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Intersections between Female Genital Mutilation, the Rule of Law and the UN Sustainable Development Goals

Isabella Micali Drossosa & Lou M.C. Granier**

Abstract: Female Genital Mutilation (FGM) is an extreme form of gender-based violence and a serious health issue which affects 230 million women and girls, with short term and long term physical and psychological consequences. As a result, FGM has mainly been addressed as a gender harmful traditional practice and as a health issue. However, the causes for its perpetuation as well as its consequences go far beyond the realms of gender and health and intersect with the UN 2030 Agenda for Sustainable Development as a whole. This article first draws the links between FGM and poverty, education, economic growth and labour, inequalities, partnership, peace, and justice. It then frames FGM not as a practice but as a crime, condemned internationally, regionally, and nationally everywhere in the world. This article highlights how the achievement of SDG5.3 to eliminate all forms of harmful practices such as FGM relies on a multisectoral development approach and especially on a better reliance on and promotion of the Rule of Law, including SDG16 to achieve peace, justice and strong institutions.

1. Introduction

The UNFPA-UNICEF Joint Programme for the Elimination of Female Genital Mutilation ("the Joint Programme") estimates that over 230 million women and girls are survivors of FGM today and that "the global pace of decline would need to be 27 times faster to end the practice by 2030"[1]. Although countries with the highest prevalence of FGM are located in Sub-Saharan Africa and in Asia, it is important to note that FGM is practiced on every continent except Antarctica. It should therefore be viewed as a universal issue. Moreover, depending on the demographical lenses adopted to address FGM, some countries that present a relatively low FGM prevalence in terms of the percentage of women and girls who have been subjected to FGM among its female population may still have to respond to similar or higher numbers of survivors than some countries that present higher percentage of FGM survivors. This is for example the comparative case between the United States of America (US) where approximately 513,000 women and girls today have undergone or are at risk of FGM although they only represent a small share of the population[2], and Guinea-Bissau where 400,000 women and girls today have undergone FGM and yet represent 52% of women aged fifteen to forty-nine in the country[3]. This is a key analytical perspective first to dismantle the idea that FGM is a "foreign" issue but also to grasp each country's needs in terms of policies for both preventive actions and survivors' care and assistance.

The World Health Organization (WHO) has classified FGM in four distinctive types. Type one also known as clitoridectomy involves the "partial or total removal of the

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The views and opinions expressed by the authors do not necessarily reflect the views, opinions, policies, or position of the World Bank.

[1] UNICEF Press Release (March, 8 2024)

[2] US End FGM/C Network, *Training Manual for Legal Professionals on FGM/C in the US* (2024), at-10

[3] UNICEF, *Female Genital Mutilation in Guinea-Bissau : Insights from a Statistical Analysis* (2021)

clitoral glans and/or the prepuce"[4]; type two also known as excision involves the "partial or total removal of the clitoral glans and the labia minora, with or without excision of the labia majora"[5]; type three also known as infibulation is the removal of the labia minora and labia majora and the appositioning of the labia majora (usually with stiches) "with or without excision of the clitoral prepuce and glans"[6]; and type four includes "all other harmful procedures to the female genitalia for non-medical purposes, for example pricking, piercing, incising, scraping and cauterization."[7]

The practice of the different types of FGM varies across communities, can evolve over time, can be the result of various socio-economic factors, can be practiced by different actors, but always results in a plethora of consequences. Clitoridectomy or type one FGM is for example the type that was most practiced in the US and in Europe during the 19th and 20th century and resulted from false medical beliefs which relied on FGM to 'treat' hysteria, erotomania and lesbianism[8]. Today, in the US and in Europe other types of FGM still affect citizens and mainly result from false religious beliefs (i.e., that FGM is mandated by the Bible or the Quran) and/or from harmful traditions and social norms that persist among some communities[9]. Notwithstanding these important evolving particularities, the practice of FGM – regardless of its type, of the community or practitioners who carry it out, of the reasons advanced for its perpetuation and its consequences – remains an extreme form of gender-based violence (GBV) embedded in harmful patriarchal social norms aimed at controlling women's bodies and sexualities and which contribute to the deep socio-economic inequalities that persist between men and women everywhere in the world.

2. Intersections: Female Genital Mutilation and Development

2.1. Definitions, Concepts and Contexts

The United Nations (UN) Joint General Recommendation N°31 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Committee on the Rights of the Child on Harmful Practices provides the following definition:

> *Female genital mutilation, female circumcision or female genital cutting is the practice of partially or wholly removing the external female genitalia or otherwise injuring the female genital organs for non-medical or non-health reasons. In the context of the present joint general recommendation/general comment, it is referred to as female genital mutilation. Female genital mutilation is performed in every region and, within some cultures, is a requirement for marriage and believed to be an effective method of controlling the sexuality of women and girls. It may have various immediate and/or long-term health consequences, including severe pain, shock, infections and complications during childbirth (affecting both the mother and the child), long-term gynecological problems such as fistula, psychological effects and death.*[10]

2.2. FGM and Health

The practice of FGM –again, regardless of its type, of the community or practitioners who practice it, and of the reasons advanced for its perpetuation– is responsible for numerous physical and psychological health issues. FGM not only poses serious threats to a woman's health and well-being from the moment she is cut and throughout her lifetime, but also threatens the health of her children. Immediate complications from FGM include severe haemorrhage which may result in shock and even death, excruciating pain of the procedure, urinary retention, infection of the excretory organs, fistulae formation, or contamination with AIDS/HIV. Long-term complications include dysmenorrhea, constant pain, vaginal stenosis, post-cryptomenorrhea, urinary retention or incontinence, dysparunia, menstrual difficulties, repeated infections, vaginism, cysts, keloids, urinary tract infection, kidney failure, pelvic inflammatory disease, fistula, infertility, interference with walking, as well as anxiety, chronic depression and post-traumatic stress disorder[11]. Other mental health consequences of FGM include feelings of incompleteness, low self-esteem, fear, chronic irritability and nightmares, sense of inferiority and suppression of emotions and feelings which are associated with higher risks of psychiatric and psychosomatic diseases[12]. The WHO also found that among women who have undergone FGM, the death rate of babies during and immediately after childbirth is significantly higher than in cases where the mother has not undergone mutilation[13]. The excess mortality is 15% in the case of type one mutilation, 32% in the case of type two mutilation, and 55% in the case of

[4] WHO, *Care of Girls and Women Living with Female Genital Mutilation: A Clinical Handbook* (2018), at-27

[5] Ibid., at-28

[6] Ibid., at-30

[7] Ibid., at-32

[8] US End FGM/C Network, *Training Manual for Legal Professionals on FGM/C in the US* (2024)

[9] Ibid.

[10] UN Joint General Recommendation N°31 of The Convention on the Elimination of All Forms of Discrimination Against Women and The Committee on the Rights of the Child on Harmful Practices (14 November 2014) UN doc. CEDAW/C/GC/31/Rev.1–CRC/C/GC/18

[11] Ibid.

[12] Esho, T., Kumar, M. *Mental and Sexual Health Outcomes Associated with FGM/C in Africa: a Systematic Narrative Synthesis* (2023)

[13] WHO, *Female Genital Mutilation and Obstetric Outcome: WHO Collaborative Prospective Study in Six African Countries* (2006)

type three mutilation[14]. FGM is a major cause of stillbirths and miscarriages. Most recently, researchers from the universities of Birmingham and Exeter further identified FGM as the fourth leading cause of death in practicing countries[15]. Their results show that FGM accounts for more deaths than any other cause other than enteric infections (usually due to consuming contaminated water and food), respiratory infection, and malaria[16].

2.3. FGM and SDG 5.3: Beyond Gender-based Violence and Health Issues

Because FGM is an extreme form of violence against women and girls (VAGW) and serves harmful gender norms, and because its practice always damages one's physical and mental health, FGM has mainly been addressed from a gender or health perspective. The entities mainly responsible for the prevention and care of FGM nationally are often either the ministries of women or the ministries of health. Internationally, the UN resolution A/RES/70/1 adopting the 17 Sustainable Development Goals (SDG) to achieve by 2030 included within the SDG5 aiming at achieving gender equality a special target SDG 5.3 "to eliminate all harmful practices, such as child, early and forced marriage and FGM"[17]. However, FGM causes and consequences go beyond gender and health and undermine the achievement of SDGs related to poverty elimination, education, economic growth and labour participation, reduced inequalities, peace, justice and partnerships.

2.3.1. Female Genital Mutilation and SDG1: No Poverty

The practice of FGM leads to poverty for women and girls. Its effects on bodily autonomy and psychological and physical health challenge women and girls' capacity to succeed in school, compete in labor markets, and in some cases, even their capacity to carry out normal daily activities such as walking or urinating. Survivors of FGM thus also fall under the definition of persons with disabilities according to the Convention on the Rights of Persons with Disabilities[18]. Moreover, FGM is the first type of GBV that a woman experiences in her life and is directly linked to later forms of GBV that she is at risk of and that will sustain or accentuate her position in poverty. FGM is a prerequisite for child and forced marriage, FGM is linked to early and difficult pregnancies, and it complicates healthy and pleasant sexual intercourse, which results in intimate partner violence. FGM is also associated with higher risks of obstetric fistula, which is one of the most serious and tragic childbirth injuries[19]. A hole between the birth canal and bladder and/or rectum, it is caused by prolonged, obstructed labor without access to timely, high-quality medical treatment. It leaves women leaking urine, faeces and menstrual blood, and often leads to chronic medical problems, depression, social isolation, and deepening poverty. It is therefore a form of "social death".

2.3.2. Female Genital Mutilation and SDG4: Quality Education

The physical and psychological short-term and long-term consequences can prevent girls who have been subjected to FGM from attending and/or succeeding at school. FGM can hinder and even end a girl's education due to the complications endured by girls who have been mutilated. In the short term, in the aftermath of the cutting ceremony, girls need to rest and heal and are thus missing school; and in the longer run, FGM-related health issues, pain, and trauma, can cause girls to be less focused in school or even absent and therefore perform poorly and/or drop out of school. Moreover, FGM is correlated with early and forced marriage and early pregnancies. FGM is indeed often regarded as a rite of passage into womanhood and is the prerequisite for a girl to be married and sexually active. FGM can thus lead to girls dropping out of school to become wives and/or mothers[20].

2.3.3. Female Genital Mutilation and SDG8: Economic Growth and Decent Work

FGM has high economic costs and no economic benefits for societies. Although there is still a lack of holistic research on the overall economic cost that FGM imposes on society, the WHO created a tool that combines data on health risks associated with FGM to analyze the cost of FGM for national health services[21]. FGM accounts for an average of 9% and up to 30% of health expenditure per capita in the 27 highest prevalence countries in Africa[22]. Another portion of the economic costs of FGM can be attributed to a loss of productive labor through increased mortality or morbidity as direct or indirect consequences of the practice. The practice also may cause a decline in productivity (and income) due to FGM-related disability linked to its long-term health complications. Finally, because a girl's opportunity to access the labor market is also influenced by her parents' level of education, a girl who has not been subjected to FGM herself may still be negatively affected by her mother's level of education because of FGM[23]. As a consequence, it could take at least

[14] Ibid., at-1

[15] Ghosh, Flowe & Rockey, *Estimating Excess Mortality due to Female Genital Mutilation* (2023)

[16] Ibid.

[17] UN Resolution adopted by the General Assembly: Transforming our World : the 2030 Agenda for Sustainable Development (September, 25 2015) UN doc. A/RES/70/1, at-18

[18] UN General Assembly Convention on the Rights of Persons with Disabilities (January, 24 2007) UN doc. A/RES/61/106

[19] WHO, *Care of Girls and Women Living with Female Genital Mutilation: A Clinical Handbook* (2018).

[20] UNICEF, *Understanding the Relationship between Child Marriage and Female Genital Mutilation* (2021).

[21] WHO, *The Economic Cost of Female Genital Mutilation* (2020)

[22] Ibid.

[23] Unterhalter, *An Answer to Everything ? Four Framings of Girls' Schooling and Gender Equality in Education* (2023)

two generations of uncut mothers to mitigate the consequences of FGM for women's opportunities to access the labor market and achieve their full economic potential.

2.3.4. Female Genital Mutilation and SDG10: Reduced Inequalities

FGM is a strong challenge to achieving gender equality, but the practice's consequences go far beyond survivors themselves and negatively impact practicing communities and society as a whole by impacting their capacity for development, economic growth, and reduced inequalities. FGM is an obvious form of discrimination against women and girls which will contribute to higher and deeper gender gaps[24]. In practicing communities, inequalities and discrimination also affect women and girls who refuse FGM and are outcast socially: they may not be able to marry, touch food, collect water or even speak in public.

2.3.5. Female Genital Mutilation and SDG16: Peace, Justice and Strong Institutions

FGM violates a person's rights to health, security and physical integrity; the right to be free from torture and cruel, inhuman or degrading treatment; and, when the procedure results in death, the right to life. It is also an extreme form of domestic violence, sexual assault, and child abuse. It thwarts the achievement of SDG target 16.1 to "significantly reduce all forms of violence and related death rates everywhere"[25] and SDG 16.2, "end abuse, exploitation, trafficking and all forms of violence and torture of children"[26]. Moreover, every country in the world has a national legal framework condemning the practice of FGM, whether it is through special anti-FGM laws or general laws on bodily harm, mutilation, manslaughter or femicide, child abuse, sexual assault, domestic violence, etc. and most practicing countries have ratified several international and regional agreements on the eradication of FGM and the protection of FGM survivors[27]. The perpetuation of the practice as well as the lack of enforcement of the existing international and national legal frameworks thus further jeopardize the achievement of SDG 16.3 "to promote the rule of law at the national and international levels and ensure equal access to justice for all" [28].

2.3.6. Female Genital Mutilation and SDG17: Partnership for the Goals

The lack of sustained and specific international efforts to end FGM and support national commitments and action plans against the practice contributes to the perpetuation of FGM. The global taboo around and/or lack of priority attributed to FGM has been a strong impediment to mobilizing resources to effectively end FGM in practicing countries. UNFPA estimates that $3.3 billion is needed to avert 24.6 million cases in high-incidence countries by 2030[29]. However, between 2020–2030, it is estimated that at the current pace of efforts, only $275 million in development assistance will be spent, leaving a serious funding gap[30].

3. Female Genital Mutilation, Justice, and the Rule of Law

3.1. International and Regional Legal Frameworks against FGM

The international and regional communities have gradually recognized FGM as a major violation of human rights, children rights, and women rights. The Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Universal Declaration of Human Rights, the WHO Constitution, the Istanbul Convention, the Maputo Protocol, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the Banjul Charter, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child and the Convention on the Rights of Peoples with Disabilities, promote the eradication of FGM and the protection of FGM survivors[31].

The perpetuation of FGM despite existing international, regional and national legal frameworks condemning and criminalizing the practice is a troubling fact: prosecution remains extremely low (and in some countries inexistent), convictions are usually suspended and perplexing debates take place openly over whether or not FGM is a crime or "simply" an expression of "religious freedom"[32]. FGM constitutes a worrying case of discrimination, denial of justice and a form of failure of the rule of law.

[24] Khosla, R., Banerjee, J., Chou, D. et al. *Gender Equality and Human Rights Approaches to Female Genital Mutilation: a Review of International Human Rights Norms and Standard*. Reproductive Health 14, 59 (2017)

[25] UN Resolution adopted by the General Assembly : Transforming our World : the 2030 Agenda for Sustainable Development (September, 25 2015) UN doc. A/RES/70/1, at-25

[26] Ibid.

[27] World Bank, Compendium of International and National Legal Frameworks on Female Genital Mutilation (8th Edition, 2024)

[28] Ibid.

[29] UNFPA, *Cost and Impact of Scaling Up Female Genital Mutilation Prevention and Care Programmes* (2020)

[30] Ibid.

[31] Micali Drossos, I., Komba, P. & Granier, L. *What did the Judge Say ? A Comparative Analysis of Selected FGM Case Law in High-Income and Low-Income Countries* (2023)

[32] Khanwilkar, A.M., Chandrachud, D.Y., Mishra, A. *Ban on Female Genital Mutilation – Sunita Tiwari v. Union of India*, Supreme Court Observer, 2021

The World Bank annually updates its Compendium of International and National Legal Frameworks against Female Genital Mutilation, which provides a census of such agreements[33]. These demonstrate how FGM intersects with the law and many of these documents have emphasized the importance of adopting and promoting the necessary domestic legal instruments to accelerate the work against FGM.

CEDAW, for instance, confirms that FGM is a form of gender discrimination and violence, as further detailed in the General Recommendations Nos. 14, 19 and 24 from the Committee on the Elimination of Discrimination against Women. These recommendations identify FGM as a form of violence against women, and recommend that member states adopt measures to eliminate the practice.

General Recommendation No. 19 notes: *States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia: Effective legal measures, including penal sanctions, civil remedies compensatory provisions to protect women against all kinds of violence, including, inter alia, violence and abuse in the family, sexual assault and sexual harassment in the workplace*[34].

Moreover, the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol are the foundation of international refugee law, and are complemented by regional treaties and declarations that also address asylum rights[35]. The convention defines a refugee as someone who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...]"[36]

The UN Refugee Agency (UNHCR) states that FGM is a form of torture which involves a deliberated infliction of harm and suffering, and that a woman or girl may have a well-founded fear of being subjected to FGM and can thus qualify for refugee status under the Convention[37]. The Agency adds that "harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds." This of course applies to women and girls who fear being subjected to FGM, but also to women and girls who are already survivors of FGM. Indeed, the UNHCR further explains that:

> "A woman or girl who has already undergone the practice before she seeks asylum, may still have a well-founded fear of future persecution because of the permanent and irreversible nature of FGM. In addition, a girl or woman subjected to FGM in her youth can later undergo a re-excision or re-infibulation, if the first procedure is considered not to be complete, at the time of her marriage, or child birth."[38]

Article 38 of the Istanbul Convention states that: "Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: a) excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris; b) coercing or procuring a woman to undergo any of the acts listed in point a; c) inciting, coercing or procuring a girl to undergo any of the acts listed in point a"[39].

Article V of the Maputo Protocol on the "elimination of harmful practices" indicates that: "States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including: a) Creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes; b) Prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them; c) Provision of necessary support to victims of harmful practices.

Article V of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted in Maputo in 2003 for example holds that:

"States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

> a) Creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;

[33] World Bank, *Compendium of International and National Legal Frameworks on Female Genital Mutilation* (8th Edition, 2024)

[34] CEDAW General Recommendation No. 19: Violence against Women Adopted at the Eleventh Session of the Committee on the Elimination of Discrimination against Women, in 1992 (Contained in Document A/47/38).

[35] UN General Assembly, Convention Relating to the Status of Refugees (July 28, 1951)

[36] Ibid., at-152

[37] UNHCR, *Female Genital Mutilation & Asylum in the European Union* (2009)

[38] Ibid., at-2

[39] Council of Europe Convention on preventing and combating violence against women and domestic violence.

b) Prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;

c) Provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;

d) Protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance"[40].

3.2. National Legal Frameworks against FGM

Every country in the world has a national legal framework against FGM whether through specific anti-FGM laws, as is the case in Senegal, the United States, Guinea, or the United Kingdom (UK), or through general laws on bodily harm, assault, child abuse, mutilation, manslaughter, femicide, domestic violence, etc., as is the case in Mali, Russia, Colombia or France, for example[41]. It is nowhere legal to remove, injure or harm a healthy organ for non medical reason and it is extremely important to reshape the international and national discourse to effectively frame FGM as a crime punishable by law everywhere in the world even in the absence of a specific anti-FGM law. Concluding that a country has no legal protection against FGM, for the sole reason that it has not adopted a specific anti-FGM law, is a dangerous, erroneous and counter-productive legal position. FGM is illegal everywhere in the world.

The adoption of a specific anti-FGM law has nonetheless shown to be effective when paired with strong implementation and good public knowledge of the law. The case of Burkina Faso is the most striking example of the positive impact that a strong national legal framework against FGM can have. In Burkina-Faso, the specific anti-FGM law No.043/96/ADP, adopted in 1996 and last revised in 2018, provides sentences ranging from 1 to 10 years in prison and fines from 500,000 to 3 million CFA francs. Moreover, "the law states that if a girl dies following the practice, imprisonment ranges from 11 to 21 years and the fine can be up to 5 million CFA francs. The law now also punishes public support of FGM"[42]. Burkina Faso is also the country with the highest number of precedents with more than 1,200 prosecutions and sentences including parents, relatives, traditional cutters, and public supporters of FGM[43]. Research further shows that the adoption and implementation of this anti-FGM law "averted FGM of approximately 237,591, women and girls."[44]

However, we also know that the adoption of a specific law against FGM does not necessarily facilitate prosecution or reduce FGM. In Europe, for example, the UK, which is home to approximately 140,000 survivors of FGM (with 60,000 girls under 15 years old at risk) and adopted specific anti-FGM laws in 1985 and in 2003, only counted two prosecuted cases; one in 2019 and one in 2023. On the other hand, France which did not adopt a specific anti-FGM Law and is home to 125,000 survivors, counted around 30 cases in 2007 alone under its general laws on mutilation, bodily harm, and violent assault[45]. Moreover, and notwithstanding the importance of the adoption of specific anti-FGM laws in certain national contexts to support multisectoral efforts to end FGM, some survivors and experts have highlighted the discriminatory nature of specific laws: they may affect only the practicing communities in countries where FGM is not generalized, potentially sustaining racial biases. Specific laws also emphasize the female genitalia as opposed to all other body parts that are otherwise protected by general laws. This may arguably reinforce gender biases against female bodies and result in lesser sanctions overall compared to general law[46].

FGM special laws also raise debates in relation to other forms of surgery on female genitalia. In the UK, for instance, some survivors and experts have highlighted how female genital cosmetic surgeries could fall under the definition provided in the 2003 Act and how the moral and legal distinction between FGM and these cosmetic surgeries "cannot be maintained without recourse to racist distinctions between the consent capacities of white women and women of colours."[47] These debates are sometimes difficult to understand. After all, questionable cosmetic surgery on the female genitalia is not about "removing", "injuring" or "harming" genitalia, but rather "conforming" it to perceived social (and patriarchal) "beauty" or "acceptability" standards. It is usually justified by medical reasons and is not different in nature to all sorts of aesthetic surgery on any body part and for all genders, even if one could question their justification. A distinction based on harm should be drawn in this respect.

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[40] African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

[41] World Bank, *Compendium of International and National Legal Frameworks on Female Genital Mutilation* (8th Edition, 2024)

[42] Micali Drossos, I., Komba, P., & Granier, L., *What did the Judge Say ? A Comparative Analysis of Selected FGM Case Law in High-Income and Low-Income Countries* (2023), at-6

[43] Ibid.

[44] Crisman, et. All, *The Impact of Legislation on the Hazard of Female Genital Mutilation/Cutting: Regression Discontinuity Evindence in Burkina Faso* (2016), at-1

[45] Le Bris, C., *The Legal Framework for the Fight Against Female Circumcision: from Cultural Indulgence to Human Rights Violations. The French Example* (2019).

[46] Generally, sanctions for FGM under special laws when the practice results in death are less punitive than general laws on manslaughter. See World Bank, *Compendium of International and National Legal Frameworks on Female Genital Mutilation* (8th Edition, 2024).

[47] Shavisi, *FGM vs. Female « Cosmetic » Surgeries : Why do they Continue to be Treated Separately* (2021)

The recent events in The Gambia have however revealed how specific anti-FGM laws even without being paired with robust implementation can participate in breaking the taboo around the practice and creating an enabling environment for change. On March 18th 2024, the National Assembly advanced a bill to repeal the Women's Amendment Act of 2015 specifically criminalizing FGM in The Gambia[48]. This alarming move created both a national and international surge to protect the Act even though since its adoption the law resulted in very few prosecutions, and although FGM would have still remained illegal under general laws against harm and abuse. But the specific anti-FGM Act stands as a public demonstration that FGM as a traditional practice is not tolerated anymore by society and of the commitment to eliminate excuses based on consent, culture, religion, or tradition. On July 15th 2024, the National Assembly voted to uphold the Act of 2015 and during a joint statement, UNICEF Executive Director, Catherine Russell, UNFPA Executive Director, Natalia Kanem, WHO Director-General, Dr Tedros Adhanom Ghebreyesus, UN Women Executive Director, Sima Bahous, and UN High Commissioner for Human Rights, Volker Türk stated that:

> "The Women's (Amendment) Act, 2015 – a pivotal milestone in advancing gender equality – is the culmination of years of advocacy, community engagement, and education aimed at eradicating this harmful practice and meeting the Sustainable Development Goal targets (5.3). It is, therefore, crucial that these legal protections remain in place. The decision to maintain the FGM ban aligns with The Gambia's international and regional commitments to prevent harmful practices against girls and women, consistent with the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Charter on the Rights and Welfare of the Child, and the Maputo Protocol protecting African women's rights."[49]

The reasons why FGM is not prosecuted are definitely not related to the existing national legal frameworks. As we know, FGM is illegal everywhere in the world, and the lack of prosecution (based on either special or general laws) raises other questions more related to the judicial and social protection systems in general: social protection services, judicial and police authorities and medical professionals must collaborate in order to successfully investigate, prosecute and convict[50]. Absent this collaboration, states will fail to protect their most vulnerable citizens.

In some instances, reluctance to initiate criminal prosecution is based on a questionable "tolerance to cultural diversity". This is what happened in a very sad case in 2008 in Pueblo Rico, Risaralda, Colombia, involving the death due to FGM of three baby girls in the indigenous Emberá-Chami community, where the court applied a provision of Colombia's Criminal Code which held that a person could not be prosecuted if they lacked "the ability to understand or determine the act's unlawfulness" due to "socio-cultural diversity"[51] even if FGM, in the court's view, should be considered as "arbitrary and unjustifiable" as "it disregards the National Constitution and International Human Rights Treaties signed by Colombia". This total lack of prosecution while three girls have lost their precious lives is quite disgraceful.

3.3. State Responsibility

The lack of prosecution, especially when FGM results in death, also raises questions of state responsibility. States which fail to adopt or adequately enforce their laws might be held liable under international human rights laws. In 2021, several women's rights non-governmental organizations (Equality Now, Institute for Human Rights and Development in Africa, *Association Malienne pour le Suivi* et *l'Orientation des Pratiques Traditionnelles and Association pour le Progrès et la Défense des Droits des Femmes*) filed a lawsuit against Mali before the ECOWAS Court of Justice to hold the government accountable for its failure to protect women and girls from FGM . These organizations called for Mali to take urgent action including by adopting an anti-FGM law, improving access to justice, ensuring that women and girls can file complaints and report perpetrators and by building the capacity of state actors to eradicate FGM. In May 2024, Equality Now and *Association Malienne pour le Suivi* et *l'Orientation des Pratiques Traditionnelles* submitted a report to the Committee on the Rights of the Child on the human rights violations against girls in Mali through FGM[53].

[48] Aljazeera, The Gambia Votes to Reverse Landmark Ban on Female Genital Mutilation (March, 19 2024)

[49] Joint Statement by UNICEF Executive Director, Catherine Russell, UNFPA Executive Director, Natalia Kanem, WHO Director-General, Dr Tedros Adhanom Ghebreyesus, UN Women Executive Director, Sima Bahous, and UN High Commissioner for Human Rights, Volker Türk (July, 15 2024)

[50] Ibid.

[51] See Case No. 66537-40-89-001-2008-00005-00 "Case involving protection against domestic violence" translated from Spanish at: https://www.globalhealthrights.org/wp-content/uploads/2013/08/Translation-Caso_Risaralda_Mutilacipn_Genital_Femenina_Colombia.pdf

[52] Press Statement – Women's Rights Organizations Challenge Mali's Lack of Anti-FGM Law at the ECOWAS Court of Justice – Abuja, Nigeria, April 12, 2021.

[53] Information on Mali for Consideration by the Committee on the Rights of the Child at its 96th Session, May 2024 - https://equalitynow.org/resource/information-on-mali-for-consideration-by-the-committee-on-the-rights-of-the-child-at-its-96th-session-may-2024/

4. Conclusions

FGM is a multisectoral issue and a strong impediment to the UN 2030 Agenda for Sustainable Development. Up to now, efforts to eradicate FGM have mainly been concentrated around gender and health prevention and response programs. However, FGM is also a form of torture that may result in death, violates our most basic human rights, and represents a criminal offense everywhere in the world under national legal frameworks. Moreover, international and regional instruments call member states to take all necessary legal and judicial measures to criminalize and prosecute FGM.

Actors working towards the achievement of SDG5.3 to end FGM should increasingly regard justice and the rule of law, as well as strong institutions, as key factors in preventing and responding to FGM everywhere to effectively accelerate the efforts to end this crime by 2030.

The recent events in The Gambia should serve as an example of how addressing FGM mainly as a harmful traditional practice rather than as a crime can vehiculate the false idea that its perpetuation is open to opinion and debate. The National Assembly finally decided in July 2024 to reject the bill to repeal the anti-FGM law and confirmed that FGM continues to be illegal.

The legal system can serve both as an effective prevention tool as well as a responsive one, providing justice for the survivors whom society has failed to protect in the first place. The prevention of FGM through better knowledge and implementation of the existing legal framework, whether international, regional or national, remains a strong empowerment tool and a significant contribution to the Rule of Law and the promotion of peace, justice and strong institutions as per SDG 16.

Accelerating Alignment with the Paris Agreement in the Financial Sector

*Divya Chawla**

Abstract: The 2015 Paris Agreement commits signatories to making global finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. The financial sector has a unique role to play towards fulfilment of this goal. In this context, it is vital for credit institutions to re-evaluate the carbon footprint of their portfolios, develop climate-resilient business strategies as well as evaluate the climate risks and impacts of new investments. This has led to the evolution of Paris alignment approaches relevant to the financial sector and the real economy, which are complemented by regulatory measures in certain jurisdictions and by voluntary market-driven standards in other jurisdictions. This article focusses on the Paris alignment approaches relevant to credit institutions.

1. Introduction

The Paris Agreement[1] sets the twin objectives of holding global average temperature increases to well below 2°C above pre-industrial levels, while pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels (Article 2(1)(a)), and of making financial flows consistent with a pathway towards low greenhouse gas (GHG) emission and climate-resilient development (Article 2(1)(c)). Financial institutions, as enablers of capital, can play a critical role in accelerating the decarbonisation of the real economy by integrating climate-related considerations into their investment and lending decisions, thereby shifting financial flows towards green and sustainable assets.[2] On the other hand, the occurrence of extreme weather events or a disorderly transition to a low-carbon economy could have destabilising effects on the financial system as a whole.[3] Two types of climate-related risks are relevant in the context of financial stability: (i) physical risks, linked to extreme weather events; and (ii) transition risks, which derive from changes in policy, regulation, availability of new technologies and changing consumer preferences, all in the context of climate change.[4]

For financial institutions, the impact of physical and transition climate risks can manifest through exposures to borrowers and guarantors that experience physical climate shocks (for e.g., floods) or that are subject to transition impact (for e.g., imposition of a pollution 'tax'). Litigation risk is considered a sub-set of physical or transition risk (depending on the particular circumstance) and can arise for credit institutions as a result of action and inaction.[5] Physical and transition risks can result in loan default due to a counterparty's inability to service debt repayments, diminished equity returns, depreciation in collateral value, increased risk premia and overall lower asset value (including stranded assets).[6] Therefore, financial institutions need to take concerted action to ensure

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The views expressed in this article are the author's own and do not reflect the policies, practices, or views of the EBRD.

[1] FCCC/CP/2015/10/Add.1

[2] U.K. House of Commons Environmental Audit Committee, The financial sector and the UK's net zero transition (2023), at 7.

[3] Financial Stability Board, The Implications of Climate Change for Financial Stability (2021), at 1.

[4] Task Force for Climate-related Financial Disclosures, *Final Report: Recommendations of the Task Force for Climate-related Financial Disclosures* (2021), at 5-6.

[5] Network for Greening Financial Systems, Report *on microprudential supervision of climate-related litigation risks Climate-related litigation: Raising awareness about a growing source of risk* (2023), at 7.

[6] Hennerkes and Chawla, *Advancing Corporate Climate Governance to meet the Paris Agreement Objectives* (2023), at 8.

full alignment of portfolios with the Paris Agreement. The G20 Sustainable Finance Working Group has developed a Sustainable Finance Roadmap[7] which includes high-level, voluntary principles for developing alignment approaches for sustainable finance.

Section 2 of this article describes the regulatory requirements and market-driven standards that underpin and complement the Paris alignment approaches. Section 3 summarises the Paris alignment approaches relevant to credit institutions in particular (including those recognised in the Sustainable Finance Roadmap). Section 4 highlights the challenges of such approaches and the significance of these developments for multilateral development banks (MDBs).

2. Overview of the underlying regulatory frameworks and standards

'Paris alignment' has emerged as an overarching term to refer to the process needed to make business activities and decisions consistent with the goals of the Paris Agreement.[8] "Alignment approaches" have evolved in order to monitor and ensure that global sustainable finance flows are contributing to the goals of the Paris Agreement.[9] These alignment approaches have taken the form of: (i) government or regulator-led approaches, such as sustainable finance taxonomies and mandatory disclosure regulations; and (ii) voluntary recommendations, guidance, and standards which are market or industry-driven.[10] Specifically, in the context of the financial sector, central banks and regulators have an important role in monitoring progress towards integrating climate-related risks and impacts as well as disclosures at the country level.

A prime example of regulatory action for Paris alignment is the EU Sustainable Finance Action Plan which encompasses a number of legislative acts to facilitate the EU's commitment to become the first climate neutral continent – including the Taxonomy Regulation[11], the Sustainable Finance Disclosure Regulation (SFDR)[12], the Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive. Beyond the EU, other jurisdictions have enacted disclosure regulations to elicit climate and sustainability-related information from large firms in the financial sector and the real economy. For example, the U.S. Securities and Exchange Commission introduced climate disclosure rules for listed issuers in March 2024 (the "**SEC Rules**")[13] and, in January 2022, the U.K.'s Financial Conduct Authority introduced mandatory reporting requirements for publicly listed companies and large private companies (the "**FCA Rules**").

In terms of market-driven initiatives, there are purely voluntary initiatives as well as initiatives which are designed to develop into mandatory requirements at the local level. An example of the former is the Glasgow Financial Alliance for Net Zero, a coalition of financial institutions which have made net zero commitments and are developing tools and methodologies needed to turn net-zero commitments into action.[14] In case of the latter, market initiatives take the form of disclosure requirements and operational principles. An example of operational principles is the Principles for Responsible Banking[15], published by the UN in 2019 and designed as a voluntary framework to be integrated by credit institutions into their strategies and across their portfolio of activities. In terms of disclosures, the Financial Stability Board established the Task Force on Climate-related Financial Disclosures (TCFD) in 2015 to develop recommendations on the information that entities should disclose to support investors, lenders, and insurance underwriters in assessing and pricing climate-related risks.

TCFD's recommendations span four core areas: governance, strategy, risk management and metrics and targets.[16] There has been significant uptake of the TCFD in the financial sector, with 257 banks globally endorsing the TCFD framework as of 2022.[17] More recently, the International Financial Reporting Standards (IFRS) Foundation established the International Sustainability Standards Board (ISSB)[18] to develop a 'global baseline'[19] of voluntary sustainability disclosure standards (the "**ISSB Standards**"). In June 2023, the ISSB released IFRS S1 and IFRS S2 which require an entity to disclose information

[7] G20 Sustainable Finance Working Group, https://g20sfwg.org/roadmap/

[8] Cochran and Pauthier, *A Framework for Alignment with the Paris Agreement: Why, What and How for Financial Institutions?* (2019), at 9.

[9] Prasad et al, *Activating Alignment: Applying the G-20 Principles for Sustainable Finance Alignment with a Focus on Climate Change Mitigation* (2023), at 8.

[10] Supra note 8, at 4.

[11] (2020/852).

[12] The European Commission is currently consulting on the implementation of the SFDR and is expected to publish a revised regulation in due course.

[13] Following a number of petitions for review filed against the SEC, SEC has issued an order staying the rules on 4 April 2024.

[14] Glasgow Financial Alliance for Net Zero (GFANZ), https://www.gfanzero.com/about/

[15] UN Environment Programme Finance Initiative (UNEP FI), https://www.unepfi.org/banking/bankingprinciples/

[16] Since their release in 2017, TCFD Recommendations have been integrated into the mandatory legal frameworks in the UK, Singapore, New Zealand, Switzerland and other jurisdictions and reporting in line with the recommendations has become part of good international corporate practice.

[17] Peter, et al., *TCFD Recommendations: Global Progress Report for the Banking Sector* (2022), at 6.

[18] ISSB was set up at COP26 with support from finance ministers and central bank governors of over 40 jurisdictions. As the accounting rules of the IFRS are used in more than 100 countries, the Standards are expected to become the predominant globally accepted reporting standard for climate and sustainability disclosures. The adoption of the Standards at country-level will have a direct impact on EBRD's clients.

[19] This means that incremental targeted disclosure requirements can be added to the standards to meet the needs of stakeholders other than investors or to address jurisdiction-specific reporting requirements which are not already covered by the standards.

about sustainability and climate-related risks and opportunities, respectively, to meet the information needs of investors. The ISSB Standards fully integrate and build on the TCFD recommendations.[20] Like the TCFD, the ISSB Standards apply to financial and non-financial institutions.

3. Approaches to Paris alignment for credit institutions

The emerging approaches relevant for credit institutions in the context of Paris alignment and the underlying regulations, frameworks and standards which embed such approaches are discussed below.[21]

3.1. Green taxonomy

A key government-driven approach is the development of a 'green taxonomy' or a 'sustainable finance taxonomy' which is a classification system that legally defines which economic activities, assets, investments and revenue streams are environmentally sustainable. While such a taxonomy is not solely applicable to the financial sector, it is vital for setting a common framework for credit institutions' assessment of green and sustainable investments in their portfolio. It is designed to act as a screening system to channel financial flows towards sustainable investments and assets by providing a credible framework for market participants to identify environmentally sustainable activities and make informed decisions. It also supports regulators to minimise greenwashing risk, thereby improving market integrity and transparency. Using a taxonomy-based approach to scale up sustainable finance has gained momentum across several jurisdictions.

The EU Taxonomy Regulation, one of the first and most ambitious green taxonomy systems to be introduced, requires an economic activity to meet four overarching conditions to qualify as environmentally sustainable: (i) make a significant contribution to one of the EU's environmental objectives[22], (ii) not cause significant harm to other EU environmental goals, (iii) comply with certain minimum safeguards with respect to social and human rights considerations; and (iv) be in compliance with technical criteria set out by the European Commission in delegated acts. The key performance indicator for credit institutions under the Taxonomy Regulation is the Green Asset Ratio, which represents the Taxonomy-aligned portfolio of a credit institution as a percentage of its overall portfolio. This metric is designed to measure the extent of green lending and the exposures associated with environmentally sustainable activities.[23]

In addition to the EU, several jurisdictions including China, Japan, and Georgia, have sustainable finance taxonomy regulations or guidance already in place, and several other jurisdictions are currently developing or considering such a taxonomy.[24] Different taxonomies use different classification methodologies, including: (i) a white-list based approach where specific eligible activities are identified, relying on technical screening, or using guiding qualitative principles; (ii) a binary classification system, i.e., an activity or investment is environmentally sustainable only if certain criteria are met; or (iii) a traffic lights system where, in addition to environmentally sustainable activities (green), the taxonomy also recognises transition activities, i.e., which are not fully aligned with the criteria for environmental sustainability but demonstrate progress towards Paris alignment (yellow); and activities which are inconsistent with the taxonomy's objectives and need to be phased-out (red).[25]

3.2. Climate and sustainability-related disclosures

While a taxonomy is an essential starting point, it is by itself insufficient for achieving action and progress towards Paris alignment. This is because disclosure of data by the non-financial sector is a prerequisite for an efficient assessment by credit institutions of how an asset or investment complies with the criteria set out in a taxonomy.[26] As a result, climate and broader sustainability-related disclosures have evolved as a regulatory requirement in certain jurisdictions, while there are standards for voluntary compliance in other jurisdictions. Mandatory disclosures are present in relatively advanced jurisdictions, including: (i) the EU (the Taxonomy Regulation sets out certain reporting requirements and, separately, the CSRD and the SFDR also set reporting requirements relevant to the financial sector with reference to the EU Taxonomy); (ii) the U.S. (SEC Rules); and (iii) the U.K. (FCA Rules).

The CSRD and the SEC Rules are applicable to financial and non-financial sector entities. The CSRD requires EU and non-EU credit institutions, which meet certain size thresholds, to make public disclosures of the risks that sustainability issues present, and the impacts of those institutions on people and the environment. Such credit institutions are required to comply with detailed European sustainability reporting standards (ESRS) developed by the European Financial Reporting Advisory Group

20 FSB has announced that the ISSB Standards mark the culmination of the work of the TCFD, and it is envisaged that the ISSB Standards will supersede the TCFD recommendations at the global level in due course: https://www.ifrs.org/news-and-events/news/2023/07/foundation-welcomes-tcfd-responsibilities-from-2024/

21 The integration of climate-related risks under the traditional prudential risk framework for credit institutions is outside the scope of this article.

22 The EU Taxonomy Regulation sets six environmental objectives: (i) climate change mitigation; (ii) climate change adaptation; (iii) sustainable use and protection of water and marine resources; (iv) transition to a circular economy, (v) pollution prevention and control; and (vi) protection and restoration of biodiversity and ecosystems.

23 NGFS, Enhancing market transparency in green and sustainable finance (2022), at 17.

24 Climate Bonds Initiative, *Global green taxonomy development, alignment and implementation* (2022), at 4.

25 Centre for Climate Engagement Hughes Hall, Summary report: Green Taxonomies – Global guidelines for the green transition?

26 Ehlers, Gao and Packer, *BIS Papers No 118: A taxonomy of sustainable finance taxonomies* (2021), at 2.

(EFRAG). The ESRS require a broad range of disclosures on specific areas that fall within three main categories: (i) environment (including climate change, pollution, marine resources, biodiversity and the circular economy); (ii) social (including companies' own workforces, workers in the value chain and affected communities); and (iii) governance (business conduct). The SEC Rules focus on climate-related disclosures in issuers' registration statements, including on climate-related risks, impacts, governance and GHG emissions.

The SFDR focusses on financial market participants operating in the EU, including credit institutions, and sets requirements for the disclosure of how sustainability risks are incorporated into the investment decision-making process. In doing so, the SFDR seeks to increase transparency around sustainable investment products and seeks to improve the quality of sustainability claims made by financial market participants. Broadly, there are two types of disclosures required under the SFDR: (i) entity-level; and (ii) product-level. Entity-level disclosures oblige the entity to disclose their policies on decision-making with regard to sustainability risks, whereas product-level disclosures are reporting obligations that concern specific financial products and require disclosure of their sustainability risks.

The ISSB has issued two sets of standards in 2023 which apply to financial and non-financial institutions: (i) IFRS S1 which prescribes how an entity should prepare and report its disclosures by setting out general requirements for the content and presentation; and (ii) IFRS S2 which sets out climate-related disclosure standards covering governance, strategy, risk management, and climate-related metrics like GHG emissions. ISSB is expected to publish further standards in due course (on biodiversity, human rights, etc.). While ISSB cannot mandate the application of the ISSB Standards, companies can voluntarily apply these standards and jurisdictional authorities can decide whether to adopt these as mandatory requirements. At this stage, more than 20 jurisdictions[27] have decided to use the ISSB standards or are taking steps to introduce the standards in their own frameworks, with these jurisdictions representing over half of global GHG emissions.[28]

While disclosure standards and regulations have a common aim - to improve market transparency - a key area of divergence is the approach to determine the materiality of information for the purposes of reporting. The EU regulatory framework adopts the 'double materiality' or 'impact materiality' position, which requires in-scope credit institutions to report on how sustainability matters affect their business as well as the external impacts of their activities on people and the environment. The TCFD recommendations, the ISSB Standards and the SEC Rules, on the other hand, focus on 'financial materiality' by applying only to sustainability and climate-related risks and opportunities that affect cash flows, access to finance or cost of capital. This is because these regulations and standards focus on the needs of investors and providers of capital, while the EU framework takes into account a broader stakeholder base.

3.3 Transition plans

A key component of the CSRD, SEC Rules and the ISSB Standards is the disclosure of a transition plan, albeit using varying terminology – 'climate transition plan', 'climate mitigation plan', 'net zero transition plan' and 'transition plan'. For the purposes of consistency in this article, the term 'transition plan' is used. A transition plan is a time-bound action plan that sets out how an entity plans to transform existing assets, operations, and business models to achieve net zero, thereby putting climate change at the heart of the entity's functioning.[29] In the EU, the recently adopted Corporate Sustainability Due Diligence Directive (CSDDD) requires in-scope credit institutions to develop a transition plan (i.e., not simply disclose a transition plan if the entity has one, as is the case with the CSRD). In the U.K., the Transition Plan Taskforce (TPT)[30] has introduced a disclosure standard specific to transition plans, which complements and builds on the ISSB Standards, along with targeted guidance for several sectors including the banking industry.

The CSDDD sets some basic components for a transition plan, including: (i) time-bound GHG emissions reduction targets; (ii) a description of decarbonisation levers identified and key actions such as changes in the product and service portfolio and the adoption of new technologies; (iii) an explanation and quantification of the investments and funding required for implementation of the transition plan; and (iv) exposures to coal, oil and gas related activities. Furthermore, the EU Capital Requirements Directive (CRD) has been recently amended to require credit institutions to develop and monitor the implementation of transition plans that identify and address the financial risks arising in the short, medium, and long term from climate-related factors, including those arising from the process of adjustment and transition towards relevant regulatory objectives.[31] The European Banking Authority plans to issue guidelines for credit institutions on the content of transition plans required under the amended CRD by January 2026.

[27] This includes U.K, Japan, Singapore, Türkiye, Australia, Canada, Brazil, Costa Rica, Bolivia, Hong Kong, South Korea, Malaysia, Kenya, Nigeria and China.

[28] IFRS, Jurisdictions representing over half the global economy by GDP take steps towards ISSB Standards (2024).

[29] Note that 'climate transition plan', 'transition plan', 'climate mitigation plan', etc. have slightly varying definitions under the applicable standards (IFRS/ISSB, U.K. TPT) or regulation (CSRD/ESRS), however this statement captures the essential features of a transition plan under the standards and regulations.

[30] TPT was launched by HM Treasury in March 2022 with a mandate to bring together leaders from industry, academia, and regulators to develop good practice for transition plan disclosures for finance and the real economy.

[31] Article 76(2) of the Amended CRD.

In developing their transition plans, credit institutions will need to reduce both their own emissions and their financed emissions, manage their climate-related risks and opportunities (e.g., by supporting clients in building climate resilience or implementing enhanced climate risk management frameworks to address borrowers who are unable to transition), and use their leverage to enable an economy-wide transition (e.g., by providing financing on favourable terms to support the growth of green alternatives). These actions would need to be benchmarked against science-based metrics and targets.

4. Important considerations for MDBs

In 2017, all MDBs committed to align financial flows with the objectives of the Paris Agreement at the One Planet Summit and COP23. Pursuant to this commitment, and to ensure a consistent approach to the implementation of the Paris alignment commitment, in 2019 the MDBs developed a framework for alignment consisting of six building blocks: alignment with mitigation goals; adaptation and climate-resilient operations; accelerated contribution to the transition through climate finance; engagement and policy-development support; reporting; and alignment of internal activities. Building on these joint principles, MDBs have developed their individual methodological guidance and toolkits to be applied according to their internal processes and procedures to determine whether an operation is "aligned" or "not aligned" with the mitigation and adaptation goals of the Paris Agreement. It is essential that this commitment is implemented and operationalised with reference to international standards and best practice to ensure credibility. Jurisdiction-specific attributes of Paris alignment approaches will also have an impact on MDBs' ability to align their finance flows channelled towards jurisdictions in their regions.

Broadly, the Paris alignment approaches for the financial sector have a common denominator - to allow investors and other stakeholders to identify high- and low-carbon real and financial assets, and to assess the impact of low-carbon investment strategies to reduce GHG emissions discharged in the real economy. Despite this common aim, there is a high degree of market fragmentation which is likely to impact cross border financial flows for green and sustainable assets. This is most likely the case with green taxonomies, which are designed by individual jurisdictions with a high degree of inconsistency in the approaches adopted (white-list based, traffic light system, binary classification, etc.), the defined activities, and technical criteria. As MDBs provide green finance across several jurisdictions, they can play a key role in reducing market fragmentation by encouraging consistent approaches through policy dialogue and offering technical assistance in the taxonomy development process to public sector stakeholders, such as regulators and central banks.

In terms of regulatory developments and jurisdiction-specific uptake of global standards, MDB clients in the financial sector across EU and non-EU jurisdictions are expected to make climate and sustainability-related disclosures in the short to medium term, as well as commence compliance with broader climate and sustainability-related legal requirements. However, there is a significant lack of preparedness and awareness of sustainability and climate-related risks, impacts and opportunities, as well as varying levels of maturity on the topic among businesses in the regions where MDBs operate. This is an area of increased relevance and complexity and a potential opportunity for MDBs to provide critical support to businesses through technical assistance. There is also a clear opportunity here for MDBs to draw on the information produced by partner credit institutions (either in response to legal requirements or on a voluntary basis) in connection with the projects that they finance.

[32] CDP, The Time to Green Finance: CDP Financial Services Disclosure Report (2020), at 5.

[33] UNFCCC Sharm el Sheik dialogue Presentation on MDB Paris Alignment Approach: linkages with Climate Finance (2023), at 2.

[34] MDBs' alignment approach to the objectives of the Paris Agreement: working together to catalyse low-emissions and climate-resilient development, https://thedocs.worldbank.org/en/doc/784141543806348331-0020022018/original/JointDeclarationMDBsAlignmentApproachtoParisAgreementCOP24Final.pdf

IFFIm: a Unicorn or a Road Map?

Alison Jensen & Jack Nichols**

Abstract: The International Finance Facility for Immunisation ("IFFIm") was established in 2006 as a UK charity to "frontload" long-term sovereign pledges to the Gavi Alliance ("Gavi"), an international organization established in 2000 part of whose mission is to provide vaccines and the means to deliver them to people in lower and middle-income countries. To do this, IFFIm issues bonds in the international capital markets backed by future grant payment obligations of sovereigns and provides the proceeds to Gavi for its programming. The International Bank for Reconstruction and Development ("IBRD") acts as IFFIm's Treasury Manager. Since its inception, IFFIm has raised nearly U.S.$8.7bn to support Gavi's vaccination programmes and has rapidly accelerated the availability of this long-term funding. IFFIm is a unique structure in the international development landscape and it has never been replicated. This article will look at the key features of the IFFIm structure and why they are critical to IFFIm's effectiveness. The article will also explore whether IFFIm is a unicorn or whether it could be a blueprint for other similar structures in different settings. To do this it is important to understand the context in which IFFIm was established and structured, before looking at IFFIm's most recent successes in frontloading funds to secure access to Covid-19 vaccines during the pandemic. Finally, the article will look at the challenges and potential opportunities to replicate IFFIm for other surge financing or frontloading uses, such as for post-conflict reconstruction or climate finance.

1. Overview of IFFIm's structure

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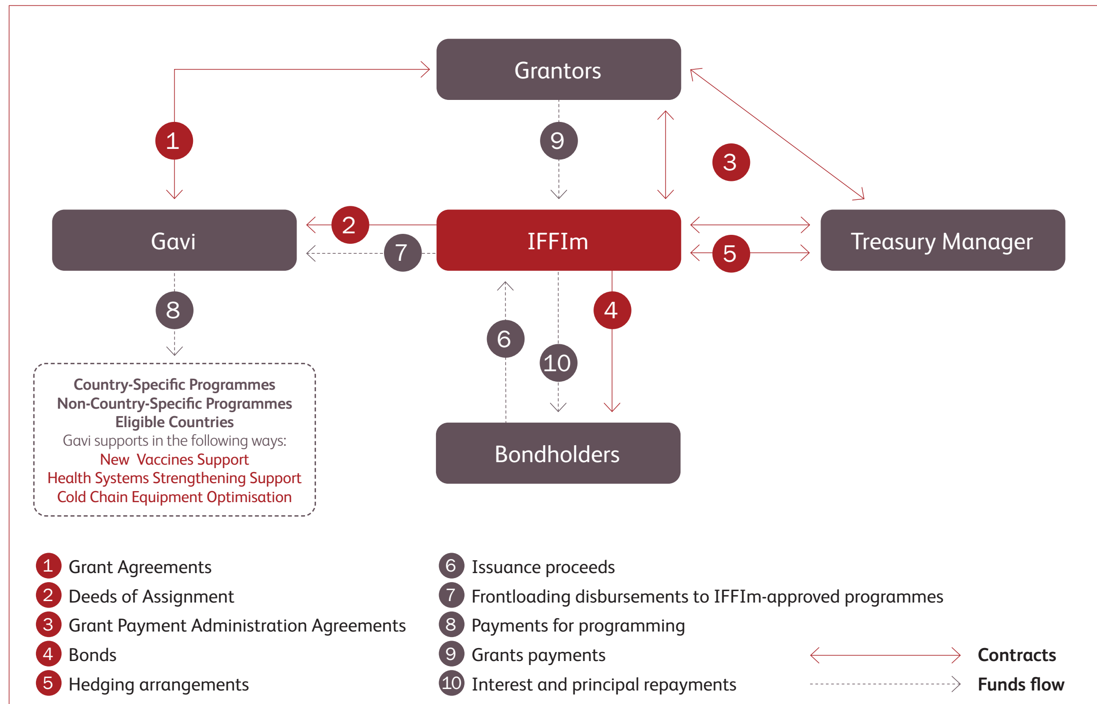
IFFIm is a funding mechanism to bring forward future contributions from sovereign grantors. It does so by issuing rated bonds supported by legally binding sovereign grant agreements, which comprise IFFIm's asset base. The proceeds of IFFIm's bonds are disbursed, as required, for programmes approved by Gavi's board. This allows Gavi to undertake activities in furtherance of its mission before it would otherwise be possible from the scheduled payments under the grant agreements. IFFIm then repays bondholders using the streams of grant payments received over time under the grant agreements, which have been provided for up to 25 years.

The diagram on page 18 provides a description of the overall structure. First, Gavi signs legally binding long term grant agreements with sovereign grantors. Gavi then assigns the benefit of those grant agreements and all future payables under them to IFFIm. The grantor, IFFIm and IBRD then sign an agreement in respect of the administration of the grant payments made to IFFIm. Backed by that pool of grant funds receivable by it over a long period of time in the future, IFFIm issues bonds to investors in the international capital markets, with IBRD as Treasury Manager. IFFIm then enters into hedging arrangements to manage interest rate and foreign exchange risks based on its payments to be made under the portfolio of bonds outstanding and expected income from the grants.

Upon the issuance of bonds, IFFIm can make an immediate payment to Gavi of the proceeds of the issuance. Gavi can then use those amounts immediately to fund vaccine programmes and fund the purchase of vaccines – providing certainty of funding and helping, through larger scale procurements, to push down the cost of vaccines. During the life of IFFIm's bonds, IFFIm receives grant payments periodically, and uses those funds to make interest and

Figure 1: Overview of IFFIm's structure



principal repayments to the noteholders in accordance with IFFIm's liquidity policy (as described further below).

IFFIm operates under a finance framework agreement (the "FFA") between IFFIm, Gavi, IBRD and each of IFFIm's sovereign donors. The FFA is central to IFFIm's operations as it sets out the activities that IFFIm is permitted to undertake, which in the main are raising funds through the issuances of bonds or borrowing of loans and disbursing the proceeds of its fundraising to Gavi. IFFIm cannot carry out any other business other than as contemplated by the FFA and related transaction documents. Any divergences from the mandate set out in the FFA would require the consent of all parties to the FFA. Like IFFIm's other structural documents, the FFA is governed by English law, aligned with IFFIm's status as a company established in England and regulated by the Charity Commission for England and Wales.

IFFIm is a "pure play" issuer. Its funding is directed exclusively to activities within Gavi's mission, which are focused on enabling equitable access to vaccines. Investing in IFFIm's bonds therefore achieves a double bottom line for investors: a clear social impact through advancing vaccine supply and the saving of lives, and a financial return on investment. The bonds issued by IFFIm do not include any of the more complex features of securities from general corporate issuers that have some socially impactful activities and others that are purely commercially focused. Investors do not need to undertake an assessment of the relative environmental, social and governance merits of the investment, as the net proceeds of IFFIm bonds are used directly for Gavi's mission. Bonds are issued through the debt capital markets and may be issued through private placements as well.

2. Utility of IFFIm

Responding to a need to dramatically scale immunisation efforts to enable rapid gains in child health, in 2004 the United Kingdom and France announced their commitment to launch IFFIm, to address financing constraints by frontloading future aid resources to accelerate Gavi's impact.

This mechanism was structured around long-term legally binding donor grant agreements, to provide a significant scale up in financing and mitigate the risks of unpredictable funding. By the end of 2005, France, Italy, Norway, Spain, Sweden and the UK had joined IFFIm. South Africa became an IFFIm donor in 2007, the Netherlands in 2009, Australia in 2011, Brazil in 2018 and Canada in 2023. To date, nearly US$ 9.7 billion worth of donor commitments have been made to IFFIm, to help support and scale up Gavi's work.[1] Backed by those commitments, IFFIm has already contributed US$ 5.8 billion to bolster Gavi's vaccination programmes.[2]

IFFIm's journey illustrates the high impact of innovative financing. In its first five years, IFFIm's frontloading capability nearly doubled Gavi's funding and transformed its financial landscape, dramatically expanding vaccine coverage and bolstering health systems. The periods spanning 2011-2015 and 2016-2020 saw IFFIm's role

[1] IFFIm, 'Table of IFFIm donors', https://iffim.org/donors.

[2] IFFIm, 'IFFIm Resource Guide' (2024), at 6, https://iffim.org/sites/default/files/IFFIm-Resource-Guide.pdf.

transition from a frontloading mechanism to a flexible financing vehicle, enabling Gavi to support unforeseen events such as standby crisis funding for Ebola. IFFIm now fulfils two overarching functions for Gavi's programming: (i) frontloading of donor grant funding for planned strategic programming; and (ii) surge financing for outbreak response.

2.1 Frontloading for strategic impact

During regular times, IFFIm can provide a burst of funding at the start of Gavi's 5-year strategic periods. This enables Gavi to undertake significant purchases of vaccines for developing countries, with payment terms that create certainty of funding for manufacturers, delivery schedules that create certainty of supply for developing countries, and of a size that can help drive down the cost of vaccines. Early interventions with vaccines lead to lives and costs saved. It is estimated that 2.4 million deaths have been averted with IFFIm funds. In 2019, IFFIm was further leveraged as a global public good, by enabling Norway to accelerate funding for new vaccine development by the Coalition for Epidemic Preparedness Innovations (CEPI) through a front-loaded pledge of US$ 66 million.

2.2 Surge financing to meet sudden need

IFFIm has also showed its utility in the context of surge financing, facilitating the scale-up of high-impact routine immunisation and a swift response to the Covid-19 pandemic. It was one of the earliest funding sources available to Gavi for the Covid-19 pandemic response, providing US$ 400 million for COVAX, the platform that supported the research, development and manufacturing of a wide range of COVID-19 vaccine candidates, and negotiated their pricing for equitable supply. By using IFFIm, donor governments could sign long-dated grants with the vast majority of payments being due beyond the initial burden of the pandemic to underpin immediate funding for Gavi, while at the same time satisfying their domestic pressure to provide immediate cash resources for their own pandemic responses.

At the same time as providing these advantages for Gavi's ability to achieve its mission, IFFIm also provides two important financial management benefits: (i) grantors' budgetary needs are accommodated; and (ii) Gavi can benefit from a steady flow of funding aside from bursts of frontloaded finance.

2.3 Accommodating grantor budgetary needs

IFFIm provides the possibility for grantors to make long-dated grants, with payments over many years, while still achieving up-front impact. Due to the ruling by Eurostat (described below), members of the European Union are entitled to only record their contributions to IFFIm at the time of payment, and not when the original grant agreement is signed. This means that IFFIm gets the immediate benefit of the grants, while grantors defer their fiscal impact.

2.4 Steady funding flow for Gavi

Even while IFFIm provides flexibility of frontloading finance for immediate impact, and to address surges of needs for funding, IFFIm itself receives a steady flow of funding. If that flow of funding is not required to pay interest and principal to noteholders, and other operating costs of IFFIm, then those funds received periodically may be made available to Gavi during a strategic period. This provides ongoing smaller amounts of resources to Gavi outside of the large donations and commitments received at the start of its 5-year strategic periods, and may be used to aid Gavi's liquidity management and can fund ongoing operational and programmatic costs.

3. Key elements of IFFIm

The IFFIm structure has some key features that have enabled its successful establishment and to meet the expectations and needs of grantors, investor, regulators and other stakeholders.

3.1 IFFIm's Bond Programme

IFFIm issues its vaccine bonds under a global debt issuance programme, which sets out the terms and conditions for the vaccine bonds. For each individual bond issuance, the specific terms and conditions are set out in a pricing supplement. IFFIm's bonds are senior and unsecured, similar to bonds offered by IBRD, the International Development Association ("IDA") and other supranational issuers.

By targeting issuances at particular groups of investors, IFFIm has successfully tapped pools of capital and investor interest around the world. Since its inaugural benchmark issuance in 2006, IFFIm has issued bonds in the UK, Norway, Japan, Australia and in the Eurobond market. IFFIm has also accessed the Islamic finance markets.

IFFIm's access to the Islamic financial markets was through the issuance of three Sukuk using a commodity murabaha structure. This involved establishing, in each case, a separate Cayman Islands special purpose vehicle (SPV), which issued sukuk certificates to investors. The issuance proceeds were used by the SPV to immediately purchase commodities, which were then sold on to IFFIm for a deferred purchase price. IFFIm then immediately sold the commodities and through that obtained cash immediately for its activities and provision of funding to Gavi. Over the life of the sukuk certificates, IFFIm paid the deferred purchase price to the SPV, and those cash flows were used to pay periodic distribution amounts to the investors in the sukuk certificates.

3.2 Binding grant agreements

IFFIm's donors enter into grant agreements that are legally binding and enforceable, similar to the donors' own capital markets debt issuances. The grant agreements contain one condition – that the ultimate amount of each grant payment is reduced based on the number of countries in

protracted arrears to the IMF within a specified portfolio of 73 countries (the "Grant Payment Condition"). The Grant Payment Condition was critical for the Eurostat ruling described further below.

Each grant agreement is accompanied by legal opinions from external legal counsel, which confirm that the grant agreements are valid, binding and enforceable. In addition to the legally valid and binding nature of the grant agreements, each sovereign donor that would typically enjoy immunity from jurisdiction or service of process has waived such immunity. Whilst these features are typical in the finance sector, this is an unusual feature for sovereign grant agreements.

Together, these elements provide assurance that the bonds issued by IFFIm are underpinned by certainty of funding from donors. As the grants are long-dated and span electoral cycles and policy shifts from the donor governments, these elements provide important certainty to investors that payments will continue to flow.

3.3 Assignment of grants by Gavi to form IFFIm's asset base

Gavi assigns to IFFIm all rights, title, interest and benefit (both present and future) in each of the grant agreements it signs with donors. This gives IFFIm the benefit of all financial flows under those grant agreements. As those financial flows are IFFIm's sole source of income, it is of fundamental importance to investors that the grant agreements are considered assets of IFFIm, even in the event of insolvency or liquidation of Gavi. A "true sale" legal opinion, providing comfort on this analysis and typical in securitisation structures, was provided at the establishment of the structure.

3.4 Relationship with Gavi

IFFIm's primary purpose is to provide funding for the immunisation programmes and/or programmes for vaccine procurement of Gavi in some of the poorest countries in the world. It does so by making grants to Gavi. With this focused mandate, donors and investors can be clear on the expected scope of activity that their funds will support. At the time of IFFIm's formation, Gavi already had an operating modality and a proven track record of delivering effective vaccine programmes. This helped to underpin a focused message of the impact achievable through the investment of funds. Equally, IFFIm can rely on Gavi's monitoring and reporting teams to measure and demonstrate IFFIm's success through numbers of children immunised.

3.5 Corporate form

IFFIm is a private company limited by guarantee, with Gavi as its sole guarantor. As IFFIm does not have share capital, there are no shareholders with control over IFFIm. Gavi's role as guarantor to IFFIm is limited to a responsibility to contribute a nominal amount, if required, to the costs of any winding up of IFFIm. The corporate form of IFFIm is not of a fixed term, which allows it to have an open-ended life and therefore to continue contributing to the funding of Gavi's mission for as long as is appropriate.

3.6 Independent nature of IFFIm

While Gavi is the sole beneficiary of funding from IFFIm and a provider of services to IFFIm, investors and donors have confidence that IFFIm itself acts as an independent entity in furthering its charitable objects. IFFIm benefits from a highly skilled independent board of directors, which bring extensive skills including in international finance, risk management and treasury from large international organisations, governments and the private sector. The IFFIm board also engages independent external legal counsel, which acts in IFFIm's interest.

In addition, Gavi has undertaken not to consent to any variation of the transaction documents, not exercise any powers of consent or waiver, and not undertake any other related transactions if they would have a material adverse effect on the donors, except with consent of the donors representing three quarters of the contributions to IFFIm. Gavi is therefore constrained to some extent in how far it may exercise its powers as the sole member of IFFIm.

3.7 Administrative/treasury support provided by Gavi and IBRD to IFFIm

IFFIm has outsourced its principal activities to two organisations: all administrative support functions are provided by Gavi; and all treasury functions are provided by the IBRD, otherwise known as the World Bank, in its capacity as IFFIm's Treasury Manager.

Outsourcing its operations ensures that IFFIm can avoid incurring the time and resources to recruit staff to carry out functions that could be done by existing organisations as service providers. Its treasury operations, including all aspects relating to raising funds in the debt capital markets, are carried out by IBRD as Treasury Manager under the terms of a treasury management agreement. In this role, IBRD performs financial and fiduciary roles for IFFIm, including monitoring and managing IFFlm's cash flows, monitoring and meeting IFFlm's bond payment obligations, monitoring and investing IFFlm's liquidity, managing donor payments, and assessing and managing the gearing ratio. In maintaining IFFIm's liquidity policy, IBRD ensures that IFFIm at all times has sufficient liquidity to meet its current financial obligations, and the policy is consistent with liquidity (or equivalent policies) established by supranational organisations and other comparable entities.

IBRD manages these risks in the same manner as it does for IBRD and IDA (as applicable). IFFIm is able to harness the expertise and networks of the largest multilateral development bank ("MDB") issuer. IBRD can structure funding transactions for IFFIm that are cost efficient and attract a diverse investor base, for example tapping the Sukuk market, the Japanese and UK retail markets and the US dollar benchmark market. The relationship with IBRD

has ensured that IFFIm is seen by investors as a supranational issuer, comparable to bonds issued by IBRD, IDA and other multilateral development banks.

IFFIm's administrative operations, including legal and governance support and resource mobilization, are carried out by Gavi under the terms of an administrative support agreement. This brings similar operational and strategic efficiencies, given IFFIm's role as a funding mechanism for Gavi. IFFIm is able to maximise Gavi's relationships with donors and its programmatic monitoring and evaluation reporting. Funds are disbursed to Gavi and allocated for programmes in accordance with IFFIm's Finance Framework Agreement, which in turn relies on Gavi's existing policies and processes to allocate funding for the procurement of vaccines and supporting health systems.

3.8 Regulated status

IFFIm is registered with the Registrar of Companies for England and Wales. IFFIm is also registered with the Charity Commission for England and Wales. As a dually regulated entity, investors and donors can take confidence from the oversight of these two authorities providing further assurance of strong corporate and charitable operations.

3.9 Eurostat ruling

As part of the implementation of the IFFIm structure, the IFFIm stakeholders sought a decision from the European Statistical Office ("Eurostat"), on IFFIm's classification and the recording of its debt and pledges. Eurostat decided that Gavi and IFFIm should be combined as a single unit and classified in the International Organisation sub-sector. Most importantly, Eurostat also decided that IFFIm's bonds should be considered as the borrowing of a non-government unit (as opposed to the debt of its sovereign donors).

The Grant Payment Condition was critical to this decision. Even though the grant agreements are legally binding, the Grant Payment Condition operates to reduce the amount of each annual grant payment if one or more countries that make up a portfolio of Gavi implementing countries enters into arrears with the IMF. The dependency on implementing countries' compliance with their IMF obligations, and the absence of any sovereign guarantee of IFFIm's debt, was considered to imply a transfer of risk to IFFIm and its bondholders.

Additionally, the Eurostat ruling provided that grants to IFFIm would only be recorded as expenditure at the point at which the donor made a grant payment. For EU member state donors, the implication of the decision is that an EU donor can make long term multi-year pledges without being required to record the full amount of the pledge on its annual budget. This was fundamental to creating the momentum to launch IFFIm and convince sovereign donors to make 15-20 year pledges to IFFIm in support of immunisation efforts.

3.10 Relationship with the rating agencies

Since its launch, IFFIm has been rated by the three main credit rating agencies ("CRAs") and each CRA developed its own methodology specifically for IFFIm, given its unique structure. On an annual basis, the CRAs review IFFIm's ratings and engage with the Treasury Manager, Gavi and the IFFIm Board on several key criteria that are relevant in assessing the strength of IFFIm's asset base and risk policies.

IFFIm is rated as a supranational issuer, falling within a category of institutions established and controlled by their sovereign government shareholders, and this means that the CRAs look at sovereign donor support over the preceding year, and gauge whether this has remained consistent or whether there has been any change in perceptions of IFFIm. The CRAs also look closely at IFFIm's financial policies, acknowledging IFFIm's robust liquidity and risk management practices and institutional support from the Treasury Manager.

From their earliest engagements, the key legal issue for the CRAs has been the validity and enforceability of IFFIm's grant agreements. As IFFIm's asset base consists of its long-term multi-year grant agreements mostly from highly rated sovereign donors, IFFIm is routinely asked to confirm that any new grant agreements are substantially similar to IFFIm's existing pledges, and are legally valid, binding and enforceable.

4. Broader application of IFFIm's structure and principles

IFFIm emerged as a response to the launch of the Millenium Development Goals ("MDGs") following the Monterrey Conference in 2002. It was originally conceived by the UK as the first international finance facility, which would be followed by other international finance facilities that would fund development at a larger scale than in the past, sufficient to achieve the MDGs in the 2000-2015 period. As the discussions progressed on structuring the international finance facility, the challenge was to identify the development related goal that could absorb funding at the scale and pace that an international finance facility would deliver. Immunisation was widely recognised by many sovereign donors as a crucial intervention in need of significant funding to increase access to the blockbuster vaccines that had started to become available. As has been discussed above, IFFIm was able to transform immunisation in low and middle income countries through Gavi. It follows that in discussing whether the IFFIm model could be applied for other development aims, it is not just a question of the features of the IFFIm model but also a clearly articulated aim that meets some of the IFFIm requirements – scaleable, aligned with donor priorities, able to absorb the volume of funding raised through the capital markets and measurable.

In Addis Ababa in 2015 there were calls to replicate IFFIm, but to date there has been no true sister organisation to IFFIm, as was originally contemplated in the development of the international finance facilities. There have however been many other structures that have used private sector techniques to increase funding flows to the development sector and brought in private capital.

The International Finance Facility for Education (IFFEd) is a multilateral financing mechanism that was established as a Swiss charitable foundation in 2023. IFFEd will provide guarantees to MDBs to facilitate the provision of concessional finance for education. The structure is a portfolio guarantee, whereby IFFEd will agree to guarantee a synthetic portfolio of loans from MDBs to sovereigns for education. This will catalyse new education loans on more affordable terms. In parallel, IFFEd will receive grants from donors and provide grants alongside the loans, effectively further reducing the blended cost of funding for education. IFFEd harnesses private sector financing structures for development aims and is designed to fit within the existing MDB system to meet a clearly articulated aim, which requires a significant volume of funding in the immediate future.

Recently discussions have progressed on the use of an IFFIm-like structure for landmine action, which includes mine clearance, mine risk education, victim assistance, advocacy and stockpile destruction. In a proposal developed through the Geneva International Centre for Humanitarian Demining, a front-loading structure is one of the options being explored to as an innovative finance mechanism for landmine action. The proposal describes a structure very similar to IFFIm, which could meet the funding needs for the sector in the near term using long term sovereign pledges.

This is an exciting opportunity to test the IFFIm model for another purpose, noting that it has been almost 20 years since the initial IFFIm donors committed to the support of the mechanism. There are several clear use-cases for an IFFIm-type structure to frontload capital, and through an early intervention save lives and future development costs. One such potential use is to accelerate provision of financing to mitigate and adapt to the effects of climate change. Frontloading of funds could help to raise the level of finance required to lower carbon emissions early, and prepare vulnerable communities to the extreme weather events caused by climate change. Another potential use-case would be in post conflict reconstruction, frontloading of funds could allow the sheer scale of finance required for rapid recovery of the affected community and economy, while not over-burdening donor government budgets at the outset.

Some of the IFFIm features would need to be revisited in a new context. Additionally, the focused use of proceeds of bonds in other settings would need to be carefully considered – to allow for sufficiently targeted interventions to satisfy both donors and investors while still allowing sufficient flexibility for effective programming. But the principles behind the design of IFFIm – the use of private sector financing structures tailored to a particular goal that could warrant the use of such a mechanism – can provide a road map for the design of other new mechanisms.

Shaping IFI Systems: Board Governance and the Way Forward

*Tom Edmondston-Low**

Abstract: In a complex and evolving global economy, the role of International Finance Institutions (IFIs)[1] has never been more crucial. Getting them to "work as a system" is key to delivering adaptive, cohesive, and forward-thinking strategies. Good corporate governance stands at the heart of this evolution. A robust governance framework ensures that an IFI can operate with integrity, accountability, and transparency – principles that are fundamental to achieving sustainable and inclusive development. However, in 2018 a report by the G20 Eminent Persons Group (EPG) on Global Financial Governance drew the conclusion that IFI corporate governance needed "transformation" and should be "brought up to date" to be in line with "established standards" in the private sector.[2]

How was such a conclusion reached? What changes are needed? And how do these get implemented?

This article summarises the findings of epistemological research that was undertaken to investigate these questions. The research first considered what is meant by "established standards" and – as there is no single set of internationally agreed corporate governance principles for IFIs[3] – a new, dedicated set of 11 private-sector focused benchmarks are synthesised from multiple sources. The practice at IFIs was then compared against these benchmarks, using the EBRD as a case study. The results show that whilst governance practices are relatively well aligned with private sector standards at an aggregate level, there are a number of areas that require further attention, such as the implementation of Board evaluations, addressing shortcomings in the size of IFI Boards and the appointment process of IFI Board Directors, using external experts more, clarifying better the roles and responsibilities of the President, Board and management, and increasing the Board's focus on strategic discussions.

If "the ambition is in the doing", as the EPG report says, then these doings seek to meet some of that ambition.

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Please note that the research behind this article was undertaken for the purposes of achieving a Masters degree in Corporate Governance from London South Bank University. It reflects neither the views nor the positions of the EBRD.

[1] The IFIs referred to are the same as those defined in the G20 Eminent Persons Group Report on Global Financial Governance, namely the IMF and the Multilateral Development Banks comprising AfDB, ADB, AIIB, EBRD, EIB, IDB, IsDB, NDB and the World Bank Group.

[2] Shanmugaratnam and others, *Making the Global Financial System Work for All* (2018), at 73.

[3] Delikanli, Dimitrov and Agolli, *Multilateral Development Banks: Governance and Finance* (2018).

1. Introduction

On 21 April 2017, G20 Finance Ministers and Central Bank Governors commissioned a report from a group of Eminent Persons (EPG) who were asked to review and make recommendations on the global financial architecture and the governance systems of International Finance Institutions (IFIs) (the "EPG Report"). The resulting report, which was presented to Ministers at the 2018 World Bank/IMF Annual Meeting in Bali, states that: "The governance of IFIs ... has to be brought up to date [as it is] ... tailored to an era of traditional banking operations, ... does not accord with ... established standards, and requires transformation [emphases added]".[4]

In many ways it is not surprising that such a conclusion was drawn. This is because the foundational legal instruments of most IFIs – i.e., the multilateral treaties that establish each institution – are based on the treaties negotiated during the 1944 Breton Woods conference that set up the World Bank and the IMF.[5] This means that many of the diplomatic compromises that were reached at that time remain present in more recently established IFIs.[6]

These treaties are usually referred to the "Articles of Agreement" (AoA) or as the Agreement Establishing the IFI. They provide each respective IFI with a legal personality and set out the principles and regulations that govern the institution. They also afford IFIs with "jurisdictional immunity",[7] which shields them from the jurisdiction of national courts (except in certain defined circumstances). As international organisations and subjects of international law, IFIs are not subject to national regulation, including on corporate governance, of which a plethora of rules, regulations and codes of practice have been rolled out across the world, most notably since the seminal 1992 report by the UK's Sir Adrian Cadbury on the "Financial Aspects of Corporate Governance".

Lamdany & Martinez-Diaz (Studies of IMF Governance: A Compendium, 2009)[8] also note that the lag in IFI practice behind that of their private sector counterparts is driven by their diffused accountability structures, the multitude of shareholders who set down numerous and sometimes conflicting objectives, and the inherent political nature of IFIs, which means that "voice and representation" is more often the measure of effectiveness rather than governance best practice.

These factors are certainly limitations to change. But as the G20 EPG notes, change is nevertheless needed. The research therefore looked into how to strike the balance and bring IFI corporate governance "up to date".

2. Who's responsible?

As a start, it is worth establishing who would be responsible for delivering any such change.

In his 1992 report, Sir Adrian Cadbury is very clear on this: his definition of corporate governance is "the system by which companies are directed and controlled".[9] By "system" he refers to having an effective governance framework with "clear structures, rules and procedures". The "direction and control" is then set by the Board of Directors, who he describes as being "responsible for the governance of their companies".[10] Whilst major decisions would typically end up with an IFI's Board of Governors, any changes to the corporate governance of IFIs should be done with or through the Board of Directors.

Situated at the intersection between the Board and management, the IFI Secretary General (or equivalent) is ideally placed to play a key leadership role in supporting the development and delivery of any corporate governance evolution.[11] This is because they can (and do) provide a bridge between all relevant parties, can facilitate strong information flows, and will usually have a strong understanding of the organisation's history and culture,[12] as well as the realities of the dynamics in the Boardroom.[13]

3. Establishing the "Established Standards"

The EPG Report sets out that IFIs should use "established standards" in the private sector.[14] The first part of the research investigated what this standard should be.

The most obvious candidate to use is the G20/OECD "Principles of Corporate Governance",[15] which are seen as *the* international benchmark.[16] However, by the OECD's own admission, these principles are more a framework for national governments to adopt rather than a set of standards for companies to follow.

Another obvious choice is the Progression Matrix designed and adopted by the Corporate Governance

[4] Shanmugaratnam and others, supra note 2, at 73.

[5] Lichtenstein, *A Comparative Guide to the Asian Infrastructure Investment Bank* (2018).

[6] Lombardi, *The Governance of the World Bank: Lessons from the Corporate Sector* (2008).

[7] Bin, *The Law and Governance of the Asian Infrastructure Investment Bank* (2019).

[8] Lamdany and Martinez-Diaz, *Studies of IMF Governance: A Compendium* (2009).

[9] Cadbury, *Report of the Committee on the Financial Aspects of Corporate Governance* (1992), at 14.

[10] Ibid., at 14

[11] Wearden, *Development of Strategy – ICSA Qualifying Programme* (2019).

[12] Kakabadse, Korac-Kakabadse and Khan, *The Company Secretary: Building trust through governance* (2014).

[13] Willis, O'Rourke and Fass, *The Resilient Director: Building an Effective Board* (2014).

[14] Delikanli, Dimitrov and Agolli, supra note 4.

[15] OECD, *G20/OECD Principles of Corporate Governance* (2015).

[16] Kibirige and Hamer, *Corporate Governance: ICSA qualifying programme* (2019).

Development Framework (CGDF),[17] which is a joint initiative by 30 plus IFIs to create a common approach for IFIs to use with their own clients. Using this Progression Matrix would therefore see IFIs apply the standards they expect of their clients on themselves. However, herein also lies the issue: the CGDF focuses on *external clients* but does not take account of the political or legal context within which the client is operating (an exact opposite scenario to that of the G20/OECD Principles).

This backs up the assertion from Delikanli, Dimitrov and Agolli (Multilateral Development Banks: Governance and Finance, 2018) that there is no single set of internationally agreed corporate governance principles for IFIs.[18] The way forward was to create a new set of benchmarks that rely on multiple private sector inputs. The research considered the following sources:

(i) the G20/OECD principles;
(ii) the CGDF Progression Matrix;
(iii) the UK Corporate Governance Code,[19] given that this grew out of the first corporate governance code and is considered to be one of the most developed;
(iv) the Principles of Good Governance that a think tank called "The Governance Forum" developed by synthesising twelve different codes;[20]
(v) conclusions from Stilpon Nestor's 2018 assessment of Board Effectiveness in International Financial Institutions,[21] given its direct relevance; and
(vi) the proposals and recommendations in the EPG Report itself (given its direct link to the research).

By undertaking a systematic content analysis, a long list of 83 thematic points was extracted, which were grouped according to topic and gave rise to 11 overall benchmarks, each with a number of sub-points (47 in total). The result was peer reviewed before being finalised. The full text of each of the benchmarks and sub-points is provided in the Annex. The headlines are:

(i) the institution has an **effective corporate governance framework** in place;
(ii) the Board has a **clear purpose, the right resources and structures**;
(iii) the Board has **access to the right reports and information**;
(iv) the Board's **roles and responsibilities** – and division of responsibilities – are clearly defined;
(v) the Board **conducts itself appropriately** (to the letter and in spirit);
(vi) the Board has **clear processes for appointment** in place to support diversity and meet the needs of the institution;
(vii) the Board has effective processes for **self-evaluation**;
(viii) the Board **takes appropriate account of risk**;
(ix) the Board can **challenge, debate and hold management accountable**;
(x) the Board is the **steward of the vision, values and culture** of the institution; and
(xi) the Board demonstrates active and effective **engagement with stakeholders**.

This list is a key outcome from the research: it provides a consolidated list of practical corporate governance benchmarks for IFIs, which have their roots firmly in the private sector – the "established standards" that the EPG refer to as the ambition to which IFIs should aspire.

17 Corporate Governance Development Framework, *Corporate Governance Progression Matrix* (2015).

18 Delikanli, Dimitrov and Agolli, supra note 4.

19 Financial Reporting Council, The *UK Corporate Governance Code* (2018).

20 The Governance Forum, *Principles of Good Governance* (2021).

21 Nestor, Board Effectiveness in International Financial Institutions: A Comparative Perspective on the Effectiveness Drivers in Constituency Boards in Quayle and Gao, Good Governance and Modern International Financial Institutions (2018), at 3-24.

4. Best Practice in IFIs

The second part of the research involved gathering and analysing feedback on how well these newly-established "best practice" benchmarks are applied in IFIs.

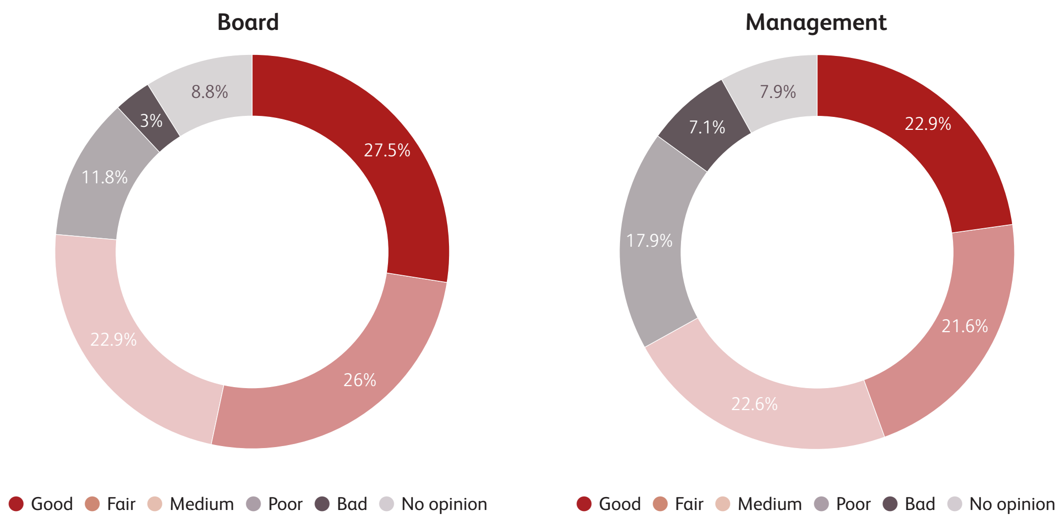
To do so, the EBRD was used as a case study and data was collected via a questionnaire and follow-up interviews from a cohort of 81 current and former Directors, Alternate Directors, Board Advisers, Executive Committee members, Managing Directors and other senior management who play (or have played) a key role in relation to the discharge of corporate governance practices in an IFI.

4.1. Overall Results

In terms of overall results, 49.4% of responses were that the implementation of the benchmarks (and their sub-points) was either "Fair" or "Good". This compares with 19.5% of responses being either "Poor" or "Bad". But as figure 1 shows, the Board have a more positive view than management. This is possibly not surprising given that the Board implement corporate governance, whilst management are subject to that implementation – an example of agency theory[22] at work).

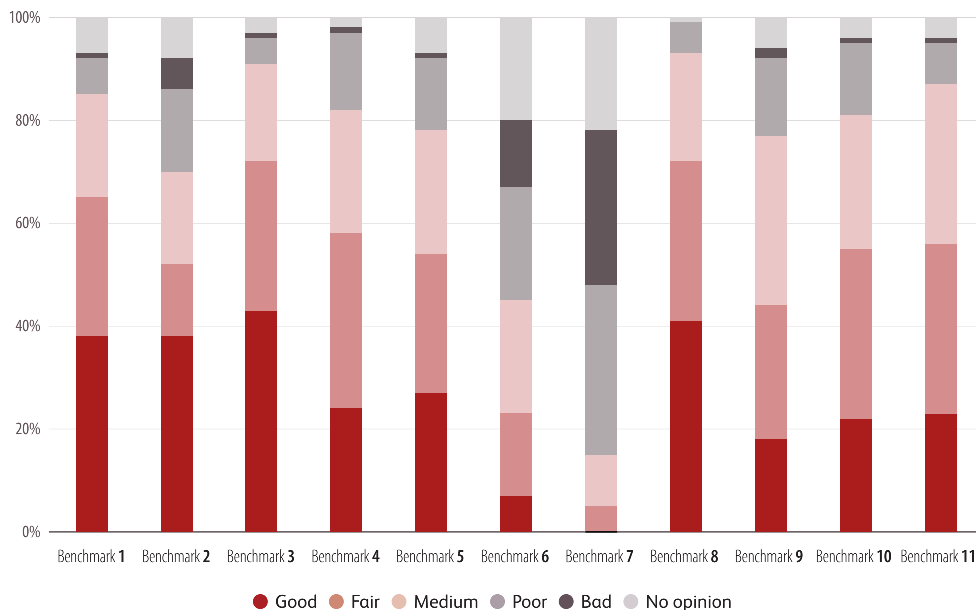
An overall conclusion can therefore be drawn that – generally speaking – IFI corporate governance practices are closely aligned with private sector standards.

Figure 1: EBRD Corporate Governance Practice – Overall responses from Board and Management



However, if one looks deeper into the analysis, some benchmarks did better than others, as Figure 2 shows:

Figure 2: Implementation Overview – by Benchmark



[22] Jensen and Meckling, *Theory of the firm: Managerial behaviour, agency costs and ownership structure* (1976), at 305-360.

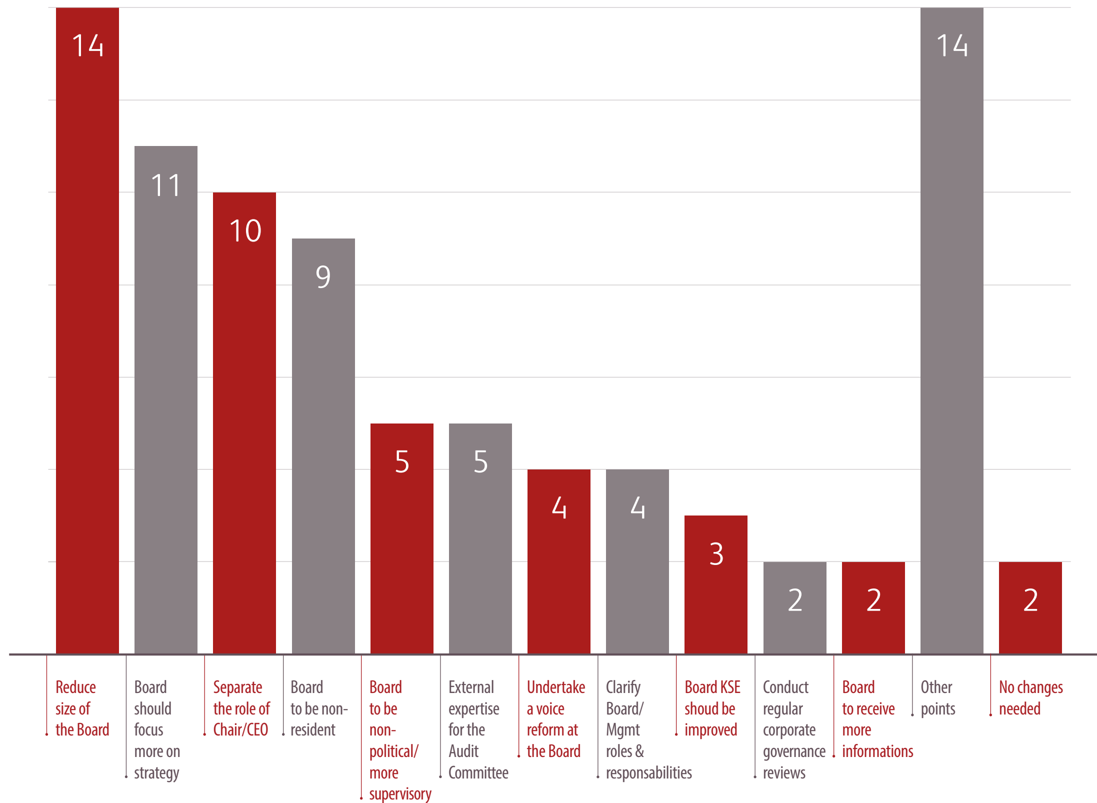
This shows that **Benchmark 7** (the Board has effective processes for self-evaluation in place), **Benchmark 6** (the Board has clear processes for appointment in place to support diversity and meet the needs of the institution) and **Benchmark 2** (the Board has a clear purpose, the right resources and structures) deserved additional investigation and analysis.

Furthermore, the high proportion of "medium" responses on **Benchmark 9** (the Board can challenge, debate and hold management accountable) suggests there is some low-hanging fruit in this area, and so was also looked into.

As part of the analysis, it was worth considering the responses to the last question that was posed in the questionnaire, which was on what one thing should change. Figure 3 provides an overview:

This shows that the top four responses, which are ahead by a margin, were to "reduce the size of the Board", encourage the Board to "focus more on strategy", "separate the role of Chair of the Board and CEO", and moving the Board to being "non-resident". These points were weaved into the in-depth analysis that was undertaken on each of the four Benchmarks noted above.

Figure 3: Total Number of Responses from the "What is the one thing you would change" Survey Question.



4.2. Outcomes from the Analysis

Seven conclusions were drawn.

4.2.1. **Conclusion 1:** IFIs should implement Board evaluations

The analysis of benchmark 7 (Board evaluations) showed that there was no Board evaluation process in place, although that there was a desire from many, including from the Board Directors themselves, that such evaluations should take place.

Some respondents considered that such evaluations would be "a good idea" or even a "must" given that they "could contribute to making the Board more effective", others questioned how an evaluation could be conducted in a "political institution" especially as it was "up to the shareholders to form an opinion on their representatives".

In the private sector, Board evaluations are recognised as a key set-piece opportunity to positively influence the functioning of a Board.[23] They should be conducted annually with an external evaluation done at least every three years.[24] If applied formally and rigorously, Board evaluations can "provide a powerful and valuable feedback mechanism for improving effectiveness, maximising strengths and highlighting areas for further development".[25]

To address this, IFI's should consider undertaking regular such Board evaluations. To align with the private sector they should be done annually with every third taken forward by an external company. However, given that IFIs are unlikely to have an established evaluation practice, some form of transition is likely to be required. It would also be important to be specific about what comparators to use when undertaking the Board evaluation – the benchmarks provided by this research are one consolidated option. Either way, evaluators should recognise that "best practice" does not necessarily translate directly into "established practice", and so a "comply or explain" approach akin to that readily available in the private sector would be natural.

4.2.2. **Conclusion 2:** Address weaknesses in the appointment process for Directors

Benchmark 6 concerns the delicate matter of how Board Directors are appointed, as well as the appointment of the Chair of the Board and senior management.

The nomination and appointment of Directors is considered to be a critical element for the long-term success of any company as it determines board composition and hence board effectiveness.[26] It is therefore no surprise that best practice would see formal, rigorous, and transparent processes for Board appointments.

In the private sector, Directors are appointed annually by all shareholders,[27] meaning that they are therefore expected to take account of shareholder interests as a whole.[28] Recommendations for appointments are usually made by a Nomination Committee, whose members are independent Non-Executive Directors (NEDs) and have the duty of reviewing the Board structure, size and composition, including its diversity of gender, social background and knowledge, skills and experience (KSE).[29]

By contrast, IFI Board Directors are elected by (and then represent) either a single shareholder or a small group of shareholders. This gives rise to a dual and conflictive representation of Board members of IFIs in that Directors need to serve the interests of both their electing member(s) whilst also discharging their duties to the institution as a whole.

Some respondents considered this to be a "major source of governance distortion", especially given that it is Governors who appoint Directors, making IFI Boards inherently "political in nature". Other respondents noted that "some shareholders have [their own] open, transparent and merit-based processes" for the selection of their candidate.

Similar negative views were expressed about the appointment processes for senior management where the Board is often "only involved in the ratification of senior management positions, not in their selection", and concerns were expressed that selection was more "nationality-based than merit-based".

How Directors are appointed is, however, usually set out in the underlying treaty that establishes the respective IFI. Whilst not impossible, changing these treaties is a heavy and lengthy process that normally requires governmental or parliamentary approval in shareholder capitals.

The research therefore looked into other ways in which IFIs could address this that remainied within the confines of the treaties. Two actions stand out: first is to **define the knowledge, skills and experience (KSE) that Directors need** to perform their duties. Second is to **implement continued professional development for Directors**, which should include (but not be limited to) targeted training that addresses any matters highlighted by the Board evaluation process (as outlined in Conclusion 1 above).

Other considerations should include **skills audits** (assuming the KSE requirements are specified), **addressing diversity and inclusion**, establishing a **Nomination Committee** (even if this is "light touch"), and delivery of a **strong induction process**.

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[23] Cross, *Boardroom Dynamics: ICSA Qualifying Programme* (2019).

[24] Financial Reporting Council, supra note 20.

[25] Financial Reporting Council, *Guidance on Board Effectiveness* (2018).

[26] Hodge, *The fairest of them all* (2016), at 1.

[27] Thomas, *Corporate Secretarial Practice: ICSA Study Text* (2017).

[28] Kibirige and Hamer, supra note 17.

[29] Kibirige and Hamer, supra note 17.

4.2.3. **Conclusion 3:** Add external experts to Board Committees, especially Audit

In the private sector, Audit Committees are expected to be made up entirely of independent Non-Executive Directors[30] where "independence" is defined as having no family connections, no business or former employment connections, and no payments are received, except for fees.[31]

The research showed that respondents had different levels of understanding of "independence". Some agreed with the private sector definition (whilst noting that IFI Directors could not be truly independent given they are nominated by shareholders, as noted in Conclusion 2). Others, however, saw this simply as "independent from management".

Whilst it is difficult to see how independent Board members could be introduced at IFIs, there was a convergence of opinion amongst respondents that more use could be made of independent external advice.

IFIs should, therefore, consider looking into introducing some form of independent external expertise in Board Committees – and on Audit Committees in particular – even if this means that such experts are not direct independent Committee *members*.

4.2.4. **Conclusion 4:** Make use of the upsides of large Boards whilst mitigating the downsides

The research clearly showed that the size of IFI Boards was considered to be too large by both Board and management respondents. With 23 Directors, this could be seen as particularly acute at the EBRD. However, other IFI Boards are also large: the World Bank has 25, the African Development Bank (AfDB) has 20, the Inter-American Development Bank (IDB) has 14 and the Asian Development Bank (ADB) has 12.[32] Whilst there is no recommended size for the private sector, 56% of FTSE150 company Boards have between 9 and 11 Directors[33] – numbers that are below the size of all the above IFIs.

The risks of having a large Board of Directors is that they will struggle to hold productive meetings, have constructive discussions, or make prompt, rational decisions.[34] Research respondents also commented that large Boards lead to increased burdens on management staff. However, the size of these Boards reflects the complex shareholding structures IFIs have. It also gives shareholders good representation, which in turn can achieve the all-important buy-in from member capitals that IFIs need.

As the size of the Board is usually set down in IFI treaties, changing this would be as equally difficult as changing the Director appointment process (as noted above). Instead, **the advantages of the Board size should be embraced** (strong representation), **whilst actions taken to mitigate against the downsides** (long, unproductive meetings), such as working hard on Board dynamics and efficacy.

4.2.5. **Conclusion 5:** Define how the roles of Chair and CEO should be exercised

In the private sector, the separation of the role of Chair of the Board of Directors and CEO is generally regarded as a good practice.[35] Such separation prevents an individual from gaining an overly-dominant influence on the Board, which in turn impacts on the Board's ability to function as an effective body.[36] This generally means that each role is exercised by different individuals.

IFI's, however, have a President who is both Chair and CEO – indeed most IFI Articles of Association require their President to do so. At the EBRD, for example, Article 30 sets out that it is the President who "chair[s] the meetings of the Board of Directors" and is "chief of the staff of the Bank".[37]

Whilst some research respondents felt that this dual role was "not good practice" and enabled the President to "accumulate too much power", others felt it was less relevant for IFI governance "given the composition of the Board itself" and the fact that the "Board is highly politicised".

To separate the roles would again require a treaty change. So instead, IFIs could address this in a similar way to the private sector when an individual occupies both roles, which is to **ensure that there is a clear division of responsibilities in how the roles are exercised and that this be set out in writing**.[38] Furthermore, in private sector companies, one Director is usually appointed as a "Senior Independent Director" (SID) in order to act as a counterweight and a sounding board for the Chair as well as an intermediary for Directors and shareholders.[39] If IFIs were to make such an appointment, then the SID role should be similarly recorded in writing.[40]

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[30] Financial Reporting Council, supra note 20.

[31] Coyle and Hill, *Corporate Governance* (2017).

[32] Nestor, supra note 22.

[33] SpencerStuart, *Board Composition: 2020 UK SpencerStuart Board Index* (2021).

[34] Kibirige and Hamer, supra note 17.

[35] OECD, supra note 16.

[36] Kibirige and Hamer, supra note 17.

[37] Agreement Establishing the European Bank for Reconstruction and Development (signed 29 May 1990, entered into force 28 March 1991) 1647 UNTS 473.

[38] Financial Reporting Council, supra note 20.

[39] Kibirige and Hamer, supra note 17.

[40] Financial Reporting Council, supra note 20.

4.2.6. **Conclusion 6:** Define the roles, responsibilities and accountabilities of Board and management

Benchmark 9 (Board can challenge, debate and hold management accountable) concerns itself with empowerment and accountability and refers to the requirement for people who have been assigned a responsibility to account for the exercise of that authority.

Private sector best practice proposes that an organisation sets out clearly who is accountable, for what, and over what period of time.[41]

In this regard, Board responders considered that management was relatively well-empowered, but also that the Board did not do enough to hold management to account against that empowerment. Management had the exact opposite view on both aspects.

This split in opinion is unsurprising given that management (as the "agent" in the principal-agent theory)[42] will always wish for more autonomy than their principals may be comfortable giving them.[43]

Whilst some of the responders commented that "there are good [accountability] systems in place" and that "the Board certainly holds management to account", other comments expressed a concern that the "accountability of management appears limited", that "shareholders have very little ability to hold the Board to account in any aggregate sense", and that the "accountability [at] IFIs has much lower standards than in private sector companies".

A "dual agency" issue for accountability emerged: how Governors hold Board Directors to account, and then how Board Directors hold management to account.

IFIs could therefore seek to clearly define who is accountable for what and for how long by defining the roles and responsibilities of Board and management (beyond what the AoAs set out at a high-level).

4.2.7. **Conclusion 7:** The Board should increase its focus on strategic discussions

The "dual-agency" issue outlined in Conclusion 6 above can lead to situations where the Board micromanages management and management macro-manages the Board (for example by taking the lead in terms of strategy).

In defining the roles, responsibilities and accountabilities, therefore, **how IFI Boards can increase their focus on strategic discussions should also be addressed**.

4.3. Alignment with the G20 EPG report recommendations

It is noteworthy that the above conclusions and suggestions align remarkably closely with those of the EPG Report, albeit that they come from slightly different perspectives. Table 1 summarises the conclusions reached in the research and compares them against the G20 EPG recommendations:

Table 1: Mapping the Research's conclusions and suggestions to the G20 Recommendations

Research Conclusions & Suggestions	**EPG Report** Proposals & Recommendations
Board evaluations should be conducted annually … and every three years … undertaken by an external company.	Boards should adopt modern corporate governance practices [including]: • … **regular feedback and self-assessment** …
[The] "dual-role" tension … reflects how Directors are appointed: **KSE requirements … should be defined,** and regular development and training introduced.	Ensure diversity and better match the skills available … **Defining skills sets** relevant for constituencies' own selection of Executive Directors.
…**external inputs** could be provided for Board Committees that require specialised knowledge (notably the Audit Committee).	Board Committees requiring specialised knowledge (e.g., Audit and Risk) should seek **external input**.
The drawbacks stemming from **large Boards** [should] be openly recognised and mitigated…	*[Not covered]*
…the President's **roles of Chair of the Board and CEO** be set out in writing [and] … a role akin to a "Senior Independent Director" be explored…	*[Not covered]*
… "dual agency" for accountability: • Need to set out clearly **who is accountable** for what and for how long.	… delegate greater responsibility to IFI Management, and hold them accountable for outcomes: Ensure clarity of **roles and responsibilities**…
Board should increase its focus on **strategic discussions**	The Executive Board of each IFI should: • …**focus on strategic priorities** for the institution

[41] Kibirige and Kiryabwire, *Corporate Governance Unlocked: An Introduction for the Curious Mind* (2019).

[42] Jensen and Meckling , supra note 23.

[43] Tricker, *Corporate Governance: Principles, Policies, and Practices* (2019).

5. Conclusion

This article summarises research into why the G20 Eminent Persons Group drew such conclusions as IFI governance needed "transformation" and being "brought up to date". The research did so by creating a set of private sector focused corporate governance benchmarks that are relevant for IFIs, and then assessed how well IFIs implement this practice (using the EBRD as a case study). Seven practical and implementable conclusions are drawn, which align remarkably closely with the recommendations made by the G20 EPG.

The standards that private sector companies have to meet, especially those for listed companies in developed economies, have been honed and tested through different corporate governance crises over many years. They are best-in-class. IFIs, however, are fundamentally different in character and nature to anything found in the private sector – they have an altogether more altruistic purpose, specific mandates, and a shareholding structure made up of sovereign states. But it is because of this that IFIs need to lead by example and hold themselves to these same high standards. With a complex and ever-evolving global economy, IFIs must play – and have the moral authority to be able to play – their critical stabilising role. To do so, they must work better as a system. Good governance is at the heart of making that system work, as it will ensure that IFIs operate with integrity, accountability, and transparency – all fundamental principles for achieving sustainable and inclusive growth and development.

"The ambition is in the doing", says the EPG Report.[44] This research, and more importantly the practical and implementable follow-up that stems from it provide opportunities for doing, which can meet the *ambition* for change.

6. Annex: Benchmarks and Sub-Points

List of Sources:

(i) G20/OECD principles, 2015 (OECD).
(ii) Corporate Governance Development Framework Progression Matrix, 2015 (CGDF).
(iii) The 2018 UK Corporate Governance Code (UKCGC).
(iv) The 2019 Principles of Good Governance from the Governance Forum (TGF).
(v) Stilpon Nestor's 2018 assessment of Board Effectiveness (Nestor).
(vi) The 2018 G20 EPG Report (EPG).

ID	Benchmarks & Sub-Points	Sources
1.	**The institution has an effective corporate governance framework in place.**	**TGF**
1.1.	The institution's corporate governance requirements, provisions and processes are clearly documented.	OECD CGDF
1.2.	An annual report is produced that sets out how the organisation has complied with relevant corporate governance laws, codes and practices, and explains where deviations have occurred (e.g. on a "comply or explain" basis).	CGDF UKCGC
1.3.	The institution has a written code of ethics/behaviours that applies to the Board.	CGDF
1.4.	The institution has a person charged with the responsibility for overseeing, ensuring compliance with, and improving the discharge of the institutional corporate governance responsibilities.	CGDF
2.	**The Board has a clear purpose, the right resources and structures.**	**TGF**
2.1.	The Board meets periodically (at least every 3 months), but not too often nor too infrequently.	CGDF
2.2.	The Board considers and approves minutes of all its meetings.	CGDF UKCGC
2.3.	The Board agenda is prepared and circulated in advance of each meeting.	CGDF
2.4.	For Board Committees that require specialised knowledge (notably Audit Committees), either membership is independent or there are external inputs.	EPG CGDF UKCGC Nestor
2.5.	The Board is the correct size for the institution (i.e. neither too large nor too small).	Nestor
2.6.	There is adequate separation between the role of Chair of the Board and CEO.	OECD UKCGC Nestor
2.7.	The Board receives adequate support from the Company Secretary team / Secretary General's team.	OECD Nestor
2.8.	A Remuneration Committee has been established, with a formal and transparent terms of reference, to consider the remuneration of Board Directors.	OECD CGDF UKCGC
2.9.	The Remuneration Committee ensures Directors' remuneration is aligned with the longer term interests of the institution and its shareholders.	OECD CGDF UKCGC

[44] Shanmugaratnam and others, supra note 3, at 27.

ID	Benchmarks & Sub-Points	Sources
3.	**The Board has access to the right reports and information.**	**TGF**
3.1.	The Board has access to accurate, relevant, sufficient and timely information in order to discharge their responsibilities.	OECD CGDF
3.2.	Board Directors dedicate sufficient time and demonstrate sufficient personal commitment to meet their responsibilities.	CGDF UKCGC
4.	**The Board's roles and responsibilities – and division of responsibilities – are clearly defined.**	**TGF**
4.1.	The division of roles and responsibilities between the Board and management are clearly defined.	EPG CGDF UKCGC
4.2.	The Board undertakes its "duty of care", which requires Board members to act on a fully informed basis, in good faith, with due diligence, and with care.	OECD
4.3.	The Board upholds its "duty of loyalty" in relation to supporting all shareholders and promoting the institution's long-term sustainable success.	OECD UKCGC
4.4.	The Board is a place for robust debate, where challenge, support, diversity of thought and teamwork are core features.	UKCGC
5.	**The Board conducts itself appropriately.**	**TGF**
5.1.	There is a code of conduct that sets out the expected professional standards in a clear and operational manner.	OECD
5.2.	Board Directors monitor and manage any potential conflicts of interest of Board members.	OECD
5.3.	The Board sets the "tone from the top".	OECD UKCGC
6.	**The Board has clear processes for appointment in place to support diversity and meet the needs of the institution.**	**TGF**
6.1.	The Board is elected (or re-elected) on an annual basis.	CGDF UKCGC
6.2.	The tenure of Board Directors is limited to 9 years.	UKCGC Nestor
6.3.	Board appointments are subject to a formal and transparent nomination and election process (e.g. via a Nomination Committee).	OECD CGDF UKCGC Nestor
6.4.	The Board appointments procedure promotes diversity in terms of gender, background (social and ethnic), and strengths (cognitive and personal).	UKCGC Nestor
6.5.	The Board has defined the knowledge, skills and experience (KSE) required for Board Directors to perform their duties.	CGDF UKCGC
6.6.	The Board appointments procedure takes account of these defined KSE requirements.	EPG Nestor
6.7.	The Board appoints senior management using a formal and transparent nomination and selection process.	OECD Nestor
6.8.	Board Directors and senior management receive regular training, including on corporate governance matters.	CGDF
6.9.	There is an open, transparent and merit based process for the selection of the Chair of the Board.	EPG
7.	**The Board has effective processes for self-evaluation.**	**TGF**
7.1.	There is an annual Board evaluation process that provides feedback on the performance and effectiveness of the Board, its Committees, the Chair and individual Directors.	EPG OECD CGDF UKCGC Nestor

ID	Benchmarks & Sub-Points	Sources
8.	**The Board takes appropriate account of risk.**	**TGF**
8.1.	The Board has established appropriate procedures to oversee the approach to risk management and the internal control framework.	EPG OECD UKCGC
8.2.	The Board determines and regularly reviews the institution's risk appetite.	EPG
8.3.	The Board makes informed decisions that take risk into account in ways that safeguard and promote the future success of the organisation.	ETGF
9.	**The Board conducts itself appropriately.**	**TGF**
9.1.	The Board can challenge, debate and hold management accountable.	EPG
9.2.	The Board empowers management.	EPG UKCGC
9.3.	The Board holds management to account against this empowerment.	OECD
9.4.	The Board sets performance objectives and monitors management's implementation and performance against these objectives.	OECD
10.	**The Board is the steward of the vision, values and culture of the institution.**	**TGF**
10.1.	The Board establishes and reviews the organisation's purpose, values and strategy.	OECD UKCGC
10.2.	The Board satisfies itself that the organisation's purpose, values and strategy are aligned with the institution's culture.	UKCGC
10.3.	The Board reviews and guides corporate strategy.	EPG OECD
10.4.	The Board advances the system-wide goals of all IFIs.	EPG
10.5.	The Board focuses its discussions on the governance of strategic issues.	EPG
10.6.	The Board ensures the necessary resources are in place for the organisation to meet its strategic objectives.	UKCGC
11.	**The Board demonstrates active and effective engagement with stakeholders.**	**TGF**
11.1.	The Board encourages engagement from shareholders and stakeholders in order to meet the institution's responsibilities to them.	UKCGC
11.2.	The organisation's workforce can raise matters of concern with the Board.	UKCGC

Creditor Protection through Choice of Governing Law

*Michal Horelik**

Abstract: This article examines a key reason for selecting English law in international commercial transactions: the ringfencing of the parties' contractual risk allocation from interference by domestic legal systems. It explores the benefits of choosing non-local law in financing transactions, illustrating the implications of this in the context of sovereign bonds. The author examines the restructuring of Greek sovereign debt in 2012 as a case study, highlighting the imposition of "collective action clauses" (CACs) by the Greek parliament and the consequentially different outcomes in the context of Greek-law and English-law governed bonds. This article emphasises the importance of the choice of governing law in debt transactions, especially for foreign investors, noting that English-law governed instruments can provide robust protection and predictability, making them a rational choice for finance contracts.

1. Introduction

It is well known that English law is the preferred governing law for many business transactions worldwide, even those that do not have any geographic connection with the United Kingdom. There are plenty of reasons for this. These include the flexibility for the parties to regulate their relationship given English law's commitment to the freedom of contract, stability and predictability as per the doctrine of precedent applied by English courts, the absence of uncertainty that may be caused by the application of general duties of good faith to commercial dealings, an experienced expert judiciary and an efficient system of courts. Another reason why English law is chosen is the certainty that English law contracts can give in times of turmoil. The doctrine of contractual strict liability makes English law-governed contracts a robust risk-management tool in international commercial transactions. Parties are not easily released from their obligations because of changes in circumstances and English courts will never amend a contract to alter the parties' contractual bargain.[1] Moreover, English courts or arbitral tribunals applying English law are recognized for their fairness, expertise, and efficiency in resolving complex commercial disputes, offering a dependable dispute resolution method. All this provides creditors and debtors with considerable flexibility in defining their contractual relationships and therefore an effective and predicable way of allocating risks, without the heavy statutory or judicial intervention found in some legal systems.

As the choice of law to govern a finance contract may significantly impact on the rights and remedies of the creditor, it consequently impacts on the value of the debt that the contract evidences. The chosen contract law can significantly affect the pricing or liquidity of the underlying financial instrument on secondary markets. This article will demonstrate this by examining the impact of the choice of law on sovereign bonds by analysing and contrasting the trials and tribulations of English-law and Greek-law governed bonds in the Greek sovereign debt restructuring that took place in 2012.

2. Sovereign debt and possibilities for its restructuring

To generate funds, governments frequently resort to issuing various debt instruments, with loans and bonds being predominant choices. Sovereign bonds are often issued under international laws, with the legal frameworks of England and Wales, as well as the state of New York in the United States, being preferred for bond issuances and other financial transactions involving debt.

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The views expressed in this article are the author's own and do not reflect the policies, practice, or views of CMS.

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[1] See generally R Zakrzewski "English law contracts, strict liability and the allocation of risk" (2020) 5 Journal of International Banking and Financial Law 293.

In developing countries or countries whose local laws hinder sovereign debt financing the largest sovereign bond issuances are made under English and New York laws. However, it is also often the case that local law is chosen, particularly if the domestic law is considered creditor-friendly and has a proven track record of being used in financial transactions. So in many cases, especially in developed countries, sovereign bonds are issued under local law, with only some issuances under foreign law to diversify the portfolio and attract a wider range of investors.[2] Such was the case with Greece, which issued most of its domestic bonds under Greek law, but part of the issuances were carried out under foreign laws, a significant proportion of which were issued under English law, although there were series of bonds issued also under Swiss, Italian and Japanese laws.

Occasionally sovereign issuers run into financial trouble. The phrase "state insolvency" is mentioned in respect of countries that cannot fulfil their financial commitments, both domestically and abroad. A notable example is Argentina, which has experienced several financial crises over recent decades. Similarly, Greece lost its ability to sustainably manage its debts as a result of the 2007-2008 global financial crisis. It faced one of the largest sovereign debt crises in history.[3] This had significant legal implications, particularly regarding the bonds issued by the Greek government held by private investors.

In mid-2010 the European Commission (EC), supported by the International Monetary Fund (IMF) and the European Central Bank (ECB), finally reacted to the looming threat of a full-blown sovereign debt crisis in Europe by passing its first rescue package for Greece. Despite the mammoth €110 billion cash injection, financing conditions for Eurozone periphery states further deteriorated in the course of the following months and additional external financial rescue measures soon became inevitable. Eventually, in 2012 Greece completed the largest sovereign debt restructuring in history. It was also the first sovereign debt restructuring within the Eurozone. This restructuring was not only a demonstration of financial engineering by a wide range of economists, bankers and consultants, but also of great craftsmanship by financial lawyers who worked on its legal aspects.

When their financial situation was on the verge of collapse, the Greek government started to look for solutions. They decided to offer to swap their private bonds with a face value of roughly €205 billion for new securities, by taking advantage of the fact that the bulk of their sovereign debt (estimated to be 86% of privately held securities) was issued under Greek law. Only 3% of all outstanding Greek government bonds were governed by English law.[4] On 24 February 2012, Greece outlined the debt swap offer made to private holders of its government bonds in an "Invitation Memorandum".[5] This was the beginning of the negotiation process with private investors. The memorandum, and associated restructuring process, was targeted at private investors; hence it was named "Private Sector Involvement" (PSI). For sovereign and EU institutional lenders there was a distinct restructuring process. Greece's largest single bondholder – the European Central Bank - swapped its bonds in an independent restructuring deal a few weeks before private investors were invited to participate in the PSI. This of course meant that private and institutional holders of Greek bonds were treated differently.

The negotiations with the Greek government were led by a steering group of twelve banks, insurers, and asset managers on behalf of a larger group of 32 private creditors, who together held approximately a third of the country's privately owned debt. Retail investors were not represented in negotiations. Initially, in exchange for their debt instruments all private creditors were offered three categories of new bonds with reduced face value as well as different maturities and rates of interest. Eventually, these bonds held by these private investors which participated in the debt restructuring program were exchanged for short-term notes issued by the European Financial Stability Facility and new long-term Greek government bonds. This resulted in a nominal reduction of the bonds of 53.5% and a net present value reduction of around 75%. According to calculations made by Jeromin Zettelmeyer, an economist, the losses of those creditors who agreed to the restructuring agreement amounted to around 59%.[6] It is also worth pointing out that the Invitation Memorandum could be considered an adhesion contract as it stated that Greece would not repay its debts to creditors who refused to participate in the restructuring process. This was meant to discourage the minority bondholders from pursuing separate solutions to recover their debts. A successful restructuring would require the exchange of about 75% of the bonds covered by the PSI.

In order to carry out the restructuring process, the Greek government implemented the following solution with respect to the Greek-law governed bonds. The Greek legislature passed a new law, known as the Greek Bondholder Act dated 23 February 2012, which led to the retroactive insertion of Collective Action Clauses (CAC) into the terms and conditions of Greek government bonds governed by Greek law. The PSI program applied to all bondholders, including natural and legal persons. It could be implemented without requiring each bondholder's consent due to the inclusion of the CACs in the new bonds. The use of CACs meant that the bonds

[2] https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2162.en.pdf

[3] Timeline: Greece's Debt Crisis, https://www.cfr.org/timeline/greeces-debt-crisis-timeline

[4] Marcus Miller and Dania Thomas, 'Eurozone sovereign debt restructuring: keeping the vultures at bay' (2013) 29(4) Oxford Review of Economic Policy 745, at 747.

[5] https://ftalphaville-cdn.ft.com/wp-content/uploads/2012/02/Reg_S_Invitation_Memorandum.pdf

[6] J. Zettelmayer, C. Trebesch and M. Gulati, 'The Greek debt restructuring: an autopsy' (2013) 28(75) Economic Policy 513.

could be restructured with only the consent of a qualified majority of bondholders. As most of the bonds did not initially contain such clauses, they would otherwise have required the unanimous consent of all bondholders for a restructuring.

3. Outcomes of the restructuring

The restructuring process of Greek-law governed bonds took around ten months and was a success as 86% of private investors, holding bonds valued at roughly €177 billion, accepted the proposed changes. For comparison, a similar process in Argentina took more than nine years. As expected, the "haircuts" or losses incurred by private investors holdings led to an influx of cases that occupied national, European, and international courts and organisations. Among these cases, the ruling of the European Court of Human Rights (ECtHR) in the *Mamatas and Others v Greece case*[7] holds particular legal and political importance. The applicants claimed that their right to property under Article 1 of the First Additional Protocol to the European Convention on Human Rights (ECHR) had been violated, either alone or in conjunction with Article 14 of the ECHR (which prohibits discrimination). The ECtHR acknowledged that states have a wide margin of discretion when implementing measures to address economic crises and that their policy choices should be respected, except when there is a clear error in judgment. The court recognised that Greece had a legitimate interest in implementing measures to ensure economic stability and to restructure its public debt. In terms of the proportionality of the interference with the applicants' rights, the losses they incurred were not significant enough to constitute a "termination" or "insignificant return" on their investment. The appropriate comparison was with the market value of the bonds at the time the PSI Agreement was implemented. Moreover, without the implementation of the measures, the state would have been unable to fulfil its obligations to the applicants. The ECtHR ruled that the compulsory inclusion of the applicants in the PSI programme did not affect the proportionality of the interference. The applicants had the option to sell their bonds on the market and the use of CACs was common in international transactions. Additionally, it would have been impossible to reduce the amount of Greek debt if Greece was required to obtain the consent of all bondholders or limit the PSI programme to only those who agreed to the "haircut". Furthermore, creditors had insisted that such a "haircut" be imposed on bonds held by private investors. If the CACs were not included, those who voluntarily participated in the 'haircut' would have suffered greater losses, and others would have been discouraged from participating. Therefore, the inclusion of CACs was a necessary and appropriate measure to reduce Greek debt and prevent the risk of insolvency. The applicants should have been aware of the associated risks. Moreover, there was no unlawful discrimination because the inclusion of bonds held by the applicants was justified by the difficulty of identifying the affected parties, the challenges of establishing precise criteria to differentiate between bondholders, the risk of undermining the effectiveness of the programme, and the need to respond quickly to the crisis.[8]

4. Why local law poses greater risks for international investors in sovereign debt

In contrast to the Greek bonds governed by local law, the bonds governed by English law had already contained CAC clauses. As a side note it is worth mentioning that there is a dichotomy in governing law "styles" of international bonds. Most of them can be categorised as being either "American-style" or "British-style", with the former being governed by New York law, German law and Japanese law and the latter referring to bonds issued subject to English and Swiss governing law. The main difference between these two kinds of bonds is the absence of Collective Action Clauses in American-style bonds before 2003, whereas most British-style bonds have incorporated features such as majority voting to change financial and non-financial terms, collective representation and sharing clauses for quite some time.[9] Given this, the Greek domestic law bonds could be categorised as American-style bonds.

But what was the main difference between CACs in Greek law governed bonds and English law governed bonds, besides the fact that CACs in the first ones were implemented retroactively by the Greek parliament? CACs in English law governed Greek sovereign bonds had been built on market principles, established many years before the crisis erupted and Greece's insolvency problem arose. Moreover, although these clauses, like those introduced retroactively into Greek law bonds, allowed for specific actions to be taken by bondholders, they were constructed differently. These differences in construction arose from another dichotomy, this time in the types of thresholds for activating these CACs which were the main difference between CACs in these bonds – "single-limb" and "dual-limb". In a "single-limb" aggregation clause, the threshold for activating CACs is based on an aggregate overall acceptance rate across all bonds in the relevant series. This means that if a certain percentage of the total outstanding debt agrees to the restructuring, the CACs can be activated, and the restructuring can proceed. In contrast, in a "dual-limb"

[7] App no 63066/14 (ECHR, 21 July 2016).

[8] M. Markakis, 'European Court of Human Rights Rules on Greek Debt Restructuring', Oxford Human Rights Hub, 30 July 2016, https://ohrh.law.ox.ac.uk/european-court-of-human-rights-rules-on-greek-debt-restructuring/.

[9] Andrew Clare and Nicolas Schmidlin, The Impact of Foreign Governing Law on EuropeanGovernment Bond Yield, The Sir John Cass Business School, City University.

aggregation clause, the threshold for activating CACs is based on the acceptance rate for each individual bond in the series. This means that each bond has to meet the specified acceptance threshold individually for the CACs to be activated. In the case of the Greek debt restructuring, the CACs in Greek law governed bonds were activated based on a single-limb aggregation clause. This meant that the acceptance rate of all bonds in the relevant series was aggregated, and if a certain percentage of the total debt agreed to the restructuring, the CACs could be activated. However, the CACs in English law governed bonds were activated based on a dual-limb aggregation clause. This meant that each individual bond had to meet the specified acceptance threshold individually for the CACs to be activated. As a result, creditors who held individual English law governed bonds and chose not to participate in the exchange offer could more easily block a restructuring of their individual bond than creditors who held Greek law governed bonds. This is because the single-limb aggregation clause used in the Greek law governed bonds allowed for a more flexible approach to aggregating the acceptance rate across all bonds, making it easier to reach the required threshold for activating the CACs.[10]

The Greek parliament could have theoretically passed a law that imposed the same rules regarding CACs on English law governed Greek sovereign bonds as those introduced into Greek law governed bonds, however, in practice, this would have been difficult, if not impossible, to enforce. This is because these English law governed bonds were subject to the jurisdiction of English courts, not Greek courts. Any attempt by the Greek parliament to pass a law that impacted the terms of English law governed bonds would have likely been seen as a violation of the bonds' originally agreed contractual terms and would have resulted in litigation before English courts.

English law is known for encouraging strict adherence to the terms of contracts and English courts are generally reluctant to sanction interference with contractual relationships. As a result, any attempt to change the terms of the English law governed bonds through local legislation would have been unlikely to succeed. It is a longstanding rule of English law that a contract may only be validly discharged or amended pursuant to its governing law.[11] Consequently a debt governed by English law cannot generally be discharged or amended by insolvency or restructuring proceedings under a foreign law.[12] Therefore, an attempt to amend the terms of the English law governed bonds by Greek legislation would have appeared to be doomed to failure before the English courts. Apprehensive of a potential loss of credibility among the global investor community and fearing a repetition of the Argentina scenario which led to decade-long international litigation, the Greek government decided to pay the holdouts who were holders of English law governed bonds in full.

An additional factor that made it necessary to pay the English law governed Greek sovereign bonds on time and with full return was the presence of cross-default clauses in Greece's other bonds. If some bonds were not effectively amended by Greek law and not paid in accordance with their original English law governed terms, it could have triggered cross-default clauses contained in other English law governed government bonds, which were not subject to the debt restructuring, and could have led to them being demanded for immediate payment.[13] Due to this whole situation owners of domestic law governed government bonds took a huge loss resulting in a price cut of the aforementioned nearly 60%, while holders of the English law governed government bonds received their pay-out in full. It is worth noting that among many foreign laws under which some Greek sovereign bonds were issued, the first foreign law bond which was repaid on time in May 2012, two months after the debt restructuring of the privately-held Greek law bonds, was a €435 million bond issued under English law. As was seen, the investors in Greek bonds who chose to invest in the English-governed bonds, reaped the rewards of such choice. For example, several hedge funds who had bought large amounts of English law governed Greek debt at steep discounts in the run up to the crisis and endured until their final settlement managed to collect enormous profits.[14] Ultimately, the different treatment of foreign and domestic law bonds creditors caused bitterness on the international debt lending scene. According to Reuters, private creditors who accepted the haircut were furious and called the decision to pay the holdouts "scandalous".[15]

5. Summary to consider from the perspective of international investors in sovereign debt

Sovereign financial turmoil and the abovementioned restructuring of Greek national debt have underscored the significance of governing law clauses in bond agreements and other financial contracts for both creditors and regulatory bodies. Foreign instruments regulated by English law, as earlier mentioned, offer stronger safeguards for cross-border creditors. This article demonstrates that

[10] BIS Quarterly Review, 10 December 2012, p. 67, https://www.bis.org/publ/qtrpdf/r_qt1212y.htm

[11] https://www.lw.com/en/insights/in-defence-of-gibbs

[12] *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399; *Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802.

[13] R. Matezou, 'In about-face, Greece pays bond swap holdouts', Reuters, 15 May 2012, http://www.reuters.com/article/us-greece-bond-idUSBRE84E0MY20120515.

[14] Sebastian Grund, Enforcing Sovereign Debt in Court – A Comparative Analysis of Litigation and Arbitration Following the Greek Debt Restructuring of 2012, Vienna Law Review.

[15] *see* Matezou, above.

bonds governed by English law are typically more robust when it comes to insolvency and restructuring. This is because foreign sovereign issuers find it difficult to alter the terms of the bond without obtaining consent from the bondholders, unlike local law bonds that can be amended through changes to local legislation. Furthermore, the longstanding stability of legal institutions, principles, and a well-established judiciary favorable to creditors have provided reasons to favour English law. Hence, opting for English law for cross-border financial contracts like loans, bonds, and related financial agreements, including financial derivatives, remains a logical choice, offering greater legal certainty and reassurance to creditor in the face of future financial, political, legislative and judicial uncertainties.

Corporate vs Individual Credit Default: A Systemic Risk Argument for Individual Bailouts

Philemon Iko-Ojo Omede & Ntayi Anfani Bandawa**

Abstract: This paper explores the role of public support for distressed individual borrowers within the financial system, arguing for individual bailouts to mitigate systemic risk. While corporate bailouts are commonly justified to prevent systemic failure, individual borrowers often lack similar support. The paper examines historical and contemporary practices of central banks as Lenders of Last Resort, the moral hazard implications, and the evolving need for a framework that includes individual debtors. By analysing the COVID-19 pandemic's economic impact and regulatory responses, citing structural risks in the global economy and the inadequacies of current personal insolvency regimes, the paper advocates for a more inclusive approach to financial stability that accommodates both corporate and individual distress.

1. Introduction

The role of public support for distressed corporate and individual borrowers within the financial system is longstanding, with central banks and finance ministers supporting distressed corporate institutions to prevent systemic failure.[1] The overwhelming evidence indicates government bias towards supporting corporate leviathans (Systemically Important Financial Institutions ("SIFIs") or Too Big To Fail ("TBTF")), while smaller firms are less likely to be bailed out when financially distressed. This is often justified as a pragmatic response to prevent systemic failure that happens to be discriminatory, rather than an intentional act of discrimination against smaller firms. Similarly, support for individual borrowers in financial distress has been less consistent and lacks a clear-cut framework. For the most part, credit default at the individual level is considered a matter for resolution under insolvency laws, rather than a concern for public support in terms of government financial assistance, pejoratively known as bailouts.[2]

Financial market regulators have at least five essential policy toolkits to stem systemic risks and ensure a stable financial system. These include market regulation, oversight and supervision, market support, and market resolution. This essay will focus on market support for corporate and individual borrowers in financial distress by examining the rationale for support, the forms of public support, and existing rules governing corporate support. The paper will examine extant forms of public support for individual borrowers and make a case for accommodating distressed individual borrowers based on the extant systemic stability arguments in the post-Covid-19 era.

The paper is structured as follows: Section 2 discusses the theories of bailouts and their historical development, including the roles of central banks and the evolution from classical to extended Lender of Last Resort (LLR) models. Section 3 assesses market support measures during the COVID-19 era, with case studies from the UK and the

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[1] SBBC News, RBS bailout 'unlikely to be recouped'. BBC (September 2018)<https://www.bbc.com/news/business-45500384#:~:text=Royal%20Bank%20of%20Scotland's%20chairman,taxpayers%20paid%20for%20their%20stake.>accessed 4 January 2021; D Kiley, 'As Obama Takes Victory Lap Over Auto Industry Rescue, Here Are The Lessons Of The Bailout'. Forbes (January 2016)<https://www.forbes.com/sites/davidkiley5/2016/01/20/obamas-takes-victory-lap-over-auto-industry-rescue/?sh=314d445a3e83> accessed 4 January 2021.

[2] Jackson, The Logic and Limits of Bankruptcy Law (2001).

US. Section 4 develops the systemic risk argument for individual bailouts, while Section 5 addresses the moral hazard and systemic stability counter-argument. Finally, Section 6 concludes with policy recommendations for integrating individual bailouts into central bank strategies.

2. Theories of Bailouts

2.1 Central Banks and Corporate Bailouts

Since the establishment of the Bank of Amsterdam in 1609 and the pioneering role of the Swedish Riksbank in 1668, central banks have evolved to maintain monetary and financial stability, including acting as lenders of last resort ("LLR").[3] Over time, central banking has grown in terms of its role and policy objectives.[4] Modern central banking is believed to have been developed mainly by the Bank of England.[5]

The primary function of the central bank is the maintenance of monetary and financial stability. Monetary policy stability entails issuing banknotes and coins and ensuring that they retain their value over time.[6] Financial stability objective, on the other hand, refers to the task of ensuring that payments are made safely and efficiently. These two objectives are often at loggerheads as the exercise of financial stability may require significant injections of liquidity which may undermine price stability.[7] This tension is consequential in understanding the reluctance to accept, or outright rejection of, any duty of public support for non-systemically important distressed borrowers, including individual borrowers in financial markets.

Central banks have historically performed the LLR role according to the *classical* LLR model but abandoned this model during the global recession of 2007/2008 for what is described here as the *extended* LLR model. Each model will be explained in further detail below.

2.1.1. The Classical LLR

Although Sir Francis Barings was the first to use the phrase 'the dernier resort' in his Observation on the Establishment of the Bank of England (1797),[8] the LLR theory was developed by the scholars, Henry Thornton (1760-1815) and Walter Bagehot (1826-77).[9] The theory proposes that the LLR, typically the central bank, should intervene in times of financial instabilities occasioning bank runs and panic by providing emergency liquidity to the market to protect against monetary contraction and slowing velocity of circulation of money.[10]

Henry Thornton (1760-1815)

Henry Thornton[11] set out the following distinctive attributes of the LLR:

(i) The central bank is the final spring of liquidity for the financial system by virtue of its monopoly to issue banknotes and coins.

(ii) It possesses sufficient ability to create liquidity in times of distress. Thus, it can prevent monetary contraction, which could affect the economy through the collapse of productivity and eventual unfavourable balance of payment.

(iii) The LLR's duties are owed to the public and are not for profit, as is the case with commercial banks.

(iv) The LLR must balance its monetary expansion plan with the need to avoid inflation by making only short to medium term emergency loans.

(v) The LLR's prime duty is to the market ('the general interests') and not to any specific bank.

(vi) The LLR must tackle the moral hazard problem by avoiding relief to institutions whose crisis was occasioned by 'rashness' and 'improvidence' provided their failure will not jeopardise the entire markets. The LLR should lend only sparingly, and when it does, the terms should be punitive.

(vii) The LLR's function is to neutralise the fallouts from shocks and panic, and not necessarily to pre-empt them.

(viii) The LLR's main charge is guarding the supply of money.[12] The needs to prevent bank runs and avoid lending crises are secondary.

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[3] Riksbanken, 'History' (25 February 2013) <http://www.riksbank.se/en/The-Riksbank/History/> accessed 4 January 2021.

[4] Central banks' early function mainly involved financing state warfare. The Riksbank, for instance, prides itself of standing its ground against King Karl XII, financing the wars of the Age of Liberty, involvement in the assassination of King Gustaf III, and competing with A. O. Wallenberg etc.

[5] Other popular central banks today are the Board of the Federal Reserve System, the Bank of Japan, the Deutsche Bundesbank, and The People's Bank of China.

[6] Riksbanken, 'The Tasks and Role of the Riksbank' (30 September 2011) <http://www.riksbank.se/en/The-Riksbank/The-Riksbanks-role-in-the-economy/> accessed 4 January 2020.

[7] Danielsson, *Global Financial Systems: Stability and Risk* (2013), at 77.

[8] Baring, *Observations on the Establishment of the Bank of England, and on the Paper Circulation of the Country* (1797), at 22.

[9] Humphrey, *Lender of Last Resort: What It Is, Whence It Came, And Why The Fed Isn't It* (2010), at 333-364.

[10] Ibid.

[11] Thornton, 'An Enquiry into the Nature and Effects of the Paper Credit of Great Britain - Online Library of Liberty' (Online Library of Liberty, 7 May 1811) <http://oll.libertyfund.org/titles/2041> accessed 4 January 2021.

[12] Thornton defines money or cash as gold coin and its equivalent, including Bank of England notes in circulation. See Humphrey, supra note 8, at 333-364.

Walter Bagehot (1826-77)

Walter Bagehot made his contribution to the LLR theory through his book Lombard Street.[13] While most of his views conform to those of Thornton, Bagehot developed the doctrine further by prescribing the following principles:

(i) **Open acceptance of duty:** The LLR should acknowledge its duty to lend freely not just when a crisis is imminent, but in all future crises. This pre-commitment will help to douse tension, uncertainty and unnecessary panic.

(ii) **Penalty rate:** The central bank's duty to lend should be subject to its ability to extract a high price for its loans. This ensures distributive equity in the form of a fair yield to the taxpayer; ensures the liquidity is maximised to good end; and guarantees prompt repayment of loans to avoid the high cost. It also discourages cash hoarding by recipients of the loan which Bagehot described as 'unreasonable timidity'.[14] Finally, it incentivises banks to dissipate possible market sources of liquidity and/or evolve new sources, making the central bank truly a lender of 'last resort'. Ability to borrow from the markets in itself is evidence of solvency.

(iii) **Eligible Borrowers and Acceptable Collateral:** It should not matter the type of borrower, rather the LLR should lend to whoever can provide 'good security'.[15]

(iv) **Insolvent/unsound institutions:** the LLR is not required to prevent insolvent institutions from going down but to keep their failures from spreading to the sound ones. Bagehot opined against TBTF, as long as failure does not trigger a contagion.[16]

(v) **Strengthening Self-Reliance:** The LLR is not meant to replace prudent bank practices. Healthy liquidity ratio and capital adequacy requirements must be maintained.

Despite the clarity and apparent logic of the classical LLR, it proved inadequate for the occasion of the global recession of 2007/2009, leading central banks across the globe to evolve more robust measures, culminating in the extended LLR framework. Departure from classical LLR was not only necessary but a reasonable acknowledgement that restricting such a powerful market governance tool to the maintenance of market liquidity where it had the potency to forestall the displacement of individual borrowers from the market, stimulate consumer demand and avert economic catastrophe was a sub-optimal and unjustifiable under-employment of monetary policy.

2.1.2 Extended LLR

The practice of the LLR role has overtime evolved from the classical to the extended LLR. Extended LLR departs from the classical LLR function because it avoids the core principles of the classical LLR role. As part of their individual and co-ordinated responses to the global recession, central banks employed broad measures to address the fallouts. A few examples of the support programmes implemented as extended LLR by the US Board of the Federal Reserve System, the Bank of England and the European Central Bank are highlighted below to illustrate this point.

During the global recession, the US Board of the Federal Reserve System (the "Fed"),[17] the European Central Bank ("ECB"),[18] and the Bank of England[19] rolled out several market support programmes.[20]

[13] W Bagehot, 'Lombard Street: A Description of the Money Market'. Fraser (1873) <https://fraser.stlouisfed.org/files/docs/meltzer/baglom62.pdf > accessed 4 January 2021.

[14] Ibid.

[15] Ibid at p. 97.

[16] Humphrey, supra note 8, at 352.

[17] See FRB, 'Money Market Investor Funding Facility' <http://www.federalreserve.gov/monetarypolicy/mmiff.htm> accessed 4 January 2021; FRB, 'ABCP MMMF Liquidity Facility' <http://www.federalreserve.gov/monetarypolicy/abcpmmmf.htm> accessed 4 January 2021; FRB, 'Term Asset-Backed Securities Loan Facility' <http://www.federalreserve.gov/monetarypolicy/talf.htm> accessed 4 January 2021; FRB, 'Commercial Paper Funding Facility' <http://www.federalreserve.gov/monetarypolicy/cpff.htm> accessed 4 January 2021; FRBNY, 'Primary Dealer Credit Facility' <http://www.newyorkfed.org/markets/pdcf.html> accessed 4 January 2021; FRB, 'Term Securities Lending Facility' <http://www.federalreserve.gov/monetarypolicy/tslf.htm> accessed 4 January 2021; FRBNY, 'Term Securities Lending Facility Options Program' <http://www.newyorkfed.org/markets/top/topseclending.cfm> accessed 4 January 2021; FRBNY, 'Summary of Terms and Conditions Regarding the JP Morgan Chase Facility' <http://www.newyorkfed.org/newsevents/news/markets/2008/rp080324b.html> accessed 4 January 2021; FRB, 'Support for Specific Institutions - Credit and Liquidity Programs and the Balance Sheet' <http://www.federalreserve.gov/monetarypolicy/bst_supportspecific.htm> accessed 4 January 2021.

[18] Omede, *Systemic Risk and Financial Stability: Dealing with the Moral Hazard of Public Support in Financial Crisis* (2015).

[19] Tucker, 'The Repertoire of Official Sector Interventions in the Financial System – Last Resort Lending, Market-Making, and Capital', *Bank of Japan 2009 International Conference "Financial System and Monetary Policy: Implementation* (BIS Review 67/2009 2009) <http://www.bis.org/review/r090608c.pdf> accessed 5 January 2021.

[20] These include the Money Market Investor Funding Facility (MMIFF), the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility (AMLF), the Term Asset-Backed Securities Loan Facility (TALF), the Commercial Paper Funding Facility (CPFF), the Primary Dealer Credit Facility (PDCF), the Term Securities Lending Facility (TSLF), the Term Securities Lending Options Program (TOP), and facilities for JPMorgan Chase, AIG, Citigroup, and Bank of America. In the UK, the Bank of England fulfilled its LLR role through the Discount Window Facility (DWF), long-term repos (LTRs), and as the Market Maker and Capital of Last Resort.

The Fed Support Programmes

The Fed programmes, in principle, departed in seven significant areas from the classical LLR role as set out by Thornton and Bagehot in section 2.1.1 above:[21]

(i) **Taking Junk Collateral:** The Fed's acceptance of toxic paper and other asset-backed securities which were difficult to value as a result of opacity violates the classical LLR principle that good security must be provided.

(ii) **Charging Subsidy Rates:** The Fed charged non-competitive rates that violate the classical LLR principle of non-discrimination in LLR lending which has the propensity to channel credit to only politically favoured recipients. For example, the Fed lent credit to the American International Group ("AIG") at interest rates as low as 8.5 per cent and not exceeding 12 per cent whereas securities of same class at the time were yielding higher than 17 per cent.

(iii) **Saving Insolvent Firms TBTF:** Noting that its hands were tied, the Fed bailed out Citigroup and AIG, contrary to the classical LLR postulation.

(iv) **Extension of Loan Repayment Deadlines:** The Term Auction Facility ("TAF") loans advanced by the Fed to borrowers, which the Fed described as a traditional lending tool,[22] had long term repayment deadlines. Similarly, the first credit to AIG lasted about two months before it was eventually repaid. The TAF therefore hardly qualify as a 'temporary' loan in the manner conceived under traditional LLR.

(v) **Lack of Pre-announced Commitment**: The Fed was not forthcoming on an open pledge to discharge its LLR duty. Its intervention was riddled with inconsistency such as its failure to bail out Lehman but bailing out AIG. This inconsistency fed uncertainty and exacerbated panic in the market, contrary to what Bagehot prescribed.

(vi) **No Clear Exit Strategy:** The Fed did not act swiftly to retire excess liquidity created during the global recession as required by classical LLR principle. For instance, it took the post-Covid-19 inflationary spike, fourteen years after the recession, for the Fed and the Bank of England to restore the interest rate to pre-global recession levels.

(vii) **Emphasis on Credit rather than Money:** The Fed's operations aimed to restore bank lending to businesses as opposed to a massive expansion of the base (i.e. money and its circulation) to meet up with the panic-induced increase in the demand for it.

The first six points are especially relevant to the analysis of the individual support framework in the following sections.

The Bank of England's Support Programmes

Unlike the Fed, the Bank of England appeared to limit itself to its classical LLR function. In a letter to the UK Parliament, the former governor of the Bank of England, Mervyn King noted that the conditions set down in classical LLR had been met.[23] However, noting that the changes in market structure in recent decades leave no room for a blind attachment to mid-19th century precepts, Tucker[24] legitimated the Bank's activity as a market maker of last resort ("MMLR"), noting that the Bank does not limit itself to the classical LLR theory exclusively in its liquidity programmes, and for that reason distinguished a 'discussion of LOLR (sic) as Bagehot would have recognised it' from 'bespoke support operations' of the Bank.

The ECB Support Programmes

Although the ECB rolled out several support schemes[25] in the form of extended LLR,[26] the ECB's support programmes complicated the tension between monetary and fiscal governance in the European Union (EU),[27] and departed from classical LLR in the following respects:

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[21] Humphrey, supra note 8, at 333-364.

[22] FRB, 'Crisis Response - Credit and Liquidity Programs and the Balance Sheet' <http://www.federalreserve.gov/monetarypolicy/bst_crisisresponse.htm> accessed 4 January 2021.

[23] M King to Chancellor of the Exchequer, 'The Governor's Letter to the Chancellor Relating to Northern Rock'. Bank of England (13 September 2007) < https://notendur.hi.is/ajonsson/kennsla2006/mervynKing.pdf> accessed 5 January 2021.

[24] P Tucker, 'The Repertoire of Official Sector Interventions in the Financial System – Last Resort Lending, Market-Making, and Capital', Bank of Japan 2009 International Conference "Financial System and Monetary Policy: Implementation (BIS Review 67/2009 2009) <http://www.bis.org/review/r090608c.pdf> accessed 5 January 2021.

[25] These include the Securities Market Programme (SMP); Outright Monetary Transactions Programme (OMT); Longer-Term Refinancing Operations I and II (LTRO); Covered Bond Purchase Programme (CBPP); Emergency Liquidity Assistance (ELA) through the Eurosystem national central bank (NCB); and the reduction of collateral requirements for commercial banks. See PI Omede, Systemic Risk And Financial Stability: Dealing with the Moral Hazard of Public Support in Financial Crisis. (University of Glasgow, LLM Dissertation, 2015).

[26] They mainly focused on bond purchases as opposed to supply of cash or money stock entailed in classical LLR except its Emergency Liquidity Assistance which required Eurosystem national central banks (NCB) to provide liquidity to distressed financial institutions.

[27] Although EU member states agreed to a historic €750bn post-pandemic EU recovery fund in the summer of 2020, tensions continue to exist in the EU fiscal and monetary governance framework. See Yanis Varoufakis, 'The EU coronavirus fund will take Europe another step towards disintegration'. The Guardian (July 2020) <https://www.theguardian.com/world/commentisfree/2020/jul/24/eu-coronavirus-fund-europe-recovery-package>accessed 5 January 2021.

(i) Even though the Treaty of Amsterdam[28] does not explicitly exclude purchases of bonds already issued (i.e., secondary-market debt purchases), it inherited the prohibition on primary-market debt purchases from its predecessor, the Bundesbank.

(ii) Northern Europe considered the ECB's interventions as disguised budgetary transfers.

(iii) The ECB has 17 shareholders as opposed to a national central bank. The implication is that when it takes losses, it will pay a lower dividend to all euro-area member states. This technically amounts to a form of redistribution, which is outside the mandate of a central bank.[29]

2.2 Extended LLR and Individual Bailout

It is not clear whether extended LLR has come to stay. In 2018, the UK government allowed the construction company Carillion to fail, despite employing about twenty thousand workers in the UK alone.[30] Similarly, in 2019 Thomas Cook was allowed to fail after operating as a firm for one hundred and seventy-eight years.[31] In Germany, Wirecard was recently allowed to fail, despite being a member of Germany's prestigious Dax index.[32] All of these companies were insolvent, hence the governments' responses satisfied classical LLR requirements. The genius of extended LLR, however, is in the flexibility of governments to depart from ideological orthodoxies where the stability of the financial system is under threat. Extended LLR requires that the narrow philosophical rationale for granting or denying public support must be justified and not presumed. For instance, while classical LLR is *primarily* concerned about financial risk turning systemic, extended LLR has been mostly rationalised by *secondary* or *incidental* economic risk, such as recession, unemployment, and market collapse. Hence, a reassessment of the role of central banks and national economic managers regarding public support for distressed individuals and corporates is inevitable under the current economic climate. It is unnecessary for central banks to maintain the pretentious posture (preoccupation with monetary policy) and the claim that they are unbothered by, and unable to, counter economic or fiscal risks with public support tools when they do have and wield such powers in practice.[33]

3. Market Support for the COVID-19 Era

In December 2019, a new epidemic began in Wuhan, China and quickly metamorphosed into the COVID-19 pandemic with all the major economies having to shut down and movement of people restricted. While the full economic impact of COVID-19 continues to unfold, governments had expended an unprecedented $11.7 trillion, or close to 12 per cent of global GDP, as of 11 September 2020 on support packages for companies and individuals to cushion the impact of the public health measures implemented.[34] But unlike support for corporate entities, the parameters for individual support is unclear even though individual borrowers have become central to the broader systemic stability discourse due to longer-term structural changes in the global economy. As the world pursues a climate-friendly economy and increasingly moves towards automation, the financial realities of individuals will shape the extent to which these goals are realized, while individuals are bound to suffer from the fallout to varying degrees.[35] Thus, narrow interventions aimed solely at big corporate entities and rationalised by TBTF are no longer sustainable as the understanding of systemic risk continues to grow. Governments had to decide whether they want to channel support in the form of grants or loans, to the unemployed or distressed businesses, via monetary or fiscal means.[36] Assuming, as seems reasonable and as many governments have done, the government decides to combine all these measures, they must also determine whether separate criteria and objectives should apply to monetary[37] and fiscal interventions.[38]

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[28] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, was signed on 2 October 1997, and entered into force on 1 May 1999.

[29] In view of these political concerns, the ECB's market support programmes in 2010–2011, apart from coming too late, were executed with a 'trembling hand' and so did not only fail to settle market anxiety but fell out of classical LLR theory. As Pisani-Ferry put it, 'investors knew that the ECB did not carry a big bazooka, and they soon speculated about when its bond-purchase programme would end'. J Pisani-Ferry, The Euro Crisis and Its Aftermath (Oxford University Press 2014) 106.

[30] J Kollewe, 'Carillion: what went wrong and where does it go from here? The Guardian (January 2018)<https://www.theguardian.com/business/2018/jan/15/carillion-what-went-wrong-liquidation-staff>accessed 5 January 2021.

[31] BBC, 'Thomas Cook collapses as last-ditch rescue talks fail'. BBC News. (September 2019)<https://www.bbc.co.uk/news/business-49791249>accessed 5 January 2021.

[32] Dan McCrum, Olaf Storbeck, Stefania Palma, and John Reed, 'Wirecard collapses into insolvency'. *Financial Times* (June 2020)<https://www.ft.com/content/ac949729-6167-4b6c-ac3f-f0aa71aca193>accessed 5 January 2021.

[33] JH Powell, 'COVID-19 and the Economy'. Board of Governors of the Federal Reserve System (April, 2020)<https://www.federalreserve.gov/newsevents/speech/powell20200409a.htm>accessed 6 January 2021.

[34] International Monetary Fund, Fiscal Monitor: Policies for the Recovery. (Washington, October 2020).

[35] For example, higher risks of political upheavals, loss of confidence in democratic institutions, anti-immigration sentiments and consequent impact on economic growth, protectionism, trade wars. See Ferguson, *The Ascent of Money: A Financial History of the World* (2008). See also R Hass and A Denmark, 'More Pain Than Gain: How the US-China Trade War Hurt America'. Brookings (August 2020)<https://www.brookings.edu/blog/order-from-chaos/2020/08/07/more-pain-than-gain-how-the-us-china-trade-war-hurt-america/>accessed 6 January 2021.

[36] OECD, 'COVID-19 Government Financing Support Programmes for Businesses'. OECD (2020)<www.oecd.org/finance/COVID-19-Government-Financing-Support-Programmes-for-Businesses.pdf>accessed 6 January 2021.

[37] Monetary interventions so far have focused on corporate entities, although some central banks have established low-cost loan schemes for SMEs. See subsequent discussion.

[38] Social safety net; zero interest loans; and payroll guarantees etc.

Structural risks in the global economy have exacerbated individual credit default risks beyond the capacity of creditors to bear under the most stringent individual insolvency proposals.[39] Meanwhile, strict personal insolvency regimes could lead to a 'disorderly liquidation',[40] i.e. leave individuals extremely vulnerable to cascading debt obligations or displacement from the credit market. Whereas the social insurance argument for a generous insolvency regime to assist 'the honest but unfortunate debtor' has gained some credence within American jurisprudence,[41] it remains less so elsewhere, and a lax insolvency regime could increase the cost of borrowing, potentially triggering further exclusion of individuals and smaller companies from the debt market in debt-driven western economies.[42] Globally, it could precipitate a systemic crisis within financial institutions with significant consumer debt portfolios because consumer credit, more than mortgage credit, has the potential to deteriorate quickly.[43]

Policymakers must reconsider the view that market support for solvent individual borrowers is the remit of fiscal intervention burdened by a moral hazard lens. It is counterintuitive to advocate for generous individual insolvency protection, while neglecting those who remain solvent yet struggle to meet their debt obligations due to circumstances beyond their control.[44] While individual insolvents (with the exception of many states in the US) must endure several indignities, market support for solvent individual borrowers will prevent forced insolvencies, and stem the rise of a permanent class of precariat, even in developed economies.[45] Market support for solvent individual borrowers could ease resistance to a more liberal personal insolvency regime, extending social benefits to insolvents who, under classical LLR, are ineligible for market support.

The merits of individual bailouts have not gained much traction within the leading central banks and finance ministries. During COVID-19, the UK and US governments rolled out extensive support packages, highlighting a significant disparity in aid directed towards businesses versus individual borrowers. The next section will appraise selected Covid-19 intervention case studies to see if the attitude to individual bailouts has changed in a fundamental way since the global recession, and whether there is now a clear-cut framework for administering individual bailouts for all times.

3.1 The UK Response

In the UK, the Chancellor of the Exchequer announced the government's COVID-19 response packages[46] that include for individuals, statutory sick pay of 28 days on account of COVID-19 sickness or isolation requirement; a £500 million local authority hardship fund in addition to a £500 million boost to the welfare system; and mortgage/rental holiday for three months. However, very significantly, the Financial Conduct Authority (FCA) left personal loan obligations to lenders and borrowers to resolve.

In contrast, the government announced full support for businesses including £330 billion of guarantees, £30 billion for public services, and £5 billion COVID-19 response fund guarantee for 80 per cent SME loans. Additionally, the government announced a Business Interruption Loan Scheme of up to £5 million at no charge to lenders. These fiscal intervention packages mark a notable departure from classical LLR.[47] In setting out his plans, the Chancellor noted, "[T]his is not a time for ideology and orthodoxy. This is a time to be bold. A time for courage."[48]

Admittedly, it is difficult to question the generosity of the UK's response[49] within the global context of rising public debt and deficits forecast to hit 12.7 and 14.4 per cent of GDP in emerging and developed economies respectively, and debt to GDP ratio rising from 83 to 100 and 105 to 126 per cent of GDP in the post-COVID-19

[39] Spooner, Bankruptcy: The Case for Relief in an Economy of Debt (2019), at 81.

[40] See SC Bair, 'Examining the Major Aspects of the Dodd-Frank Act' Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg64796/html/CHRG-111shrg64796.htm> accessed 8 August 2015.

[41] *Local Loan Co. v. Hunt* 292 U.S. 234 (1934).

[42] J Nocera, 'Bankruptcy Is the Solution to the Student Loan Crisis'. *Bloomberg* (16 December 2020)<https://www.bloomberg.com/opinion/articles/2020-12-16/bankruptcy-is-the-solution-to-the-student-debt-crisis>accessed 1 February 2021.

[43] Bank of England, 'Record of the Financial Policy Committee Meeting 22 March 2017' (*Bank of England*, 4 April 2017) <https://www.bankofengland.co.uk/-/media/boe/files/record/2017/financial-policy-committee-meeting-march-2017.pdf> accessed 6 January 2021.

[44] The Pew Charitable Trusts, 'The Precarious State of Family Balance Sheets' (*PEW*, January 2015) <https://www.pewtrusts.org/en/about/news-room/press-releases-and-statements/2015/01/29/pew-state-of-us-family-balance-sheets-is-precarious>accessed 9 September 2019; A Lusardi, D Schneider, and P Tufano, *Financially Fragile Households: Evidence and Implications* (The Brookings Institution 2011). See also the University of Warwick School of Law's comprehensive list of reports on the impact of public spending cuts in the UK across several metrics <https://warwick.ac.uk/fac/soc/law/research/centres/chrp/spendingcuts/resources/reports-uk/> accessed 9 September 2019.

[45] US Bureau of Labor Statistics, 'Labor Force Statistics from the Current Population Survey'. BLS (January 2021)<https://www.bls.gov/web/empsit/cpsee_e10.htm> accessed 29 January 2021.

[46] HM Treasury, 'How to access government financial support if you or your business has been affected by COVID-19'. HM Treasury (March 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878995/Covid-19_fact_sheet.pdf>accessed 6 January 2021.

[47] For further details and analysis of the support package, see *Chartered Insurance Institute*, 'Government COVID-19 support packages for businesses'. Chartered Insurance Institute (March 2020)<https://www.cii.co.uk/news-insight/coronavirus-hub/articles/government-covid-19-support-packages-for-businesses/91347>accessed 6 January 2021.

[48] HM Treasury, 'Chancellor of the Exchequer, Rishi Sunak on COVID19 Response'. *HM Treasury*<https://www.gov.uk/government/speeches/chancellor-of-the-exchequer-rishi-sunak-on-covid19-response>accessed 4 January 2021.

[49] HM Treasury, 'The Chancellor has also announced £750 million coronavirus funding for frontline charities'. HM Treasury (April 2020)<https://www.gov.uk/government/news/chancellor-sets-out-extra-750-million-coronavirus-funding-for-frontline-charities>accessed 6 January 2021.

era *mutatis mutandis*.[50] Nevertheless, the policy of non-intervention by fiscal and monetary authorities in personal loan contract appears borne out of long-standing moral hazard concerns and the assumption that market recovery can occur despite endemic precariat borrowers ostensibly not too big to fail.[51] Central bank bailouts are simply not fashioned for the individual actor, but the market. While these assumptions might seem prescient for short term market recovery, it misses the reality of the longer-term structural displacement of individual borrowers in the labour market and the systemic impact of widespread default, for consumer confidence and economic growth. The future of the debt-driven economy is on the balance, at a time governments' fiscal war chest is far spent, especially in developing countries.

While the demise of credit liberalisation is not necessarily to be mourned, aggressive promotion of access to credit is integral to the financial inclusion strategy of Western capitalist governments to meet public demands for higher living standards. The engineered transition from state welfare begins with governments dismantling barriers to market access by all citizens and ends with individual citizens taking full personal financial responsibility by various lawful means, including individual borrowing. Governments increasingly embrace borrowing to shore up their revenue shortfalls and encourage citizens to do the same. By floating policies that make access to credit easier, they not only shed the associated financial burden of state welfare but ensure that social tensions are kept at bay. In South Africa, easy access to credit was seen as a negotiated settlement to 'postpone' a possible citizen revolt against the political and economic system.[52] This process systematically replaces one set of human rights with a new kind of right. The things that were hitherto considered 'human rights'– access to decent education, universal healthcare, and affordable housing – are now understood as privileges that individuals must pay for to enjoy, on credit if necessary.[53]

If individual credit products and loan terms are so widely legitimated and yet broadly precarious without addressing individual weaknesses like education, bargaining power, and robust recourse options,[54] withholding government bailout from individual borrowers becomes morally indefensible.

Although individual debtors may benefit indirectly from furlough schemes and the various interventions either as employees or business owners, it is no excuse for leaving individual borrowers to the devices of lenders during a major and ongoing global health crisis. Firstly, households cannot afford to apply capped furlough pay to debt servicing while unable to work or find work. Extreme financial distress can undermine government lockdown measures and many indebted individuals would be forced to trade-off their health by returning to unsafe jobs.[55] Secondly, the class of borrowers likely to be overburdened by personal loans overlaps with the demographics most vulnerable to COVID-19.[56] Thirdly, the support provided by the government is often directed at 'citizens' and employees, leaving out the non-citizens including international students, low-income immigrant workers and other groups unqualified for state aid but potentially with existing personal loan obligations. Fiscal intervention might be inadequate for individual borrowers in that fiscal plans typically target nationals and taxpayers, whereas monetary policy interventions mostly interact with the market rather than citizens.

The Bank of England's Monetary Policy Committee also implemented measures targeted at household borrowers, to complement the Chancellor's programmes including cutting the Bank Rate to 0.1per cent; issuing a 'market notice' for a Term Funding Scheme to offer four-year funding at or very close to the Bank Rate.[57] While these measures, in theory, enable existing debtors to rollover credit at a low or lower interest rate, there is no guarantee that all lenders will participate or agree to rollover debt for existing borrowers for a number of reasons. Like most businesses, many financial institutions lack clarity about the scale of losses awaiting them, some might have no wriggle room to cut interest rates on deposits, whereas others might simply lack the incentive to provide the additional data requirements imposed by the Bank.[58]

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[50] International Monetary Fund, Fiscal Monitor: Policies for the Recovery. (Washington, October 2020).

[51] In the US, even economists sympathetic to the liberal agenda of newly-elected President Joe Biden have begun to raise red flags about his plan to hand out an extra $1200 to individual American citizens on top of previous assistance via the CARES Act 2020. See S Rattner, 'Biden's Relief Plan Is a Trojan Horse. And I'm OK With That.' New York Times (27 January, 2021)<https://www.nytimes.com/column/steven-rattner>accessed 1 February 2021.

[52] James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (2015), at 4, 27.

[53] Bickerton, *Capitalism after the Crisis* (2015), at 20 (5) New Political Economy 783-791.

[54] Bar-Gill and Warren, *Making Credit Safer* (n 236) 1-101. A recent study of the payday lending market in Ohio, United States, blames unemployment, absence of living wages and state welfare together with loopholes in regulation for more people turning to payday loans. See Hembruff and Soederberg, *Debtfarism and the Violence of Financial Inclusion: The Case of the Payday Lending Industry* (2019), at 48. (1) Forum for Social Economics 49-68. See also J Parker, 'Payday Lending in Ohio' (2013) 130 (1) Members Only Brief 1–16 <https://www.lsc.ohio.gov/documents/reference/current/membersonlybriefs/130paydaylending.pdf> accessed 29 August 2019. Critics of the credit-driven model of financial inclusion have advocated increased state welfare or at least a halt in cuts. Others have proposed the Universal Basic Income (UBI) as the way forward. UBI is a welfare model that proposes governments pay all its citizens not based on work done but based on citizenship. UBI is as exciting as it is controversial. Surface analysis of UBI will flag issues of feasibility and likely disincentive to work. See para 6.9.1 for a discussion of these critiques.

[55] Apouey, *et al., Gig Workers during the COVID-19 Crisis in France: Financial Precarity and Mental Well-Being* (2020), at 776–795.

[56] Fickling, 'The Gig Economy Compromised Our Immune System'. *Bloomberg* (July 2020)<https://www.bloomberg.com/opinion/articles/2020-07-26/coronavirus-how-the-gig-economy-compromised-our-immune-system>accessed 6 January 2021.

[57] Bank of England, 'Our response to coronavirus (Covid)'. Bank of England (November 2020)<https://www.bankofengland.co.uk/coronavirus>accessed 6 January 2021.

[58] Ibid., at para. 15 provides that participants will need to provide data on lending to UK resident households, private non-financial corporations (PNFCs) and certain non-bank credit providers (NBCPs). For lending to UK resident households, the amount which is to unincorporated businesses (UBs) will need to be disaggregated. For lending to PNFCs, the amount will need to be disaggregated into 'SMEs' and 'Large Corporates'.

Furthermore, the Bank has reduced the capital requirement for banks and building societies lending to UK businesses and households. UK banks on their part, agreed to freeze payments of senior staff bonuses, new dividends, as well as dividends due to shareholders from 2019, until the end of 2020. Again, the hope is to incentivise bank lending during the pandemic.[59]

3.2 The US Response

In the US, the Fed had capitalised on emergency lending powers, with the consent of Congress and a conservative Secretary of the Treasury, to initiate many programmes crucial to the flow of credit in the economy. While the Fed had pledged to use its emergency powers forcefully, proactively, and aggressively to ensure a solid recovery, it continues to reiterate that it only has lending powers, not spending powers. In other words, the Fed continues to signal its commitment to its pre-global recession classical LLR role of granting only secured loans to solvent entities despite the profound economic impact of COVID-19 on the US economy. It insists that insolvent entities must rely on direct fiscal support.[60]

Despite its conservative tone, the Fed floated significant monetary interventions, and collaborated with the US Treasury to administer fiscal buffers. For instance, the Fed protected some employees through the Small Business Administration's Pay Check Protection Program; guaranteed credit flows to small and mid-sized businesses with the purchase of up to $600 billion in loans through the Main Street Lending Program and $75 billion in equity using funding from the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Like in the UK, the Fed supported credit flow to households through capital markets, by expanding the size and scope of the Primary and Secondary Market Corporate Credit Facilities as well as the Term Asset-Backed Securities Loan Facility ("TALF"), which together provided $850 billion in credit backed by the Treasury; and a Municipal Liquidity Facility that offered up to $500 billion in lending to states and municipalities.

To support further credit flow to households and businesses, the Fed broadened the range of assets considered eligible collateral for TALF and kept the size of the facility at $100 billion. TALF continued to support the issuance of asset-backed securities that funded a wide range of lending, including student loans, auto loans, and credit card loans.[61] Furthermore, section 4013 of the CARES Act, which was signed into law on March 27, 2020 provided one of the reliefs that solvent individual borrowers so need in a time of crises. It allowed financial institutions to suspend the requirements to classify certain loan modifications as troubled debt restructurings (TDRs), while mandating regulatory agencies to endorse prudent efforts to modify terms on existing loans for affected customers.[62] However, like in the UK, the law does not impose this mandate but relies on moral suasion by encouraging financial institutions to work with borrowers, and the Fed will not criticise institutions for doing so in a safe and sound manner. While this is commendable, the central bank should have inherent powers to make reasonable cooperation in debt restructuring a condition for public support for commercial lenders since Congress is unlikely to act swiftly and generously in 'normal' times.

Commendably, section 4012 of the CARES Act required the agencies to temporarily lower the community bank leverage ratio to 8 per cent until January 1, 2022, to allow community banking organisations to focus on supporting lending to creditworthy households and businesses given the strains on the US economy caused by the coronavirus.[63] This underscores the benefits of extended LLR over the insolvency law option in that an insolvent borrower is effectively shut out of the credit market, whereas the goal of market support is to provide liquidity for solvent individual borrowers to access affordable credit even in a time of unprecedented crisis and prolonged economic displacement.

Overall, the US approach is similarly indicative of a broader policy stance that prioritises market stability and business continuity over individual financial stability. Like the UK, the US response leaves many individual borrowers vulnerable, particularly those without sufficient fiscal support, highlighting a significant gap in both countries' strategies to mitigate the impact of economic shocks on the most financially precarious individuals.

4. Towards Public Support for Individual Borrowers Under the Extended LLR Framework

4.1 Systemic Importance of Individual Borrowers

Thornton argues that the LLR's prime duty is to the market ('the general interests') and not to any specific bank. This stance emphasises the broader financial stability rather than the fate of individual institutions. However, establishing the systemic importance of distressed

[59] Ibid.

[60] JH Powell, 'COVID-19 and the Economy'. Board of Governors of the Federal Reserve System (April, 2020)<https://www.federalreserve.gov/newsevents/speech/powell20200409a.htm>accessed 6 January 2021.

[61] Federal Reserve System, 'Federal Reserve Takes Additional Actions to Provide up to $2.3 Trillion in Loans to Support the Economy'. Board of Governors of the Federal Reserve System (April, 2020)<https://www.federalreserve.gov/newsevents/pressreleases/monetary20200409a.htm>accessed 6 January 2021.

[62] Board of Governors of the Federal Reserve System and others, 'Agencies Issue Revised Interagency Statement on Loan Modifications by Financial Institutions Working with Customers Affected by the Coronavirus'. Board of Governors of the Federal Reserve System (April, 2020)<https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200407a.htm>accessed 6 January 2021.

[63] Board of Governors of the Federal Reserve System and others, 'Agencies announce changes to the community bank leverage ratio'. Board of Governors of the Federal Reserve System (April, 2020)<https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200406a.htm>accessed 6 January 2021.

households is inherently more complex than identifying that of large corporations. Yet, Bagehot's approach, which is more inclusive of all solvent borrowers, suggests that individual bailouts could be justifiable under the classical LLR doctrine, especially when the failure of individual borrowers could lead to market disruptions. The global recession has demonstrated that individual borrowers can indeed pose systemic risks, similar to SIFIs. If we consider the broader socio-economic implications, the growing discontent among the precariat, such as those in precarious employment or financial situations, represents a different form of systemic risk. This is evidenced by the rise of populist movements across both advanced and developing economies, which have been partially fueled by widespread economic disillusionment.[64]

Individual debt defaults, therefore, pose not just a financial risk but a socio-political one as well. The Occupy Wall Street movements of 2009-2010 are a testament to the consequences of neglecting the plight of individual borrowers who fall victim to aggressive and often predatory lending practices. Governments, having promoted a culture of debt-driven consumption for decades,[65] bear a share of the moral responsibility for these outcomes. The regulatory environment has often enabled lenders[66] to engage in negative-option marketing, long-maturity,[67] lower down payments, unsolicited credit, automatic increases in credit limits, and automatic and incremental re-advances or refinancing.[69] This environment has led to a significant imbalance of power, where lenders possess superior knowledge of borrowers' repayment capacities.[70] Given this context, it is disingenuous to deny support to distressed individual borrowers. Beyond the constitutional duty of governments to protect their citizens from economic distress, particularly in an era of increasing automation[71] and job redundancy,[72] there is little evidence to suggest that individual defaults are a deliberate act.[73] Instead, they are often a consequence of a system that has encouraged risky borrowing practices.[74]

Improvements in market regulation, oversight and supervision after the last global recession mean that individual credit defaults are less likely to occur, less likely to be the result of irresponsible lending and borrowing when they occur, and more likely the result of factors beyond the control of individual borrowers.[75] According to the International Monetary Fund's Financial System Stability Assessment 2020:

> Banks have entered the crisis [COVID-19 pandemic] with strong buffers and ***households have deleveraged***, but the rise in corporate leverage and migration of risks to nonbank financial institutions in recent years compounded with ongoing economic disruption could result in severe financial strain.[76]

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[64] Other factors include immigration, climate change, cultural anxieties, and political demagoguery, etc.

[65] Soederberg, *Debtfare States and the Poverty Industry: Money, Discipline and the Surplus Population* (2014), at 71; Lazzarato, *Governing by Debt* (2015), at 66.

[66] Prior to the COVID-19 pandemic, debt-driven consumption had been critical to the continuation of austerity policies in the West. See ibid at 71, Bickerton, *Capitalism after the Crisis* (2015), at 20 (5) New Political Economy 783-791; D Bryan and Rafferty, *Reframing Austerity: Financial Morality, Savings and Securitisation* (2017), at 10 (4) Journal of Cultural Economy 339-55; Soederberg, supra note 64, at 71; Lazzarato, supra note 64, at 66.

[67] Attanasio, Goldberg, and Kyriazidou, *Credit Constraints in the Market for Consumer Durables: Evidence from Micro Data on Car Loans* (2008), at 49 (2) International Economic Review 401–436.

[68] Adams, Einav, and Levin, *Liquidity Constraints and Imperfect Information in Subprime Lending* (2009), at 99 (1) American Economic Review 49–84.

[69] Davel, *Regulatory Options to Curb Debt Stress* (2013).

[70] Technological advances in the credit market mean that creditors can more accurately measure creditworthiness than individual borrowers prone to heuristic biases. See L Brix and K McKee, Consumer Protection Regulation in Low-Access Environments: Opportunities to Promote Responsible Finance (2010) CGAP, Focus Note No. 60 <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Consumer-Protection-Regulation-in-Low-Access-Environments-Opportunities-to-Promote-Responsible-Finance-Feb-2010.pdf> accessed 6 January 2021. See also O Bar-Gill and E Warren, 'Making Credit Safer' (2008) 157 (1) University of Pennsylvania Law Review 1-101.

[71] D Acemoglu and P Restrepo, 'Robots and Jobs: Evidence from U.S. Labor Markets'. 128(6) Journal of Political Economy<https://www.journals.uchicago.edu/doi/pdf/10.1086/705716>accessed 29 January 2021. A Semuels, 'Millions of Americans Have Lost Jobs in the Pandemic—And Robots and AI Are Replacing Them Faster Than Ever'. *Time Magazine* (August 2020)<https://time.com/5876604/machines-jobs-coronavirus/>accessed 29 January 2021. See also Schmidt and Cohen, *The New Digital Age: Reshaping the Future of People, Nations and Business* (2013); Brynjolfsson and McAfee, *The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies* (2016).

[72] Johnson, 'The Rise of In-Work Poverty is a Complex Issue with no Easy Answer' (*Institute for Fiscal Studies*, 24 June 2019) <https://www.ifs.org.uk/publications/14210> accessed 6 January 2021. See also Joyce and Xu, 'Inequalities in the 21st Century: Introducing the IFS Deaton Review' (Institute for Fiscal Studies, 14 May 2019) <https://www.ifs.org.uk/inequality/chapter/briefing-note/> accessed 6 January 2021; Johnson, 'Child Poverty, Where Parents are Doing What the Social Security System Expects of Them' (Joseph Rowntree Foundation, 10th Sep 2018). <https://www.jrf.org.uk/report/child-poverty-where-parents-are-doing-what-social-security-system-expects-them> accessed 6 January 2021. See also Kumhof, Rancière, and Winant, *Inequality, Leverage, and Crises* (2015), at 105; Piketty, *Capital in the Twenty-First Century* (2014).

[73] Zinman, *Consumer Credit: Too Much or Too Little (or Just Right)?* (2014), at 43; Disney, Bridges and Gathergood, *Drivers of Over-Indebtedness: Report to the Department for Business, Enterprise and Regulatory Reform* (2008). Also, excessive household leverage is not necessarily correlated with the wanton pursuit of luxury or frivolities. See The Pew Charitable Trusts, 'The Precarious State of Family Balance Sheets' (*PEW*, January 2015) <https://www.pewtrusts.org/en/about/news-room/press-releases-and-statements/2015/01/29/pew-state-of-us-family-balance-sheets-is-precarious>accessed 6 January 2021; A Lusardi, D Schneider, and P Tufano, *Financially Fragile Households: Evidence and Implications (*The Brookings Institution 2011) <https://www.brookings.edu/wp-content/uploads/2011/03/2011a_bpea_lusardi.pdf >accessed 19 August 2024. See also the University of Warwick School of Law's comprehensive list of reports on the impact of public spending cuts in the UK across several metrics <https://warwick.ac.uk/fac/soc/law/research/centres/chrp/spendingcuts/resources/reports-uk/>accessed 6 January 2021.

[74] Technological advances in the credit market mean that creditors can more accurately measure creditworthiness than individual borrowers prone to heuristic biases. See L Brix and K McKee, Consumer Protection Regulation in Low-Access Environments: Opportunities to Promote Responsible Finance (2010) CGAP, Focus Note No. 60 <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Consumer-Protection-Regulation-in-Low-Access-Environments-Opportunities-to-Promote-Responsible-Finance-Feb-2010.pdf> accessed 6 January 2021. See also Bar-Gill and Warren, Making Credit Safer (2008), at 157 (1) University of Pennsylvania Law Review 1-101.

[75] Omede, *Nigerian Consumer Credit: Law, Regulation and Market Insights* (2022).

[76] International Monetary Fund, Financial System Stability Assessment 2020: Financial System Stability Assessment.

Indeed, regulatory attention is zeroing-in on consumer exposure to fintech, its attendant risks and financial institution malfeasance rather than the other way around.[77] For these reasons, the practical considerations that birthed extended LLR should apply to all borrowers provided they are solvent. Understanding the systemic importance of individual borrowers requires us to broaden our perspective on financial stability. It is not just about protecting large institutions but also about addressing the vulnerabilities of individuals whose financial struggles can have far-reaching implications for the economy and society at large. By recognising the interconnectedness of these risks, we can better appreciate why the LLR's role should extend beyond corporate bailouts to include support for distressed individual borrowers.

4.2 Fiscal Policy and Individual Bailouts

Opposition to public support programmes during the global recession was mostly from the political left and received expression through the Occupy Wall Street movement. Conversely, while opposition to individual bailouts would mostly come from the political right for well-established ideological reasons,[78] such fiscal deficit hawkishness within conservative ranks in the UK and US is often tempered during major crises, as had been the case during the Covid-19 pandemic.[79] Conservatives may be less sympathetic to public support programmes that appear to expand the welfare state in the long-term but may find the improved regulatory landscape in the personal loan market post-global recession an incentive for backing such a proposal. Liberals on the other hand will consider individual bailouts equitable and pragmatic, if inadequate, as they would prefer a more direct and substantive expansion of the welfare state. One practical benefit of a framework for individual debt rescue is that it could steer policymakers on the middle course and pull politicians on both sides of the isle out of the political trenches, thereby avoiding the kind of policy impasse on student loan forgiveness in the US.

In a statement that appears to forebode the somewhat gloomy economic future awaiting swaths of working-class people, the five leading regulatory agencies[80] on individual lending in the US declared that meeting the individual credit needs of household is important because of temporary cash-flow imbalances, unexpected expenses, or income disruptions during periods of economic stress or disaster recoveries. Although, the agencies seem optimistic about the temporary nature of the economic stress, they recommend innovative lending structures including "open-end lines of credit, closed end instalment loans, or appropriately structured single payment loans."[81]

Old-time central bankers desire a more autonomous ministry of finance to provide fiscal support for distressed individuals but acknowledge the propriety of central banks financing support programmes that "help the government get cash to households so that they stay under shelter, [and put] food on the table."[82] Whether such intervention is christened LLR or MMLR is of little consequence to distressed individual borrowers provided the support is meaningful. Following this logic, and to de-stigmatise LLR's intervention, the Bank of England's recent reduction of the capital requirement for banks and building societies lending to UK businesses and households as a form of bespoke support could be better tailored. The Bank could achieve this by requiring lenders to disaggregate data on borrowers classed as 'overindebted' by the FCA, and make participation in the Term Funding Scheme conditional on automatic restructuring without additional costs to the borrower. Market support in this case could mean the government splitting 'additional costs' with lenders, buying the loan from the banks' books, or transferring same to the new government interest-free lending scheme.

Another implication of locating the burden of public support in finance ministries is that it reduces the central bank to the role of the government's banker, handling its 'transfer payments' or at best a lender to the government rather than a classical LLR. Support for US households by the Fed has taken this form as all of the facilities mentioned above are established by the Fed under the authority of Section 13(3) of the Federal Reserve Act, with the *approval* of the Treasury Secretary.

[77] European Banking Authority, 'Report on Fintech Regulatory Perimeter, Regulatory Status and Authorisation Approaches in Relation to Fintech Activities'. *EBA* (July 2019)<https://eba.europa.eu/sites/default/documents/files/documents/10180/2551996/810d55c1-9866-4422-84ca-d78270b66452/Report%20regulatory%20perimeter%20and%20authorisation%20approaches.pdf?retry=1>accessed 5 January 2021. See also Salway, 'Wirecard's collapse exposes gap in payments regulation'. *Financial Times* (September 2020)<https://www.ft.com/content/0e84428b-bee6-45e6-bef1-b03f6f9be335>accessed 5 January 2021.

[78] Politi and Fedor, 'Biden's $1.9tn stimulus plan faces growing Republican backlash'. *Financial Times* (15 January, 2021)<https://www.ft.com/content/7745fdad-b896-4883-afa0-7e6528ddcee0>accessed 1 February 2021. See also Clarke *et al, Austerity and Political Choice in Britain* (2016), at 28-56; Pautz, *Think tanks, Tories and the Austerity Discourse Coalition* (2018), at 37(2) Policy and Society, 155-169.

[79] P Whiteley, HD Clarke, and M Stewart, 'How the Conservatives' austerity rhetoric won them GE2015, and almost cost them GE2017'. *LSE British and Irish Politics and Policy* (29 November 2017)<https://blogs.lse.ac.uk/politicsandpolicy/austerity-rhetoric-reality/>accessed 1 February 2021.

[80] The Board of Governors of the Federal Reserve System, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency.

[81] Board of Governors of the Federal Reserve System and others, 'Agencies announce changes to the community bank leverage ratio'. *Board of Governors of the Federal Reserve System* (April, 2020)< https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200406a.htm>accessed 6 January 2021.

[82] Andrew Metrick and P Tucker, 'Management in Practice: Awaiting the Will to Ensure Financial Market Stability'. *Yale Insights* (6 January, 2021)<https://insights.som.yale.edu/insights/awaiting-the-will-to-ensure-financial-market-stability#gref>accessed 1 February 2021.

Under the current responsible lending regime, borrowers who experience unexpected circumstances that compromise their ability to repay a loan as structured, should be supported by the LLR which could mandate banks, savings associations and credit unions to workout strategies that mitigate the repayment burdens of borrowers without having to re-borrow.[83]

4.3 Monetary Policy and Individual Bailouts

Thornton also expressed concern that monetary expansion via the LLR role could lead to inflation and favoured only short to medium term emergency loans. Again, the short-term nature of LLR applies to individual borrowers. Moreover, inflation triggered by individual bailouts might be good news to many advanced economies experiencing deflationary trends.[84] In the COVID-19 era, developing countries enforced a mix of strict-but-short lockdowns (e.g. China, Taiwan, Singapore) or a moderate one with lax compliance and enforcement (e.g. sub-Saharan Africa) and experienced minimal decline in productivity.[85] Therefore, the risk of social unrest from economic stagnation outweighs concerns for inflation, making the case for individual bailouts stronger in government decision-making. Individual over-indebtedness lowers productivity and increases poverty levels, fuelling civil unrest such as the recent protests in Nigeria.[86]

Thornton's productivity and balance of payment arguments for corporate bailouts apply to individual debt distress in that individual over-indebtedness can also result in the collapse of productivity. In the UK, where productivity has been persistently low,[87] policymakers must decide on whether more automation or better investment in workers is the way forward. Both options may be more complementary than alternatives, but public support for distressed individual debtors provide a crucial buffer in an age of uncertainties.[88] The LLR may incur losses in the course of administering individual bailouts, but this should not discourage action because this intervention is a public duty rather than a 'for profit' investment. Indeed, saving distressed individuals within established rules is a public good.

5. Moral Hazard and Systemic Stability: Striking a Balance

5.1 The Imperative of Individual Borrowing in the Modern Economy

Lending and borrowing are time-worn economic realities, but indebtedness is often described as the modern equivalent of slavery or peonage.[89] Borrowing is deemed safe if it is "...risk-free, carefully assessed, or socially acceptable".[90] However, borrowers often lack the expertise and judgment to borrow responsibly, especially when they cannot avoid borrowing.[91] Specific forms of borrowing have become unavoidable in modern societies, such as to fund one's education. But even legitimate debt like student loans can be as stressful as imprudent borrowing to lead unsustainable lifestyles, e.g. to keep up with the Joneses.[92] Individual credit products like credit cards and payday loans can create financial distress for borrowers, economic losses for innocent third parties, and a state of economic instability for a country's economy.[93] In a study of credit card debt among four hundred and forty-eight students on five college campuses, students reporting higher debt reported higher stress and decreased financial

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83 Board of Governors of the Federal Reserve System, 'Joint Press Release: Federal Agencies Encourage Banks, Savings Associations and Credit Unions to Offer Responsible Small-Dollar Loans to Consumers and Small Businesses Affected By COVID-19'. *Board of Governors of the Federal Reserve System* (26 March, 2020) <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200326a.htm>accessed 1 February 2021.

84 International Monetary Fund, 'World Economic Outlook: Subdued Demand, Symptoms and Remedies'. *IMF* (October 2016)<https://www.imf.org/en/Publications/WEO/Issues/2016/12/31/Subdued-Demand-Symptoms-and-Remedies>accessed 1 February 2021.

85 World Bank, 'The Global Economic Outlook During the COVID-19 Pandemic: A Changed World'. *World Bank* (June, 2020)<https://www.worldbank.org/en/news/feature/2020/06/08/the-global-economic-outlook-during-the-covid-19-pandemic-a-changed-world>accessed 1 February 2021.

86 S Haynes, 'The Nigerian Army Shot Dead at Least 12 Peaceful Protesters in Lagos, Rights Group Says. Here's What to Know'. *Time* (23 October 2020) <https://time.com/5902112/nigeria-endsars-protest-shootings/>accessed 1 February 2021.

87 R Heys, 'Productivity measurement – how to understand the data around the UK's biggest economic issue'. *Office of National Statistics* (March, 2020) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/labourproductivity/articles/productivitymeasurementhowtounderstandthedataaroundtheuksbiggesteconomicissue/2020-03-13>accessed 1 February 2021.

88 Heffernan, *Uncharted: How to Navigate the Future* (2020).

89 James, supra note 51, at 27.

90 Duggan and Ramsay, *Front-End Strategies for Improving Consumer Access to Justice* (2012), at 121.

91 Ibid.

92 James, supra note 51, at 45-6, 50.

93 Ibid.

well-being.[94] Expensive credit, for instance, translates to more financial distress,[95] bankruptcy,[96] and a decrease in job performance.[97]

Critics have suggested that central bank bailout of individual borrowers is a step too far in that such loans are 'below investment grade' and therefore riskier.[98] This objection, which also rides on the slippery slope fallacy (i.e. 'you're taking on a lot more risk, and where does it end?'), can easily be overcome by reference to the stringent regulations now in place in the consumer credit market post-global recession, and conditioning corporate bailouts on automatic (mandated) deferment or debt restructuring for individuals.

Others argue that rising inequality is the main cause of excessive household leverage,[99] therefore, any intervention through the LLR channel is a band-aid solution that is unsustainable. According to this theory, a hardworking individual with a decent job should not need to borrow to finance basic individual needs.[100] Most recently, in the UK and several other advanced capitalist societies, there is a recognition that the 'working poor' is becoming a statistically significant demography and fuel for populist politics.[101] A low wage regime forces the working poor to borrow in order "to subsidise basic subsistence needs in the absence of social welfare ...thereby forging a new normal—the privatisation and commodification of social subsistence."[102] This criticism, however, only preaches to the converted since the LLR function is essentially a band-aid solution, except one that had always been reserved for corporates deemed TBTF.

In the absence of better alternatives for rapidly improving household incomes, it is unhelpful to focus exclusively on the risks of individual borrowing especially if that leads to the solution of curbing access to individual credit because it misses the utility of individual credit especially in developing countries,[103] and thus the imperatives of individual debt bailout. The positive value of individual loans in modern society, mainly the social insurance function it performs, its necessity for financial individualism and economic growth, and the dependence of governments in advanced economies on debt-driven consumption make individual debt bailout almost inevitable.

5.2 The Moral Hazard Conundrum

'Moral hazard' is a phrase that originally referred to the increased risk that insurance policy holders lack any incentive to avoid losses.[104] It can more broadly describe governments abusing the IMF's safety nets meant to stave off defaults, or irresponsible use of public healthcare or social security systems by some persons.[105] In this paper, it bears the notion that allowing corporations and individuals to evade the costs of their hazardous behaviour encourages them to repeat same in the future.[106] The main arguments against public support, which presumably apply more strongly to individual borrowers, are summarised below.

5.2.1 Unfair Subsidy and Taxpayer Loss.

It has been argued that public support for firms and individuals in crisis imposes a burden on taxpayers, who may not have directly caused the crisis or profited from the

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[94] Zinman, supra note 73, at S209-S237.

[95] Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market* (2011), at 517–555; Campbell, Tufano and Martinez-Jerez, *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures* (2012), at 1224–1235.

[96] Skiba and Tobacman, *Payday Loans, Uncertainty and Discounting: Explaining Patterns of Borrowing, Repayment, and Default* (2008); Morgan, Strain, and Seblani, *How Payday Credit Access Affects Overdrafts and Other Outcomes* (2012), at 519–531.

[97] Zinman, supra note 73, at S209-S237. Studies seeking to understand why consumer credit users are prone to exploitation found that it is mainly because most users are desperate and insensitive to the rate of interest as is commonly the case with payday loans, while others borrow too much because they underestimate the cost of credit. See A DeFusco and A Paciorek, *The Interest Rate Elasticity of Mortgage Demand: Evidence from Bunching at the Conforming Loan Limit* (2014); Bar-Gill and Warren, *Making Credit Safer* (2008), at 1-101. Many borrowers pay a high price for a loan that is of limited net benefit or makes their already difficult financial situation worse. Creditors, on the other hand, have found various means to entrap their customers into spiralling debt cycles or rollover loans. See Stango and Zinman, *Limited and Varying Consumer Attention: Evidence from Shocks to the Salience of Bank Overdraft Fees* (2014), at 990-1030; Soederberg, *Debtfare States and the Poverty Industry: Money, Discipline and the Surplus Population* (2014), at 69-71. In its report on payday lending in the UK, the Financial Ombudsman Service found that most consumers bringing complaints about payday lending frequently have multiple payday loans at any one time, or have taken out several sequential payday loans with the credit record of 24 per cent of complainants damaged. See Financial Ombudsman Service, *Payday Lending: Pieces of the Picture* (2014). Sometimes the same creditor is issuing judgment summonses against a debtor, while through its agents, it is persuading that debtor to accept extra credit. See Committee on Consumer Credit Law, *Consumer Credit: Report of the Committee* (Cmnd 4596,1971). Similarly, the Financial Conduct Authority in its study of the UK credit card market found that during the period covered by its dataset, there were around 4 million accounts in persistent debt at any given time. See Financial Conduct Authority, *Credit Card Market Study: Consultation On Persistent Debt And Earlier Intervention Remedies* (2017) Consultation paper CP17/10, <https://www.fca.org.uk/publications/consultation-papers/persistent-debt-earlier-intervention-cp17-10> accessed 29 August 2019.

[98] J Smialek, 'Why State and Local Debt Is Fraught Territory for the Fed'. New York Times (1 April, 2020)<https://www.nytimes.com/2020/04/01/business/economy/fed-coronavirus-municipal-debt.html>accessed 1 February 2021.

[99] Kumhof, Rancière, and Winant, *Inequality, Leverage, and Crises* (2015), at 1217-45; Piketty, *Capital in the Twenty-First Century* (2014).

[100] Lanchester, *The Case for Universal Basic Income* (2019), at 5-8.

[101] P Johnson, 'The Rise of In-Work Poverty is a Complex Issue with no Easy Answer' (*Institute for Fiscal Studies*, 24 June 2019) <https://www.ifs.org.uk/publications/14210> accessed 29 August 2019. See also R Joyce and X Xu, 'Inequalities in the 21st Century: Introducing the IFS Deaton Review' (Institute for Fiscal Studies, 14 May 2019) <https://www.ifs.org.uk/inequality/chapter/briefing-note/> accessed 29 August 2019; P Johnson, 'Child Poverty, Where Parents are Doing What the Social Security System Expects of Them' (Joseph Rowntree Foundation, 10th Sep 2018). <https://www.jrf.org.uk/report/child-poverty-where-parents-are-doing-what-social-security-system-expects-them> accessed 29 August 2019.

[102] Ibid.

[103] Omede, *Nigerian Consumer Credit: Law, Regulation and Market Insights* (2022).

[104] Hajek, *What Is Moral Hazard and How Was It Invoked in the UK during the Northern Rock Crisis in 2007?* (2010), at 27.

[105] Ibid.

[106] Lastra, *Lender of Last Resort, an International Perspective* (1999), at 345.

errant behaviour occasioning the default. While classical LLR protects against such losses by the requirements of solvency, good security, and penalty rate of interests, critics have dismissed such buffers as impracticable. It has been argued that with the high interest rates associated with emergency liquidity assistance requests, the fact that the distressed borrower is unable to borrow from a private lender is sufficient evidence of insolvency.[107] The LLR thus lends with full commitment to resulting losses that may follow.[108] In the same vein, the risk of taxpayer loss is exacerbated by extended LLR which by design lacks the protective buffers of classical LLR as highlighted above. For instance, contrary to claims by the Fed that its liquidity facilities during the global recession were made subject to good security, both the Fed and US Treasury purchased mortgage-backed securities of dubious worth. About 20 per cent of the fair value of the assets was made up of securities rated no higher than BB+, and a vast proportion was below investment grade.[109] In the UK and Nigeria, the governments sold respective stakes in nationalised banks at a loss,[110] but individuals have never really been directly bankrolled like corporate borrowers.[111] Although some government agencies have claimed that no loss will result to the taxpayer, loss is inevitable for the twin reasons that interest rates are usually subsidised (compared to what a private lender will extract if it was a sole lender in a crisis, like the LLR) and repayments of loans to the government are mostly made possible using other facilities from government or the central bank.[112] In effect, public support amounts to a subsidy of corporate loss, privatising gain and nationalising loss.

5.2.2 TBTF and time-consistency challenge.

Systemically Important Financial Institutions ("SIFIs") are often deemed TBTF. This may be due to their size as a proportion of a given market where they operate, or in terms of the importance of the services they render to the market.[113] In any case, the underlying assumption is that their failure would impose systemic losses that are larger than the costs of bailing them out if they are troubled. The knowledge that the government will step in to save SIFIs when they are distressed creates a high degree of moral hazard both for SIFIs and non-SIFIs. While the former could become reckless, the latter will strive to attain a SIFI status to profit from the implicit guarantee and the repayment behaviour of the rescued individual debtor is hard to model or predict. Another associated problem is that TBTF concern has transformed the original character of the lender-of-last resort from an entity that provides high-priced cash to temporarily illiquid banks, to one that provides extended credit (capital) to permanently insolvent banks.[114]

The TBTF problem also leads to an allied problem of time-consistency. The LLR may find itself unwilling to lend, and yet unable to withhold credit to a SIFI for reasons such as poor collateral. A SIFI, believing prior to a crisis that it is considered a TBTF may decide that the LLR's collateral rule will be dis-applied when there is a crisis, and humans are particularly prone to the 'herd' mentality. The LLR policy of providing loans subject to the best assets may prove time inconsistent during a credit crunch.[115] The time-consistency challenge became apparent in the US with the rescue of Bear Stearns which had its junk assets accepted as security, whereas Lehman Brothers was denied support on the back of similar assets. In other words, the collateral rule was disapplied to save Bear Stearns but later applied to let Lehman Brothers fail. If one of the prime goals of public support is to instil confidence in the market, inconsistency in policy approach will only complicate market uncertainty.

5.2.3 Policy contradiction

Public support particularly in the form of LLR leaves unanswered questions about the fate of SIFIs without good collateral and non-SIFIs with good collateral. The goal of supporting SIFIs is to avoid the systemic impact of their failure. Such systemic impact would be allowed to occur if a SIFI is denied a loan for lack of collateral. Assuming that the LLR insist on this requirement, and in most cases they cannot, then one may conclude that if the financial system can survive the collapse of an insolvent SIFI, then it should be able to survive the collapse of a solvent SIFI making liquidity injection an unnecessary intervention.[116] And if a systemic collapse from a SIFI failure is not inevitable, public support for SIFIs is no more 'necessary' than for individuals or non-SIFIs.

[107] O'Neill, *The Lender of Last Resort: A Comparative Analysis of Central Banking and Fractional Reserve Free Banking* (2013), at 163.

[108] Ibid.

[109] *Gabilondo, Financial Hospitals: Defending the Fed's Role as a Market Maker of Last Resort* (2013), at 760.

[110] BBC, 'RBS: Government Sells £2.1bn of Shares in Bank at a Loss' BBC Business (4 August 2015) <http://www.bbc.co.uk/news/business-33769906> accessed 1 February 2021.

[111] Omede, *A Tale of Two Markets: How Lower-End Borrowers are Punished for Bank Regulatory Failures in Nigeria* (2019), at 519-542.

[112] S Khimm, 'Banks Are Using Government Loans to Repay TARP' *Washington Post* (9 March 2012) <http://www.washingtonpost.com/blogs/ezra-klein/post/the-government-has-recouped-tarp-money-by-accepting-other-government-funds/2012/03/09/gIQAHgdT1R_blog.html>accessed 1 February 2021.

[113] Munger and Salsman, *The Implications of Bailouts: Is "Too Big to Fail" Too Big?* (2013), at 433.

[114] Ibid.

[115] P Tucker, 'The Repertoire of Official Sector Interventions in the Financial System – Last Resort Lending, Market-Making, and Capital', *Bank of Japan 2009 International Conference "Financial System and Monetary Policy: Implementation* (BIS Review 67/2009 2009) <http://www.bis.org/review/r090608c.pdf> accessed 5 January 2021.

[116] Munger & Salsman, supra note 113, at 442 frame the problem thus: 'Failing banks that lack good collateral are just as contagious, and maybe more contagious, than banks that have good collateral. If the job of the central bank is to prevent contagion, it is literally impossible to hold to Bagehot's third rule. Citing the examples of Overend and Gurney and Barings, Wood argues that history does not support TBTF and that no institution is TBTF. See Wood, *The Lender of Last Resort Reconsidered* (1999), at 180.

Another area of contradiction is with respect to the apparent moral hazard of making an overt pre-commitment to bear the LLR responsibility. To the contrary, however, the Bank of England's inability to offer covert liquidity assistance to Northern Rock, a failed British mortgage bank,[117] was partly blamed for the run that ensued.[118]

5.2.4 Political Controversies

Public support in the form of new LLR have been widely criticised for derogating from the purpose of classical LLR and lending itself to political objectives outside the domain of the LLR's monetary policy brief. In the US for instance, credit advances to corporate borrowers were made with a view to stimulating bank lending in the wider economy, a goal that directly contradicts the requirements of Bagehot's LLR principle but pursues the political goals of quantitative easing.[119] Others posit that new LLR has shades of illegality particularly with respect to asset purchases. The Fed was accused of constituting itself a Leviathan, in a war to displace free market mechanisms while even Paul Volcker, an American economist who served as the 12th chairman of the Fed, hinted that the Fed was at the elastic limit of its power with respect to its liquidity programmes.[120] Another popular concern was the perceived lack of transparency and a public accountability deficit.[121]

5.2.5 Misuse of public funds

A genuine concern with public support for distressed borrowers is the possibility that the funds could be applied to purposes that have no bearing on solving the systemic risk. The most glaring illustration is the American International Group (AIG) offering bonuses to its staff with funds it received from the US government which President Barack Obama described as 'an outrage'.[122] This also suggests that if regulators cannot stop boards, then it is both unfair and impractical to discriminate non-SIFIs and individual borrowers.

5.3 Striking A Balance Between Support for Distressed Individual Borrowers and Mitigating Moral Hazard

The case for public support for SIFIs appears straightforward: the cost of non-intervention (systemic instability) outweighs the cost of support (potential balance sheet losses to central banks and taxpayers). Systemic risk, however, is not a principal reason for classical LLR intervention. Based on the analyses presented in sections 2.1.2 and 5.2 above, factors such as size, politics, and administrative discretion have become practical considerations for extended LLR, including for insolvent corporate entities despite moral hazard concerns.

Just as Bagehot abandoned Thornton's recommendation that the LLR should tackle the moral hazard problem by avoiding relief to institutions whose crises were caused by 'rashness' and 'improvidence', provided their failure will not jeopardise the entire market, public support need not be restricted to corporates. Non-SIFIs can qualify for public support albeit at punitive rates. Indeed, the subsequent development of classical LLR by Bagehot further confirms its plasticity over time. Unlike Thornton, Bagehot proposed open acceptance of an LLR duty to lend freely not just when a crisis is imminent, but in all future crises to douse tension, uncertainty and unnecessary panic. Bagehot's theory presents two distinct problems for the individual debtor in terms of the moral hazard issue and the effect of punitive interest rates on individual over indebtedness. In the case of moral hazard, while there is no evidence of deliberate loan default from the existing literature, it is unclear how individual debtors would respond to an open pre-commitment by the LLR to cover any future default. For corporates, Bagehot addresses this by proposing a punitive interest rate which would prove counterproductive for individuals. It is worth noting that imposing a penalty rate may discourage speculative borrowing and encourage early repayment by corporate borrowers. However, it may compound individual debt obligations since individual borrowers are less likely to hoard borrowed cash in the absence of genuine distress. Public support for individual borrowers will be loans, rather than grants, which they will be liable to repay. For insolvent individual debtors, universal basic income and pre-emptive low-cost lending such as the UK government has piloted could resolve this by enabling individuals to borrow without interest to repay expensive private loans.[123] Such a loan could be advanced by the central bank with or without guarantees by the Treasury since it involves wealth transfer in practice. Instead of imposing a penalty rate on individuals, such loans could be paid for by taxes on gambling and high net worth individuals in line with the UK's proposed no-interest loan scheme.[124] Bailed out

[117] Shin, *Reflections on Northern Rock: The Bank Run that Heralded the Global Financial Crisis* (2009), at 101–119 for more information on the run on Northern Rock.

[118] McDonnell, *Northern Rock: Was Mervyn King Right'* (2007), at 623.

[119] O'Neill, supra note 107, at 163. Tucker, supra note 115, at 16 emphasised this point succinctly: Central banks should not be involved in providing facilities which it is clear would be likely to result in a transfer of resources to the private sector. That is the realm of fiscal policy. Central banks should stick to central banking.

[120] Wessel, *In Fed We Trust: Ben Bernanke's War on the Great Panic* (2010).

[121] Gabilondo, *Financial Hospitals: Defending the Fed's Role as a Market Maker of Last Resort* (2013), at 760.

[122] BBC, 'Obama "Outraged" at AIG Bonuses' BBC Business (17 March 2009) <http://news.bbc.co.uk/1/hi/7945774.stm> accessed 8 August 2015

[123] London Economics, 'Feasibility Study into the Viability of Establishing a No-Interest Loans Scheme (NILS) in the UK: Final Report'. *London Economics* (August 2019)<https://londoneconomics.co.uk/wp-content/uploads/2020/03/NILS-feasibility-study-report.pdf>accessed 1 February 2021.

[124] Questions may arise as to whether punitive taxpayers have a moral right to expect accountability or return on bailouts and whether the rest of the public stands to lose anything since they technically do not fund this, although they share in the cost of the negative externalities warranting the punitive tax in the first place. This is an externality that may be accommodated through legislative appropriation, but it would create a double standard in that externalities from the bailout of corporates in the past were borne by the taxpayer without much public say in the debates that led to the allocation of public funds.

individuals could be required to undertake some community service, could be barred from accessing *certain kinds* of credit, but not automatically subjected to insolvency regimes which could speedily take them below the poverty line, and potentially out of the labour market as undischarged bankrupt.

The consequences of ineffective market support are well known. Inadequate support for the market at the beginning of the sub-prime mortgage defaults in the United States contributed to the global recession of 2007/2008.[125] According to the UK's Financial Crisis Inquiry Commission, letting Lehman Brothers fail was the single most significant event that led to the recession.[126] The de Larousier Report[127] also noted that the initial response of the European Commission was hesitant.[128] Consequently, conceptions of SIFIs must change so that systemic risk and moral hazard analyses going forward anticipate the market impact of corporate failures and the practical effects of evolving structural socio-economic factors capable of upsetting responsible individual borrowing. Keynesian economic theory remains relevant in its emphasis on strategic government stimulus during downturns, and the need to prioritise addressing the real social costs of financial crisis, such as unemployment and poverty, over concerns about taxpayer loss and government deficits.[129] In practice, taxpayer losses from public support occur,[130] but are often overstated. In some cases, governments have reported net gains from such interventions.[131]

6. Conclusion

Public support for distressed borrowers, both corporate and individual, is crucial for systemic stability. Flexible and dynamic LLR policies that accommodate solvent individual borrowers can mitigate systemic risks and promote economic resilience. The threshold test for necessary public support is to weigh the costs of moral hazard of support against the costs of systemic failure. Should the latter outweigh the former, then moral hazard considerations will have to be relegated. Governments choose bailouts not out of preference but rather to avoid a 'disorderly liquidation.'[132] Allowing an entire banking system to fail is far worse than providing a bailout, as seen with the Lehman Brothers collapse. Similarly, central banks could balance bailout policies for both corporations and individual borrowers by setting a standard for individual insolvency that penalises irresponsible behaviour while providing reliefs for unavoidable repayment issues.

There is need for flexibility and dynamism around market support rules. Legitimate moral hazard concerns should only form a part of a conceptual framework that recognises the evolving nature of LLR in response to market changes.[133] Classical LLR must begin to recognise a broader role for the central bank since credit has become a commodity traded by banks, nonbank lenders, and other firms.[134] Market liberalisation, technological advancement, product innovation, dematerialisation, immobilisation and the resultant interconnectedness of global markets, necessitate flexible and dynamic responses to financial crises.

The role of LLR should distinguish between solvent and insolvent borrowers. Solvent borrowers, SIFI or non-SIFI, individual or corporate, should receive public support where it affords better protection than insolvency law to the individual and the economy. Insolvent borrowers, on the other hand, should be allowed to use insolvency protection in resolution, and individuals without the risk-assessed capacity to borrow should receive assistance through alternatives like Universal Basic Income and no-interest loan schemes. This approach would mitigate the inequities and inconsistencies observed in the application of LLR policy in the past seventeen years.

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[125] When it comes to market support, it is not just the amount that counts but the timing and decisiveness. Arguably, the difference between the American International Group surviving, and Lehman Brothers going bankrupt was public support. See US Department of the Treasury, 'Financial Regulatory Reform: A New Foundation' (US Department of the Treasury, 17 June 2009) <http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf> accessed 4 January 2021.

[126] The Liikanen Report describes the Lehman bankruptcy as having been 'unnecessarily disruptive'. See EC, 'High-Level Expert Group on Reforming the Structure of the EU Banking Sector' (European Commission, 2 October 2012) < https://ec.europa.eu/info/publications/liikanen-report_en> accessed 4 January 2021.

[127] de Larosière and Others, *The High –Level Group on Financial Supervision in the EU- de Larosière Report* (2009).

[128] Seven months passed between George Papandreou's revelations on the sorry state of Greece's public finances, and the agreement of European leaders on a tentative solution. Pisani-Ferry, *The Euro Crisis and Its Aftermath* (2014).

[129] Some writers argue that even though they expose central banks to a contingent risk of loss and create a certain amount of increased moral hazard, classical LLR are not taxpayer-funded. See Guynn, *Are Bailouts Inevitable?* (2012), at 121.

[130] Asset Management Corporation of Nigeria, 'AMCON slumps to full-year loss'. *AMCON* (2018)<http://amcon.com.ng/news-story.php?n=13>accessed 1 February 2021.

[131] US Department of the Treasury, 'The Financial Crisis Five Years Later: Response, Reform, and Progress' (*U.S. Department of the Treasury,* September 2013) <http://www.treasury.gov/connect/blog/Documents/FinancialCrisis5Yr_vFINAL.pdf> accessed 2 February 2021.

[132] SC Bair, 'Examining the Major Aspects of the Dodd-Frank Act' Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg64796/html/CHRG-111shrg64796.htm> accessed 8 August 2015.

[133] Gabilondo, *Financial Hospitals: Defending the Fed's Role as a Market Maker of Last Resort* (2013), at 776.

[134] Ibid.

Book Review: Siobhán McInerney-Lankford and Robert McCorquodale (eds), *The Roles of International Law in Development*

Chris Tassis & Tomkeen Onyambu Mobegi**

1. Introduction

This book explores how general international law as well as specialised areas of international law influence and are influenced by the overarching concept of (sustainable) development. The book does so by providing a holistic and multifaceted presentation of the many tenets of law that govern and shape development, including the interaction with different legal disciplines, the role of law-making and law-shaping actors. At the epicentre of the book's analysis lies the argument that law and development are inextricably linked, with neither operating in isolation from the other.

The book is divided into five parts, comprising 18 chapters (co)authored by 25 contributing authors. Part I sets the theoretical, conceptual and methodological perimeter of the book and provides an extended overview of the relationship between law and development; Parts II, III and IV have a more targeted orientation and focus on examining the role of different legal disciplines in development; Part V reflects on the content and recommendations of different chapters and the overall theme of the book as well as further highlights one of the book's initial key points, namely that development-oriented work and initiatives do not occur in a vacuum, isolated from other critically connected areas and perspectives.

2. Part I: **Context**

Part I of the book lays the foundations for the analysis to follow by identifying the content and meaning of "international law" and "development", and by highlighting the relevance of international law for development law and practice as a foundational premise of the book. In chapter 2, Siobhán McInerney-Lankford posits international law as an "indispensable foundation of sustainable development" given that the former – and its substantive rules – anchor international legal accountability. Regime fragmentation is identified as one of the main challenges in the context of development and three types of international legal fragmentation are recognised: substantive, institutional and methodological. In the words of Christopher Borgen, fragmentation might give rise to potential normative conflicts 'due to the ignorance of lawyers and policy makers "unaware of the legislative and institutional activities in the adjoining fields and the general principles of international law".[1] The chapter argues that development activities are best construed and materialised via greater legal coherence and anchoring to international legal obligations, and further puts forward legal due diligence as the methodological approach and tool for the attainment of development-oriented objectives. Apart from the evident benefit of mapping applicable laws, international law due

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The views expressed in this article are the authors' own and do not reflect the policies, practice, or views of their respective institutions.

[1] Christopher Borgen, *Treaty Conflicts and Normative Fragmentation*, in D Hollis (ed), Oxford Guide to Treaties (2012).

diligence can be primarily understood as a systematic method to ex ante assess whether proposed "development policies or programs will result in the breach of an international obligation or harm to a state's rights". Such an approach is already applicable and has been deployed during the appraisal and design phases of development projects undertaken by multilateral development actors, like the EBRD and the World Bank, as a means of project screening to ensure alignment with the Banks' relevant environmental and social policies.[2]

3. Part II: **The Role of Human Rights Law**

Part II analyses various aspects of the role of human rights law in development, outlining, in particular, a) the multifaceted and complex relationship between human rights, international law and sustainable development;[3] b) the role of the United Nations human rights treaty bodies in shaping the development and implementation of the 2030 Agenda for Sustainable Development (2030 Agenda);[4] c) the mandate and role of the International Labour Organization (ILO) in generating, promoting and supervising the implementation of the International Labour Standards (ILS);[5] (d) the "promises" to streamline and achieve gender equality;[6] e) the gaps and opportunities to address racism and guarantee inclusion and non-discrimination in international law and international development;[7] and f) the recognition and promotion of the human right to water, including through international development support.[8]

These chapters build on and challenge the argument that human rights commitments and development objectives of countries and international organisations have historically been treated as separate and independent agendas. In an effort to challenge this view and provide an alternative perspective, the chapters thread decades of pieces of evidence, principles, and practices to show how human rights, international law and sustainable development are inextricably linked. For instance, international law provides a range of frameworks, principles and commitments within which states and international organisations can model and achieve their development objectives while enabling and promoting the fulfilment of their human rights obligations.

In addition, the book elaborates on the fundamental role of regional and international legal frameworks and institutions in promoting and negotiating the inclusion of human rights standards in the 2030 Agenda for sustainable development. While the 2030 Agenda does not refer to any human rights frameworks, its ambitious, pro-human rights language has been incorporated into various (sub) frameworks, norms, and principles of international law. This interconnectedness clearly indicates that, in a steadily changing legal, political, economic, and social environment, human rights, international law and sustainable development must complement each other inclusively and transparently. However, this complementarity is difficult to be realised in practice, especially in a world crippled by crises and competing social, economic, environmental, and political demands.

In recent years, the human rights-based approach (HRBA) to sustainable development has provided alternative ways to incorporate specific human rights principles and obligations into development practices and policies. For instance, where development operations may potentially impact human rights, incorporating measures that promote and emphasise the importance of stakeholder engagement, full and prior informed consent, rule of law, non-discrimination, transparency and accountability may, indeed, increase the benefits of development and enhance "the protection and empowerment of poor, discriminated, or otherwise marginalised groups."

Irrespective of the way that human rights considerations are incorporated into mainstream policy- and law-making, the authors of this review fully agree with the view of the authors of the book that international organisations, including the World Bank and the EBRD, "have a vital role in the development and implementation of international (human rights) norms", including by incorporating such norms into their development policies, standards and operations. Last but not least, multilateral development actors can also serve as an effective means for understanding how issues have evolved from the past, how they were addressed, and how they may potentially be navigated in the present and the future by capitalising on their rich experience in addressing crises.

[2] See for example, European Bank for Reconstruction and Development (2019) Environmental and Social Policy, https://www.ebrd.com/news/publications/policies/environmental-and-social-policy-esp.html, last accessed 22 August 2024.

[3] Chapter 4 – Jan Wouters and Michiel Hoornick, The Triangle of Human Rights, International Law, and Sustainable Development, at 59 – 79.

[4] Chapter 5 – Anganile Willie Mwenifumbo, Harumi Fuentes Furuya, and Marie-Joseph Ayissi, United Nations Human Rights Treaty Bodies' Approaches.

[5] Chapter 6 – Katerina Tsotroudi and Jordi Agustí Panareda, The ILO's Dialogical Standards-Based Approach to International Labour Law.

[6] Chapter 7 – Sandra Fredman, Achieving Gender Equality.

[7] Chapter 8 – Harum Mukhayer, Race and Discrimination.

[8] Chapter 9 – Laurence Boisson de Chazournes, Mara Tignino, and Haoua Savadogo, The Right to Water.

4. Part III: **The Role of Environmental, Humanitarian, and Refugee Law**

In Part III, the book analyses a) the potential avenues for furthering action and addressing the impacts of climate change on "the three dimensions of sustainable development, namely the environment, society, and the economy";[9] b) how World Bank policies, projects, and practices intersect with and strengthen the "existing and emerging principles of public international law" on forced displacement;[10] and c) the problematic role of the World Bank in "updating colonial hierarchies and legacies" by promoting "extractivist" mining guidelines, policies, and constitutional and legal reforms in Latin America.[11]

In recent years, it has become evident that environmental issues such as climate change and humanitarian crises such as fragile and conflict situations, forced displacement and related refugee challenges are a "threat" to the gains and benefits of international law and international development. Part III of the book advances the cross-cutting claim that international law is inherently suited to shape the actions, policies, and procedures of states and international organisations. In this regard, the book builds on the binding nature and grounding power of international law norms and principles, and their ability to dictate the behaviours and actions of states and international organisations. In this instance, the book also conceptualises states and international organisations as norm-makers and implementers. This part of the book further recognises the effectiveness and importance of regional perspectives in understanding and addressing challenges such as climate change. It also accounts for the problematic role of international law and institutions in enabling hegemony and coloniality, particularly in shaping national and regional policies on access to and exploitation of natural resources such as minerals.

5. Part IV: **The Role of International Economic Law**

The last substantive part of the book focuses on the contentious relationship between international economic law and development, with a particular emphasis on the role of international investment law.[12] At the epicentre of the analysis included in the three, investment law related chapters lies the core question of how to avoid the phenomena of regulatory chill by reconciling the protection of foreign investments with the preservation of State's right to regulate in the context of development. This question is approached from different angles, with the authors offering a detailed account of the latest trends and scholarship, including an overview of the recent proliferation of sustainable development conducive clauses in investment treaties and trade agreements as well as a commentary on recent caselaw, particularly in the renewable energy spectrum. The authors of this review enjoyed Farouk El-Hosseny's apt analysis of the rule of law in investment and the call for regime and objectives symbiosis, and agree with his statement that "it is not about whether or not that right can be exercised[13] – it is about *how*".

6. Conclusion

Overall, the authors of this review greatly enjoyed reading the book, find it suitable and interesting for a range of audiences, spanning from practitioners to law students. The authors of the book made clear from the introductory chapters that this will not be an attempt at "yet another reprise of the philosophical or jurisprudential arguments of the relevance of law [for development]" infusing the book with a practical orientation that makes the main ideas presented easy to follow and digest. Perhaps the book's greatest feature is its very structure and the combination of different legal and policy voices. The whole book and the specialised content of its chapters are a prominent illustration and manifestation of regime and discipline interaction – one of the book's central ideas – with law being an integral part of the equation and the thread that holds everything together.

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[9] Chapter 10 – Bakary Kanté, Environmental Law and Climate Change: A Perspective from Africa

[10] Chapter 11 – Duygu Çiçek, Paige Casaly, and Vikram Raghavan, Forced Displacement, International Law, and the World Bank

[11] Chapter 12 – Ximena Sierra-Camargo, Problematizing the Role of the World Bank in Latin America Mining Reforms.

[12] Chapter 13 – Ursula Kriebaum, International Investment Law; Chapter 14 – Chin Leng Lim, International Trade and Foreign Investment; and Chapter 17 – Farouk El-Hosseny, The Rule of Law in Investment – A Condition for Development?

[13] Meaning the State's right to regulate.

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