from unreasonable interference (including protection against unreasonably high rates)’.<sup>137</sup> The defendant replied that ‘there has been no showing that the Bank and the Fund need lower-than-commercial-rates to carry out their functions’.<sup>138</sup> While the US Federal Communications Commission (FCC) materially accepted the complaint by the IFIs and allowed them to continue to pay lower rates, it avoided a thorough discussion of the underlying functional immunity arguments.<sup>139</sup>

The IMF’s absolute immunity from suit was implicitly recognized for instance in *Loughran, et al. v. United States*.<sup>140</sup> There, the owners of real property expropriated by the United States to allow construction of additional buildings for the IMF challenged this taking. In order to decide an interlocutory appeal, the DC Court of Appeals had to pass on the finality of the district court’s taking judgment. It held that the intended immediate transfer of title to the IMF after the United States had validly acquired title as a result of the district court’s judgment made this judgment a final one which was not appealable because the IMF was ‘an entity which [was] immune from all judicial process of the United States’.<sup>141</sup>

In *Gruslin v. IBRD*,<sup>142</sup> a party dissatisfied with the outcome of an International Centre for Settlement of Investment Disputes (ICSID) arbitration challenged the result by claiming damages from the responsible IFI. However, the suit was bound

---

136. *Int’l Bank for Reconstruction & Development & International Monetary Fund v. All America Cables & Radio, Inc., et al.*, 22 I.L.R. 705 (1953).

137. 22 ILR at 709.

138. *Ibid.*

139. *Ibid.*, 711 et seq.

140. *Loughran, et al. v. United States*, 317 F.2d 896 (D.C. Cir. 1963).

141. *Ibid.*, 898.

142. *Philippe Gruslin v. La Banque Internationale pour la Reconstruction et le Développement*, Tribunal de première instance de Bruxelles, 72ème Chambre, 19 Aug. 2005 (not published).

to fail because the plaintiff selected the wrong organization: instead of suing ICSID, which is an independent international organization in itself, he chose to institute legal proceedings against the World Bank.<sup>143</sup> Despite close legal ties between the ICSID and the World Bank,<sup>144</sup> the Centre is an autonomous international organization, enjoying its own international legal personality.<sup>145</sup> Thus, lawsuits against the World Bank that concern arbitration or conciliation activities conducted under the auspices of the ICSID are directed against the wrong defendant. However, because of the ICSID's broad immunity from legal process actions against it are unlikely to succeed.<sup>146</sup>

In a few instances, IFIs are subject to regular tort claims, such as in *Robert A. Mitishen v. Otis Elevator Company and IBRD*.<sup>147</sup> There, an employee of the IBRD successfully filed a suit after an elevator accident had happened on the premises of the World Bank. The holding of the court confirmed the general restrictive immunity approach for IFIs as provided for in the applicable agreements, and therefore rejected the employee's claim for damages. The court specified that the plaintiff could only claim workers' compensation benefits, which were exclusive and replaced all liability of the employer in relation to the employee.<sup>148</sup>

## VII. IFIs' INVOLVEMENT IN BANKRUPTCY PROCEEDINGS

Typically, parties try to argue that the immunity of IFIs should be waived because of their qualified involvement in the activities of their 'clients' subsequent to the initial agreement.<sup>149</sup> This argument has particular importance in bankruptcy proceedings where bankruptcy creditors are faced with the risk of being ultimately unable to recover assets.

A good example is provided by the bankruptcy proceedings before US courts in the *Kaiser*<sup>150</sup> case. It concerned the involvement of the IFC subsequent to the

---

143. *Gruslin v. Malaysia*, ICSID Case No. ARB/99/3; Award, 27 Nov. 2000, available at <[http://ita.law.uvic.ca/documents/Philippe\\_Gruslin\\_v\\_Malaysia.pdf](http://ita.law.uvic.ca/documents/Philippe_Gruslin_v_Malaysia.pdf)>.

144. See Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001), Comment 5 to Art. 2.

145. Pursuant to Art. 18 of the ICSID Convention, '[t]he Centre shall have full international legal personality'. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 U.N.T.S. 159; 4 ILM 532 (1965), Art. 18 (hereinafter ICSID Convention).

146. According to Art. 20 of the ICSID Convention, '[t]he Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity'. *Ibid.*, Art. 20.

147. *Mitishen v. Otis Elevator Co. & IBRD*, 1990 U.S. Dist. LEXIS 12465 (D.D.C. 1990).

148. *Ibid.*, at 4.

149. An illustrative example is the previously discussed case *Ashford v. World Bank Group* (2006 U.S. Dist. LEXIS 17286), see *supra* n. 119.

150. In re: *Kaiser Group International, Inc., IFC v. Kaiser Group International, Inc. (Kaiser I)*, 302 B.R. 814 (D. Del. 2003), 2003 U.S. Dist. LEXIS 23852; In re: *Kaiser Group International, Inc., IFC v. Kaiser Group International, Inc. (Kaiser II)*, 308 B.R. 666 (D. Del. 2004), 2004

grant of a loan for a project relating to the construction of a steel mill in the Czech Republic. A construction agreement had been entered into by a subsidiary of Kaiser Group International Corporation (Kaiser) with the Czech company Nova Hut. The IFC had agreed to grant a secured loan to Nova Hut and had been accordingly assigned Nova Hut's rights and title to the steel mill. In the bankruptcy proceedings initiated by Kaiser, the IFC was accused of having allowed Nova Hut's improper draws on its letter of credit, and thus to have been actively involved in the financial collapse of the project.

Interestingly, the IFC did not straightforwardly invoke immunity, but filed a proof of claim because it sought recovery from Kaiser based on an assignment it had received from Nova Hut. However, the IFC stressed that in doing so, it did not consent to the jurisdiction of the claim with respect to Kaiser's accusations for the improper draw of the letter of credit. For this reason, the IFC filed a motion to dismiss the initial order of the US bankruptcy court.<sup>151</sup> While the Delaware District Court found that it needed supplementary information before it could ultimately decide on the matter, it emphasized that the IFC had waived its immunity because it had actively participated in the bankruptcy proceedings through the filing of the proof of claim.<sup>152</sup>

The dispute continued before the same court a few months later<sup>153</sup> and again the court relied on procedural aspects specific to the United States to rule that Kaiser's counterclaims were not covered by the waiver of IFC's immunity. On appeal by Kaiser, the US Court of Appeals for the Third Circuit<sup>154</sup> reversed the District Court's judgment and remanded the case to the Delaware bankruptcy court for a decision on the merits.<sup>155</sup>

---

U.S. Dist. LEXIS 3098; In re: *Kaiser Group International, Inc., IFC v. Kaiser Group International, Inc. (Kaiser III)*, 399 F.3d 588 (3rd Cir. 2005); 2005 U.S. App. LEXIS 3288; 60 Fed. R. Serv. 3d (Callaghan) 1153; Bankr.L.Rep (CCH) P80, 244; 44 Bankr. Ct. Dec. 89.

151. *Kaiser I*, 302 B.R. 814.

152. This waiver of immunity is explicitly provided for in US bankruptcy law. Section 106(b) of the US Bankruptcy Code stipulates that when in bankruptcy proceedings a 'governmental unit' has filed a proof of claim, a waiver of its 'sovereign immunity' is to be assumed in relation to a claim 'that is the property of the estate' and 'that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose'. Therefore, the subsequent bankruptcy proceedings focussed precisely on these two elements, that is the 'property of the estate' and the 'same transaction or occurrence requirement'.

153. *Kaiser II*, 308 B.R. 666.

154. *Kaiser III*, 399 F.3d 588.

155. While no evidence of the Delaware bankruptcy court's holding in relation to the IFC in this context is retrievable, the developments relating to Nova Hut before the Delaware court are remarkable and are influenced by the resort to arbitration by Kaiser. On 2 Jan. 2004, the Kaiser subsidiary Kaiser Netherlands filed a request for arbitration with the International Chamber of Commerce, which ultimately resulted in an Arbitration Award of 26 Apr. 2006. Therefore, in in re: *Kaiser Group International, Kaiser Group International, Inc. v. Nova Hut* (307 B.R. 449 (D. Del. 2004)) the advisory proceedings initiated by Kaiser were stayed. However, the role of the legal counsel and the allegation of its improper influence on the outcome of the arbitration was again subject matter before the Delaware District Court (In re: *Kaiser Group International, Kaiser Group International, Inc. v. Nova Hut*, 2007 Bankr. LEXIS 2256



The IFC was also involved as a bankruptcy creditor in one of the most publicly discussed bankruptcy cases in the United States at the turn of the century, the collapse of the American energy company Enron Corporation (Enron) in 2001. This case related to Enron's attempt to recover certain initially made transfers. Enron had instituted adversary proceedings against the IFC which had acquired securities as a 'mediate transferee'. The first decision, *Enron Corp v. IFC*,<sup>156</sup> rejected the recovery attempt directed against the IFC because it did not address the annulment of the initial transfers. Unsurprisingly, this result was confirmed in the appeal before the US District Court of the Southern District of Delaware.<sup>157</sup> Even though the *Enron v. IFC* decisions did not particularly consider questions of immunity of an IFI, they nonetheless serve as an example for the breadth of the involvement of IFIs in domestic (bankruptcy) proceedings.

While not a bankruptcy case *stricto sensu*, the determination of the scope of the waiver of the EBRD was subject matter in the *Bro Tech v. EBRD* case.<sup>158</sup> The EBRD had agreed to invest in a Romanian joint venture for the production of ion exchange materials, which led to the creation of Virolite, a joint stock company according to Romanian law. The EBRD's involvement was in accordance with its purpose to promote private and entrepreneurial initiatives in the countries of Central and Eastern Europe.<sup>159</sup>

At the brink of Virolite's insolvency, the other parties involved in the venture – entrepreneurs of US origin – were faced with EBRD's refusal to re-finance. EBRD, together with another private investment corporation, initiated insolvency procedures against Virolite in Romania. At the same time, the suit before the US court directed against the EBRD claimed breach of loyalty vis-à-vis the other joint venturers, such as the breach of the joint venturer's fiduciary duty, tortious interference, and conspiracy.

The US court first referred to Article 46 of the EBRD Agreement<sup>160</sup> in order to analyse the requirements of a waiver of the EBRD's immunity. The court relied on the *Atkinson* rationale for the determination of a waiver of immunity and accordingly found that the 'corresponding benefit' to allow a waiver was to enable the

---

(D. Del. 2007)). Yet, the court found that the legal counsels did not violate their obligations. The most recent decision of the Delaware bankruptcy court (in re: *Kaiser Group International, Kaiser Group International, Inc. v. Nova Hut*, 2007 Bankr. LEXIS 3035 (D. Del. 2007)) addressed the specific issue of the parties' motions for summary judgment in the light of the allegation that Kaiser tried to enforce only parts of the Arbitration Award. The court still did not finally decide on the matter, but found that there were genuine issues of material fact left to be decided.

156. *Enron Corp. v. IFC*, 2006 Bankr. LEXIS 800 (S.D.N.Y. 2006).

157. *Enron Corp. v. IFC*, U.S. Dist. LEXIS 75626 (S.D.N.Y. 2007).

158. *Bro Tech v. EBRD*, 2000 U.S. Dist. LEXIS 17049 (E.D. Pa. 2000).

159. Cf. EBRD Agreement, *supra* n. 3. It states in its first Article that '[i]n contributing to economic progress and reconstruction, the purpose of the Bank shall be to foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative in Central and Eastern European countries committed to and applying the principles of multi-party democracy, pluralism and market economics'.

160. See EBRD Agreement, *supra* n. 3, Art. 46.

EBRD to ‘function on the international, commercial marketplace’.<sup>161</sup> Therefore, an immunity waiver was, in principle, conceivable.

Curiously, the court then turned to an arbitration agreement concluded between the parties<sup>162</sup> in order to determine the scope of the waiver of immunity. In its relevant clause, the agreement stated that any ‘dispute, controversy, or claim arising out of, or relating to, this Agreement, or the breach, termination or invalidity thereof, shall be referred to and finally resolved in’ arbitration. Therefore, the court found in a rather misleading formulation that the ‘EBRD’s waiver is limited, and that the EBRD had only waived its immunity with respect to the resolution of disputes through arbitration’.<sup>163</sup> The court then found that ‘[b]ecause all of the claims are controlled by the arbitration clauses’,<sup>164</sup> subject matter jurisdiction was denied.

The wording does not reveal whether the court’s approach could be viewed as giving the arbitration agreement a *lex specialis* character in relation to the immunity waiver provisions contained in the EBRD Articles of Agreement. The reference to an arbitration clause as an ‘interpretative tool’ in order to determine the scope of the waiver of immunity was certainly atypical and the conclusion that the court had no jurisdiction is hard to reconcile with its assertion that the Bank had waived its immunity in the limited field in issue.

Different approaches can be identified with regard to the general relationship between an arbitration clause and the scope of immunity of a (financial) organization. While in a few instances, express references to immunity rules exist,<sup>165</sup> it is disputed whether in the absence of such provisions, an arbitration clause, as such, amounts to an implicit waiver of immunity. Even if this view is accepted, the extent of immunity granted to the organization is controversial. It is thus in most cases necessary to identify whether the arbitral agreement entered into by an organization can be interpreted as a waiver of immunity, either in relation to the usual legal supervision of such arbitral proceedings and/or for the enforcement of the final award.

Some scholars link the existence of an implicit immunity waiver to a specific constellation. Domestic jurisdiction is said to exist only if a choice of law rule is included that provides that the arbitration procedure itself should be governed by a particular domestic law.<sup>166</sup> This view is primarily based on the French case,

---

161. *Bro Tech*, 2000 U.S. Dist. LEXIS 17049 at 16.

162. EBRD invoked two agreements, the ‘Amended and Restated Cooperation Agreement for Virolite Functional Polymers S.A.’ (Amended Agreement), and the Transformation Contract for the Transformation of Purolite International Polimeri Functional SRL into a Joint Stock Company Called Virolite Functional Polymers S.A. (Transformation Contract).

163. *Bro Tech*, 2000 U.S. Dist. LEXIS 17049 at 23.

164. *Ibid.*, 24.

165. Such a rare example is, for example, Art. 6(1) of the International Tin Council Order 1972 (Privileges and Immunities), which provides for the International Tin Council’s immunity from suit and legal process ‘except: (a) to the extent that [the ITC] shall have expressly waived such immunity in a particular case [...] and (c) in respect of the enforcement of an arbitration award’.

166. See for instance, Christian Dominicé, ‘L’arbitrage et les immunités des organisations internationales’, in *Etudes de droit international en l’honneur de Pierre Lalive*, ed. Christian



*Beaudice v. ASCENA*,<sup>167</sup> in which an appellate court held that rules on the choice of law were also decisive for the exercise of judicial control over the arbitration.<sup>168</sup> Thus, the cautious approach on the qualification of the impact of the arbitration award on the EBRD immunity by the US court in the *Bro-Tech* case corresponds with the more prudent interpretation exemplified by the *ASCENA* case.<sup>169</sup>

Finally, in *Banco de Seguros v. IFC*<sup>170</sup> the collapse of a Uruguayan bank (Banco Montevideo SA) raised the question of whether third parties could involve an IFI in disputes before national courts based on the specific relationship of an IFI to their contracting party. In this case, Banco Montevideo was involved in irregular banking transactions, notably the allowance of improper loans to insiders. The breach of banking procedures through wilful and intentional activities of

---

Dominicé, Robert Patry & Claude Raymond (Basel, Switzerland, Frankfurt am Main: Helbing & Lichtenhahn, 1993), 492. Support of this view can be inferred from case law which links the explicit choice of a specific domestic law with the establishment of domestic jurisdiction of an international organization. For instance, in *Standard Chartered Bank v. ITC and Other*, 77 I.L.R. 8 (1986), the ITC agreed to English law and jurisdiction of English courts by means of a facility later in relation to a loan agreement. Others reject that the choice of domestic law rule relating to arbitral proceedings should be interpreted as an implicit waiver of immunity for international organizations, for example, see Loquin, *Journal du droit international* 106 (Clunet, 1979): 135.

167. Cour d'Appel de Paris, 25 Nov. 1977. In this case, an employment dispute between a technician and the Agency for the safety of air navigation in Africa and Madagascar (Agence pour la sécurité de la navigation aérienne en Afrique et Madagascar, ASCENA) was brought before the President of the Administrative Tribunal of Paris as an arbitrator. On appeal against the arbitral decision, the French court upheld jurisdiction. It thus decided that the rule of the ASCENA employment contract on the nomination for an arbitrator permitted French law to govern the arbitral procedure and that therefore the recourse to domestic courts was admitted.
168. There are only a limited number of cases that relate to the choice of law rules contained in arbitral agreements and its interpretation as an implicit waiver of immunity for international organizations. This conclusion can for instance be inferred *e contrario* from the *UNRWA v. General Trading and Transport Co. (the Rice)* case, an Arbitration Award of 1958 (cf. *Yearbook of the International Law Commission*, vol. II (New York: United Nations, 1967), 208), in which the arbitrator excluded domestic jurisdiction because the arbitration clause between the United Nations Relief and Work Agency for Palestine in the Near East (UNWRA) and a private party was based in, and thus governed by, international law and not a national system of law. Accordingly, the recourse to a domestic judge to adjudicate the subject matter was barred. In the *Centre pour le développement industriel (CDI) v. X* case of 13 Mar. 1992, the Tribunal Civil de Bruxelles held that the CDI had waived its immunity from jurisdiction by agreeing to arbitration. Therefore, the lower court's *exequatur* order was valid, which resulted in the enforcement of an arbitral award against the organization. Similarly, in *ITC v. Amalgam Inc.*, 80 I.L.R. 31 (N.Y. 1988), the New York Supreme Court qualified the entering into an arbitration agreement on the subject matter of the dispute as a waiver of immunity of the ITC.
169. Interestingly, only a relatively small number of arbitral decisions involve international organizations, which is even more surprising as arbitration clauses are frequently included in contracts of international organizations with mostly private third parties. Cf. August Reinsch, *International Organizations before National Courts*, *supra* n. 11, 266.
170. *Banco de Seguros del Estado v. IFC*, U.S. Dist. LEXIS 69741 (S.D.N.Y. 2007).

directors and shareholders reached a severe criminal level and resulted in the bank's liquidation being ordered by the Uruguayan Central Bank.

One of the creditors of the bank, Banco de Seguros, filed a suit against the IFC. It argued that the IFC owned shares of the Banco Montevideo and was entitled to participation through the appointment of a director on the board of directors. Thus, liability of the IFC was invoked as it had 'failed to supervise the functioning of the bank and neglected to appoint a director as its investment agreement authorized it to do'.<sup>171</sup> The US District Court for the Southern District of New York rejected this reasoning and referred to functionality considerations to emphasize the immunity of the IFC. Because Banco de Seguros did not belong to 'the types of persons, and their claims are not the types of claims for which IFC has waived immunity in Article VI Section 3 of its Articles of Agreement',<sup>172</sup> the IFC had to remain immune from suit. While it is difficult to draw further conclusions from this decision, it nevertheless underlines the unwillingness of this domestic court to extend the restricted scope of a waiver of immunity to third parties, notably if they claim to be related to an IFI by means of the IFI's liability.

## VIII. CONCLUSION

Domestic cases involving IFIs help to highlight problems relating to their specific legal position, which is decisively shaped by their financial activities. As the UK decisions in *Hashim v. AMF* aptly demonstrated, IFIs' domestic legal personality can be central to a dispute if the forum state is not a member of the IFI in question.

The definition of the exact scope of immunity is particularly critical in the context of employment disputes brought against IFIs. Usually, staff members of an international organization are impeded to bring actions against their employer organization in domestic courts and have to bring their claims before administrative tribunals. The restricted scope of the immunity of IFIs in this context necessitates a differentiated approach by national courts. Traditionally, policy considerations have led to the recognition of immunity in staff disputes.

The analysis of domestic cases involving IFIs provides evidence for the typical balancing act a national judge is faced with when dealing with IFIs. Because their scope of immunity is less wide when compared to other international organizations, domestic courts tend to interpret the remaining immunity broadly in order to abstain from adjudicating such disputes. This analysis is subject to subsequent modifications which take into account the existence of 'internal' administrative disputes settlement systems, as evidenced by the leading *Mendaro* case.

---

171. *Ibid.*, 9.

172. *Ibid.*, 23. The text of Art. VI, s. 3 of the IFC Articles of Agreement is identical to the wording of Art. VII, s. 3 of the IBRD Articles of Agreement. See IBRD Articles of Agreement, *supra* n. 2, Art. VII(3).

Sometimes, arguments in favour of a waiver of immunity relate to the purpose of IFIs and stress the duty of an IFI to supervise the activities of their contractual partners following the initial agreement. This line of reasoning can notably be retraced in US cases, such as *Ashford* and the *Kaiser* bankruptcy proceedings.

Starting with the 1998 *Atkinson* case, a recent strand of US case law particularly emphasizes functional aspects in determining the restricted immunity of IFIs. These cases typically allude to the purpose of the activity of an IFI as stated in its governing instruments and regularly stress that the IFI's immunity 'should be construed as *not waived* unless the particular type of suit would further its objectives'.<sup>173</sup> Accordingly, US courts have fine-tuned the assessment of objectives as a decisive factor for the determination of the immunity of IFIs. Clearly, their constituent treaties provide the key benchmarks. Yet, the development of this field is illustrated by the fact that the analysis regularly does not merely include a simple reference to the Articles of Agreement or the Headquarters Agreement. Rather, the courts typically apply a cost-benefit assessment of whether the burden of allowing the suit in a particular circumstance is outweighed by an additional benefit that furthers the development of the bank's objectives.

In Europe, following the *Waite and Kennedy* jurisprudence of the European Court of Human Rights, the link between immunity and denial of justice considerations has been emphasized by some national courts. According to this reasoning, immunity should be denied when no other 'reasonable alternative means' to pursue claims exist. While the Belgian appellate court ruling in *Siedler v. Western European Union* relied on denial of justice considerations in accordance with ECHR, Article 6(1), the French Supreme Court decision in *Banque africaine de développement v. M.A. Degboe*, referred to denial of justice as an element of an '*ordre public international*'.

The assessment of the case law does not allow a definite answer on the further development of the immunity of IFIs. US courts seem to broaden their immunity by adding further restrictive criteria for the assessment of a 'waiver' or 'implicit waiver' derived from their constituent instruments. Courts in Europe start to follow the *Waite and Kennedy* jurisprudence and to support an exemption from immunity when otherwise a severe interference of the rights of the party is at stake. According to the most pronounced view, the level of the infringement must amount to a violation of the '*ordre public international*'.

---

173. *Atkinson*, 156 F.3d at 1338.

