STATE RESPONSIBILITY AND INTERNATIONAL FINANCIAL OBLIGATIONS: A Case Study of the International Monetary Fund Stand-By Arrangements with Developing Country Members

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Abstract

Since the international debt crisis arose in 1982, various forms of debt relief measures have been applied by international creditors to alleviate the difficulties encountered by most developing countries in meeting their financial obligations. Renegotiation of external debts within the framework of official and private creditor clubs, however, has become the widely acceptable procedure in recent years. A sine qua non to this process is the entry by a debtor state into a stand-by arrangement with the International Monetary Fund. Compliance with the terms of the stand-by arrangement is closely linked, either in a formal or informal manner, to the enforcement of bilateral loan rescheduling agreements with creditor governments and syndicated loan agreements with private commercial banks.

The crux of IMF financing is a commitment by a debtor state to implement economic policies aimed at improving the latter's balance of payments position. However, the impact of these economic austerity measures upon the political stability of the debtor's government and the living standards of its citizens has generated an attitude of reluctance among the leaders of several developing countries to consult the IMF in accordance with current renegotiation procedures.

In this thesis, the writer will examine the salient legal and political issues arising from the practice of international creditors in using compliance with the terms of the IMF stand-by arrangement as a parallel condition under their loan agreements with a debtor state.

Three main arguments have been considered by this writer in shedding light upon this study.

Firstly, the assumption that compliance with the terms of the IMF stand-by arrangement constitutes an international obligation is not in accord with the law and practice of the IMF. Any inference of breach entailing state responsibility, therefore, is unwarranted on account of the characterization of the IMF stand-by arrangement as a non-binding instrument.

Secondly, a debtor state experiencing extreme economic hardship may be justified under international law to take unilateral action having the effect of deviating from the stand-by arrangement provisions. It will be argued in particular that the principle of "freedom for payments" embodied in stand-by arrangements is subject to an exception applying the rule of a state of necessity under international law.

Finally, it will be argued that the political sustainability of economic adjustment for debtor states through the stand-by arrangements could be enhanced by incorporating human rights principles as a juridical standard for adjustment policies formulated in consultation with the IMF.

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CHAPTER 1

INTRODUCTION

1. INTRODUCTION

> "I am convinced that if in ... 1989 we do not find a solution to the debt problem, democracy in Latin America will be threatened by destabilization ... The condition in Africa is more dramatic."
>
> - President Carlos Andres Peres of Venezuela, 5 February 1989, Conference of the Group of Eight Latin American Countries[1]

On February 28, 1989, less than a month after President Carlos Andres Peres warned the international community of the possible political consequences of the international debt problem for the developing debtor nations, the Venezuelan President signed for the first time a letter of intent containing the economic adjustment programs which his government intended to undertake during the effectivity of the stand-by arrangement with the International Monetary Fund (IMF)[2]. Having the arrangement in place would pave the way for the approval of the US$ 4.3 billion three year credit arrangements with Venezuela's other foreign creditors.[3]

The economic austerity measures which proposed "traditional" monetarist solutions, such as, currency devaluation, price increases for a range of basic goods and services (including bus fares, food, gasoline and electricity), increases in interest rates, new taxes and higher import duties, triggered a week of looting and riots in Caracas and at least 11 major cities leaving 300 people dead.[4]

The principle of economic adjustment under IMF surveillance through the instrumentality of stand-by arrangements has been viewed by international creditors today as evidence of orderly management designed

to put the debtor state to a position of eventually servicing its external debt.[5] Historically, international mechanisms adopted by creditor states and their subjects to influence economic policy-making in debtor states during a period of insolvency were acceptable means in state practice to guarantee eventual repayment of international financial obligations. Some of the fundamental principles which emerged during the debt crises in the nineteenth and early twentieth centuries were institutionalized in new international economic rules formulated during the Bretton Woods Conference before the end of the Second World War. The Articles of Agreement of the International Monetary Fund which entered into force on December 27, 1945 contains far-reaching principles governing international economic relations today.

Article V, Section 3 (entitled "Conditions Governing Use of the Fund's Resources" known as the policy of conditionality) of the Amended Articles of Agreement has become particularly useful in the current sovereign debt renegotiation process. This thesis focuses on paragraph (a) of the provision which states:

> The Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special policies for special balance of payments problems, that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund.

International creditors, both public and private, have often linked their rescheduling and restructuring agreements, respectively, to the implementation of stand-by arrangement policies formulated in consultation with the IMF.

Much of the debate on conditionality and the impact of stand-by arrangement policies upon the debtor states had dealt with the economic and political dimensions of the problem. This thesis aims to examine some of the novel legal issues arising from the current role of stand-by arrangements in the sovereign debt renegotiation process. The governing legal regime applicable to this investigation is the international law of responsibility. An argumentative approach will be employed in this study.

The thesis is divided into three major chapters. Chapter Two contains a brief survey of the development of rules of international law pertaining to earlier debt crises during the nineteenth and early twentieth centuries. Another purpose of this survey is to point out the earlier parallels of the present concept of economic adjustment measures institutionalized in the stand-by arrangements, including the international actors and institutions involved in resolving the debt crises before the Second World War. Chapter Three essentially establishes the legal nature of IMF operations with emphasis on its balance of payments financing for heavily indebted developing country members through the use of stand-by arrangements. The role of these arrangements in the multilateral framework for sovereign debt renegotiations after the Second World War is examined and analyzed. Finally, Chapter Four applies the current Draft Articles on State Responsibility adopted by the International Law Commission to three aspects of the IMF stand-by arrangements. The first legal issue deals with the consequences of non-compliance with the terms of the stand-by arrangements. In the second issue, the writer addresses the principle

of "freedom for payments" and examines the legal justification which a debtor state may invoke against the stand-by arrangement provision which prohibits any form of restriction on the making of payments and transfers for current international transactions. And the last issue relates to the responsibility of the International Monetary Fund for the promotion of human rights in the context of the stand-by arrangement programs.

CHAPTER 2

TRADITIONAL INTERNATIONAL LAW AND THE PROBLEM OF STATE INSOLVENCY

2.1 PRE-19TH CENTURY THEORY

During a series of lectures delivered by Sir J. F. Williams in 1923 on the subject "International Law and International Financial Obligations Arising From Contract", he emphasized the long-standing cases of contractual liabilities incurred by the ruling monarchs or princes since ancient times.[1] The character of these loans according to Williams "were no doubt, the personal transactions of monarchs, the idea of the state as a separate personality under a monarchical regime, distinct from the monarch, not having yet established itself in law."[2]

The implications of the traditional concept of contractual liabilities arising from monarchical debts were overwhelming. Hugo Grotius wrote in his opus *De Jure Belli Ac Pacis* that

> ... Authorities generally assign to wars three justifiable causes: defence, recovery of property, and punishment. All three you may find in Camillu's declaration with reference to the Gaul's: 'All things which it is right to defend, recover, and to avenge.' In this enumeration the obtaining of what is owed to us was omitted, unless the word 'recover' is used rather freely. But this was not omitted by Plato when he said that wars are waged not only in case one is attacked, or despoiled of his possessions, but also if one has been deceived. In harmony with this is a sentence of Seneca: 'Perfectly fair, and in complete accord with the law of nations, is the maxim, "Pay what you owe."' The thought was expressed also in the formula of the fetial: 'Things which they have not given, nor paid, nor done, which things ought to have been given, to have been done, to have been paid'; in the words of Sallust, in his Histories: 'I demand restitution in accordance with the law of nations.'[3]

Corollarily, according to Grotius, "the goods of subject may both be seized and acquired, not only [542] for the exaction of the original debt which gave rise to war, but also for the exaction of indebtedness which develops subsequently...."[4]

Williams observed, however, that with Grotius' own "characteristic humanity he adds that it does not follow that because you have a just

cause of war you therefore ought to make war."[5] The qualification of the rule is expounded by Grotius himself in the following manner:

> But we must keep in mind that which we have recalled elsewhere also, that the rules of love are broader than the rules of law. He who is rich will be guilty of heartlessness if, in order that he himself may exact the last penny, he deprives a needy debtor of all his possessions; ... humanity requires that we leave to them that do not share in the guilt of the war, and that have incurred no obligation in any other way as sureties, those things which we can dispense with more easily than they, particularly if it is quite clear that they will not recover from their own state what they have lost in this way .... The right over the goods of innocent subjects has been introduced as a subsidiary means; and as long as there is hope that we can obtain what is ours with sufficient ease from the original debtors, or from those who by not rendering justice voluntarily make themselves debtors, to come to those who are free from blame, even though it is granted that this is not in conflict with our strict right, nevertheless is to depart from the rule of human conduct.[6]

Creditor monarchs or states in the seventeenth century infrequently availed of their right to engage in war to enforce an obligation owing either to them or to their subjects. Williams suggested in his lectures that the behaviour of international actors at that time may have been conditioned by a number of reasons: "All monarchs were more or less indebted; none of them were good debtors. As a general rule the individuals who lent money to a king were the king's own subjects, and when this was not the case there was perhaps a certain corporate feeling in royal circles that militated against the espousal by a monarch of the claim of a private creditor against another monarch ... [and] that [c]ommercial transactions [went] ill with war."[7] He concluded that it is evident that at this stage "no positive rule of International Law ... has ever yet been made dealing specially with the question of inter-state debt."[8] But for reasons that will be cited in the next section by the present writer the state practice which gradually developed during the nineteenth century was the "assertion of the rights of creditor

subjects within the context of the duty of a state to protect its own nationals."[9]

2.2 PROTECTION OF THE RIGHTS OF CREDITOR SUBJECTS: THE CASE OF THE BONDHOLDERS

2.2.1 BACKGROUND

It will be recalled that loans contracted by monarchs predominantly with particular individuals were in the nature of personal loans. By the sixteenth century, "... when the territorial State reached full development, with a treasury independent of that of the sovereign, the personal credit of the king was substituted by the credit of the state .... The form of loans also changed. Instead of accepting a loan from one or several individual or bankers, public subscriptions were opened. Occasionally the so-called private property of the state, not devoted to the public service, was mortgaged or burdened. But bankers did not disappear. Whenever the chances of the success of a loan by public subscription seemed weak, resort was had to bankers, either as direct lenders or as underwriters."[10] Private lenders in the major nineteenth century imperial states soon turned to the developing areas of South and Central America, Asia, Africa, and the Middle East which provided a significant international loan market.[11] Citing a report by statisticians, Professor Edwin Borchard stressed that "state debts have grown in the course of 130 years from about $2,500,000,000 in 1789 to $7,500,000,000 in 1815, $20,000,000,000 in 1889, $31,000,000,000 in 1914, and $210,000,000,000 in 1919."[12]

In order to guarantee minimal financial risk, British merchants, in particular, utilized a number of bond issuing mechanisms. The legal aspects of these three principal forms of bond issuances are succinctly summarized by one contemporary writer as follows:

> ... First was the institution of a foreign sovereign using one or more banks as its agent in the foreign capital market. A bank would agree to represent, as agent, a foreign borrower in the issuance of the foreign borrower's debt.... In such an agency arrangement the bank bore no direct economic risk. Should an issuance not be successful, i.e., not find sufficient buyers at the offering price, only the borrower would suffer economic loss, through disappointed expectations or by selling at a discount from the initial offering price. What the agent bank risked, in fact, was its reputation with the investing public -- the basis upon which investors often made the decision to buy particular issues. In return for taking the risk of loss of reputation, however, the merchant banks which acted as agents of foreign government borrowers received substantial commissions, the exact amount depending upon the credit-worthiness of the foreign borrower. Thus, although there was some risk involved in this agency mechanism, it was a risk to reputation rather than to assets.
>
> A second form of issuing mechanism, known as contracting, was also common. In a contracting scheme, the intermediary bank served not as an agent of the foreign borrower, but as principal, albeit for a short period only. The issuing bank would purchase directly for its own account the whole of a foreign borrower's proposed debt issue, with the intention to immediately resell the issue on a public exchange. The profit to the issuing bank derived not from payment of fees by the borrower as in the agency case, but rather by the borrower selling the issue at a substantial discount from par (face value) to the issuing bank and the issuing bank selling the issue to the public at a higher price, preferably at par or at a premium above par, if possible.
>
> ...during the 1860s and 1870s there emerged a system of multiple banking intermediaries contracting a single bond issue. The system was known as underwriting. The great virtue of the underwriting system was that it diversified even the short-term market risk issuance among a larger group. It also had the more dubious virtue of making market manipulation easier to achieve.[13]

Two waves of default during the nineteenth century triggered a bitter rivalry between the sovereign borrowers and the governments of the private bondholders. The first phase of defaults occurred between 1822-1825 while the second followed during the 1870s.[14] In both periods the Latin American countries have been the principal defaulters. But a number of non-American states have also been recorded by Borchard as

having defaulted several times within the same stage: "Austria - 1802, 1805, 1811, 1816, 1868, 1919; Holland - 1814; Germany (Prussia) - 1807, 1813, 1919; Westphalia - 1812; Schleswig-Holstein - 1950; Spain - 1820, 1831, 1834, 1851, 1867, 1872, 1882; Greece - 1826, 1893; Portugal-1837, 1852, 1892; Russia - 1839, 1919; Turkey - 1875, 1876, 1881; Egypt - 1876. In the United States nine states of the Union - Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and West Virgina - repudiated their debts about the middle of the century ...."[15]

State insolvency at this time according to Professor Borchard occurred in the following ways: "1. Non-payment of interest, by reducing the rate, by postponing the payment for a period, by complete and indefinite suspension of interest payments, by reduction of the coupon interest by a special tax on the coupons in breach of the contract; 2. By a failure to repay the capital, either by postponing the duty to repay, by transforming the obligation into a different type, including compulsory conversion, by reducing the capital amount of the debt, by conversion of a metal into a paper obligation; and, 3. By a reduction or repudiation of interest payments and the simultaneous reduction or repudiation of the capital debt."[16]

Though most defaults which occurred during the nineteenth and early twentieth centuries were mainly involuntary, a number of repudiations cited in the past, however, were justified by certain governments on the ground that a prior government lacked the authority to bind the nation. These cases were illustrated by the Spanish repudiations under King Philip II in 1566, 1576, and 1595; by Portugal after the reign of Dom

Miguel in 1832; by Mexico's refusal to be bound after Maximilian; and the repudiations by the Mississippi, Florida, Alabama, North Carolina, South Carolina, Georgia, Louisiana, Arkansas, and Tennessee during the middle of the nineteenth century.[17]

2.2.2 REMEDIES OF THE BONDHOLDERS

The nature and extent of the liability of the defaulting state during this period became the subject of intense debate as expressed in the writings of international legal scholars and the policies pursued by governments. In an exhaustive survey of the literature on these aspects of intergovernmental loans, Borchard identified the sources of uncertainty which contributed to the lack of unanimity over the proper legal approach towards the resolution of state insolvency during the period. Drawing from the opinions of scholars from different legal systems and, occasionally, from arbitral decisions, he distinguished three views on the legal characterization of the financial obligation arising from the loan contract between the debtor state and the private bondholders. The proponents of the first theory, mainly debtor states

> ... regard the sovereign as above the law -- a view having a long standing historical background -- and conclude that the sovereign can not be subject to legal rules; that he who contracts with the sovereign or the state has nothing but the state's honor and credit as a sanction, because the state can not be sued effectively either in its own courts or in those of the bondholder; that the contract is, therefore, aleatory or a gambling contract, depending for its performance entirely on good faith and capacity of the debtor to pay. This school of thought concludes that, if a state becomes insolvent or repudiates, such eventuality is a contingency which the creditor had or should have had in mind in concluding the contract or buying the bond, and that the state is as privileged to alter the terms of the contract or to violate it as it was originally to enter upon it ....[18]

On the other hand, the creditors' legal position was that

> ... the relations between the state and the bondholders are recorded in contracts, just as in the case of any private corporation debtor. It therefore concludes that the obligation is controlled by the private law of contracts. It is not concerned with the question what the remedy for breach may be, regarding remedy as independent of substantive right. This school maintains that when the state contracts a loan it tacitly waives its sovereign character and subjects itself to the rules of private law."[19]

Finally, the third view

> ... regards the transaction as a contract of public law, thus admitting the sovereign character of many of the motives and laws which authorize and support the loan, while yet insisting that the obligation is legally binding, whatever remedy the bondholder may or may not have. The contract of loan is indeed *sui generis*, both in the form of its creation and in the results attending the non-payment. It is created by laws of the debtor state and in order to bind the state must conform to all requirements of those laws. Yet the purchaser of the bond and the issuing state both contemplate that they are entering not a gambling contract, a contract subject to repudiation by one party, but a definite and clearly stated obligation to make payments .... Hence members of the third school of thought ... refuse to consider the nonpayments as either privileged or unprivileged but as an operative fact which creates a number of consequences, legal and factual. Practice, if not law, has determined the nature of some of these consequences ...."[20]

In the light of the peculiar nature of the intergovernmental loan just described, Borchard observed that during this period political and economic remedies of the organized bondholders became preferred over the judicial remedies available within the forum of the borrower or the lender.[21] A number of institutions, procedures, and diplomatic practices which evolved during this period serve us valuable insights in our understanding of post-World War II debt relief strategies pursued by international financial institutions, creditor governments, private commercial banks and debtor states.

2.2.2.1 Negotiation and the Readjustment Plan

Bondholders generally had recourse to two major institutions (apart from the judicial system) which facilitated negotiations with a defaulting government. The first body was the private protective committee of bondholders of defaulted loans from various states.[22] This type of lenders association arose in England during the first half of the nineteenth century and was participated in by bondholders of defaulted Spanish-American, Portugal, Greek and other loans. In the wake of a succession of defaults, however, and in order to gather more government support, protective committees organized themselves into the Corporation of Foreign Bondholders in 1868 in England.[23] A similar government-sponsored entity, known as the Foreign Bondholders Protective Council, Inc., was also constituted in the United States in the early 1930s.[24] France (1898), Belgium (1898), Germany (1927), the Swiss and Italian committees had their own organizations, too, even earlier than the United States.

The role played by the corporations or councils in relation to the committee during a "debt crisis" situation in the past can be illustrated by the practices of the United States and British groups. In the case of the United States, "The Council [had] no power and [did] not purport to bind the bondholders to any plan of adjustment. But its recommendation for or against acceptance of a particular plan is likely to have considerable weight with bondholders. Non-accepting bondholders have little opportunity for legal or diplomatic recourse against the debtor and more against the Council or their fellow bondholders."[25] On the other hand, "the relations between the English Council and its

protective committees is more intimate, ... The British Council did (sometimes) request the deposit of bonds and become, in consequence, the legal representative of the bondholders. The British advisory or special committee passed upon the plan of adjustment and advised the Council whether the plan should be recommended by the Council to the bondholders ...."[26]

The principles and procedures which emerged as a result of the practice of negotiations between defaulting governments and representatives of the bondholders are comparatively the same as the terms of debt rescheduling agreements constantly negotiated by most developing country borrowers with the creditor clubs today. It would be of great importance then to mention in some detail these basic substantive and procedural "rules" governing the conduct of the private creditors and a sovereign borrower in a default situation inasmuch as constant adherence to these "rules" would be indicative of state practice particularly from the perspective of the defaulting state.

A debtor state was normally induced by the protective committee to engage in a readjustment plan after a default. This is "essentially a procedure for terminating a default by substituting new terms for the existing obligation which, for one reason or another, can no longer be fulfilled."[27] Some aspects of this procedure require elaboration for the purpose of comparison with the current international debt renegotiation procedures. Firstly, private creditors conducted preliminary investigations into the economic and financial conditions of the defaulting state whenever feasible,[28] but if the same can not be obtained for lack of willingness on the part of the debtor state to

honor its obligation, resort to some disinterested studies of the debtor's economic capacity to comply with the financial obligation has been done in order to arrive at a common policy among the different bondholders.[29] Secondly, the debtor state had often times been encouraged to take the initiative in proposing the terms of the debt settlement. [30] Thirdly, as it was usual to expect extreme sectionalism among the bond creditors, they have been advised occasionally in dealing with the debtor states that " ... no group [should be] inclined to grant a concession unless all other groups make corresponding concessions to the end that the aggregate of concessions may meet the assumed abilities of the debtor. In such a situation no group of creditors can successfully deal with its debtors wholly in disregard of other groups of creditors."[31] Third parties who have an economic interest in the recovery of the debtor state were also allowed to participate in the process.[32] Fourthly, negotiations have been conducted traditionally by officials of either the Ministry of Finance or the Treasury Department of the debtor state with the representatives of the bondholders who may be particular individuals or corporations.[33] Fifthly, the results of the negotiations were set forth in an instrument the binding force of which was dependent upon the mode of representation on behalf of the bondholders.[34] On the part of the debtor state, it was customary to incorporate the obligations under the debt settlement in a law to impress upon the agreement a binding character.[35] Finally, bondholders protective committees preferred short-term settlements which allowed the parties to adopt to future economic conditions which may radically affect their respective rights and duties; although in the

case of a debtor state whose financial position showed a "reasonable measure of stability", a more permanent form of settlement was occasionally negotiated subject to increased security attached to bonds.[36]

The readjustment plan also embodied some substantive principles which to date continue to be applied in official and private debt renegotiations. The first is the consideration of the capacity of a debtor state to pay.[37] An issue which had occupied both the creditors and the debtor state on this point was the absence of a legal standard or test by which the reasonability of the invocation of such principle may be measured. Borchard had put the problem as follows:

> It has been argued that a government's capacity to pay actually depends primarily on its will to pay. A government, through the exercise of its taxing power, has the whole wealth of the nation, including the private wealth of all its nationals, to draw upon for the fulfillment of its financial obligations, and only in case the taxing power has reached the point of exhaustion can there be any question about the debtor's capacity to pay. The principal answer to this argument is the oft-repeated maxim that no sovereign state can be asked to sacrifice essential national interests to the performance of its loan contracts. The precise question, however, is what, in a given case, constitutes necessary expenditures for national purposes. Is it 'the welfare of the debtor nation, as determined by itself' that must take precedence over foreign debt payments? Shall the debtor country be permitted not only to improve the standard of living of its citizens but also to maintain its political power and influence through expenditures on armaments before it can be required to live up to its financial engagements toward foreign bondholders? The answer to these questions is not to be found in any legal rules or accepted standards of justice. It depends on the particular circumstances of each case where the line between bad faith and indispensible needs of the debtors is to be drawn.[38]

On this point it is useful to examine the interpretations and declarations by a creditor and some debtor states in regard to the principle of "capacity to pay". An American debt funding commission report in 1925 had stated that

> While the integrity of international obligations must be maintained, it is axiomatic that no nation can be required to pay another government in sums in excess of its capacity to pay ...[39]

One debtor state declared before its creditors further that if

> ...full service of its foreign indebtedness were paid, it could not carry on 'the elementary necessities of government and, of course, if the government did not function, there would not in the chaos that would ensue, be revenues and the bonds could not then be paid even as much as the Province was offering![40]

Another debtor also wrote to the U.S. Secretary of State in 1934 in regard to its proposal to the Foreign Bondholders Protective Council that it

> was prompted by an earnest desire to preserve the credit of the ... Republic and to preserve compliance with its obligations to foreign bondholders to the utmost degree, consistent only with its paramount duty to preserve the functions of government under the unprecented conditions of world-wide depression from which the government and people have suffered.[41]

Finally, Mexico in 1928 recognized that "while there was a need for social reforms ... [it] insisted that to make provisions for the debt services was equally necessary."[42]

Borchard concluded that it is apparent from the declarations of both creditors and debtor states that "debt adjustment is judged ultimately by measures of expediency and political feasibility rather than purely economic yardstick."[43]

Debtor states during this period had found it essential to express some signs of good will by "the introduction of financial reforms or by accepting advice of independent organs for improving their financial condition ..."[44] On the other hand, creditors normally agreed to adopt some devices to reduce the debt burden of the debtor states.[45] The readjustment plans have applied, for instance, the following schemes: (1) conversion or the exchange of defaulted bonds for new ones;[46]

(2) consolidation and unification of all indebtedness for orderly administration and uniformity of interest rate;[47] (3) reduction of principal and interest when there is a claim by a debtor state that "the face value or (nominal) value of the capital was grossly in excess of the proceeds actually realized by them from the transaction;[48] and, (4) partial payment of arrears.[49] In support of these devices, however, creditors sought greater control over the administration and collection of revenues allocated to debt service.[50] Furthermore, it became a common feature of the readjustment plan to include reversion clauses providing that in the event a debtor fails to execute the terms of the debt settlement, bondholders revert to the previous position.[51]

The frequency of debt settlements also gave rise to a system of preferences among the different creditors.[52] Three governing principles adhered to by the creditors and the debtor state require a brief discussion.

Firstly, the principle of equality required that all bondholders be treated alike although this did not mean that absolute uniformity of treatment was necessary. Any form of preferential treatment to a particular class of bondholders must be reasonably justified by the debtor state.[53]

Secondly, in line with the principle of non-discrimination, the "most favored-debt clause" became an essential feature of debt settlement instruments. A debtor state became obliged to "extend automatically to the adjusted debt all the advantages which [it] may in the future grant to any one of its outstanding external obligations."[54]

Finally, for special reasons, such as, "the significance of a loan for the economic and political life" of a debtor state or on account of the "quality of the claims as expressed in the nature and value of the security behind it", differentiation had been recognized in debt settlement plans.[55] Thus, preferences had been accorded trade debts and short-term credits in most debt settlements as "non-payment or settlement of [these] may have a much more immediate and direct repercussion on the welfare of the government and its citizens than does the continuation of default on its long term debt.[56] The so-called "international law debts" were traditionally preferred over a governmental loan contract with a private individual primarily on account of the difference in the legal consequences arising from non-fulfillment of an international obligation.[57]

2.2.2.2 Diplomatic Protection

A second recourse which bondholders availed of to seek repayment on their loans was diplomatic protection. Borchard provides some background for the increased use of this channel during this period:

> The nineteenth century witnessed a growing appreciation of the importance of foreign investment, including loans to foreign governments, in the competition for national prosperity and political influence ... the greatest capital accumulations, with resulting capital exports, occurred in the advanced industrial and trading nations like Great Britain - the world's financial center - France, Germany, and later the U.S., while most regular borrowers were the underdeveloped and more politically unstable countries of Europe and Latin America. Although , with rare exceptions, laissez faire dominated capital exports in Great Britain and the United States until well into the twentieth century, it soon became apparent, first in France and later in other countries, that foreign investment could be used as an instrument of policy to serve the national political interest.
>
> The economic exploitation of backward areas, a term not invidiously employed, became a goal of imperialism, and finance the least provocative means to an end .... As governments realized the political weight of financial power they not only took

> more interest in directing the flow of export capital and showed more concern in its fate but, in some instances, themselves became capital investors on a grand scale.[58]

Governments of bondholders recognized as a rule of public international law that they "would make the mere losses of their citizens the basis of an international claim and interpose diplomatically for their vindication or collection."[59] British official policy on this point defined by Lord Palmerstone's Circular of 1848, did not augur well for British holders of defaulted bonds when it declared

> ... that it is for the British Government entirely a question of discretion, and by no means a question of international right, whether they should or should not make this matter the subject of diplomatic negotiation .... It has hitherto been thought by the successive Governments of Great Britain undesirable that British subjects should invest their capital in loans to foreign governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign governments, who may be either unable or unwilling to pay the stipulated interest thereupon, the British Government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions.[60]

On the other hand, the United States position on the matter was expressed by President Roosevelt in 1906 at Buenos Aires:

> The United States has never deemed it to be suitable that she should use her army and navy for the collection of ordinary contract debts of foreign Governments to her citizens. For more than a century ... that has become the settled policy of our country .... We deem the use of force for the collection of ordinary contract debts to be an invitation to abuses in their necessary results far worse, far more baneful to humanity than the debts contracted by any nation should go unpaid. We consider that the use of the army and navy of a great power to compel a weaker power to answer to a contract with a private individual is both an invitation to speculation upon the necessities of weak and struggling countries and an infringement upon the sovereignty of those countries,...[61]

The above pronouncement by President Roosevelt soon established a firm precedent for the development of a rule of international law

against the use of force in the satisfaction of financial obligations owed to a creditor state's subject.

The use of good offices typically provided claimants with advantages, such as, easily inducing a debtor state to comply with the terms of the agreement; providing facilities for receipt of payment; bringing about a readjustment of the debt; facilitating the control of the collection of pledged revenues; and, an opportunity for participation in the establishment of a governmental body to oversee the debtor's fiscal affairs.[62] In addition, the legal technique of putting in treaty form the terms of the debt settlement between a state's nationals and a defaulting government necessarily gave rise to an issue of a breach of an international obligation whenever non-compliance with the agreement occurred.[63]

Increased pressure from bondholders upon their governments in the latter part of the nineteenth century, however, resulted in what Borchard described as a "progression of a policy over a relatively short span of years."[64] It was not uncommon thereafter for several stronger nations to threaten debtor states with the use of military force when the latter refused to pay or engage in the negotiation of readjustment plans with the bondholders.[65] The blockade of 1902-1903 put up by Germany, Great Britain and Italy against Venezuela to enforce various claims including breaches of contracts, however, left the debtor states in Latin America with a common goal to seek an end to the use of force for the recovery of contract debts.

It is relevant to recall the pertinent words of the Argentine Foreign Minister, Señor Luis M. Drago, in his note dated December 29,

1902 addressed to Señor Martin Garçia Merou, then Minister of the Argentine Republic to the United States, concerning the Venezuelan blockade:

> Among the fundamental principles of international law ... is that which decrees all states, whatever be the force at their disposal, are entities in law, perfectly equal one to another, and mutually entitled by virtue thereof to the same consideration and respect.
>
> The acknowledgement of the debt, the payment of its entirety, can and must be made by the nation without diminution of its inherent rights as a sovereign entity, but the summary and immediate collection at a given a moment, by means of force, would occasion nothing less than the ruin of the weakest nations, and the absorption of their governments mighty of the earth. The principles proclaimed on this continent of America are otherwise. 'Contracts between a nation and private individuals are obligatory according to the conscience of the sovereign, and may not be the object of compelling force ....'
>
> The collection of loans by military means implies territorial occupation to make them effective, and territorial occupation signifies the suppression or subordination of the governments of the countries on which it is imposed.
>
> Such a situation seems obviously at variance with the principles many times proclaimed by the nations of America, and particularly with the Monroe doctrine ....
>
> Among the principles which the memorable message of December 2, 1823 enunciates, there are two great declarations which particularly refer to these republics, viz: 'The American continents are henceforth not to be considered as subjects for colonization by any European powers,' and '*** with the government *** whose independence we have acknowledged, we could not view any interposition for the purpose of oppressing them or controlling in any other manner their destiny by any European power in any other light than as the manifestation of any unfriendly disposition toward the United States.[66]

The issue of forcible collection of debts had earlier been the subject of the first of the two Hague Conferences in 1899.[67] The Russian delegation presented a proposal seeking the "submission to obligatory arbitration ... differences or claims relating to pecuniary damages suffered by one state or its citizens as the result of the illegal action or the negligence of another state or its citizens."[68] But it was during the second conference (1907) that controversies

related to pecuniary claims were proposed to be the subject of an arbitration. The proposition as announced by General Horace Porter of the United States stated that

> With the object of preventing between nations armed conflicts of a purely pecuniary origin, arising from contractual debts (dettes contractuelles), claimed by the government of one country as due to its citizens, the Signatory Powers agree not to have recourse to armed force for the collection of such contractual debts. However, this stipulation is not to be enforced when the debtor state refuses or leaves unanswered an offer of arbitration; or, if accepting it, makes impossible the establishment of the compromise; or, after the arbitration, fails to comply with the terms of the award. It is further agreed that the arbitration referred to will be suitable for the procedure described in Chapter III of the Convention for the Peaceful Settlement of International Differences adopted at The Hague, and that it will determine, unless agreement has been made to the contrary, the justice and the amount of the debt and the time and manner of its payment.[69]

The proposition drew a number of substantial objections from several American republics who eventually refused to ratify the Convention (II) Respecting the Limitation of the Employment of Force For the Recovery of Contract Debts signed in October 18, 1907.[70] One of the three arguments raised by Señor Drago reflected the principal reservation of the other American republics:

> War is not justifiable in the absence of causes sufficient to endanger or to affect profoundly a nation's destiny, and among these causes can never be placed the non-payment of bond coupons to their eventual holders ... By accepting that part of the proposition of the United States which makes appeal to force for the execution of disregarded arbitral sentences (in the case of bonded public debts), we should take a long step backward, we should recognize war as an ordinary resort of law, we should establish one more case of lawful warfare; a thing which would surely be a contradiction in a Peace Conference which has, as the very object of its existence, the prevention of the causes of war, or at least their diminution ....
>
> The denial of justice established by arbitration constitutes a common offense in international law, and must give occasion for reparation. A denial of justice, like an act of piracy, is a fact which destroys the equilibrium of the world community and endangers that community itself, and because of that very fact it falls within the immediate domain of the international repression which is overseen, accepted, and made applicable by the general consensus of all nations.[71]

But the delegate from Colombia, M. Perez Triana, took an extreme position against the use of force regardless of the circumstances involved.[72] No attempt was made by the American delegation to define the phrase "contract debts" as it appeared in the final text of the Convention.[73] Thus, the controversial portion, Article 1 read as follows:

> The contracting Parties agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of another country as being due its nationals.
>
> This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or after the arbitration, falls to submit to the award.[74]

However, Williams opined that "the achievement ... [of the second Hague Peace Conference] consisted essentially in the substitution of the sentence of a tribunal for the unilateral decision of a single Power in estimating the liability of a debtor state. The views of great international jurists ... that claims on public loans do not without more, in and by themselves, de plano, justify the employment of force, have thus become part of international law .... Force, it is true, remains in reserve for carrying into effect the sentence of the tribunal, if the debtor country should fail to execute it, but being then held in reserve and being invoked only in aid of the sentence of a tribunal, force loses its character of unregulated violence."[75]

It is essential to note, however, that the adoption of the United Nations Charter, which now ensures "that armed force shall not be used, save in the common interest ..."[76] and further obliges parties to settle their disputes peacefully,[77] would finally confirm in principle the

exclusion of the use of force in regard to the enforcement of international financial obligations.[78]

2.3 German Debt Settlement and the Multilateral Approach: The Treaty Model As Applied to Non-Contractual Liabilities

Pursuant to Article 232 of the Versailles Peace Treaty of 1919, Germany was obliged to compensate private individuals and the Allied Powers for damages and war costs.[79] On account of the high post-war inflation rate, however, Germany encountered severe payments problems which led its government to seek a readjustment of its payment schedule on the basis of its capacity to pay. The series of renegotiations and readjustments of these inter-war debts, including the indebtedness incurred by Germany to three Allied Powers arising from the economic assistance extended by the latter after the Second World War, deserve some treatment in this paper because the underlying principles involved in the process affirm some previous practices of debtor states and public and private creditors concerning financial obligations arising from contracts. Furthermore, the element of multilateralism and the treaty approach to the renegotiation of a state's financial obligations are significant contributions to the development of state practice in this field of international relations.

2.3.1 The Dawes Plan[80]

Three years after the signing of the Treaty of Peace, Germany requested the Reparations Commission "to fix (its) liabilities at an amount which could be defrayed from the budget surplus and to grant (it) a moratorium for three or four years."[81] Two committees of experts were

organized to address the request. The first committee was headed by General Charles Dawes of the United States while Great Britain's Reginald Mckeena accepted to preside in the second committee.[82] Upon investigation of the financial capacity of the German government, the first committee recommended the following: (a) the creation of a new bank exclusively authorized to issue paper money for a period of fifty years and empowered to act as the depository and fiscal agent of the German Government; (b) that Germany comply with the treaty obligations by drawing from its ordinary budget, railway bonds and transport tax, and industrial debentures; (c) provision for a fixed annual payment and a variable addition thereto dependent upon a composite index figure designed to reflect Germany's increasing capacity ("index of prosperity"); (d) that "the German people should be placed under a burden of taxation at least as heavy as that borne by the people of the Allied countries"; (e) that Germany be given an initial two-year "budget moratorium period" and another two-year "transition period" before regular payments are made; (f) as a second source for deriving treaty payments, Germany must issue 11,000,000,000 gold marks first mortgage bonds on the Germany railways with the interest thereof to be used for the satisfaction of the treaty obligations; (g) that the Germany industry contribute to the reparation payment to the amount of 5,000,000,000 gold marks with the interest of mortgage bonds with the interest being due as reparation payments; (h) assignment of revenues from customs, alcohol, tobacco, beer and sugar as collateral for the satisfaction of the amount charged annually on the German budget with the yield arising from these revenues to be utilized in fulfillment of

the treaty obligations; and, (i) aside from the administration of the reparations by the Reparation Commission, a Transfer Committee would be responsible for controlling the transfer of cash to the Allies without destabilizing the German currency.[83]

The Dawes Report was taken up and became a substantial part of the Allied Powers' Final Protocol during the London Conference in August, 1924.[84] Pursuant to this treaty approved by the German Government, three fundamental legislations were passed, namely: (a) The Bank Act; (b) The German Railway Company Act; and, (c) The Industrial Debentures Statute.[85]

2.3.2 The Young Plan[86]

The settlement under the Dawes Plan was the initial process of "removing the reparation problem from the political to the financial sphere."[87] A subsequent meeting on February 11, 1929 under the chairmanship of Mr. Owen D. Young of the United States finally adopted a general plan for a complete settlement of the reparation problem effecting a full conversion of the German reparation debt into a commercial obligation, giving the debt a "semblance of a simple business commitment."[88]

Essentially, the new plan introduced the following changes: (a) a definite number of fixed annuities without reference to the index of prosperity under the Dawes programme; (b) phasing out of the index of prosperity; (c) freedom from external control over the discharge of obligations in marks (by the removal of a system of transfer protection); (d) the right to suspend payment and to resort to measures of

temporary relief in regard to postponable annuities upon the initiative of the debtor (i.e. Germany) in the event of an exceptional emergency; (e) reduction of claims; and, (f) establishment of the Bank for International Settlements which served as a depository for the service of German annuities.[89]

As in the case of the previous plan the new programme was put into force by agreement of the governments in the Protocol of the Hague Conference of August 31, 1929.[90]

2.3.3 London Agreement on German External Debts[91]

Germany's failure to comply with the terms of her contractual commitments for about twenty years since the renegotiation under the Young Plan and the need to facilitate her payment of debts owed to three Allied state arising from economic assistance extended her after the Second World War made it necessary to convene a meeting with her creditors. A series of negotiations and a conference held in London from February 28 to August 6, 1952 led the parties to the signing of a detailed agreement "to provide support (comparable to a protection order) for the debts in question by means of a treaty under international law: in technical terms by means of regulations."[92] Under the structure of the treaty, the "recommended regulations for individual kinds of debts must be effected by way of agreements between the parties concerned, detailed contents of the regulations were laid in advance."[93]

The significance of the agreement in relation to the current multilateral debt renegotiation procedure is concerned lies in some recognizable terms affirming concrete principles governing the relation-

ship between the sovereign debtor and its creditors (public and private) on the one hand, and between the creditors themselves.

Among the debts covered by the agreement were the following:

(a) non-contractual pecuniary obligations the amount of which was fixed and due before 8th May, 1945;
(b) pecuniary obligations arising out of loan or credit contracts entered into before 8th May, 1945;
(c) pecuniary obligations arising out of contracts other than loan or credit contracts and due before 8th May, 1945;

(2) Provided that such debts:

(a) are covered by Annex 1 to the present agreement, or
(b) are owed by a person, whether as principal or otherwise, and whether as original debtor or as successor, who, whenever a proposal for settlement is made by the debtor or a request for settlement is made by the creditor or, where appropriate in the case of a bonded debt, a request for settlement is made by the creditors, representative under the present Agreement and the Annexes thereto, resides in the currency area of the Deutschemark West;

(3) Provided also that such debts:

(a) are owed to the Government of a creditor country; or
(b) are owed to a person who, whenever a proposal for settlement is made by the creditor under the present Agreement and the Annexes thereto, resides in or is a national of a creditor country; or
(c) arise out of marketable securities payable in a creditor country.[94]

Article 8 of the agreement states the principle of non-discrimination in the treatment of the debts:

> The Federal Republic of Germany will not permit, nor will the creditor countries seek from the Federal Republic of Germany, either in the fulfillment of terms of settlement in accordance with the present Agreement and the Annexes thereto or otherwise, any discrimination or preferential treatment among the different categories of debts or as regards the currencies in which debts are to be paid or in any other respect. Differences in the treatment of different categories of debts resulting from settlement in accordance with the provisions of the present Agreement and the Annexes thereto shall not be considered discrimination or preferential treatment."[95]

And to ensure the transfers of interest and amortization payments, Article 9 treats these transfers as "payments for current transactions

and, where appropriate, provided for in any bilateral or multilateral arrangements relating to trade or payments between the Federal Republic of Germany and the creditor countries."[96] The parties have also recommended in Appendix II, Article 5 that there should be no reductions in the outstanding principal amounts for private loans made before May 8, 1945.[97]

Another interesting feature of the London Agreement was the provision for the settlement of disputes. Appendices IX and X outlined the statutes for the Arbitral Tribunal (to regulate disputes between the contracting governments under the treaty) and the Mixed Commission (for disputes between private debtors and creditors), respectively.[98]

CHAPTER 3

THE INTERNATIONAL MONETARY FUND ARTICLES OF AGREEMENT AND THE CURRENT FRAMEWORK FOR SOVEREIGN DEBT RENEGOTIATIONS:

"An Expanding Role for Stand-By Arrangements In National Economic Policy-Making In Developing Country Debtors"

3.1 INTRODUCTION

The rise of the United Nations and its specialized agencies as fora for cooperation in various aspects of international relations had the positive effect of introducing new methods of creating rules of customary law and general principles of law. In the case of specialized agencies, scientific and technical progress requiring new approaches necessitated the generation of "new rules of law-making which often tend to deviate from traditional treaty processes (whenever unsuitable in modern conditions) and from some of the tenets of jurisprudential orthodoxy."[1] These specialized agencies have facilitated the adoption of law-making treaties, conventions and treaty-like texts and in some of the agencies' constitutions the power to unilaterally generate technical rules or standards have been fully entrusted upon these organizations.[2]

One of the most influential specialized agencies in the area of international economic relations which now performs an important role in resolving the international debt crisis is the International Monetary Fund. The practices of this specialized agency in the monetary field have become an important process of either law-making by custom or by the generation of general principles of law.[3] One writer remarked that frequent interpretation and modification of the IMF treaty regime is necessary on account of the constant adjustment that the IMF had to undertake to adopt to changing conditions of the world financial equilibrium.[4] Its practice of conditional balance of payments financing in the form of stand-by or extended arrangements, for instance, has given rise to a set of norms which has been extensively relied upon in most modern sovereign debt renegotiations. The dependence of interna-

tional lenders, whether official or private, upon the surveillance authority of the IMF over its heavily indebted developing members has been expressed in a complex system of documenting new international loan and restructuring or rescheduling agreements linked either formally or informally to the IMF-SBA. This chapter aims to discuss this "new" role that the IMF-SBA had assumed in the current renegotiation process.

3.2 BRETTON WOODS SYSTEM AND THE DEVELOPMENT OF NEW INTERNATIONAL ECONOMIC RULES

The "beggar thy neighbor" policy which promoted extreme economic nationalism among the industrialized nations and triggered the "trade wars" before the Second World War became a grim reminder of the harshness of an international economic environment which paid lip service to customary international rules of commerce which either existed or were evolving at that time. In fact Professor Georg Schwarzenberger observed that during the inter-war period, the assumption that "As long as the economic mechanisms of international trade were allowed to operate more or less automatically, a bilateral framework for the standards of international economic law sufficed" had been abandoned by states.[5]

The need for a system of international economic rules to address the abuses committed by states in the exercise of near absolute economic sovereignty before the Second World War was urged as early as 1941 by Professor Quincy Wright in his speech before the American Society of International Law when he argued that

> International Law is ... ill adapted to the present interdependent world. The economic sovereignty of States must be limited by rules of positive law if a more stable and prosperous world order is to be achieved.[6]

He suggested six approaches under international law to achieve this goal: first, the development of the concept of abusive exercise of powers by international tribunals; second, the development of the concept of basic human right to trade limited only by reasonable governmental control in the public interest; third, the establishment of an international economic commission charged with the task of conciliating claims and controversies arising from unjust governmental acts of business concerns; fourth, the founding of an international economic organization which could investigate and publicize the commercial practices of states; fifth, the negotiation of bilateral treaties on the basis of reciprocal and unconditional most-favored-nation treatment gradually reducing tariffs and eliminating other obstructions to trade; and sixth, through multilateral treaties a code of fair practice in international commerce could be evolved.[7]

In response to the experience of the 1930s and anticipating the economic needs after the war the United States and Great Britain led other Allied powers at Bretton Woods, N.H. in 1942 in designing the post-World War II international economic system based on a "directed order, a treaty order of made norms" as one contemporary writer described it.[8] Professor Andreas Lowenfeld recalls the distinction between the American and British expectations of this new economic order as follows:

> For the United States, the essential policy objective was 'the reconstruction of a multilateral system of world trade.' In the words of Secretary of the Treasury Henry Morgenthau, new international financial institutions were conceived as 'the alternative to the desperate tactics of the past -- competitive currency depreciation, excessive tariff barriers, uneconomic barter deals, multiple currency practices, and unnecessary exchange restriction -- by which governments vainly sought to maintain employment and uphold living standards.' The British statement of goals, though

similar in purport, was more modest, and reflected the prospect that the United Kingdom would occupy a debtor's position at the war's end: 'Our long-term policy must ensure that countries which conduct their affairs prudently need not be afraid that they will be prevented from meeting their international liabilities by causes outside their control.'[9]

Out of these policy objectives emerged proposals to establish a trade organization (whose function now rests upon the General Agreement on Tariffs and Trade)[10], an international bank (International Bank for Reconstruction and Development or World Bank)[11] to provide capital for the reconstruction of Europe and an international institution composed of professional economists which will promote international monetary cooperation and provide temporary financing for countries facing severe balance of payments situation (International Monetary Fund).

In the international monetary field two plans were proposed again by the United States and Great Britain. While both proposals recognized the need for governments to assume the obligation to maintain the value of their currencies and to change applicable rates of exchange based on a set of rules enforceable by an international organization, they debated in regard to the issue of providing resources to countries requiring adjustment on account of serious balance of payments difficulties.[12] Mr. John Maynard Keynes, then a special consultant to the British Treasury, sought to convince the participating states of the need to make credit "more or less automatically available at the request of a member"[13] to which Mr. Harry Dexter White of the United States, then Secretary Morgenthau's assistant for international finance, took exception by proposing that the international monetary institution should be empowered to require the borrowing member to bring its international accounts into balance.[14] This difference was eventually

resolved at the conference in 1944 during which the (original) Articles of Agreement of the IMF was adopted. Suffice it to note that the imposition of conditions were viewed to be necessary with respect to the use of Fund resources.[15]

3.3 NORM-CREATING FUNCTION OF THE INTERNATIONAL MONETARY FUND ARTICLES OF AGREEMENT

Customary or conventional international law had consistently recognized in the past that "a State is entitled to regulate its own currency."[16] Although central banks had adhered to the use of the gold standard in the past for the purpose of balance of payments adjustments and domestic monetary policy control, Sir Joseph Gold observed that the so-called "rules of the game ... were not regarded as binding on states."[17] He argued, therefore, that this "traditional attitude toward the rules of the game makes the achievement of Keynes and White all the more remarkable," because "both were aware that they were proposing a new legal order in international monetary relations."[18]

With the creation of the IMF, legal norms have arisen constituting the "Law of the Fund". These legal norms have been hierarchically classified into three main categories namely: (i) the Articles of Agreement, accepted by members; (ii) the by-Laws, resolutions, and other decisions of the Board of Governors, and (iii) the rules and regulations and other decisions of the Executive Board.[19]

Gold opined that "The Articles are a treaty, and, therefore the law of the Fund includes the applicable norms of treaty law and of other aspects of public international law."[20] The provisions of the Articles have been construed to be paramount in relation to the other legal

norms,[21] but in so far as individual norms within a class are concerned no ranking exists.[22] For instance, the statement of purposes in Article I of the Agreement according to Gold "[does] not represent an order of precedence."[23]

Legal norms under the Articles may be viewed as either mandatory or permissive. A mandatory norm is one which prescribes "specific prohibitions for members."[24] Gold cites as an example Article VIII, Section 2(a) of the amended Articles which obligates a member "not to impose restrictions on the making of payments and transfers for current international transactions unless [it] is authorized by the Articles or approved by the Fund."[25] On the other hand, a member may be allowed under several norms "to adopt measures, take actions, or pursue policies provided that certain conditions are observed."[26] Article VI, Section 3 according to Gold fits into this category. This provision declares "that members may apply controls to regulate international capital movements, provided that these controls are exercised in a manner that will not restrict payments and transfers for current international transactions or will not unduly delay transfers of funds in settlement of commitments."[27] Several norms are deemed permissive according to Gold.

Decisions of the Fund's organs that are formulated in general terms have been a major source of new legal norms.[28] However, it has occurred that previous decisions for individual members have evolved into a general decision expressive of an established Fund practice.[29] An example typically cited to illustrate this development is the decision of the Executive Board of March 2, 1969 on the "use of the Fund's

General Resources and Stand-By Arrangements" wherein the said body laid down the guidelines on conditionality for the use of the Fund's resources and for stand-by arrangements. This decision was incorporated in the Articles of Agreement during the second amendment thus fully establishing its legality.[30]

In regard to the legal effect and the consequence of a violation of decisions of the Fund, Gold is of the view that a distinction must be made between "those ... that require members to behave in a particular way because that conduct is explicitly or implicitly made obligatory by the Articles ... [and] those that make recommendations or provide guidelines for conduct."[31] In so far as the Fund is concerned, non-compliance with decisions requiring specific action is automatically a breach of obligation but non-compliance with recommendations or guidelines must first be established "to be neglect of an obligation under the Articles as well."[32]

3.4 MANDATE OF THE INTERNATIONAL MONETARY FUND

In this section three purposes of the IMF which have considerably affected sovereign debt renegotiations in the post-World War II period will be briefy discussed. Emphasis will be given to the practice of conditionality and the legal aspects of the stand-by arrangements.

Article 1 of the amended Articles of Agreement enumerates the following purposes of the Fund:

(i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems

(ii) *To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.*

(iii) to promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

(iv) *To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.*

(v) *To give confidence to members by making the Fund's resources temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.*

(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balance of payments of members. (Italics mine)

3.4.1 DEVELOPMENT AS A SECONDARY PURPOSE

Gold maintains that it is clear from the history of the Fund's creation that "development is not a direct purpose."[33] In support of this argument he referred to Mr. H.D. White's distinction in his proposed plan at the beginning of the Bretton Woods meetings in 1942 of the functions of the two financial institutions: one "to stabilize foreign exchange rates and strengthen the monetary systems of the United Nations"; and the other, "to provide capital for economic reconstruction, to facilitate rapid and smooth transition from war-time economies to peacetime economies, to provide relief for stricken people during the immediate post-war periods, to increase foreign trade and permanently increase the productivity of the United Nations."[34] As we are now aware, the two functions have been divided between the Fund and the World Bank, respectively. According to Gold while the Articles of Agreement of the Fund[35] state in its first article that it will "facili-

tate the expansion and balanced growth of international trade, and ... contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy," the reference to "development" in paragraph (ii) must be interpreted in the light of the history of the negotiations which led toward its adoption.[36]

The Indian delegation's proposed draft of the paragraph, deemed to be the most definitive statement invoking a direct involvement of the Fund in the development efforts of its developing members, was challenged on the ground that the proposal, which read

> To facilitate the expansion and balanced growth of international trade, *to assist in the fuller utilisation of the resources of economically underdeveloped countries* and to contribute thereby to the maintenance in the world as a whole of a high level of employment and real income, which must be a primary objective of economic policy; ...[37] (Italics mine)

described more the function of the World Bank and would fall beyond the means of the Fund as a source of financing.[38] After intense negotiations according to Gold the Indian delegation declared in a press release that, "the Fund cannot directly assist but can facilitate these aims in pursuing its purpose of the expansion and balanced growth of international trade."[39] The proper view insofar as the Fund's responsibility is concerned, as Gold suggests, is "expressed in the phrase 'to contribute thereby,' but if the Fund's contribution is indirect, the language of the provision is not a 'one-way pendulum' because the aims are recognized as 'primary objectives of economic policy.'"[40]

3.4.2 "FREEDOM FOR PAYMENTS" AND EXTERNAL DEBT SERVICE

The mandate in paragraph (iv) has become increasingly relevant in the management of external debts of developing country borrowers particularly during the seventies and eighties. Pursuant to this mandate accompanying provisions have been laid down by the drafters of the Agreement.

Sec. 2(a) of Article VIII of the amended version provides:

> (a) subject to the provisions of Article VII, Sec 3(b), and Article XIV, Section 2, *no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions.*[41] (Italics mine)

The term "restrictions" as it has been defined in the Fund's law and practice refers to "governmental prohibition of, limitation on, or hindrance to the availability or use of exchange in connection with current international transactions."[42] It has been distinguished from the term "control" in that the latter may entail "a procedure that is not unreasonable as a condition precedent to a payment or transfer ... to assumable statistics or ... to prevent the illicit transfer of capital."[43] This procedure does not amount to a breach of the obligation under the Fund's Articles of Agreement.

The other term which needs to be clarified under the above-mentioned provision is "current international transactions." Article XXX (d)[44] defines current transactions as follows:

> (d) Payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation:
>
> (1) *All payments due in connection with foreign trade, other current*

business, including services, and normal short-term banking and credit facilities;

(2) Payments due as interest on loans and as net income from other investments;

(3) Payments of moderate amount for amortization of loans or for depreciation of direct investments;

(4) Moderate remittances for family expenses;

The Fund may, after consultation with the members concerned, determine whether certain specific transactions are to be considered current transactions or capital transactions. (Italics mine)

It is implied from the provision that members are free to restrict capital transfer particularly when read with Article VI, Section 3 which states that "members may exercise such controls as are necessary to regulate international capital movements .... "[45] But Gold emphasized that the "recognition of the right of members to limit or prevent capital transfers does not apply to those categories of transactions that would be considered capital but for the fact that the Articles declare them to be current."[46] This is supported by the qualification in the same provision just cited to the effect that "no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b) and in Article XIV, Section 2."

3.4.3 USE OF THE FUND'S RESOURCES: BALANCE OF PAYMENTS FINANCING

Paragraph (v) of the statement of purposes expresses the financial function of the IMF. The IMF administers a pool of resources derived mainly from subscriptions of its members determined by quotas assigned

to the latter. Before the Second Amendment of the Articles of Agreement in 1978 the subscription of each member based on its assigned quota was made payable 75 percent in its currency and the rest in gold.[47] Under the present arrangement each member is assigned a quota expressed in special drawing rights.[48] Many of the rights and duties of membership under the Articles of Agreement have been determined based upon quota assignment. An example of this is found in terms of the extent of financial assistance a member can avail of in times of balance of payments difficulty.[49]

The temporary character of the use of the Fund's resources is emphasized with the insertion of the word "temporarily" before the phrase "available to them" during the First Amendment of the Articles of Agreement in 1968. In Decision No. 102-(52/11)[50] the Fund had interpreted the temporary character of its balance of payments financing scheme as not exceeding three to five years at the most.[51]

As the paragraph also suggests, it is the Fund's policy to make its resources available under "adequate safeguards". This policy is aimed not only to protect the level of resources in the Fund's holding but primarily to ensure that the transaction will be consistent with the principal purpose of "the achievement of a multilateral system of payments and transfers for current international transactions in order to promote international trade and the benefits that flow from it."[52] It is, therefore, essential from the Fund's point of view that in making the use of its resources available, a member engaging in such a transaction would be expected to pursue an "economic and financial program ... consistent with the purposes of the Fund."[53] The concept of economic

development supported by the provision of the Fund's resources is otherwise known in Fund practice as the doctrine of conditionality. This institutional policy has also given rise to a unique instrument called the stand-by arrangement which guarantees access by a member seeking to engage in a transaction for balance of payments reasons. Conditionality and the stand-by arrangements have now become a central feature of the Fund's financial function and, in fact, the principal consideration in most instances before international creditors agree to a renegotiation of sovereign debts. Reliance by the international creditors upon the authority of the Fund to recommend politically sensitive economic adjustment measures upon sovereign debtors through the policy of conditionality has filled a void in the evolving sovereign debt renegotiation procedures.

3.5 THE DOCTRINE OF CONDITIONALITY AND THE DEVELOPMENT OF THE STAND-BY ARRANGEMENT

The Fund observes the practice of setting quantitative limits on the use of its resources.[54] These quantitative limits are described as "the amounts defined by the Fund's 'tranche policies', in which the Fund has clarified the kinds of policies it will expect members to follow for the purpose of avoiding balance of payments problems if they wish to use the Fund's resources, and the kind of scrutiny that the Fund will give to members' requests to use the Fund's resources."[55] Conditional use of the Fund's resources essentially carry the following important elements: (a) the need on the part of the member to adopt policies intended to overcome its balance of payments problem; (b) consistency of these policies with the purposes of the Fund; (c) the member's policies

should be able to correct the problem within a "temporary" period; and, (d) the policies must aim to increase the reserves of the member to enable it to repurchase its currency immediately consistent with the temporary character of the use of the Fund's resources.[56]

It has been argued by Gold that conditionality is not aimed at changing the basic character or the organization of a member's economy and he stresses in fact that "the social objectives or priorities of a member are accepted as beyond negotiation, subject to the proviso that the policies to promote them will permit the member to achieve a sustainable balance of payments position."[57] Furthermore, in assessing the severity of the policies expected of a member Gold points out that the Fund considers a number of factors among which are "the hardships for the population or sectors of it, the political difficulties for the government in introducing and following policies of adjustment, the period of adjustment, and the volume of resources made available."[58]

In the application of standards of conditionality the Fund makes a distinction based on its tranche policies. It has been mentioned earlier that the member's quota is determinative of the extent of the member's rights and privileges among which is the amount of resources it can request from the Fund. Originally, the members were obliged to comply with their quota partly in gold and partly in their own currency. The significance of this distinction between the gold and currency contribution is explained as follows:

> The practical significance of the gold tranche as originally defined was that it was equal to a member's net economic contribution to the Fund .... The rest of the member's currency subscription did not have the same significance because it was only a potential economic claim against the member until the currency was put in the hands of others. Because the gold tranche at any particular moment was

> equivalent to the net economic contribution that a member had made to the Fund up to that time, the standards applied by the Fund to requests to make gold tranche purchases were the least searching. The Fund sought to give as automatic a treatment to these requests as could be reconciled with the Articles.[59]

A second amendment in 1978 modified the original definition of the gold tranche.[60] The term "reserve tranche" was introduced and came to be understood as the "excess of a member's quota over the Fund's holdings of its currency after excluding holdings of the member's currency obtained by the Fund in transactions under policies that the Fund decides shall lead to these exclusions."[61] In determining the reserve tranche today the Fund excludes holdings of the member's currency resulting from transactions or requests under their facilities intended to meet specific needs of a member caused by other difficulties.[62] As in the case of the gold tranche, Art IV, Section 3(c) of the Agreement provides that "requests for reserve tranche purchases shall not be subject to challenge."

Purchases by a member that necessarily go beyond its net economic contribution are governed by the "credit tranche policy".[63] This policy has been regarded as the central or basic policy on the conditional use of Fund's resources.[64] For purposes of determining the kind of conditionality which should be applied to a purchase beyond the reserve tranche the Fund had distinguished in practice between the first credit tranche and the upper credit tranches. A purchase in the first credit tranche has the effect of raising the Fund's holdings of the purchasing member's currency from an amount equal to its quota to no more than 125 per cent of quota after excluding the holdings obtained under other facilities.[65] On the other hand, an upper credit tranche purchase

increases the Fund's holdings of the purchasing member's currency from 125 per cent of quota to no more than 200 percent of quota also after excluding the holdings from the other facilities.[66] The upper credit tranche is divided into three tranches of 25 per cent of quota each, and standards of conditionality become more severe as a member increases its purchase within these tranches.[67] Substantial justification is required when making a request for transactions in the upper credit tranches.[68]

The main instrument utilized by the Fund in making its resources available in the credit tranches is called a stand-by arrangement.[69] Under Article XXX of the Agreement the stand-by arrangement is defined as follows:

> ...a decision of the Fund by which a member is assured that it will be able to make purchases from the General Resources Account in accordance with the terms of the decision during a specific period and up to a specified amount.[70]

According to Gold, the Fund emphasized in its earlier practice the analogy of a confirmed line of credit when granting a stand-by arrangement.[71] This view is supported by a decision of the Fund dated February 13, 1952 in which the Managing Director was quoted to have considered the availability of drawing from the Fund's resources within a period of 6 or 12 months.[72] In the same year the Fund adopted its first general policy on the use of the stand-by arrangement.[73] Decision No. 155-(52/57) of October 1, 1952 contained the following essential points:

1. Stand-by arrangements would be limited to periods of not more than six months. They could be renewed by a decision of the Executive Board.

2. In considering the request for a stand-by arrangement or a renewal of a stand-by arrangement, the Fund would apply the same policies that are applied to

requests for immediate drawings including a review of the member's position to make purchases of the same amount of exchange from the Fund.

3. Such arrangements would cover the portion of the quota which a member would be allowed, under Article V, Section 3, to draw within the period provided in the arrangement. However, this does not preclude the Fund from making stand-by arrangements for larger amounts on terms in accordance with Article V, Sec. 4.

4. A charge of ¼ of 1 per cent per annum would be payable to the Fund at the time a stand-by arrangement is agreed. This change would be payable in gold (or United States dollars in lieu of gold) or the member's currency as specified for other charges by Article V, Section 8(f). In the event a stand-by arrangement is renewed, a new charge at the rate of ¼ of 1 per cent per annum would be payable to the Fund.

5. A member having a stand-by arrangement would have the right to engage in the transactions covered by the stand-by arrangement without further review by the Fund. The right of the member could be suspended only with respect to requests received by the Fund after: (a) a formal ineligibility, or (b) a decision of the Executive Board to suspend transactions either generally (under Article XVI, Section 1(a)(ii) or in order to consider a proposal, made by an Executive Director or the Managing Director, formally to suppress or to limit the eligibility of the member.[74]

A subsequent decision modified the general policy by introducing, among other provisions, a statement recognizing an extended arrangement under the following circumstance:

> ... If a member believes that the payments problems it anticipates (for example, in connection with positive programs for maintaining or achieving convertibility) can be adequately provided for only by a stand-by arrangement of more than six months, the Fund will give sympathetic consideration to a request for a longer stand-by arrangement in the light of the problem facing the member and the measures being taken to deal with them. With respect to stand-by arrangements for periods of more than six months, the Fund and the member might find it appropriate *to reach understandings additional to those set forth in this decision.* (Italics mine)[75]

The effect of the new policy was a movement away from the original concept of a confirmed line of credit toward the additional understandings.[76] Through these understandings the Fund had introduced "protective clauses" such as the obligation to consult and the observance of performance criteria or specific policies in a member's program which

give the Fund an assurance that the objectives of the stand-by arrangement are being realized.[77]

An in-depth examination of the stand-by arrangement in 1968 led to a number of important conclusions on the use of protective clauses and the characterization of the stand-by arrangement. It was decided that the Fund policies and practices on the use of its resources, including tranche policies, would continue to apply subject to the following:

1. Appropriate consultation clauses will be incorporated in all stand-by arrangements.

2. Provision will be made for consultation, from time to time, with a member during the whole period in which the member is making use of the Fund's resources from a stand-by arrangement.

3. Phasing and performance clauses will be omitted in stand-by arrangements that do not go beyond the first credit tranche.

4. Appropriate phasing and performance clauses will be used in all stand-by arrangements other than those referred to in paragraph 3, but these clauses will be applicable only to purchases beyond the first credit tranche.

5. Notwithstanding paragraph 4, in exceptional cases phasing need not be used in stand-by arrangements that go beyond the first credit tranche when the Fund considers it essential that the full amount of the stand-by arrangement be promptly available. In these stand-by arrangements, the performance clauses will be so drafted as to require the member to consult the Fund in order to reach understandings, needed, on new or amended performance criteria even if there is no amount that could still be purchased under the stand-by arrangement ....

6. Performance clauses will cover those performance criteria necessary to evaluate implementation of the program with a view to ensuring the achievement of its objectives, but not others. No general rule as to the number and content of performance criteria can be adopted in view of the diversity of problems and institutional arrangements of members.

7. In view of the character of stand-by arrangements, language having a contractual flavor will be avoided in the stand-by documents.[78]

Increased use of the stand-by arrangement during the seventies by the developing countries required further clarification of the Fund's policy of conditionality and the framework of the stand-by arrangement. The

new guidelines on conditionality was approved by the Executive Board in its decision of March 2, 1979.[79] The important aspects of the Fund's new policy on the use of its resources were as follows:

1. Members should be encouraged to adopt corrective measures, which could be supported by use of the Fund's general resources in accordance with the Fund's policies, at an early stage of their balance of payment difficulties or as a precaution against the emergence of such difficulties. The Article IV consultations are among the occasions on which the Fund would be able to discuss with members adjustment programs, including corrective measures, that would enable the Fund to approve a stand-by arrangement.

2. The normal period for a stand-by arrangement will be one year. If, however, a longer period is requested by a member and considered necessary by the Fund to enable the member to implement its adjustment program successfully, the stand-by arrangement may extend beyond the period of one year. This period in appropriate cases may extend up to but not beyond three years.

3. Stand-by arrangements are not international agreements and therefore language having a contractual connotation will be avoided in stand-by arrangements and letters of intent.

4. In helping members to devise adjustment programs, the Fund will pay due regard to the domestic social and political objectives, the economic priorities, and the circumstances of members, including the causes of their balance of payment problem

. . .

7. The Managing Director will recommend that the Executive Board approve a member's request for the use of the Fund's general resources in the credit tranches when it is his judgment that the program is consistent with the Fund's provisions and policies and that it will be carried out. A member may be expected to adopt and carry out a program consistent with the Fund's provisions and policies ... these cases the Managing Directors will keep Executive Directors informed in an appropriate manner of the progress of discussions with the member.

8. The Managing Director will ensure adequate coordination in the application of policies relating to the use of the Fund's general resources with a view to maintaining the non-discriminatory treatment of members.

9. Performance criteria will normally be confined to (i) Macroeconomic variables, and (ii) those necessary to implement specific provisions of the Articles or policies adopted under them. Performance criteria may relate to other variables only in exceptional cases when they are essential for the effectiveness of the member's program because of their macroeconomic impact.

Paragraph 5 of the new guidelines reiterates paragraphs 1 and 2 of the 1968 decision while paragraph 6 corresponds with the previous paragraph 3. And the first sentence of paragraph 9 merely reiterates the sixth paragraph of the old decision. Paragraph 10 requires a provision for review in programs extending beyond one year where a member is unable to establish in advance one or more performance criteria, or in which an essential feature of a program can not be formulated as a performance criterion at the beginning of a program year on account of substantial uncertainties concerning major economic trends. The final two paragraphs of the present decision mention the Fund's assessment of the member's performance under the programs and the conduct of studies of programs supported by stand-by arrangements.

The process of approving a stand-by arrangement consists of several stages.[80] Initially, negotiations are conducted almost exclusively between the requesting member's representatives (usually the Governor of the Central Bank and/or the Minister of Finance) and the Fund's mission whose function is "to arrive at a thorough understanding of the member's policies so as to be able to explain them to the Fund and to follow their progress" and "to assist the member in the preparation of its letter of intent (by making) available the Fund's knowledge of the experience of other members in dealing with difficulties comparable to those of the host member."[81] A letter of intent and the stand-by arrangement are drafted with the understanding that "the mission must refer them to headquarters".[82] These stand-by documents are submitted to the Managing Director and the staff for discussion before a decision is made by the Managing Director to recommend to the Executive Directors

their approval of the stand-by arrangement based on the letter of intent.[83] The letter of intent is signed by the Governor of the Central Bank and/or the Minister of Finance upon completion of the discussions and transmitted to the Managing Director whose responsibility is to submit to the Executive Directors a memorandum containing the proposed stand-by arrangement and the letter of the intent.[84]

3.6 SOVEREIGN-DEBT RENEGOTIATION PROCESS AND THE IMF STAND-BY ARRANGEMENT

According to Gold, the uniqueness of the stand-by arrangement as a form of financial assistance is expressed in the various ways by which the instrument can be used to address a wide range of problems.[85] Even before the financial crisis in the 1970s and early 1980s the Fund had envisioned the influence of the stand-by arrangement in the decision of international lenders, both official and private, in extending loans to the Fund's members.[86] Gold describes the Fund's approval of a stand-by arrangement for a member as useful whenever the member is concerned with the "creation of international confidence" and as a matter of fact such decision constitutes a "leading international judgment on the soundness of a member's policies."[87]

Another important use of the stand-by arrangement which has gained wide acceptance among the international lenders today is its catalytic role in the renegotiation of sovereign debt.[88] This role connected with debt relief strategies for most developing borrowers in recent years actually grew out of a general policy for the Fund's membership which was defined in its Annual Report of 1965 as follows:

> The Fund has the opportunity to assist in preventing a recurrence of the need for debt renegotiation when a stand-by arrangement is being negotiated parallel to the debt refinancing, ... mutual benefits can be derived from commitments given to the Fund under a stand-by arrangement, since if adequate measures to restore the payments balance are implemented, there can be assurance that such problems as the accumulation of arrears will not recur.[89]

As a result of the above-mentioned policy, interlocking agreements have become commonplace and in fact institutionalized in current sovereign debt renegotiation procedures. In the succeeding discussion, this writer will examine the legal ties which have arisen between the sovereign debtors and their various creditors in the light of the provisions embodied in these interlocking agreements.

3.6.1 PARIS CLUB RESCHEDULING PROCESS

Rescheduling of debt-service payments on loans extended by, or guaranteed by, the governments or the official agencies of the creditor countries has customarily been conducted through the so-called "Paris Club".[90] The Paris Club history dates back to 1956 when a group of European creditor governments convened a meeting in Paris with Argentina for the purpose of outlining an arrangement to enable the latter state to resume orderly trade and payments relations, and to provide for the renegotiation of supplier credits insured by the participating creditor governments.[91] Since that time creditor states have adhered to a set of practices and procedures during renegotiations with a debtor state.

The Paris Club meetings have usually been held in Paris under the chairmanship of an official of the French Treasury. There is no formal legal organization to speak of despite the existence of an uniform

process observed during the meeting with the debtor state. One writer explains that this non-legal approach

> reflects the creditor point of view that the debtor rescheduling is an extraordinary event justified in only the most extreme circumstances. If the Paris Club were viewed as a permanent institution, it would be an admission that rescheduling is a normal financial transaction. This would undermine the concept of the sanctity of contracts, and would encourage debtor countries to seek debt relief.[92]

Another writer suggests however the political advantage enjoyed by the creditors through the present characterization of the Paris Club meetings:

> The *ad hoc* nature of the Club is also frustrating to debtors because it allows political considerations to color a primarily financial process. For example, the renegotiation terms accorded Indonesia in 1970 did not reflect the cautious and essentially commercial approach accorded Ghana in the same year .... In part, the Indonesian terms were due to the political orientation of that country toward the capitalist bloc after a coup in the 1960's.[93]

Three underlying principles govern the financial relationship between the participating official creditors and the debtor state, and among the creditors themselves, whether participating or not. Firstly, there must be a strong evidence of imminent default as "when a debtor country's uses of foreign exchange, which are usually projected for one year in advance, exceeds its sources."[94] Secondly, debt relief is coupled with conditionality. It has become the practice of creditors participating in the renegotiation within the Paris Club to make debt relief conditional "upon the existence of an economic program supported by a borrowing arrangement with the IMF, involving drawings in the upper credit tranches."[95] A debtor state which is not a member of the IMF is expected to negotiate directly with the creditor governments on policy reforms similar to those contained in the IMF stand-by arrangements

entered into by a member.[96] Finally, the principle of burden-sharing engages creditors to "provide relief that is commensurate with their exposure in the debtor country."[97] Excluded from the operation of this principle are the multilateral lending institutions such as IMF, World Bank, the major regional development banks (Inter-American Development Bank, Asian Development Bank, and African Development Bank), European Investment Bank, and the OPEC Special Fund.[98]

The Paris Club process is actually initiated by a debtor state through a formal request sent to the Chairman. Invitations are sent out to creditor governments having significant exposure in the debtor state. Participating governments have come almost exclusively from the OECD although in recent years some developing countries such as Abu Dhabi, Israel, Argentina, Mexico and South Africa have appeared as creditor participants.[99] Representatives of the Fund, the World Bank, the United Nations Conference on Trade and Development (UNCTAD) and concerned regional development bank are also present to provide material information and technical advice as regards the debtor state seeking rescheduling. Negotiations normally proceed in stages which involve a debtor's presentation, statements by the representatives of the multilateral financial institutions (particularly an evaluation of the debtor's proposed economic stabilization polices under an IMF stand-by arrangement), and a closed meeting of delegates from the creditor governments.[100] The whole exercise is usually concluded after two or three days.

Official creditors sign ad referendum an agreement known as the "Agreed Minute"[101] which outlines the broad terms of rescheduling. The

terms of the agreement or informal understanding are recommended by the representatives of these official creditors to their respective governments for incorporation into bilateral agreements with the debtor concerned. While Agreed Minutes are clearly not international treaties, it has been argued that their character is that of "an international agreement entailing political, non-legal obligations ... (creating) a shared expectation of all actors concerned that debt restructuring will take place according to the terms of the document."[102] In an earlier analysis of the implication of this type of agreement, Professor Oscar Schachter noted two aspects which may be useful in arriving at a better appreciation of the character of the obligation:

> One is internal in the sense that the commitment of the state is 'internalized' as an instruction to its officials to act accordingly .... The political commitment implies, and should give rise to, an internal legislative or administrative response. These are often specific and determinate acts.
>
> The second aspect is 'external' in the sense that it refers to the reaction of a party to the conduct of another party. The fact that the states have entered into mutual engagements confers an entitlement on each party to make representations to the others on the execution of those engagements .... By entering into an international pact with other states, a party may be presumed to have agreed that the matters covered are no longer exclusively within its concern. When other parties make representations or offer criticism about conduct at variance with the undertakings in the agreement, the idea of a commitment is reinforced, even if it is labelled as political or moral ....[103]

One writer has maintained that the above tests are clearly applicable to the Paris Club renegotiations in that "each creditor in a Paris Club agreement instructs its administration to enter into a subsequent binding, bilateral agreement with the debtor ... (and) the state's commitment to the agreement is externalized by allowing each state to offer representations or criticism regarding the behavior of commitment of the other states privy to the agreement."[104] On the part of the

debtor state there is an understanding that it should have an arrangement with the Fund in upper credit tranches and that it consents to the Fund informing the Chairman of the Paris Club regarding the status of their (debtor state - Fund) relationship.[105] Future renegotiation of debt service payments have also been made conditional upon the continued eligibility of the debtor state to make purchases under the upper tranche conditionality of the Fund.[106] Bilateral agreements implementing the terms of the Agreed Minute, however, do not contain provisions which tie-up performance criteria under the stand-by arrangement with the Fund unlike the restructuring agreements forged by the private commercial banks with a debtor state.[107] This may be explained by the fact that in the renegotiation of sovereign debts owed to the private commercial banks no elaborate procedure comparable with the Paris Club process exists to date.

Attempts at formulating sovereign debt renegotiation policies on the international level have been conducted under the auspices of the UNCTAD. As early as 1967, the UNCTAD has stirred discussions in regard to the improvement of official debt renegotiations.[108] A significant instrument adopted by the Trade and Development Board was Resolution 132 (XV) of 15 August 1975 endorsing the recommendation of the ad hoc Group of Governmental Experts which provided, among others, that "on the initiative of debtor developing countries, ad hoc meetings may be convened, with participation of major creditor countries concerned and of interested developing countries to examine at the international level a debtor's solution in a wider development context, prior to debt renegotiations in the customary forums."[109] Subsequently, at a Con-

ference on International Economic Cooperation held in Paris in 1977-1978 the positions of the creditor group and the debtor states became more defined but no agreement was arrived at on a common framework for debt renegotiation.[110] A joint proposal by the United States and the European Economic Community crystallized the basic concepts and principles adhered to by these creditor countries in the official debt renegotiation process:

(ii) *The debtor would undertake a comprehensive economic programme designed to strengthen its underlying balance of payments situation. This programme would, as a general rule, be worked out with, and monitored by the IMF.*

(iii) Debt reorganization and the programme of economic measures would take into account the development prospects of the debtor country, thereby enabling it to continue debt service payments and restore its creditworthiness and to increase its capacity to discharge its debt servicing obligations over the longer term.

(iv) The modalities of the debt reorganization would be determined flexibly, on a case-by-case basis, taking into account, on the other hand, the economic situation and prospects of the debtor country, the development prospects and the factors causing the debt service difficulties and, on the other hand, the legitimate interests of the creditors. It should also be recognized that the country's implementation of its viable economic policies is essential to the long-term effectiveness of a rescheduling exercise.

(v) Debt reorganization would cover official and officially guaranteed debt with a maturity of over one year.

(vi) Consolidation periods would normally be kept relatively short and generally would not extend, as to future maturities, beyond the year in which the reorganization is undertaken.

(vii) Equality and non-discrimination among all creditors, including those not participating in the creditor club is an essential principle underlying the operation of debt renegotiations. Creditor countries with minor debts due, which frequently include developing countries, would generally, however, be excluded from the multilateral debt negotiation.

(viii) In respect of its private non-officially guaranteed debt, the debtor country would be expected to negotiate debt reorganization with

private creditors on terms similar to those agreed in the creditor club for its official and officially guaranteed debt.

(ix) Debt reorganization arrangements would provide for flexibility to review the situation at the end of the consolidation period in the light of unforeseen circumstances. They would also provide for accelerated repayments in an agreed manner if the debtors' economic situation improved more rapidly than anticipated.[111]

Official creditors stressed the distinction between a default or imminent default situation, which would be dealt with through creditor clubs, and cases of longer term structural problems, which would be considered expeditiously and individually in an appropriate forum.[112] In the latter case, the creditors recommended the following procedure: first, the developing country concerned would, before the problem has reached crisis proportions, request an examination by the World Bank or another appropriate multilateral development finance institution mutually agreed upon; second, if, after examination of the request, further steps seemed necessary, the institution would analyse the economic situation of the country; third, if the institution found that the development prospects of the country in question were seriously hampered, it would contact the aid donors to discuss urgently the country's need; fourth, donor countries and the recipient country would take the conclusions of the institution's analysis into serious consideration; and, finally, where the analysis led to broad agreement that the developing country was encountering long-term financial difficulties impinging unduly on its development progress, donor countries would, to the best of their abilities, enhance assistance effort directed toward increasing the quantity of aid in appropriate forms and improving its quality, in response to the developing country, for its part, demon-

strating its willingness to take corrective measures on its own behalf, in so far as it was able.[113]

The developing countries submitted two proposals, one dealing with immediate and generalized debt relief[114] and another on the future debt reorganization.[115] Of particular interest in the second set of proposals were the guidelines suggested by the developing countries for reorganization operations:

> First: Creditor and debtor countries should ensure that reorganization would be completed expeditiously in order to reduce to the minimum any uncertainties associated with them.
>
> Second: Measures to be adopted should be consistent with an accepted minimum rate of growth of *per capita* income.
>
> Third: International and national policy actions to be adopted should be consistent with the socio-economic objectives and priorities of the country's development plan, and should be conducive to restoring the country to its development path as quickly as possible.
>
> Fourth: The provision of new flows and the terms of debt renegotiation should be on a long-term basis consistent with the country's long-term financial and developmental needs as reflected in the analysis.
>
> Fifth: The terms and conditions of rescheduling the official and commercial debts should be no harsher than the softest terms prevailing for the same kind of loans at the time of reorganization.
>
> Sixth: Provisions should be included to facilitate additional flows or accelerated repayments if the analysis proved either too optimistic or too pessimistic with respect to the pace of the country's recovery.[116]

They called for the establishment of a more permanent institutional machinery empowered to convene, organize and supervise reorganization operations based on a set of internationally agreed principles and procedures.[117] Noticeably absent from the proposal is the commitment to undertake a comprehensive economic programme under the auspices of the IMF.

As a compromise the creditor states and the developing country borrowers agreed on four basic concepts which would govern future debt renegotiations. The guidelines embodied in UNCTAD Resolution 165 (S-IX) of 11 March 1978 were as follows:

> (a) International consideration of the debt problem of a developing country would be initiated only at the specific request of the debtor country concerned;
>
> (b) Such consideration would take place in an appropriate multilateral framework consisting of the interested parties, and with the help as appropriate of relevant international institutions to ensure timely action, taking into account the nature of the problem which may vary from acute balance of payments difficulties requiring immediate action to longer term situations relating to structural, financial and transfer of resource problems requiring appropriate longer term measure;
>
> (c) International action, once agreed by the interested parties, would take into due account of the country's economic and financial situation and performance, and of its development prospects and capabilities and of external factors, bearing in mind internationally agreed objectives for the development of the developing countries;
>
> (d) Debt reorganization would protect the interest of both debtors and creditors equitably in the context of international economic co-operation."[118]

Upon the suggestion of the Trade and Development Board, the Secretary-General of the UNCTAD convened a meeting of an intergovernmental group of experts at Geneva on October 2, 1978 which laid down the detailed feature of the multilateral debt negotiation process.[119] After three plenary meetings the group produced an informal note which served as a provisional document but deemed as non-operational in character.[120] The work was endorsed by the Trade and Development Board in resolution 222 (XXI) of September 27, 1980.[121] Under paragraph 4 of the detailed features it is mandated that

> international action ... (a) Should be expeditious and timely; (b) Should enhance the development prospects of the debtor country, bearing in mind its socio-economic

> priorities and the internationally agreed objectives for the development of developing countries; (c) Should aim at restoring the debtor country's capacity to service its debt in both the short term and the long term, and should reinforce the developing country's own efforts to strengthen its underlying balance-of-payments situation; and, (d) Should protect the interests of debtors and creditors equitably in the context of international economic cooperation.[122]

Studies on the conduct of multilateral debt renegotiations within the framework of the Paris Club have shown that there has been little progress with regard to the implementation of the detailed features.[123] The focus on the restoration of debt servicing capacity in the short term have failed to enhance the development prospects of the debtor states.[124] Fund conditionality, however, has become central and an essential element in seeking a solution to the debt problem of these states. The multi-year restructuring agreements (MYRAs) concluded by official creditors with some debtor states in recent years required continued Fund assistance in designing economic programs and monitoring their implementation by these debtor states.[125]

3.6.2 COMMERCIAL BANKS AND PRIVATE DEBT RESTRUCTURING AGREEMENTS

In the 1960s and the early 1970s, some developing country borrowers, such as, Argentina, Brazil, and Chile, have already engaged in private debt rescheduling with commercial banks[126] but the method adopted by the lenders was characteristically ad hoc in nature without any coordination among themselves. As signs of imminent or even actual defaults by a number of heavily indebted non-oil producing developing countries emerged in the later 1970s private commercial banks finally recognized the need for a more enlightened approach toward alleviating the debt-service payments difficulty of the debtor states. In comparing

the earlier reschedulings and those which transpired in the latter part of the 1970s one writer observed that: "What distinguished the reschedulings of the later 1970s, then, was not so much their novelty as their scope. Instead of the relative handful of banks, often from a single country that once had been involved in negotiations, there were now 100, 200, or more .... And where a few million dollars were once at issue, the stake had grown to the hundreds of millions, or, in some cases, billions of dollars."[127]

The banks' new approach was tested through the agreement between Zaire and its bank creditors in November, 1976.[128] An analysis of the succeeding rescheduling process between 1976 and 1980 identified some interesting features which now form part of the so-called "London Club" renegotiation process: First, banks began to reschedule medium-term syndicated Eurocredits.[129] Second, bargaining was conducted by a steering committee of half a dozen or so lead banks on behalf of all commercial bank creditors.[130] Third, creditor banks became bound by the doctrine of "fair treatment" whereby each bank was expected to participate in debt relief in proportion to its existing exposure.[131] Fourth, the banks suggested the adoption of economic programs by debtor states under close surveillance of the IMF through stand-by credit arrangements.[132]

Bank lending to developing country borrowers since the late 1970s remarkably decreased. But during the "Mexican rescue" in 1982, the IMF assumed a leading role in the renegotiation process by virtually dictating commercial lenders to refinance Mexico (and eventually future defaulting debtor states) in exchange for the banks' insistence upon the

debtor states undertaking painful economic austerity measures monitored by the IMF.[133] A former General Counsel of the World Bank described the Mexican rescheduling in 1982 as "the beginning of a new era in debt rescheduling, one aspect of which is the emerging cooperative roles of governments, central banks and the Fund.[134] The involuntary nature of commercial bank involvement in refinancing scheme received further reinforcement under the Baker Plan in 1985.[135] Baker's request for combined financing from private creditors and multilateral institutions was coupled with the condition that debtor states continue to adopt adjustment programs which must be agreed before additional funds are made available, and should be implemented as the funds are disbursed by these institutions.[136] This strategy was designed mainly to encourage more commercial bank participation in balance of payments financing, which the IMF alone could not adequately provide in favor of several debtor states.

Cooperation between the IMF and the commercial banks in the management of the debt crises, however, has led the banks to devise ways of establishing a formal linkage between IMF stand-by arrangements and private loan agreements. Today, the practice among the syndicate banks reveals a tendency to bind debtor states to extremely tight "protective clauses" in standard Euro-dollar loan agreements and collective restructuring agreements. Subsequent paragraphs will illustrate this established linkage.

Firstly, the purpose clause of a syndicated term loan Agreement may provide, for instance, that

> "The proceeds of the Loans shall be applied in or towards providing financing for investments included in the economic plan of the Republic of _____ for 1987 or other productive projects *in the context of the stablisation policy agreed between the Borrower and the International Monetary Fund* ....[137]

Secondly, parallel financing by commercial banks with the IMF has increasingly made a linkage between new money drawings under either a syndicated term loan agreement or restructuring agreement and the purchases by IMF members under a stand-by arrangement or similar facility. Paragraph 4 (entitled "Draw Down") of the specimen syndicated term loan agreement provides the following:

> Subject to the terms of this Agreement (*including* but not limited to *the conditions set forth in Clause 12*), loans will be made to the Borrower at anytime and from time to time during the commitment period ....[138] (Italics mine)

Clause 12 referred to under paragraph 4 refers to "Conditions Precedent" to loans. Section (2) of Clause 12 states, on the other hand, that

> The obligations of each Agent and each Bank hereunder are subject to the further precedent that, both at the time of the request for and at the time for the making of each Loan, *the representations and warranties of the Borrower set out in Clause 13(1) are true and accurate on and as of such times as if made at each such time* and no Default has occurred and is continuing or would result from the proposed loan.[139] (Italics mine)

Among the standard representations and warranties required of a debtor state in Clause 13(1) is a provision which relates to IMF membership stating that

> The Borrower is a member in good standing of the International Monetary Fund and *no limitation or restriction has been imposed on its use of the resources thereof.*[140] (Italics mine)

In relation to the above-quoted representation, banks have maintained in practice that amounts under the syndicated term loan agreement or the restructuring agreement shall be disbursed "only when the program on the basis of which they agreed to reschedule or provide new financing is in place and progressing successfully."[141] One writer has expressed the view that the use of compliance with performance criteria under the IMF stand-by arrangement as an express condition would have the effect of incorporating directly all of the performance criteria into the new money or restructuring Agreement.[142]

Finally, Clause 16 on "Events of Default" includes the following circumstance:

> (c) any representation, warranty or statement made or deemed to be repeated in this Agreement or in any notice, certificate, statement or the Information Memorandum delivered, made or issued by or on behalf of the Borrower hereunder or in connection herewith or any information provided by the Borrower to any of the Agents, the Managers and the Banks hereunder shall be at anytime incorrect in any respect or any such representation, warranty or statement would, if made or repeated at any time with reference to the facts and circumstances then subsisting, be incorrect in any respect at that time ....[143]

In a more recent development, commercial loan documentation had also incorporated as covenants and events of default commitments by debtor-states to undergo a closer surveillance. The February 26, 1986 Restructuring Agreements between Venezuela and its commercial banks creditors (which represent the latest arrangement utilized in several multi-year restructuring agreements) contain the following pertinent clauses:

> SECTION 10.02 *Covenants of the Republic.* So long as any Credit or any other amount payable by the Obligor or the Republic under this Agreement shall remain unpaid, the Republic agrees as follows:
>
> .....

(e) *Monitoring Procedures. The Republic will complete the implementation of, and maintain, the Monitoring Procedures as provided in Schedule 6 to the Restructuring Principles.* The Republic agrees that any changes limiting the Monitoring Procedures (including, without limitation, any limitation thereof which affects the scope of any of the Annual Economic Programs to be prepared as described in Part 1 of the Monitoring Procedures, the implementation and maintenance of the procedures for the monitoring of the Venezuelan economy described in said Part 1, expanded as provided in the last paragraph of said Part 1, or the nature or extent of the consultations with international agencies described in Part 2 of the Monitoring Procedures) shall be mutually agreed by the Republic and the Overall Majority Banks before being implemented.

(f) *Reporting and Information.* The Republic will furnish to the Servicing Bank the following:

.....

(iii) Promptly after the same becomes available to the Republic, a copy of each report referred to in the last paragraph of the description of the Monitoring Procedures set forth in Schedule 6 to the Restructuring Principles (including, without limitation, each report specifically referred to in the fourth and penultimate paragraphs of Part 2 of said Monitoring Procedures).

(iv) Within 30 days after the end of each calendar quarter, information concerning the Republic's consultations with international agencies (such as the Inter-American Development Bank, the IBRD and the IMF) described in the first paragraph of Part 2 of the Monitoring Procedures, and a comprehensive description of the preceding quarter's major macroeconomic policies and objectives, plans and assumptions, a statement of specific and quantified economic targets, and an update of the short and medium-term fiscal, economic and financial objectives of the Plan de la Nacion then in effect.

.....

SECTION 11.01 *Events of Default.* If any of the following events ("*Events of Default*") shall occur and be continuing:

.....

(s) The Overall Majority Banks shall notify the Overall Coordinating Bank (through the respective Overall Servicing Banks) that they have determined in their reasonable judgment that any of the following events or conditions has occurred (provided that, in the case of a determination contemplated by clause (iii) below, such determination shall have been notified by the Overall Coordinating Bank to the Republic and 30 days shall have elapsed since the date of such notice):

.....

(ii) *Based on the information furnished pursuant to Section 10.02 (f) hereof and the corresponding provisions of other Restructuring Agreements and the Relending Facility Agreement, the results of the economic program of the Republic of*

Venezuela are or will be materially incompatible with a viable external payments position consistent with continuing debt service; or

(iii) The reporting and consultation procedures outlined in the Monitoring Procedures are not being implemented as contemplated by the Monitoring Procedures; or

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This brief review of current loan documentation shows increasing dependence of international private lenders upon the surveillance authority of the IMF over its members. While banks have the tendency to adopt a more formal linkage with IMF stand-by agreements there is a more cautious attitude on the part of the IMF officials to reinforce this legal tie. Not only does the IMF interpretation of the legal nature of stand-by arrangements prohibit this formal linkage but, more importantly, the IMF can not now risk losing the confidence of its developing country members who have continually exerted their best efforts to respect the evolving renegotiation procedure.

3.7 CONCLUSION

The legal arrangements between sovereign borrowers and their creditors indicate a growing recognition of a "shared responsibility" in the on-going crisis management of third world debt. Despite the strong arguments for unilateral state action by several heavily indebted developing country borrowers, there has been an acceptance of less confrontational means of addressing differing views and approaches. It is thus evident that international actors in the global debt crisis have affirmed in practice an obligation to negotiate instead of exercising unilateral actions. However, as debtor states continue to accept the

principle of economic adjustment through IMF surveillance, it is crucial to emphasize that international creditors should realize that certain provisions of the loan or rescheduling agreements may not be susceptible of strict enforcement. A case in point is the express reference to IMF stand-by arrangement performance criteria as conditions precedent. This form of linkage now opens a whole range of legal issues particularly in the area of international responsibility.

CHAPTER 4

CURRENT LEGAL ISSUES:

"The International Law Commission Draft Articles On State Responsibility And Some Aspects Of The International Monetary Fund Stand-By Arrangements"

4.1 CONSEQUENCES OF NON-COMPLIANCE WITH THE IMF STAND-BY ARRANGEMENTS

4.1.1 GENERAL PRINCIPLES OF STATE RESPONSIBILITY AND THE CHARACTERIZATION OF IMF STAND-BY ARRANGEMENTS UNDER INTERNATIONAL LAW

The ILC had approved and adopted on first reading the following provisions of the Draft Articles:

> Article 1. Every internationally wrongful act of a State entails the international responsibility of that State.

This article is supplemented by Article 3 which enumerates the elements of an "internationally wrongful act":

> There is an internationally wrongful act of a State when:
>
> (a) conduct consisting of an action or omission is attributable to the State under international law; and,
> (b) that conduct constitutes a *breach of an international obligation* of that State. (Italics mine)

Finally, the second element is qualified further under Articles 16 and 17 in the following manner:

> Article 16. Existence of a breach of an international obligation.
>
> There is a breach of an international obligation when an act of that State is not in conformity with what is required of it by that obligation.
>
> Article 17. Irrelevance of the origin of the international obligation breached.
>
> 1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.
>
> 2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

A closer review of the above-quoted provisions leads to the necessary implication that a preliminary inquiry into the nature of the

obligation of a debtor state under the IMF stand-by arrangement is warranted. The question may be asked whether a commitment to undertake economic austerity measures under the IMF stand-by arrangement constitutes an international obligation within the purview of the Draft Articles.

It should be noted that the Draft Articles contemplates responsibility arising either from a breach of an international agreement or a violation of any other obligation under international law.[1] Professor Ian Brownlie also comments more succinctly that

> An act or omission which produces a result which is on its face a breach of a legal obligation gives rise to responsibility in international law, whether the obligations rests on treaty, custom, or some other basis.[2]

In its commentary on the objective element of an internationally wrongful act under Article 3, the ILC said:

> It is widely acknowledged in judicial decisions, practice and authoritative literature that the objective element which characterizes an internationally wrongful act is the breach of an international obligation of the State. In its judgment of 26 July 1927 on jurisdiction in the case concerning the Factory at Chorzow, the Permanent Court of International Justice used the words "breach of an engagement". It employed the same expression on its judgment of 13 September 1928 on the merits of the case. The International Court of Justice referred explicitly to the Permanent Court's words in the advisory opinion of 11 April 1949 on Reparation for Injuries Suffered in the Service of the United Nations. In its advisory opinion of 18 July 1950 on the Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (Second Phase) the Court held that "refusal to fulfill a treaty obligation" involved international responsibility. In arbitration decisions, the classic definition is the one referred to above, given by the Mexico-United States General Claims Commission in its decision in the Dickson Car Wheel Company case. In State practice, the terms "non-execution of international obligations", "acts incompatible with international obligations," breach of an international obligation" and "breach of an engagement" are commonly used to denote the very essence of an internationally wrongful act, source of responsibility. These expressions recur frequently in the replies by Governments, particularly on point III, to the request for information addressed to them by the Preparatory Committee for the 1930 Conference. Moreover, the article 1 unanimously adopted on first reading by the Third Committee of the Conference contains these words: "any failure to carry out the international obligations of the State." The same consistency of terminology is to

be found in the literature and private draft codifications of State responsibility.[3]

Turning now to the IMF stand-by arrangement this writer proposes to inquire into the legal debate about the characterization of the instrument as an international agreement.

Two decisions of the IMF are essential in order to guide us in our inquiry. In its 1968 review of the policy over stand-by arrangements, the IMF decided that "language having a contractual flavor will be avoided in the stand-by documents."[4] Later, the IMF Executive Board in its decision dated March 2, 1979 further made the pronouncement that "Stand-by arrangements are not international agreements and therefore language having a contractual connotation will be avoided in Stand-by arrangements and letters of intent."[5]

The characterization of IMF stand-by arrangements under international law has been the subject of crucial debates between noted international legal scholars. J.E.S. Fawcett, one time General Counsel of the IMF (1955-1960), had earlier expressed the view that "there is a presumption that any transaction between the Fund and another international person is governed by public international law, and where the other party is a Fund member it is irrebuttable."[6] He admitted, however, that the case of a stand-by arrangement "is not so simple."[7] His arguments proceeded as follows:

> Here the Fund agrees to sell a specified amount or amounts of currency to a member for equivalent amounts of its currency, at any time over a period of six months or a year without further investigation of the member's representation of need. *But it is usual for the Fund, by way of conditions, to require the member to declare itself committed to certain economic policies, such as fiscal or credit restraints. There are a number of points of interest in these standby arrangements which maybe noticed here: first, they are governed wholly by public international*

> *law, since they are creations of Fund practice and have no place as such in the Fund Agreement, and there is no doubt that both Fund and members regard them as imposing legal rights and obligations; second, it is in consideration of the member's declaration of intent as to its economic policies that the Fund stands ready to sell currency to the members as required*; third, the standby arrangements commonly contain a safeguard for the member's carrying out its declared intent in one of two forms: either the member may raise what is in effect estoppel against itself by undertaking that, if for example prescribed credit ceilings are exceeded during the currency of the standby arrangement, it will not request a drawing from the Fund; or the Fund may reserve for itself the right in the same circumstances to require further consultation between the member and itself before a drawing is made; fourth, Fund transactions are not either in the form of straight drawings or of standby arrangements registered or filed with the United Nations under Article 102 of the Charter.[8] (Italics mine)

And later, elsewhere, J.E.S. Fawcett emphasized that the fact that undertakings related to taxation, incomes policy and credit policy "are often broad in scope and subject in their performance to many incalculable forces, and that the Fund may be more or less lenient in judging the adequacy of their performance, must not obscure the fact that the Member, in making them in consideration of the drawing, and the Fund in accepting them, intend to establish legal relations."[9]

On the other hand, a contrary view has been repeatedly asserted by Gold even before the Executive Board's decisions in 1968 and 1979. He argues that

> It is a familiar doctrine that when parties have reached common understandings, the answer to the question whether they have entered into an agreement depends on their express or implied intention. If the parties have declared their intention, that is decisive. If they have not, their understandings may be expressed with formality and in detail and yet may not amount to an agreement.[10]

Gold cites a number of reasons why the IMF stand-by arrangement can not be interpreted as an agreement. One of the more practical reasons advanced by Gold relates to the existence of various factors which may

prevent a member from implementing its commitment under the IMF stand-by arrangement:

> Failures to observe the objectives and policies that a member declares in its letter of intent may result from the impact of developments that the member did not foresee or that it has not been able to control. In some cases, it may be difficult to decide whether a failure was the result of inaction, volition, or external influences, or, when combined, in what proportions these causes were responsible for a failure.[11]

This writer is of the opinion that Gold's interpretation is more in line with the political and economic realities a debtor-state usually faces when enforcing adjustment policies during the effectivity of stand-by arrangements. Secondly, Gold's view is in accord with the ILC's criterion in determining the scope of the Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations stating that

> It is not the purpose of the draft articles to state whether agreements concluded between organizations, between States and international organizations, or even between organs of the same international organization may be governed by some system other than general international law, whether the law peculiar to an organization, the national law of a specific country, or even, in some cases, the general principles of law ... *Indeed, that is a question which, within the limits of the competence of each State and each organization, depends essentially on the will of the parties and must be decided on a case-by-case basis.*[12]

Thirdly, Fawcett's theory that the IMF stand-by arrangement is presumptively governed by international law could arise based on the ILC's formulation only "if an agreement is concluded by organizations with recognized capacity to enter into agreements under international law and if it is not by virtue of its purpose and terms of implementation placed under a specific legal system (that of a given State or organization), ..."[13]

There is evidence to show in the light of Fund practice that a specific legal order applies to stand-by arrangements often concluded between the Fund and its member-states.[14] According to one writer, the general rules of international economic law only apply subsidiarily to separate subsystems or leges speciales:

> ... the primary rules of international economic law which provide for State responsibility in a case of non-compliance, or failure to perform some positive duty, are already accompanied by secondary rules on the content, form and degree of this responsibility and on relevant dispute settlement procedures or other remedies for injured parties.[15]

It appears that the ILC Draft Articles on State Responsibility had also considered the exclusion of obligations arising from this separate subsystem from its scope by indicating in its commentary on Article 16 (Existence of a Breach of an International Obligation) that

> the 'international obligations' whose breach is envisaged in the present articles must be legal obligations incumbent upon the State under international law. Hence they are legal obligations which States assume in accordance with norms of international law, and not, for example, obligations of a moral nature or obligations of international courtesy; *nor are they legal obligations which may possibly be incumbent upon a state under a legal order other than the international legal order.*[16] (Italics mine)

And in its commentary on Article 17 (Irrelevance of the Origin of the International Obligation) the ILC in fact distinguished responsibility under a special regime:

> Subject to the possible existence of peremptory norms of general international law concerning international responsibility, some states may at any time, in a treaty concluded between them, provide for a *special regime of responsibility* for the breach of obligations for which the treaty makes specific provision.[17] (Italics mine)

In this regard it is relevant to raise the existence under the IMF Articles of Agreement of certain procedures which may entail suspension

of a member's rights. In the case of the IMF stand-by arrangements "performance clauses exist which, if not observed, would disentitle a member to request further purchase under a stand-by arrangement pending the outcome of a consultation with the Fund."[18]

Another eminent jurist had a noteworthy approach to the issue. Sir Hersch Lauterpacht, referring to Letters of Intent, expressed the following view:

> The language of such texts contains no words of legal obligation. Yet the State declaring its intentions is clearly entering into an undertaking which can adequately be described as a 'gentlemen's agreement, unenforceable in law though nonetheless enforceable by extra-legal sanctions .... Strictly speaking, the (letters are) one of request for the establishment of a stand-by agreement, but the main part of the letter is devoted to a statement of the economic policy .... *This statement is clearly made on the basis that a good faith attempt to fulfill its terms is a condition of the arrangement.*[19] (Italics mine)

While Gold disagrees with Lauterpacht's conclusion on the character of the Letter of Intent and the IMF stand-by arrangement, he recognized that "A valuable element in these statements ... is the expectation that a member intends in good faith to observe the objectives and policies stated in its letter of intent."[20] This interpretation apparently finds support in the ILC commentary on the Law of Treaties and Article 2(2) of the United Nations Charter which ordains all Members to "fulfill in good faith the obligations assumed by them in accordance with the present Charter."[21] And it is recognized that this legal principle is an integral part of the rule pacta sunt servanda.[22] Some writers have in fact declared the need to strengthen the legal principle of good faith in international economic relations but one writer cautioned, however, that "the qualification of non-legal obligations as obligations of good faith is somewhat dangerous. Good faith is a legal concept, and basing

respect for non-legal obligations on a legal concept would not seem to be appropriate."[23] In this writer's opinion, the caveat would be applicable only to an instrument which is not legally binding and at the same time devoid of any legal character.[24] The IMF stand-by arrangement is not such an instrument according to Gold:

> The grant of a stand-by arrangement is an action by the Fund in which the Fund makes it clear that in certain circumstances the use of its resources will or will not be in accordance with the Articles. It is an action which produces legal consequence in making the resources available or in withholding them. The Fund has the legal authority to produce these consequences without entering into treaties or agreements.[25]

Expressed in a more precise manner, it may be said that

> The stand-by arrangement is, it seems, an example of a legal rule which does not impose a specific obligation to do something, but provides for certain negative consequences if certain behaviour is not followed. Thus, non-compliance is not illegal but risky.[26]

It is essential to point out, nonetheless, that Gold himself did not presume that Lauterpacht was suggesting that the expectation of good faith converted the observance of the economic policy described in the letter of intent into an obligation the breach of which constitutes a wrongful act entailing international responsibility.

The conclusion one gathers from this investigation is that non-compliance with performance criteria in IMF stand-by arrangement is not an internationally wrongful act within the purview of the Draft Articles. It is submitted that the legal consequences of non-compliance are governed by a separate legal order, i.e., the IMF Articles of Agreement. Therefore, the concept of a breach of an international obligation which ordinarily would give rise almost automatically to a

form of reprisal, in this situation an economic one, through denial of financial resources under existing interlocking bilateral rescheduling agreements and/or commercial bank restructuring agreements, does not apply. Instead, the official and private creditors must rely on the separate subsystem or leges speciales which lays down a special regime of responsibility. Therefore, a decision to invoke the cross-default provisions for "breach of the terms of the IMF stand-by arrangement" should take into consideration the Fund's attitude towards non-compliance with the economic policies.

4.1.2 PRACTICAL IMPLICATIONS OF THE "NON-LEGAL" NATURE OF IMF STAND-BY ARRANGEMENTS UNDER EXISTING LINKAGES WITH PRIVATE LOAN OR RESCHEDULING AGREEMENTS

The characterization of an IMF stand-by arrangement as a non-binding instrument under international law and the view that international responsibility does not arise for non-compliance with its terms, particularly the carrying out of economic policies, have some relevant implications under private loan agreements which utilize the IMF stand-by arrangement as a formal condition for their continued enforceability. It has previously been shown by this writer that individual private loan agreements, or restructuring agreements with several creditor banks contain provisions requiring a member to be "in good standing" and "fully eligible" to use the resources of the IMF. It is instructive to cite the authoritative opinion of Gold on these two points. In regard to the use of the term "in good standing", Gold finds that the use of this expression is "unclear".[27] He contends that this

> may mean that lenders refer to par. 5 of stand-by arrangements which suspends the right of a member to make purchases if the Executive Board has taken a decision to consider a proposal, made by an Executive Director or the Managing Director, formally to suppress or to limit the eligibility of the member .... The decision to consider a proposed ineligibility or limited use is a preliminary action and is not equivalent to a decision decreeing ineligibility or a limitation on use. The effect of the decision is to impose a standstill and to give the Fund and the member an opportunity to consult, so that understandings can be reached on the circumstances in which purchase can be resumed under the Stand-by arrangement.[28]

Similarly, the requirement of full eligibility to use the Fund's resources as a condition under private loan agreements is inappropriate according to Gold because "there are many circumstances in which a member may be unable to use the Fund's resources even though its eligibility in the sense of the Articles is unimpaired."[29] On the other hand, Gold points out that "A declaration of ineligibility does not impede transactions financed directly with resources held in the Special Disbursement Account."[30] Finally, ineligibility does not rise by the mere fact that a member is unable to make purchases under its IMF stand-by arrangement for failure to comply with the economic policies stated in its Letter of Intent.[31] Gold notes that the Fund has the discretion to either "waive the objection of nonobservance of a performance criterion, or modify a performance criterion that is not being observed, and permits purchases under the stand-by arrangement."[32] Again, this situation may yet be another opportunity for consultation as one can infer from paragraph 11 of a standard stand-by arrangement which states that "in accordance with paragraph _____ of the attached letter (member) will consult the Fund on the adoption of any measures that may be appropriate at the initiative of the government or whenever the Managing Director requests consultation because any of the criteria under paragraph 4 above have not been observed or because he considers

that consultation on the program is desirable ...."[33] Gold opines that in the event the Managing Director calls for consultation "a member's ineligibility remains unimpaired."[34]

On the basis of the foregoing analysis it has been suggested that it would be a sound practice for international creditors, more specifically commercial banks who have tied their individual loan or rescheduling agreements with the IMF stand-by arrangement, to allow first the IMF "to decide whether a formal modification of its agreement with the country is necessary to adapt it to the new situation or whether a flexible interpretation can cover the new situation."[35] Standard loan agreements and rescheduling agreements can accommodate this suggestion through the application of materiality tests.[36] Under this scheme, the fact of non-compliance with economic policies must neither be treated as a breach of warranty or representation provisions, nor can it be viewed as an event of default which may possibly trigger the operation of stringent cross-default clauses under other parallel financial agreements. In this way, the flow of financial resources is not interrupted and the prospects for economic recovery for a debtor state is not substantially delayed while it reappraises its economic policies in cooperation with the IMF. Therefore availing of consultation mechanisms under an existing stand-by arrangement in the event of failure to meet performance criteria would serve as evidence on the part of the debtor state that it continues to comply in good faith with its obligations. It would be unjustified and premature to interpret such a situation under the private loan agreements as a breach of a representation or warranty, or a default.

4.2 FULL EXTERNAL DEBT SERVICE AND THE PRINCIPLE OF STATE OF NECESSITY

4.2.1 EXISTING IMF POLICY ON EXTERNAL DEBT SERVICE PAYMENTS

A standard IMF stand-by arrangement usually contains a provision stating that

> (Member) will not make purchases under this extended arrangement:
>
> ...
>
> (d) throughout the duration of the extended arrangement, if (member)
>
> (i) imposes [or intensifies] restrictions on payments and transfers for current international transactions.

It will be recalled that a fundamental purpose of the Fund Agreement is "to assist in the establishment of a multilateral system of payments in respect of current transactions ..."[37] in order to facilitate trade between Fund members. The principle underlying this purpose is one of "freedom for payments." This writer has also cited earlier that the definition of "current transactions" under Article XXX (d) includes, among others, "All payments due in connection with foreign trade, other current business, including services, and normal-short-term banking and credit facilities" and "Payments due as interests on loans and as net income from other investments."[38] The significance of this set of provisions rests upon the fact that under the existing linkage between private loan agreements and IMF stand-by arrangements, a foreign person, i.e., commercial bank, could now invoke a conventional instrument whose terms are reflective of a norm of international monetary law requiring IMF members to pursue a particular conduct the

violation of which is treated automatically as a breach of an international obligation under the Articles of Agreement. A leading economist, Professor Jeffrey Sachs, has been extremely critical of this linkage saying that

> ... the current overhang of external debt to private creditors can greatly hinder the effectiveness of IMF conditionality, at least under the prevailing design of IMF programs. Virtually all IMF programs to date have been designed under the assumption that the debtors country can and will survive its external debts in the long run on a normal market basis. The programs are constructed under the maintained assumption of such normal debt servicing. (For example, in the technical calculations in Fund programs, interest rates on the existing debt are assumed to be at market rates; the country is assumed to clear all arrears on a reasonable timetable,... [39]

The Fund's stringent policy towards the enforcement of the principle of "freedom for payments" often makes developing country members reluctant to enter into stand-by arrangements. In recent years, several IMF members have resorted to unilateral actions either by declaring a moratorium or limiting debt service payments to a percentage of their export earnings. Often the Fund had reacted by automatically denying further purchases under existing stand-by arrangements or declaring them ineligible to use the Fund's resources which, in turn, triggered interruptions in the flow of capital from other financial institutions. Needless to say, the costs for the debtor states were staggering.

It is submitted that the Fund's policy requires a reexamination in the light of the experiences of majority of the debtor states who have undertaken structural economic adjustment programs bound by a commitment to abide by their debt service obligations in full. This writer argues that the specific prohibition against the imposition of restrictions on

the making of payments and transfers for current international transactions under Sec. 2(a) of Article VIII is subject to "implied qualifications".[40] The current work of the ILC on State Responsibility is again instructive for purposes of resolving the legal issue at hand. Article 33 of the Draft Articles providing for the conditions that must co-exist for a proper invocation of the legal concept of a state of necessity is a useful guide in determining the limits and scope of a state's conduct while pursuing economic austerity programs under IMF surveillance. In a detailed analysis of the evolution of this legal concept, the ILC found that the plea of necessity had been the subject of a number of international law cases concerning the adoption by obligor states of certain measures in response to deep economic and financial crisis. As a matter of fact, these cases were deemed most helpful in the ILC's determination of the content of this rule of general international law.

4.2.2 APPLICABILITY OF ARTICLE 33 (STATE OF NECESSITY) OF THE DRAFT ARTICLES ON THE INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES

4.2.2.1 State of Necessity Distinguished From Other Circumstances Precluding Wrongfulness of State Conduct

Article 33 of the Draft Articles on State Responsibility provides the following:

> 1. A state of necessity may not be invoked by a state as a ground for precluding the wrongfulness of an act of that state not in conformity with an international obligation of the state unless:
>
> (a) the act was the only means of safeguarding an essential interest of the state against a grave and imminent peril; and
>
> (b) the act did not seriously impair an essential interest of the state towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a state as a ground for precluding wrongfulness.
   (a) if the international obligation with which the act of the state is not in conformity arises out of a preemptory norm of general international law; or
   (b) if the international obligation with which the act of the state is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
   (c) if the state in question has contributed to the occurrence of the state of necessity.[41]

In its commentary, the ILC distinguished this legal concept from the other circumstances preluding the wrongfulness of state conduct not in conformity with what is required of it by an international obligation. Compared with consent (Article 29), counter-measures in respect of an internationally wrongful act (Article 30) and self-defence (Article 34), the ILC states that "the wrongfulness of an act committed in a state of necessity is not precluded by the pre-existence, in the case concerned, of a particular course of conduct by the State acted against it."[42]

On the other hand, the concept of state of necessity shares some common features with two other circumstances, namely, force majeure and fortuitous event (Article 31), and distress (Article 32), in that in all these cases there is "the irrelevance of the prior conduct of the state which has suffered the act";[43] and that the invoking state "must have been induced by an external factor to adopt conduct not in conformity with the international obligation."[44] But the ILC notes in contrast to force majeure and fortuitous events that "in the case of a state of necessity ... the deliberate nature of the conduct, the international aspect of its failure to conform with the international obligation are not only undeniable but in some sense logically inherent

in the justification alleged; invoking a state of necessity implies perfect awareness of having deliberately chosen to act in a manner not in conformity with an international obligation."[45]

Finally, the ILC underscores a fine distinction between distress and state of necessity. It is recognized that, in the case of distress, in order to avoid a tragic fate, the persons acting on behalf of a state and those entrusted to his care may adopt a conduct that leaves the impression of an intentional and entirely free act although in reality "the choice is not a 'real choice'."[46] But the state of necessity is evidently distinguishable in that

> ... the situation of extreme peril alleged by the state consists not in danger to the lives of the individuals whose conduct is attributed to the state, but in a grave danger to the existence of the state itself, to its political or economic survival, the maintenance of conditions in which its essential services can function, the keeping of its internal peace, the survival of part of its population, the ecological preservation of all or some of its territory, and so on. The state organs which then have to decide on the conduct which the state will adopt are in no way in a situation that deprives them of their free will. It is certainly they who decide on the conduct to be adopted in the abnormal conditions of peril facing the state of which they are the organs, but their personal freedom of choice remains intact. The conduct adopted will therefore result from a considered, fully conscious and deliberate choice.[47]

The ILC also had occasion to note the fact that there is a predominant view among international legal scholars to abandon the traditional legal basis of necessity, i.e., the existence of certain fundamental rights of states. According to the ILC, early writers have espoused the view that the state of necessity "is characterized by the existence of a conflict between two 'subjective rights', one of which must inevitably be sacrificed to the other."[48] It appears, however that this notion, which gave legitimacy earlier to the paramount right of self-preservation by a state, was feared by later writers to be

susceptible of abuse in international practice.[49] Lauterpacht rejected outrightly the traditional concept arguing the "if every state really has a right of self-preservation, all the states would have the duty to admit, suffer and endure every violation done to another in self-preservation."[50] A similar view was espoused by Schwarzenberger who maintained that "if self-preservation were an absolute and overriding right, the rest of international law would become optional, and its observance would depend on a self-denying ordinance, revocable at will by each state, not to invoke this formidable superright."[51] It appears from the report of Judge Ago on Article 33 that the ILC had favored the later writers upon examination of state practice and international judicial decisions.[52]

To sum it up, the legal concept of a state of necessity is understood as a situation which arises out of a conflict between the interests of two states and the law decides against a lesser interest.[53] Furthermore, the invoking state is legally justified to voluntarily adopt a measure contrary to its international obligation in order to protect an essential interest.

4.2.2.2 Current Relevance of International Jurisprudence on the Plea of Necessity

There are four essential tests laid down by the ILC which must co-exist before a state may invoke this rule: (a) "an essential interest of the state must be involved (which need not be) solely a matter of the 'existence' of the state";[54] (b) "the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations";[55] (c) "the state

claiming the benefit of the existence of a state of necessity must not itself have provoked, either deliberately or by negligence, the occurrence of the state of necessity";[56] and (d) "the interest sacrificed to the need of assuring the otherwise impossible defence of an 'essential' interest of the state - must itself be a less essential interest of the state in question."[57]

Some views on how these conditions may apply to the situation of a debtor state today are worth examining.

In a paper written for the International Monetary Law Committee of the International Law Association, Justice Florentino P. Feliciano of the Supreme Court of the Philippines argued that

> ... Under certain circumstances, it may become virtually impossible for the debtor sovereign both to continue to honor its debt service obligations and to maintain an acceptable minimum standard of living for its population. We refer here to circumstances which drastically affect the level of foreign exchange reserves of the debtor country. These circumstances may include upheavels of nature, ... marked and prolonged drops in the prices of particular commodities on the production and exportation of which debtor countries may be dependent, in important degree, for their foreign exchange revenues ....
>
> At the point in time where the foreign exchange reserves of the debtor state fall to dangerously low levels, due to circumstances beyond the control of the debtor state, a principle of necessity may become applicable to authorize the debtor sovereign to suspend the servicing of its foreign debt, though only to the extent necessary to maintain or to return to acceptable conditions of international public order and standards of well being for its people. A companion principle of proportionality would require a reasonable relationship between the costs imposed upon creditors and the deprivations of its own people relief from which is sought by non-performance of debt service obligations ...[58]

It is of interest to note that the quoted opinion finds support in international jurisprudence considered by the ILC during the formulation of the content of the rule at hand. Among these cases relied upon by the ILC were those dealing with the repudiation or suspension of payments of international debts. A perusal of the pertinent arguments

and pronouncements in these cases reveals a progression towards a more liberal basis for invoking the legal justification of a state of necessity.

Case Law:

Some early cases, such as, the French Company of Venezuela Railroads Case, the Russian Indemnity Case and the Case Concerning the Payment of Various Serbian Loans Issued in France demonstrate the strict test.

War or Revolutions As A Legal Justification: French Company of Venezuelan Railroads Case[59]

On July 25, 1887, the Government of Venezuela executed a concession contract with a French citizen involving the building of a railroad and canalization of a river. The contract also granted the French citizen, Duke of Morny, other rights and privileges which included the privilege of transferring the contract to any other person or company at his pleasure on notice to the Venezuelan Government. The concessionary was obligated to commence the work within six months from August 13, 1888. Two years after the construction began the contract was modified and the French Company of Venezuela Railroads succeeded to the rights of the Duke of Morny. The first section of the railroad was completed on September 29, 1891 and for which reason the French Company of Venezuela Roads demanded of the Government its acceptance. Unfortunately, a portion of the railroad was located in two states of Venezuela, the State of Andes which was then in revolt, and the State of Zulia which remained loyal to the Venezuelan Government. In response to the repeated requests of the company for recognition and payment of credits

the national Government had expressed its inability to pay for lack of funds. When the national Government's financial condition improved in 1896 the claim of the company was raised again resulting in a formal convention on April 18, 1896 in which an agreement was forged which reduces to 1,950,000 bolivars the total amount of all the company's claims for the guaranty of 7 per cent, liquidated until December 31, 1895. Furthermore, the agreement provided that "for the redemption of the obligation by which the Government has to continue to pay the same guaranty of 7 percent upon 18,000,000 bolivars guaranteed capital during ninety-nine years, the term of the above-mentioned contract, the company consents to receive 2,500,000 bolivars."[60] Payment of the two amounts was made by the Government by remitting to the representative of the company an order upon the Disconto Gesellschaft of Berlin for the amount of 4,450,000 bolivars in bonds at par of the Venezuelan loan of the Disconto Gesellschaft of 1896 bearing 5 per cent interest annually with 1 per cent amortization. In turn, the company recognized and annulled all its credits against the Venezuelan Government for the guaranty of 7 per cent due up to December 31, 1895 and renounced the guaranty during the remainder of the ninety-nine years the term of its concession. Subsequently, on account of the political crisis which continued in Venezuela, the company registered a poor financial performance. In 1895 the Venezuelan Government used the railroad line in transporting its troops and materials but failed to compensate the company. The company was left with only 200,000 francs for use in its operation by 1898. The revolutionary movement in 1898 which affected the States of Zulia and Andes further intensified troop movements requiring the services of the

company. But the company repeatedly complained of the serious threat to its existence unless payment could be made for its services. A successful revolution broke out in 1899 which brought disaster to the railroad. The company informed the citizen president of Zulia that because of force majeure it was suspending its exploitations until a settlement is made. The same message was sent to the national Government. On January 18, 1891, the French Company of Venezuela Railroads realizing the futility of further demands upon the Venezuelan Government sought the intervention of the French Minister of Foreign Affairs presenting before the latter its claim for 18,000,000 francs. The dispute was referred to the French/Venezuela Mixed Claims Commission established under the Protocol of 19 February 1902.

It was considered by the French arbitrator that the non-execution of the obligations by Venezuela from its engagements and requisitions carried on placed the company in the impossibility of continuing its exploitation. On the other hand, the Venezuelan arbitrator considered that the reasons for the suspension of the exploitation of the line by the company were of economic order and argued that Venezuela could not be held responsible for damages for those suffered from the fact of the troubled condition of the country or of accidents of war.

On the issue of force majeure, the umpire rendered the following opinion:

> The claimant company was compelled by force majeure to desist from its exploitation in October, 1899; the respondent Government, from the same cause, had been prevented from paying its indebtedness to the claimant company. *The umpire finds no purpose or intent on the part of the respondent Government to harm or injure the claimant company in any way or in any degree. Its acts and its neglects were caused and incited by entirely different reasons and motives. Its first duty was to itself. Its own preservation was paramount. Its revenues were properly devoted to that end. The appeal of the*

company for funds came to an empty treasury, or to one only adequate to the demands of the war budget. When the respondent Government used, even exclusively, the railroad and the steamboats it was not outside its contractual right nor beyond its privilege and the company's duty had there been no contract. When traffic ceased through the confusion and havoc of war, or because there were none to ride and no products to be transported, it was a dire calamity to the country and to all its people; but it was a part of the assumed risks of the company when it entered upon its exploitation.[61] (Italics mine)

This case makes a distinction between the claimed direct injury received by the company which allegedly led to the suspension of its exploitation and the continued existence of an obligation to pay existing debts. As regards the indemnity sought for damages occasioned upon the property of the company, expenses of transportation and requisitions during the revolution, and loss suffered since the immobilization of the railroad and boats, the umpire cleared the Venezuelan Government of any responsibility on the ground that the conditions which existed in 1899 were "misfortunes incident to the government, to business, and to human life."[62]

The inability to pay just debts of the Venezuelan Government during the period of the revolution did not also engage its responsibility under the law of nations since the intent to breach an obligation to do under this circumstance was absent.

The test applied by the umpire in this case was a strict one. It will be seen that some subsequent decisions found support in the umpire's opinion.

The "Self-Destructive Test": Russian Indemnity Case[63]

Pursuant to an armistice which ended hostilities between Russia and Turkey, the Ottoman Government engaged to indemnify Russia for war

damages and losses. A final treaty of peace signed at Constantinople on January 27/February 8, 1879, stipulated the following:

> Art. 5 - The claims of Russian subjects and institutions in Turkey for indemnity on account of damages suffered during the war will be paid as soon as they are examined by the Russian Embassy at Constantinople and transmitted to the Sublime Porte. The total of these claims shall in no case exceed 26,750,000 francs. Claims may be presented to the sublime Porte beginning one year from the date on which ratification are exchanged, and no claims will be admitted which are presented after the expiration of two years from that date.[64]

On May 2/14, 1882, the two Governments signed a convention fixing the war indemnity. After about two years with no sum having been received by the Russian claimants, demand was put forward by the Russian embassy on behalf of these claimants. A first payment was made on December 19, 1884 amounting to approximately 1,150,000 francs. In 1885 war broke out between Serbia and Bulgaria and Turkey discontinued payment of the claims. Through a number of reminding notes, the Russian Government managed to force Turkey to make a second payment on April 22, 1889. The third instalment was paid on April 2/14, 1893 leaving a balance of 91,000 Turkish pounds. An instalment of 50,000 Turkish pounds was delivered on October 27, 1894 but with regard to the balance of 41,000 Turkish pounds, the Ottoman Government informed the Russian embassy that the Ottoman Bank will guarantee payment in the future. The series of insurrections between 1895 and 1899 involving the Druses, Crete and Macedonia, including the outbreak of the Graeco-Turkish War of 1897, placed Turkey in an extremely difficult financial situation. During this period there was no correspondence between Russia and Turkey. At the resumption of communication between them on July 19, 1899 and July 5, 1900, Russia claimed the balance of 43,978 Turkish

pounds but Turkey only paid 42,438 pounds by 1902. In mid-1902 Russia sought a complete settlement of the remaining debt with a petition demanding compound interest at 12% from January 1, 1881, to March 15, 1887, and at 9% from the latter date, when the legal rate of interest was reduced by an Ottoman law. The total claim amounted to about 6,200,000 francs. Turkey refused to pay interest but instead deposited with the Russian embassy the sum of 1,539 Turkish pounds representing the balance of the principal debt. The parties had agreed to an arbitration of the dispute.

The Russian Government argued that the responsibility of states for the non-payment of pecuniary debts implied "the obligation to pay interest-damages and especially interest on sums unduly withheld."[65] On the other hand, Turkey was of the view that moratory interest has no basis in international law in the absence of express stipulation and to admit against a state such an implied obligation would make that state a "debtor to a greater extent than it would have desired, and there would be the risk of compromising the political life of the state, injuring its vital interests, upsetting its budget, preventing it from defending itself against an insurrection of foreign attack."[66]

In overruling the plea of force majeure by the Ottoman Government the arbitral tribunal expressed the following reason:

> ... International law must adopt itself to political necessities. The imperial Russian Government expressly admits ... that *the obligation of a state to carry out treaties may give way 'if the very existence of the state should be in danger, if the observance of the international duty is 'self-destructive.'*
>
> It is incontestable that the Sublime Parte proves by means of the exception of force majeure ... that Turkey was, from 1881 to 1902, in the midst of financial difficulties of the utmost seriousness, increased by domestic and foreign events (insurrections and wars) which forced it to make special application of a large part

> of its revenues, to undergo foreign control as to part of its finances, to grant even a moratorium to the Ottoman Bank, and, generally, it was placed in a position where it could meet its engagements with delay and postponements, and even then at great sacrifice. *But it is asserted, on the other hand, that during this same period and especially following the creation of the Ottoman Bank, Turkey was able to obtain loans at favorable rates, redeem other loans, and, finally, pay off a large part of its public debt, estimated at 350,000,000 francs.* It would clearly be exaggeration to admit that the payment (on the obtaining of a loan for the payment) of the comparatively small sum of about six million francs due the Russian claimants would imperil the existence of the Ottoman Empire or seriously compromise its internal or external situation. The exception of force majeure cannot, therefore, be admitted.[67] (Italics mine)

The tribunal laid down a very narrow interpretation of the nature of the threat to the essential interests of the state. The use of the term "self-destructive" seemed to imply the need for the existence of a political and economic situation with a magnitude reminiscent of the Venezuelan revolution. This view does not appear to be the case as the Court of Arbitration clearly recognized that "political exigencies" may require a different interpretation of an applicable rule of international law. What this case established and which was endorsed by writers at that time was that "a situation of force majeure exists whenever payment of the debt may imperil the existence of the State, even if the peril is not great, or the payment may gravely jeopardize the internal or external situation."[68]

Economic Dislocations Caused by War as Giving Rise to Equities Which May Be Considered in Negotiation of an International Financial Obligation: Case Concerning the Payment of Various Serbian Loans Issued in France[69]

Between the periods of 1895 and 1913 France and the Serbian Government and some banks entered into several contracts for the issuance of loans to the Serbian Government. The bonds, which were issued mostly in France, and related Serbian legislations expressedly

provided for payment in gold francs. The Serbian Government paid the loans continually in French francs with respect to the French holders. Subsequently, as a result of the depreciation of the French currency in 1924 and 1925 a demand for payment in gold francs was made by the French holders upon the Serbian Government. One of the arguments pleaded by the Serbian Government before the Permanent Court of International Justice was that grave economic crises and dislocations after the First World War and the threat of a constant state of uneasiness and unrest within its territory had made it impossible for the Serbian Government to comply with the legal obligations of the contracts with the French bondholders. In support of this argument the counsel of the Serbian Government alluded to the principle of equity and force majeure. He contended that

> It is possible to conceive of equity without law when it is suggested that principles not recognized by positive law should be taken into consideration, but it is impossible to imagine law without equity. It can be said in general terms that if in an exceptional case the law is found to be divorced from equity, it is because the law has been ill understood or ill interpreted, for nowhere in the world is there a legislator who wittingly intended to flout equity. There is one case in which this mingling of law and equity is most typically manifested: that is the case of force majeure which frees the debtor of his obligation by reason of the impossibility of his performing it, when this impossibility results from an unforeseen circumstance for which he is not responsible; the typical situation of force majeure being what the English call an act of God. Under all systems of law, war is the circumstance which most overwhelms the will of individuals.[70]

The French counsel commented, however, that

> ... in the light of these figures and of this possible 5 per cent increase in the whole Serbian budget, I am bound to ask whether one can speak of the exception of force majeure. And since I question whether one can speak of the exception of force majeure, there is no need for me to remark that in speaking of the exception of force majeure, the representatives of the Serbian Government ceased to speak of French law. There is no need, either, for me to remark that if there was indeed a situation of force majeure, Serbia should have invoked it also in the case of the

English holders of the 1895 loan, who are still, unless I am badly informed, being paid in pounds sterling.[71]

In finding for the French bondholders the Permanent Court of International Justice said that

> It can not be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor state, although they may present equities which doubtless will receive appropriate consideration in the negotiations and -- if resorted -- the arbitral determination for which article II of the Special Agreement provides.[72]

It is easy to appreciate the persuasiveness of the tribunal's reasoning particularly when we draw our attention to fact that the Serbian Government had been complying with similar obligations in favor of other creditors. However, this case affirms in fact the primacy of negotiations in this type of situation taking into account relevant principles of law.

Two later decisions, however, impliedly gave due recognition to the result of the work of the 1930 Hague Codfication Conference on the issue of international responsibility for repudiation of debts contracted with foreigners either by means of an executive or a legislative act. The ILC commentary notes the fact that in response to the views propounded by a number of governments in regard to the issue, the Bases of discussion made a distinction between repudiation of debts and suspension or modification of debt servicing in the following manner: "A state incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by financial necessity."[73]

Forests of Central Rhodope Case (Merits)[74]

The argument of the Bulgarian Government in the 1933 dispute with Greece in the Forests of Central Rhodope Case (Merits) provides an insight into the ramification of the rule enunciated at the 1930 Conference. Pursuant to an award in an arbitration, Bulgaria was ordered to pay Greece in the form of cash an amount of 475,000 gold leva. Bulgaria could not comply with the order. Greece brought the case on appeal before the Council of the League of Nations on September 6, 1933. It was argued by Bulgaria that

> ... it was not the Bulgarian Government's intention, as might perhaps be supposed from the Greek Government's action in asking for this question to be placed on the Council's agenda ... to evade the obligation imposed upon it by the arbitral award in question. He confirmed therefore the statement that his Government was prepared to discharge to Greece the payment stipulated in the award. The present situation of the national finances, however, prevented the Bulgarian Government from contemplating a payment in cash. His Government was nevertheless prepared to examine immediately, with the Greek Government, *any other method of payment which might suit the latter.* In particular, the Bulgarian Government would be able to discharge its debt by deliveries in kind.[75] (Italics mine)

An agreement by the parties was reached in regard to the nature and quantity of the deliveries thus altering the original form of payment.

It can be noted quite distinctly that the invocation of an extremely serious financial situation independent of the existence of a state of war or insurrection gained acceptance as sufficient to justify "a recourse to means of fulfilling the obligation other than those actually envisaged by the obligation."[76]

Societé Commerciale De Belgique Case[77]

The Societé Commerciale De Belgique Case, on the other hand, is arguably one of the most useful precedents for debtor states today.

As a background to the case, it appears that the Greek Government had been repaying its outstanding obligation to a Belgian Company, the Société Commerciale De Belgique, regularly until July 1, 1932. Since then no payment had been made either in interest or principal to the company for which reason the company sought to arbitrate the matter in 1936. Two arbitral awards were made in favor of the company obliging the Greek Government to make certain payments. The Greek Government failed to pay in accordance with the terms of the awards alleging later that: "first, the state of its finances does not permit it to do so; second, there is inability to make transfers; and third, its agreements with other creditors."[78]

The Belgian Company asked the Belgian Government to intervene on its behalf. In its application and memorial submitted to the Permanent Court of International Justice, the Belgian Government sought a declaration to the effect that the Greek Government had violated an international obligation for failure to execute the arbitral awards.

In its counter-memorial of September 14, 1938, the Greek Government stated that it respects the arbitral awards and cited in evidence the fact that it even initiated the execution of the principal provision when it declared its readiness to pay a sum equivalent to $300,000. In refuting preliminarily the charge of violating an international obligation, the Greek Government argued:

> ... the country's financial situation, as it was established by the survey conducted by the League of Nations, is unchanged; everything that the representatives of the Financial Committee recorded in 1933 regarding the capacity of Greece remains valid

today. Accordingly, the immediate and full payment in cash, as the company and the plaintiff request, of a sum of 6,771,868 gold dollars or 1,270,000,000 drachmas or, with interest to 1 August 1938, 1,400,000,000 drachmas, is absolutely impossible.

The immediate and full payment of such a sum in fact exceeds the financial capacity of the country, which is a country of limited resources; this amount constitutes a substantial portion of the annual budget of Greece, and it is totally impossible to charge so large an amount to the budget without irremediably jeopardizing the normal operation of the country's public services.

Moreover, the payment of this sum implies the transfer of foreign currency in an amount such, in comparison with the gold cover that assures the stability of the national currency, as undoubtedly to imperil the stability of the currency.

Finally, the undertakings given by Greece with regard to holders of external debt obligations preclude it from treating its debt to the company more favourably than its external debt, lest the whole system of arrangements for the settlement of the country's external debt ....

It is a matter of principle that the sacrosanct character of acquired rights and of *res judicata* must bow to the exigencies of the general interest and of the State's primary obligation to assure the regular operation of its public services, and the normal fulfillment of the function which it exercises and which are inherent in its missions.

The State has in consequence the duty to suspend the execution of *res judicata* if its execution may disturb order and social peace, of which it is the responsible guardians or if the normal operation of its public services may be jeopardized or gravely hampered thereby.[79]

The Greek Government further made the distinction that a question of fact arose after the award was made, i.e., its financial condition made it incapable of making full and immediate payment.

In a reply dated October 29, 1938, the Belgian Government blamed the Greek Government itself for the obstacles which prevented the latter to comply with its international obligation by stating:

If the Hellenic Government considered itself to be in a position, after the arbitral award was made and notwithstanding the special character of its debt to the company, to promise the holders of its external debt that they would be treated as the most favoured creditor; this fact can not be invoked against the company; even if this is in practice an obstacle to the payments due to the company, the obstacle is one the Hellenic Government itself created.[80]

The Greek Government emphasized in its rejoinder of December 15, 1938 that

> The arbitral award rendered between the Government and the company, is without force so far as the holders of the external debt are concerned, the latter not having been parties; and if the Government conforms to the award, it runs the risk that the bondholders will make use of the clause that prohibits favourable treatment of another loan; the argument that the debt to the company does not arise from a loan, the position taken by the arbitral commission, may not be given consideration in subsequent proceedings between the Government and the bondholders ....
>
> Thus, the Government finds itself unable to treat the company's debt more favourably, under pain of being obliged to extend this treatment to the great mass of its creditors; this would bring about the collapse of the arrangements painfully worked out with the creditors, the depreciation of the national currency, and the disruption of the budget and the country's economic situation generally ....
>
> Finally, it is not correct, as the Belgian Government's other submission alleges, that any obstacle to the payments due to the company that may arise from the agreement in question was created by the government, which can not invoke it against the company.
>
> *The Hellenic Government did not agree of its own volition to insert this clause in the agreements; it was obliged to do so; the bondholders presented this clause as a sine qua non of the arrangement concerning Greece's external debt, and there is no doubt that they will insist on its adoption in its arrangement at present under discussion; the Hellenic Government has therefore the right to plead, in relation to the company and the Belgian Government, the impossibility which confronts it by reason of the clause in question ....*
>
> It follows from all that has been said that the Hellenic Government has not refused to execute the terms of the arbitral award which fixed the amount of its debt; it has been unable to do so, because it is bound by the agreements concluded with the bondholders of its external public debt and because it has been and still is, affected by a situation of force majeure, namely, inescapable financial and monetary necessities; ....[81] (Italics mine)

And during the oral presentation, Mr. Youpis cited further on behalf of the Greek Government the overriding concern of his Government for the "rigorous sanctions of the London agreements, which would entail the collapse of the external public debt arrangements, with the consequential ruin of its finances and national economy."[82]

While Mr. Youpis recognized the applicability to governments of the principle that contractual commitments and judicial decisions must be performed in good faith he contended in justification of his Government's action as follows:

> ... Nevertheless, there occur from time to time external circumstances beyond all human control which make it impossible for Governments to discharge their duty to creditors and their duty to the people; the country's resources are insufficient to perform both duties at once. It is impossible to pay the debt in full and at the same time to provide the people with a fitting administration and to guarantee the conditions essential for its moral, social and economic development. The painful problem arises of making a choice between the two duties; one must give way to the other in some measure: which? ....
>
> Doctrine recognizes in this matter that the duty of a Government to ensure the proper functioning of its essential public service outweighs that of paying its debts. No state is required to execute, or to execute in full, its pecuniary obligation if this jeopardizes the functioning of its public services and has the effect of disorganizing the administration of the country. In the case in which payment endangers economic life or jeopardizes the administration, the Government is, in the opinion of authors, authorized to suspend or even to reduce the service of the debt.[83]

Aside from the writings of publicists and decisions of the courts supporting the Greek Government's legal position, Mr. Youpis drew the Court's attention to the work of the Conference for the Codification of International Law convened in 1929 concerning the repudiation by states of their debts:

> According to the bases of discussion prepared [by the Preparatory Committee for the Conference] which reflect the common ground among the opinions expressed by the Governments questioned, a State may not in principle suspend or modify the service of its debt wholly or in part.
>
> There is, however, an exception to the rule: the State does not incur responsibility if [it] has suspended or modified the service of the debt under the pressure of financial necessities.
>
> This is the theory of force majeure expressed in another formulation, and it is well known that various schools and writers express the same idea in the term 'State of emergency'.[84]

Greece openly acknowledged that it had no intention of repudiating its obligation to the Belgian company and expressed its good faith in the following manner:

> ... We are ready to come to an agreement with you and to find a practical solution, with a view to paying to the extent we are able to do so and to discharging our obligations to the company. We propose a solution; this solution has been accepted by the great mass of the State's creditors; it has been accepted by the American company Ulen; it is the only solution consistent with the facts of the situation and the country's capacity to pay. We do not want to be relieved of all obligations towards the company; we respect these obligations; but we can only perform them to the best of our ability, and we have proposed a logical, practical and equitable solution ....[85]

The Belgian Government decided to make a modified submission on May 17, 1939 which laid down the following distinctions in regard to the Greek Government's assertion of impossibility of performance:

> If we examine this conclusion in the light of the arguments that have been expounded by Mr. Youpis, we find that the impossibility which the Hellenic Government states prevents it from executing the award involves three elements: first, Greece's financial situation, second, the difficulty of transferring currency to Belgium -- these are factual impossibilities -- and third, a juridical obstacle, the impossibility resulting, according to the Hellenic Government, from the existence of the London agreements with the bondholders of the Greek foreign debt ....
>
> ... it is necessary to determine whether the non-execution is indeed solely dictated by factual considerations deriving from incapacity to pay or whether there are not also, in support of the non-executing, other reasons derived from an alleged right or the challenging of a right ....
>
> ... What must be ascertained, in order to decide whether there was and still is a violation of international law, is not whether the Hellenic Government is now capable of paying in full or in part, but whether the Hellenic Government repudiates or has repudiated its debt or whether it does no more or has done no more than suspend it.
>
> ... What the Hellenic Government has sought and still seeks is not a readjustment of its debt with a view to obtaining more time to pay; it is a reduction of its debt, in particular by the elimination of payment in gold.
>
> Modification or reduction of the debt is tantamount to repudiation of the award.[86]

Judge Anzilloti interpellated the Belgian counsel after his oral reply and expressed the view that it appeared that the Court "may be faced with an exception on the part of the Hellenic Government."[87] Counsel for Belgium responded with the observation that

> when the Hellenic Government uses the term force majeure, its reasoning is somewhat confused. If it is a matter of a purely factual force majeure resulting from the fact that the necessary money is not available to it, this would not amount to a refusal to pay amounting to repudiation of the award; on the contrary, it would recognize the award if it said: 'we can not pay you because we have not the wherewithal to do so.' This attitude would not constitute a fault ... counsel for the Hellenic Government combined the legal impediments and the factual impediments in a single type of force majeure.[88]

In his oral rejoinder, Mr. Youpis said that "... the other distinction between factual grounds and legal grounds is impossible to conceive. If the legal grounds are genuinely valid and under the rule of law make it impossible for the debtor to comply in full, the debtor is without fault."[89]

The Court admitted the first submission of Belgium which prayed for a declaration that "all the provisions of the arbitral awards given in favour of the Société Commerciale de Belgique are unreservedly definitive and binding on the Hellenic Government";[90] and the third submission of Greece whereby its Government recognized "as res judicata the arbitral awards."[91] Due regard was emphasized by the Court to the "need of negotiations between the parties for the conclusion of an agreement as to the execution of the awards ... with a view to settling ex aequo et bono any difficulties which might arise in regard to proposals made by Greece for instalment payments."[92]

This decision evidently recognized the exception invoked by Greece but concurrently clarified the temporary character of Greece's right to

avail of the plea. It is also interesting to note the implied endorsement of existing external public debt arrangements participated in by Greece and her other creditors.

In applying the rule of state of necessity liberally to the situation of a debtor state under an IMF stand-by arrangement Professor Jeffrey Sachs recently suggested, alongside other options, "the IMF and World Bank to approve programs with debtor countries that allow for a buildup of arrears (i.e., nonpayments) to the commercial bank creditors, in well-defined circumstances. These circumstances would include (1) a large overhang of debt that is deemed to be highly inimical to the stabilization efforts of the country; and (2) the unwillingness of the commercial creditors either to grant relief or significant new financing."[93]

This proposal, read with the opinion of Justice Florentino P. Feliciano, is consistent with the tests laid down by the ILC. Furthermore, it can be argued that a provision of the Articles of Agreement even suggests the specific application of the rule to an obligation of an IMF member to "repurchase" its currency in the holding of the IMF. Article V, Section 7(g) provides that

> The Fund, on the request of a member, may postpone the date of discharge of a repurchase obligation, but not beyond the maximum period under (c) or (d) or under policies adopted by the fund under (e) above, unless the Fund determines, by a seventy percent majority of the total voting power, that a longer repurchase which is consistent with the temporary use of the general resources of the Fund is justified because discharge on the due date would result in exceptional hardship for the member.[94]

Therefore, this writer submits that sufficient legal bases exist for the application of a liberal test by IMF officials in granting extensions to

repurchase obligations and in waving the specific prohibition against the imposition of restrictions on payments and transfers for current international transactions.

4.2.3 A MODEL LEGISLATION FOR LIMITING EXTERNAL DEBT SERVICE: THE PHILIPPINE APPROACH

At this stage, an examination of a proposed legislation before the Philippine Congress aimed at establishing limits to the country's debt service payments would be worth pursuing in view of the reasonableness of its contents. This could serve as an acceptable model or approach for a number of developing members of the IMF suffering serious balance of payments difficulties today.

Senate Bill No. 535, entitled "An Act Establishing Limits of Foreign Debt Service Payments and, Under Certain Conditions, Net Resource Outflow therefore Amending For The Purpose Republic Act Numbered Forty-Eight Hundred Sixty, As Amended, and For Other Purposes",[95] introduces the following essential amendments:

> Sec. 2. The Monetary Board of the Central Bank of the Philippines shall promulgate and enforce such measures as shall be necessary to reduce the external debt service burden to an annual level not exceeding twenty percent (20%) of the total foreign exchange receipts of the immediately preceding year: *Provided, however,* That during the critical economic recovery period 1988-1992 inclusive, the external debt service shall not exceed twenty percent (20%) of the foreign exchange receipts from exports of goods.
>
> The abovementioned twenty percent (20%) ceiling (20% of foreign exchange receipts from exports of goods) may be exceeded upon the approval of the President as recommended by the Monetary Board: *Provided,* That the net resource outflow from the Philippines, as defined hereunder, is reduced to at least the amount of the twenty percent (20%) debt service ceiling (20% of foreign exchange receipts from exports of goods): *Provided, further,* That the President, in allowing the aforesaid excess, shall submit to Congress a program for attaining the said twenty percent (20%) debt service ceiling during the economic recovery period: *Provided, further,* That whenever applicable the excess over the said twenty percent (20%) limit on debt service shall be on account of interest payments on new loans and new money

necessary and expedient to finance programs in support of the Government's economic development plan: *Provided, finally,* That the proposals for such new money and new loans causing the projected incremental interest payments shall be submitted by the Monetary Board to Congress. Such report shall contain the details thereof including the specific purpose, credit terms and the loans impact on the country's balance of payments.

SEC. 2. Section 2 of the same Act is hereby further amended by inserting a new paragraph after the last paragraph thereof, to read as follows:

(a) *Debt Service Burden* shall include the principal and interest payments on external short, medium and long-term monetary and non-monetary credits; International Monetary Fund credits; and payments under such rescheduling and, new money agreements that have been or will be incurred, assumed, and guaranteed by the Philippine Government with foreign creditors;

SEC. 5. In enforcing the debt service ceiling, the following shall be given priority:

(1) Trade, revolving or suppliers credits and such other financing facilities necessary to ensure continued conduct of international trade by the Philippines;

(2) Loans from official creditors;

(3) New loans originally contracted after February 25, 1986; and

(4) Debts which benefited the country and were used for the purposes for which they were contracted.

In this writer's view, the projected measures are consistent with the obligations of the Philippines under international law for a number of reasons. Firstly, the bill does not amount to a repudiation of the country's international financial obligations. Any form of reduction scheme amounting to repudiation, which would technically be within the ambit of the proscription enunciated in the Hague Codification Conference and, subsequently, applied to the Forest of Central Rhodope Case (Merits) and the Societé Commerciale De Belgigue Case, is the subject of an international readjustment process within the Paris Club and London Club frameworks. In fact, the bill left this option open for the Philippine Government to pursue when it stated that

Concurrently with the foregoing, the Government shall exert all efforts towards the reduction of the external debts service burden through, but not limited to the following approaches:

(a) Negotiate a restructuring of the Paris Club debt and/or conversion of certain portions of the debts to grants;
(b) Negotiate a Debt-for-Bond Swap;
(c) Limit interest payments to only five percent (5%) and capitalize the unpaid interest portion;
(d) Convert foreign debt for use in promoting nature, wild life conservation and child survival programs; and
(e) Negotiate a debt for commodities program.[96]

Clearly, this is an implied recognition of the proscription against the repudiation of international financial obligations. Secondly, the ILC recognizes the right of the invoking or obligor state to initially become "the judge of the existence of the necessary conditions in the particular case concerned."[97] However this is qualified by the ILC to be subject to the objections of affected states, thus, giving rise to a dispute that "will need to be settled by one of the peaceful means specified in Article 33 of the Charter."[98] These points raised by the ILC are relevant particularly to the situation of an IMF member. It may be arguable that the determination of the effectivity of the measures in a given period, in this case a critical economic recovery period between 1988-1992, could be the subject of consultation with the IMF in compliance with the Philippines' specific obligation under the Articles of Agreement and a general obligation under the U.N. Charter to seek peaceful means towards the settlement of disputes. Therefore, as long as the Philippine Government complies with its obligation to consult the IMF, the carrying out of these measures should not be construed as a violation of the specific prohibition against imposition of restrictions

on payments and transfers for current international transactions which would cause the suspension of an existing IMF stand-by arrangement.

Finally, it can hardly be concluded that in adopting these measures, which include a limitation on payment of IMF credits, the Philippine Government should be declared ineligible to use the General Resources of the Fund because the Philippines is utilizing these resources "in a manner contrary to the purposes of the Fund. "[99] The legislation specifically designates the amount released from the debt service burden as "a fund which shall be utilized exclusively for projects identified by the Legislative - Executive Development Council and shall be aimed at achieving a sustainable economic growth and development."[100] In line with the second reason, consultation mechanisms under the Articles of Agreement, could facilitate coordination between standards of economic policy on a national level and international public policy. It is also appropriate to emphasize in this regard that one of the policies governing IMF stand-by arrangements is that "in helping members to devise adjustment programs, the Fund will pay due regard to the domestic social and political objectives, the economic priorities, and the circumstances of members, including the causes of their balance of payment problems."[101] In his commentary on this aspect of the stand-by arrangement, Gold emphasizes that "(a) principle implicit in the Fund's practice has been that stabilization in the short term or medium term should facilitate and not obstruct a member's economic priority of development in the longer run and longer-term investments"[102] and that "In making its resources available the Fund cannot underwrite a particular level of growth for its members."[103]

Reiterating this latter point, Mr. J. De Larosière had also declared in fact that while "The expertise of the Fund and the World Bank is available to help members make more informed choices about the growth and income-distribution implications of alternative forms of adjustment, the final choices, however, must rest with the country itself."[104] This writer submits that the conduct of the Philippine Government is a lawful expression of a recognized right to economic self-determination under international law and is specifically in accord with the IMF's avowed policy of respecting its member's choice of an economic development plan.

4.3 INTERNATIONAL RESPONSIBILITY OF THE IMF: HUMAN RIGHTS STANDARDS AND STAND-BY ARRANGEMENTS

4.3.1 INTRODUCTION

> When credit agencies consider the situation solely from the economic and monetary angle, they often impose on the debtor countries terms, in exchange for accrued credit, that can contribute, at least in the short term to unemployment, recession, and a drastic reduction in the standard of living .... Debt servicing can not be met at the price of the asphyxiation of a country's economy, and no government can morally demand of its people, privations incompatible with human dignity.
>
> ... Economic structures and financial mechanism are at the service of the human person and not vice-versa ....[105]
>
> - Roger Card. Etchegaray (President, Pontifical Commission, "Iustitia et Pax")

Ardent critics of the IMF have often raised the issue concerning the lack of consideration by this institution for the promotion of "human rights" when monitoring stand-by arrangements with its member states. This concern for human rights standards in such highly complex and technical financial arrangement is arguably difficult to imagine

particularly for an institution whose constituent instrument narrowly defines its function to the provision of technical assistance and advice on economic matters. However, the status of the IMF as a subject of international law and the role that this institution has assumed to date over the formulation by its members of economic policies, the implementation of which may have serious repercussions on the maintenance of human rights standards, warrant an inquiry into the nature and extent of this institution's responsibility.

This writer recognizes the need on the part of a debtor state to adjust its economies in order to resolve its balance of payments difficulty but strongly recommends a reexamination of the dominant theme in every renegotiation process that the burden of adjustment must be borne mainly by the marginalized debtor state. Most developing country members of the IMF now question, for example, some of the economic adjustment standards recommended by this institution during the effectivity of a stand-by arrangement because of the adverse effect of the policies on the standard of living of their citizens. Equally alarming is the impact of economic "shock treatment" upon the political stability of the debtor states. Thus, today, there is an urgent call for the linkage between human rights and economic development. Debtor states maintain that the existing dichotomy is most evident in the attitude of creditor states and international financial institutions towards the debt problem.

The present investigation has a two-fold purpose: (1) it will examine the legal basis for the IMF to consider human rights standards in its stand-by arrangements with member states consistent with the

institution's constituent instrument; and, (2) an argument will be advanced maintaining that an evolving principle of the "right to development" may provide an effective standard in formulating and carrying out economic adjustment programs under the surveillance of the IMF.

4.3.2 PRINCIPLE OF FUNCTIONAL LIMITATION IN INTERNATIONAL INSTITUTIONAL LAW AND THE IMF ARTICLES OF AGREEMENT

In defining the scope of the Draft Articles on State Responsibility, the ILC expressed the view that "It does not underrate the importance of studying questions relating to the responsibility of subjects other than States."[106] Given this situation, one must resort at this point to international practice or jurisprudence to determine the rules of responsibility applicable to other subjects of international law.

In the case concerning the Reparation For Injuries Suffered in the Service of the United Nations[107] the International Court of Justice had occasion to render an opinion with respect to the legal capacity of the United Nations to bring an international claim against a government on account of an injury suffered by an agent of the former in the performance of his duties. Of particular interest in our inquiry is the Court's finding that the United Nations is an organization possessing international personality:

> In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must

be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state. Still less is it the same thing as saying that it is 'a super-state', whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a state must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.[108]

Commenting on the implication of this decision, Eagleton found it "reasonable to believe that the rules of the international law of responsibility would apply, though perhaps with some variations, to any subject of international law, and not merely to states."[109] It follows from the Court's opinion and Eagleton's suggestion that an international organization, like the IMF, possessing attributes similar to that of the United Nations, is endowed not only with rights but, equally important, with duties toward other subjects of international law.

The capacity to act and the extent of the responsibility of an international organization differs from states in that "The extent of the rights and duties [of the international organization] ... is to be determined in each case by reference to the treaty establishing it"[110] and will "depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[111] This restatement of the familiar principle of functional limitation in international institutional law, however, does not equip us with a clear guide over certain aspects of the legal relations of an international organization. The problem is put by Bowett as follows:

> The attribution to an international organization of legal personality, both under international and municipal law should not be allowed to obscure the fact that there is no single, comprehensive body of law to govern its transactions and activities .... To the extent that the activities are internal activities, relating to the functions of the organizations, these will generally be adequately covered by the constitutional texts of the organizations. *It is when the activities become external in the sense of affecting third parties, be they states, other international organizations or even private entities, that the constitutional texts may afford no guidance to the problems raised. The problems are either choice of law problems or jurisdictional problems.*[112] (Italics mine)

In the case of the IMF, attribution of responsibility for international acts affecting human rights in its member states must be qualified to pertain more on the question of "responsibility for [technical and economic] advice given, even though the action is taken by the state."[113]

There is a tendency for the IMF and some developed members of the organization to view the duty to promote human rights as solely within the borrowing state's domain and direct responsibility. The IMF's duty to promote human rights is actually relegated to a mere reinforcement of the borrowing state's primary obligation under existing international human rights covenants to which the IMF, as an international legal person, is not a party. In fact this position was recently reiterated by the Fund's incumbent Managing Director, Mr. Michel Camdessus, in response to a query concerning the Fund's past financing for the South African government:

> We have to follow our articles in a completely impartial way. Nothing in our articles tells us that we have to look at the moral quality of the policies of the country. Nor do we have to consider whether the country is perfectly democratic or not.
>
> This is, conceivably, a weakness in the moral grounds of our articles of agreement, but they are as they are and we have to follow them. Of course, we- as staff and management of the IMF - are happier when we assist a young

> democracy in developing its programs than when we assist a country whose leaders are not up to a certain human standard. But, the international law exists as it is, and we have to comply with international law.[114]

From this perspective it would appear that the IMF's refusal to include human rights considerations in its decision-making process and the exercise of its technical functions in economic matters may be arguable.

Following further the IMF's argument, it has justified its denial of responsibility for the political activity of its member states by citing a pertinent provision of the Articles of Agreement. Gold maintains, in line with the test of functional limitation, that under the last sentence of Article I "The Fund shall be guided in all its policies and decisions by the purposes set forth in (Article I)."[115] He compares this provision to a similar obligation contained in the last sentence of Article I of the constituent document of the International Bank for Reconstruction and Development supplemented by Article IV, Section 10 which is expressed in the following admonishing language:

> The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes set forth in Article I.[116]

While recognizing the absence of such supplementary provision in the Articles of Agreement of the IMF, Gold argues that "the last sentence of Article I ... has been understood to imply what is made express in the Bank's provision on political activity".[117] However, it is useful to recall once again the Fund's policy on stand-by arrangements specifically paragraph 4 which states that "In helping

members devise adjustment programs, [the Fund] will pay due regard to the domestic, social and political objectives ... of [its] members."[118] This writer is of the opinion that in order to appreciate the meaning of this statement, the cautious language utilized in this paragraph, i.e., "will pay due regard", should be read alongside the more restrictive provision of paragraph 9 of the policy which emphasizes that "Performance criteria will normally be confined to (i) macroeconomic variables, and (ii) those necessary to implement specific provisions of the Articles or policies adopted under them. Performance criteria may relate to other variables only in exceptional cases when they are essential for the effectiveness of the member's program because of their macroeconomic impact".

It is clear, as the Fund has consistently maintained, that the institution's jurisdiction is very limited in this respect. But to this writer's mind, the Fund's view of its responsibility for human rights reflects the practice and thinking in human rights law of "compartmentalizing" these rights. Expressed in a different manner, the Fund adheres to a school of thought which maintains that human rights are divisible in nature.

Gold justifies the primacy of economic adjustment over other considerations, including human rights, in the Fund's practice as follows:

> The explanation of the weaker language (in paragraph 4) is not that the Fund might wish to modify the political objectives of a member. The paragraph means that, if after paying due regard to a member's political objectives, the Fund were to conclude that those objectives would impede adjustment and prevent a use of the Fund's resources that was compatible with the Articles, the Fund would be required by the Articles to withhold the use of its resources. To make the Fund's resources available in the circumstances would not be in accordance with the purposes of the

Fund, and a decision to permit transactions would be inconsistent with the last sentence of Article I.[119]

Another jurisdictional basis advanced by Gold to stress the Fund's limited authority is Article I, paragraph 2 of the Agreement between the United Nations and the IMF providing that

> The Fund is a specialized agency established by agreement among its members and having wide international responsibilities, as defined in its Articles of Agreement, in economic and related fields within the meaning of Article 57 of the Charter of the United Nations. *By reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Fund is, and is required to function as an independent international organization.*[120] (Italics mine)

Again, this provision is being presented possibly as evidence to illustrate that the Fund's international act within its field of competence, i.e., financial and economic matters, is beyond judgment by a higher authority.

Be that as it may, what remains certain, however, is that the Fund's effective influence, through the instrumentality of stand-by arrangements, over the adoption by its member states of economic policies which may be politically unpopular and could threaten the stability of social conditions in the member states should not be beyond scrutiny under international law. After all, like the United Nations, the IMF as an international legal person has been endowed with such status rendering it capable in international law to cause "harm" to the citizens of its member states when certain economic policies deemed by IMF "missions" to be crucial for the success of any adjustment program cause short-term social costs to vulnerable groups upon implementation through the stand-by arrangements. Considering the unfavourable consequences which may arise if a member state chose not to heed these

"recommendations", voluntariness as an element of stand-by arrangements is almost always diminished in actual practice. In fact, there is wide recognition of the fact that effective control over economic policy-making, under the present circumstances of most developing member States, actually resides with the IMF.[121]

To sum it up, it appears that an enquiry into the nature of the international responsibility of the IMF for violations of human rights requires certain qualifications. Direct international responsibility for violation of civil and political rights cannot be imputed against the IMF in instances wherein economic policies recommended by its "missions" for implementation under an existing stand-by arrangement create or generate a situation of political instability which may eventually cause the debtor state to use repressive measures to quell the people's opposition to the policies. The situation may be different when IMF officials or members of "missions" actually become involved in direct implementation of the economic austerity measures. The assumption of this writer is grounded on the fact that the International Covenant on Civil and Political Rights imposes a negative obligation upon the state to guarantee these rights to its citizens. In the same light, the International Covenant on Economic, Social and Cultural Rights, couched in a positive obligation, is addressed to a signatory state primarily and, it is arguable, the responsibility of international organizations with specialized economic functions arises secondarily whenever the state is unable to meet the standards set by the Covenant for lack of technical and financial means. But this writer is of the opinion that the preceding observation does not lend us a firm basis

under international human rights law to hold an institution, like the IMF, responsible for the consequences of its international act in the form of effective control over national economic policy-making in their member states during the adjustment period covered by a stand-by arrangement. Therefore, this writer suggests that a more authoritative approach establishing the obligation of the IMF under international human rights law can be pursued by examining an international legal principle directly addressed to this international legal person taking into account its field of competence. It will be argued in the succeeding section that such principle has evolved in international law under the rubric of a "right to development".

4.3.3 EVOLUTION OF THE RIGHT TO DEVELOPMENT

Contrary to the belief of most commentators on the subject the evolution of the concept of a "right to development" in international law could be traced even earlier than the commonly acknowledged source of this principle, i.e., the United Nations Charter. It is even more revealing and of utmost relevance to the contemporary problem of most developing countries to realize that this international legal principle had been invoked by a representative from a developing country already in deep financial crisis at the opening of this century. In his article, published in Revue General de Droit International dated April 1907, Señor Drago argued as follows:

> Sovereignty is a historic fact and may be studied in each of the phases of its long and slow evolution, but it has attributes and prerogatives which may not be disregarded without danger to the stability of social institutions.

The bodies of men that constitute human society are not mere aggregations; they are living organisms with distinct characters and inalienable rights, inherent in their nature, among which is the right to grow and develop independently without hindrance ....[122] (Italics mine)

With the adoption of the United Nations Charter, signatory states, individually and collectively, assumed some international obligations which had a profound impact on the status and rights of the individual under international law. Alongside the creation of new international economic institutions founded on the principle of a basic "human right to trade", as suggested by Professor Quincy Wright just before the conception of the Bretton Woods system, the following obligations were proclaimed as equally binding upon the members of the United Nations:

Article 55. With a view to the creation of conditions of stability and well-being which are necessary for the principle of equal rights and self-determination of people, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56. All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

A few years later, the 1948 Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly, became the first international instrument to define the rights and freedoms guaranteed under the United Nations Charter. This resolution gave impetus to the adoption of the two major human rights documents mentioned earlier, namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Together they constitute what is known today in human rights circles as the International Bill of Human Rights.

The realization of these rights particularly in the developing nations did not come about as earnestly envisioned by the framers of the United Nations Charter and the authors of the Covenants. Western states have often criticised regimes in the developing regions of the world for sacrificing the civil and political rights of their citizens. Some developing nations' retort, however, is that there are obstacles of a fundamental nature on the international economic level which hinder their development and render them less capable of affording their citizens the actual and reasonable enjoyment of the rights guaranteed under international human rights law. In fact, some developing country leaders have argued that only upon the improvement of the economic and social conditions in their societies will they be able to comply genuinely with the mandate of the Covenants.[123] According to them, the promotion of human rights can only receive adequate push through the restructuring of the global economic order. Practical demands for reform, for instance, have been addressed to the existing international economic institutions whose policies, in the opinion of most developing country leaders, serve more the economic interests of the more advanced member states rather than promoting genuine economic development in marginalized nations. One writer has noted a United Nations study on development activities as early as 1960 depicting the drawbacks of an extremely materialist orientation and criterion of economic development reflected in the practice of the major international economic institutions:

> One of the greatest dangers in development policy lies in the tendency to give to the more material aspects of growth an overriding and disproportionate emphasis. The end may be forgotten in preoccupation with the means. Human rights may be submerged and human beings seen only as instruments of production rather than as free entities for whose welfare and cultural advance the increased production is intended. Even where there is recognition of the fact that the end of all economic development is the growth and well-being of the individual and larger freedom, methods of development may be used which are a denial of basic human rights.[124]

The schism between the developed and developing nations on the matter of prioritizing human rights prepared the ground for the conceptualization of a principle in international human rights law that could serve as a guide in understanding the relationship between the promotion of human rights and economic development. Arguably, the task assumed mainly by the United Nations Commission on Human Rights was aimed at resolving the dilemma of most developing nations today.

Against the backdrop just drawn by this writer, the Foreign Minister of Senegal used the phrase "right to development" in his plea before the United Nations in 1966 for the establishment of a New International Economic Order.[125] By 1969, the Algerian Commission on Justice and Peace report had invoked the "right of underdeveloped peoples to development".[126] Later in 1972, Mr. Keba Mbaye, President of the Senegal Supreme Court, defined the right to development during a lecture before the Institute International de Droits de l'Homme in Strasbourg, France.[127] His view had two aspects according to one commentator, Karel de Vey Mestdagh:

> ... Keba Mbaye ... came to the conclusion that the right to development is a human right. All fundamental rights and freedoms, he argued, are necessarily linked to the right to existence, to an increasingly higher living standard, and therefore to development. The right to development is a human right because man can not exist without development.

> This point of view is a somewhat philosophical one, but Mbaye also argued, more from the legal point of view, that there would be little point in drafting a new proclamation with the aim of creating a new right; the right to development was already contained in international law... he referred first to Articles 55 and 56 of the UN Charter ... then mentioned the Universal Declaration of Human Rights of 1948, Articles 22 to 27 ... concerned with social and economic rights (and, finally) *the statutes of a large number of specialized agencies of the UN in which international cooperation on the basis of a universal principle of solidarity is of primary importance.*[128] (Italics mine)

Karel Vasak, on the other hand, espoused the view that a "third generation" of human rights or so-called "solidarity rights" had emerged relating to the subjects of development, peace, environment and communal heritage.[129] Since then substantial work on the crystallization of the principle of the right to development began to be initiated under the auspices of the United Nations Commission on Human Rights (UNCHR).

In Resolution No. 4 (XXXIII)[130] of 21 February 1977, the UNCHR upon recognizing the right to development as a human right requested the Secretary-General for a study on the international dimensions of the right to development. By 2 January 1979, the office of the Secretary-General had concluded its comprehensive report on the subject. The study identified "a substantial body of principles based upon the Charter and the International Bill of Human Rights and reinforced by a range of conventions, declarations and resolutions which demonstrate the existence of a human right to development ...."[131]

It is of special interest to our inquiry to note the response of the IMF at that time to paragraph 4 of Resolution 4 (XXXIII) of the UNCHR which contained a recommendation that the Economic and Social Council should invite the Secretary-General, in co-operation with the United Nations Educational, Scientific and Cultural Organization and other competent specialized agencies, to conduct the study:

> We have noted the proposed study to be undertaken by the Secretary-General in co-operation with UNESCO and other competent specialized agencies on "The international dimensions of the right to development as a human right in relation with other human rights based on international co-operation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs." *Since a study of this nature is outside the International Monetary Fund's area of competence, we are unable to make contribution to it.*[132] (Italics mine)

A more co-operative and remarkable reply was made, however, by the IMF's twin institution, the IBRD:

> The World Bank does not claim to possess any particular degree of expertise in the general field of human rights. However, as the main multilateral agency dealing with development financing, ... *the World Bank holds as a fundamental principle that the enjoyment of human rights generally has little, if any, true significance unless basic human needs are fulfilled* .... (I)t would be our suggestion that the study be arranged to cover those sectors (nutrition, shelter, health, education, etc.) which are relevant to the basic human needs concept and that the study then proceed to analyze how the fulfillment of those needs and the enjoyment of other human rights are intimately linked.[133] (Italics mine)

Similarly, other specialized agencies of the United Nations with more explicit mandate relating to the promotion of economic, social and cultural rights have identified the "basic human needs"[134] concept as an element of the principle of the right to development. In the case of the International Labour Organization, its reply recognized the need "to develop a strategy for eradicating poverty and unemployment oriented towards the satisfaction of economic, social and cultural rights ...."[135] On the other hand, the World Health Organization, citing its long-term objective of "Health for all by the year 2000", defined the objective as "the enjoyment by all of a level of health that will be conducive to a high social and economic productivity [and] WHO's primary health care programme is one approach to the attainment of the social goal set by the Organization for the year 2000".[136]

The right to development was subsequently recognized in Resolution No. 5 (XXXV)[137] of the UNCHR and UN General Assembly Resolution 34/46,[138] both adopted in 1979. Thereafter, the UNCHR convened a working group of fifteen governmental experts in 1981 for the purpose of preparing a draft of a Declaration on the Right to Development.

At this stage, parallel efforts were being undertaken on the regional and non-governmental organization levels to clarify the nature of this principle. One writer recalls that the African Charter of Human and People's Rights[139] had in fact defined the right to development earlier than any other international legal instruments. Its Preamble ordains

> that it is henceforth essential to pay particular attention to the right to development and that civil and political rights can not be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

In addition, Article 22 enumerates as among the human and peoples rights and duties the following:

> 1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind.
>
> 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

On the part of the International Law Association, its Committee on Legal Aspects of a New International Economic Order was most helpful in elaborating the basic elements of existing and evolving principles and norms of international law related to the New International Economic Order. This writer is of the opinion that the explanation given by the

Yugoslav Branch of the ILA in regard to the function of the concept of the right to development in international law provides an authoritative argument against the narrow view maintained by the IMF concerning its responsibility under human rights law. The Yugoslav Branch propounded that

> ... the Right to Development constitutes an integration of the two branches of international law - the law of international economic relations and the law of human rights. The implementation of human rights through the realization of principles and norms of the New International Economic Order gives the area of human rights a new dynamism and above all makes this subject much more realistic. The right to development constitutes, therefore, an opportunity for a conceptual overcoming of the artificial division between human rights and social development. The concept of participation which constitutes one of the most significant parts of the substance of the right to development, plays the key function. All individuals and all peoples have the right to effective and meaningful participation in decision-making on the problems of development, in the voluntary implementation of decisions on the problems of development and in an equitable distribution of the results amounting from such activities.[140]

The result of the ILA investigation on the right to development was finally contained in section 6 of the "Declaration on the Progressive Development of Principles of Public International Law Relating to the New International Economic Order" adopted unanimously by the ILA during its Sixty-Second Conference in 1986.[141] The pertinent portions of the Declaration read as follows:

> 6.1 *The right to development is a principle of public international law in general and of human rights law in particular, and it is based on the right of self-determination of peoples.*
>
> 6.2 By virtue of the right of development as a principle of human rights law, individuals and peoples are entitled to the results by the efforts of States, individually and collectively, to implement Articles 55 and 56 of the United Nations Charter in order to achieve a proper social and international order for the implementation of the human rights, set forth in the Universal Declaration of Human Rights, through a comprehensive economic, social, cultural and political process based upon their free and active participation.

6.3 The right to development as a principle of public international law implies the co-operation of States for the elaboration of civil, cultural, economic, political and social standards, embodied in the Charter of the United Nations and the International Bill of Human Rights, based upon a common understanding of the generally recognised human rights and of the principles of public international law concerning friendly relations and co-operation among these States. *These standards should be taken into account in the formulation, adoption and implementation of administrative, legislative policy and other measures for the realization of the right to development at both national and international levels.* (Italics mine)

Later that same year, the United Nations General Assembly adopted its own version of the Declaration by a vote of 146 in favor, 1 against and 8 abstentions.

4.3.4 THE 1986 UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT: ITS PRACTICAL APPLICATION TO THE NEGOTIATION OF IMF STAND-BY ARRANGEMENTS

4.3.4.1 Legal Value of General Assembly Resolutions

Aside from being one of the latest contributions to the field of human rights law, the Declaration on the Right to Development also comes within a body of international instruments related to development[142] which has grown steadily since the sixties and through the seventies. The legal value or effect of these instruments has been the subject of numerous scholarly writings and, in fact, would remain relevant in the future as states resort more to these forms of expressing international solidarity in their economic relations. As the relevance of these instruments become more felt in state practice, contemporary thinking in the area of international law-making is also undertaking major strides to keep apace with the clamor of developing states to make international law more responsive to the plight of their citizens.

With respect to the Declaration at hand, some guidelines used by international legal scholars to evaluate the relevance of United Nations General Assembly resolutions would be of immense value in arriving at a thorough understanding of the implications of the Declaration for the international community in general and for the IMF in particular.

The typical argument advanced by writers critical of the view that resolutions of the U.N. General Assembly may have some legal effect on member states is Article 10 of the United Nations Charter:

> The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Security Council or to both on any such questions or matters.

It has been stressed further that under Article 17 of the Charter, the General Assembly "has clear authority to make binding decisions only with respect to budgetary and administrative matters of the United Nations" and "For all its work, the General Assembly is empowered to make recommendations (Articles 10-16), which are not considered binding per se but can have value as means for the determination of international law."[143] In this regard, it is of interest to cite that in opposing the notion that the right to development was somehow a principle of international law, the United States invoked Article 10 of the Charter to emphasize the recommendatory character of the Declaration.[144] However, it should now be argued that the strict positivist stance assumed by the United States and other developed nations on the matter of the binding effect of the Declaration can not be sustained in the opinion of this writer in the light of existing

evidence confirming that the Declaration is not without any legal value or consequence.

In the South West Africa, Voting Procedure Case,[145] the legal effect of a resolution of the General Assembly received due recognition when Judge Lauterpacht said that

> A Resolution recommending to an Administering State a specific course of action creates some legal obligation which, however, rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith.[146]

This observation, however, does not provide us with a concrete guide in determining the character of a resolution which may give rise to a legal obligation. The void was subsequently filled in part by the Court's inquiry into the legal nature of a Security Council resolution in the Namibia Case.[147] In its Advisory Opinion, the Court observed that

> 114. It has been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. *The language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.*[148] (Italics mine)

Later, in the Western Sahara Case,[149] the Court relied extensively, as it did in the Namibia Case, on the various General Assembly resolutions in proclaiming the existence of a right of self-determination of peoples. It recalled, for instance, General Assembly

Resolution 1514 (XV) on the Declaration on the Granting of Independence to Colonial Countries and Peoples which it described in the Namibia Advisory Opinion as "[a] further stage in [the] development"[150] of the right of self-determination. And speaking on the Western Sahara situation itself, the Court observed in a more definitive language that "General Assembly resolution 1514 (XV) provided the basis for the process of decolonization ... [and] is complemented in certain of its aspects by General Assembly resolution 154 (XV), which has been invoked in the present proceedings".[151] Some elements of the right of self-determination have also been recognized in General Assembly Resolution 2625 (XXV) on the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." Taking into account these developments, Judge Dillard concluded in a separate opinion "that a norm of international law has emerged".[152]

Finally, the Court in recognizing the non-use of force as a principle of customary international law in the Military Activities in and Against Nicaragua Case[153] reasoned in the following manner:

> The Court has however to be satisfied that there exists in customary international law an opinio juris as to the binding character of such abstention (from the use of force). This opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." The effect of consent to the text of such resolutions can not be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law.[154]

What this writer derives from a perusal of the cases is that there exists a significant imprimatur of the legal value of General Assembly resolutions, under certain circumstances, in contemporary international relations. However, this writer is in agreement with the view of a number of commentators on the subject that the legal effect of these resolutions must be determined on a case-by-case approach giving due regard to the various factors which may shed light upon the characterization of these instruments.[155]

4.3.4.2 Some Guidelines For Assessing "Declarations"

Sloan points out three common factors which legal scholars regard as important in assessing resolutions in general: the terms and intent of the resolution; voting patterns or support; and, state practice.[156] In addition, he suggests that a further distinction must be made between decisions, recommendations, and declarations.[157] With respect to declarations, the opinions of some contemporary writers provide us with useful guidelines in understanding the present role or contribution of this form of instrument in the development of a rule of international law. Sloan argues that

> Where, however, there is an intent to declare law, whether customary, general principles or instant, spontaneous or new law, and the resolution is adopted by a unanimous or nearly unanimous vote or by genuine consensus, there is a presumption that the rule and principles embodied in the declaration are law. This presumption could only be overcome by evidence of substantial conflicting practice supported by an opinio juris contrary to that stated or implied in the resolution. If the declaration is adopted by a majority vote its evidentiary value is to be weighed in the light of all relevant factors. It would in any event be part of the material sources of customary law and would constitute an expression of opinio juris, or lack of opinio juris for conflicting norms, of those States voting for the resolution.[158]

A closely related argument is espoused by Judge Jimenez de Arechaga as follows:

> ... [Resolutions] may have a declaratory effect, merely restating already established rules of international law .... Other General Assembly resolutions adopted unanimously or by consensus crystallize emerging rules of international law .... Finally, *resolutions of the General Assembly prescribing principles of conduct may, in their application by Member States and also by General Assembly organs, constitute a model of conduct which, followed by the practice of States and of the Organization, becomes a rule of international law.*[159] (Italics mine)

He further points out, using as an example the Charter of Economic Rights and Duties of States, that while there may have been resolutions not adopted by broad consensus, "nevertheless [these may] contain elements which constitute part of international law."[160] With respect to those elements disputed as constituting rules of international law he maintains that

> They are not positive international law at present date, but these principles have been accepted by all States, and constitute a goal which nobody would question today. *No one doubts the necessity of establishing greater equity in international economic relations;* what is in question is not the objective, which has been universally accepted, but the methods used to reach this objective ....[161] (Italics mine)

Finally, there is an emerging consensus among international legal scholars today as regards the relevance of the concept of "soft law"[162] particularly in international economic relations. In fact, there has been a proliferation of the use of resolutions by the General Assembly and by other international organizations in developing "informal prescriptions" for state behaviour in relation to trade, finance, transnational corporations' activities and other economic matters. Commenting on this recent phenomenon, Professor Brownlie opines

- ... that a more interesting way of looking at so-called cases of soft law is to look at their real importance; the fact that certain informal prescriptions, things that are not law as such, obviously have significance in terms of political behaviour between States, and are generally recognized by decision-makers to have an important *catalytic effect*. By informal prescriptions I am referring to anything which can provoke authoritative decision-makers into adopting the normative elements as legal rules.[163] (Italics mine)

Turning now to the Declaration on the Right to Development, one may preliminarily inquire into the voting pattern to examine any substantial split between important homogeneous groups in the United Nations. As previously mentioned, the vote stood at 146 in favor, 1 against and 8 abstentions. Standing on its own, this particular resolution ostensibly represents more than a clear majority. But, the only "no" vote cast by the United States and the abstentions by some developed States must be closely examined in connection with the subsequent General Assembly Resolution 41/133 which was declared by a vote of 133-11-12. The resolution contained the following pertinent aims:

1. The achievement of the right to development requires a concerted international and national effort to eliminate economic deprivation, hunger and disease in all parts of the world without discrimination in accordance with the Declaration and the Programme of Action on a New International Economic Order, the International Development Strategy for the Third United Nations Development Decade and the Charter on the Economic Rights and Duties of States.

2. To this end, international co-operation should aim at maintenance of stable and sustained economic growth with simultaneous action to increase concessional assistance to developing countries, build world food security, resolve the debt burden, eliminate trade barriers, promote monetary stability and enhance scientific and technological co-operation.[164]

The states which voted against this resolution were as follows: Belgium, Canada, France, Federal Republic of Germany, Italy, Japan, Luxembourg, Netherlands, Portugal United Kingdom and the United States. Those abstaining were Australia, Austria, Bahamas, Denmark, Finland,

Greece, Iceland, Ireland, Israel, Norway, Spain, and Sweden. It is arguable that while there is no substantial disagreement on the text of the Declaration, the dissent by donor States on the practical measures enumerated in Resolution 41/133 deserves some measure of consideration on account of the problem this poses in assessing the normative value of the Declaration per se. For instance, the positive influence of the content of the Declaration on the negotiation of Fund-supported adjustment programs for developing country debtors may not be substantially realized on account of the absence of a firm commitment to increase concessional assistance or to adopt measures to alleviate the debt-burden of these nations.

The report of the Working Group of Governmental Experts on the Right to Development, dated 29 January 1987 provides additional insights into the normative character of the Declaration. According to the report, the Chairman of the Working Group, Mr. Alioune of Senegal, "noted that although the Declaration was a compromise text, efforts by many States to achieve consensus on the adoption of the Declaration had not been successful."[165] But he emphasized that "the adoption of the Declaration opened a new era with regard to the right to development, in which the principal task of the international community was to find ways and means to promote that right."[166]

Suggestions to codify the Right to Development as a principle of international law have been objected to by some experts and observers of the Working Group specifically on the ground that there has been no consensus on the Declaration.[167] Notwithstanding this disagreement, however, a report of the open-ended Working Group, dated 13 February

1989, contained the following statement concerning an earlier report entitled the "Analytical compilation of comments and views on the implementation and further enhancement of the Declaration on the Right to Development prepared by the Secretary-General":

> 14. A number of experts considered the analytical compilation a good basis for its work. *It reflected that, although the Declaration on the Right to Development was not adopted by consensus, there was a growing trend towards a convergence of views on the implementation of the Declaration.*[168] (Italics mine)

It appears, therefore, from the foregoing survey of the most recent reports of the Working Group that considering the voting pattern alone may not be conclusive to establish the normative content of the Declaration on the Right to Development. It may be suggested that a more useful route in this case would be a further resort to the text of the Declaration to identify certain elements of the instrument reflective of universally recognized norms of international human rights law which may have direct relevance and application to the object of this enquiry, i.e., the negotiation of the stand-by arrangements. In this regard, Professor Philip Kunig comments that "it is fair to say that ... the right to development ... is limited to creating a favourable climate for the demands of the developing countries at international conference and ... multilateral negotiations."[169] However, he posits, in response to the strictly positivist description of the Declaration, that a more interesting approach is the "... question of establishing a rule aimed generally at 'development,' that is to say, in its simplest terms, improvement of human living

conditions, within the structural framework of contemporary international law."[170] And he continues,

> When one considers the possibilities of development of the law it is not only the question of the content of the existing law which assumes a lesser importance, but also the question of the extent to which it is legally binding: it only makes sense to consider this when it has been established to whom the law is addressed and what its content is to be. Only then do we need to consider whether we are dealing with a norm of law in the strict sense, or how it can be put into force, or are dealing with a norm of a kind which falls short of this threshold, either as a programmatic principle with quasi-legal compliance or as a principle which is effective mainly in the purely political open area.[171]

Following the above approach, the present writer would attempt in the final section to establish the possible legal implications of existing provisions of the Declaration upon the rights and duties of the parties involved in designing and implementing the economic adjustment programs currently relied upon by international creditors as a condition precedent in sovereign debt renegotiations. In addition, an account would be made of the most recent developments in the Fund's practice which may be relevant in establishing the normative value of the Declaration.

4.3.4.3 Provisions of the Declaration on the Right to Development Relevant to the Negotiation of IMF Stand-By Arrangements

In the negotiation of Fund-supported adjustment programs, two crucial considerations for all parties concerned are the political sustainability of the programs and the short-term distributional implications of certain macroeconomic policies on the plight of the poor in the negotiating debtor state. In order to facilitate the discussion of these two aspects of the negotiation within the legal context, this

writer suggests to classify them into two basic categories, namely, procedural and substantive. Employing these categories, an enquiry will be conducted on the applicability of some of the provisions of the Declaration to the negotiation process.

On the procedural plane, it will be argued that the right to development entails respect for political freedoms in the adoption and implementation of adjustment programs essential for economic recovery and eventual development. The need to guarantee certain "rights of participation" in economic policy-making would be a necessary condition for harnessing genuine political support for the adjustment policies.

The substantive aspect of economic adjustment in the developing member states is gradually receiving attention from the governing body of the IMF. There is also positive evidence more recently of the increasing recognition of the "basic human needs approach" and the concept of international social justice in IMF conditionality. This writer would attempt to define the implications of this current invocation of ethical considerations in the Fund's practice within the context of the Declaration. It will be argued that certain definable duties and responsibilities on the national and international levels require immediate compliance by the obligors to avoid further social costs in most developing nations.

Procedural Aspect: "Rights of Participation" and National Economic Policy-Making

Negotiation of stand-by arrangements is often governed by a code of secrecy of information and conducted by an exclusive team of experts in the economic field, including top level politicians. The nature of the

negotiation process is further reinforced by the official IMF policy on the characterization of the transaction as non-contractual. A staunch critic of this policy argues that the existing norm of conduct involving "farther-reaching general interests"[172] amounts to an "infringement of parliamentary prerogative"[173] which ultimately undermines the "will of the electorate".[174] Although the present writer generally agrees with the interpretation advanced by Sir Joseph Gold in regard to the Fund's characterization of stand-by arrangements, the fact that his interpretation discounts the possibility of a treaty arising as a result of the entry into a stand-by arrangement by a debtor state does not necessarily grant a licence to the negotiators, including the IMF "missions", to override the right of the people to be consulted about economic adjustment policies subject to the negotiation which substantially affect the latter's living standards.

Under Article 2, paragraph 3 of the Declaration, the right and duty of the state "to formulate appropriate national development policies" for its citizens is qualified by the phrase "on the basis of their active, free and meaningful participation in development". It is further emphasized in Article 8, paragraph 2 that "states should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights".

The rights of participation contemplated by the Declaration are premised on two of its preambular provisions.

Firstly, the sixth paragraph of the Declaration's Preamble states that "... by virtue of (the right of peoples to self-determination), they have the right freely to determine their political status and to

pursue their economic, social and cultural development". This provision should be read with Article 1, paragraph 1 which declares that

> The right to development is a human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

On the basis of these two cited provisions it can be inferred that the right to development, with the concomitant rights of participation, is actually entrenched in the universally recognized principle of the right to self-determination of peoples.

Secondly, there is recognition of "the human person [as] the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development".

With respect to the second point, it is essential to identify some basic rights which must be guaranteed the citizens generally to enable them to effectively become a participant, for instance, in the national decision-making process. De Vey Mestdagh opines that "Of essential importance to effective participation are the right to education and the right to take part in cultural and scientific life, freedom of expression and the right of association and assembly, including the right to form trade unions, ..."[175] It must be emphasized, however, that the same writer carefully qualifies the manner and form of compliance by the developing States with these obligations based on their economic and social situation.[176]

A significant observation one derives from the above provisions is that the right of the people to participate in economic development

entails strict observance of the classical freedoms by the State. Theo van Boven cautions in general that "a development strategy based on political repression and denial of human rights could perhaps appear to succeed in terms of specific overall economic objectives, but full and genuine development would never be achieved."[177] Applied to our investigation in particular, while there is a conflict of opinions on the matter of the direct relationship between authoritarianism, on the one hand, and the formulation and successful implementation of adjustment policies under IMF surveillance, on the other hand,[178] there is ample support for the view that an important factor which contributed to the failure of several adjustment programs in the past was the absence of political support for the selected policy instruments.[179] It would not be an overstatement to posit that more often than not genuine consultation processes specifically on the grassroots level have either been overlooked or deliberately ignored by political authorities, economic policy-makers, and IMF "missions". There may be legitimate reasons for not establishing or availing of consultation mechanisms on the national level, such as, time constraint and the fact that the problems involved are highly technical in nature. However, these reasons may now be hardly convincing in the light of the accounted heavy social and political costs borne often by the marginalized groups in most of the adjusting debtor States resulting from the "shock treatment".

Joan Nelson suggests that "in countries where there are only a few well-trained economic (officials) and they are working under immense pressure, the negotiating team itself should include among its

responsibilities the preparation of simple, clear written explanations of the program which the government can use at its discretion to promote fuller understanding".[180] In line with this approach, it may be helpful in generating stronger political commitment for the adjustment program from the grassroots to afford full constitutional recognition to "people's organizations" or non-governmental organizations (NGOs) which would have direct linkages with the poor in most debtor States. On this subject, the following provisions in Article XIII of the 1987 Philippine Constitution are evidently instructive:

> Sec. 15. The State shall respect the role of independent people's organizations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means.
>
> People's organizations are bona fide associations of citizens with demonstrated capacity to promote the public interest and with identifiable leadership, and structure.
>
> Sec. 16. The right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged. The State shall, by law, facilitate the establishment of adequate consultation mechanisms.

The existence of effective consultation mechanisms or similar channels of communication with economic policy-makers could minimize suspicion by groups who are highly vulnerable to the unavoidable short-term effects of some adjustment policies.

To sum up, there is a primary responsibility on the part of the debtor state under the principle of the right to development to inform the populace of negotiating terms with IMF "missions" and other international creditors. Education of the public on technical aspects of the negotiations may be effectively achieved through the people's

organizations. It is also incumbent upon the IMF "missions" to adopt as a matter of policy during the conduct of the negotiations an attitude of openness or deference to national consultation procedures in order to genuinely assess the level of political commitment to the Fund-supported adjustment programs.

Substantive Aspect: Entitlement of the Poor to the Satisfaction of Their Basic Human Needs and International Social Justice as Juridical Standards in the Formulation of Adjustment Policies

Several commentators[181] have argued on the basis of well-founded empirical analyses that certain IMF recommended adjustment policies (e.g. money and credit, fiscal, pricing, labor markets, and external sector), aimed at generating large trade balance surpluses in very short periods of time have resulted in "a significant cost for the major debtors in terms of decline in employment, income, and standard of living".[182] A recent report of the United Nations Children's Fund (UNICEF) sketches concretely the unconscionable impact of the adjustment processes particularly on the plight of the poor in these countries:

> ... the heaviest burden is falling on the shoulders of those who are least able to sustain. It is the poor and the vulnerable who are suffering the most, and for two reasons.
>
> The first is that the poor have the least economic 'fat' with which to absorb the blow of recession. Often, three quarters of the income of the very poor is spent on food and much of what remains is needed for fuel and water, housing and clothes, bus fares and medical treatment. In such circumstances, a 25% cut in real incomes obviously means going without basic necessities.
>
> The second reason is that the poor also have the least political 'muscle' to ward off that blow. Services which are of concern to the richer and more powerful sections of society - such as the major hospitals, universities, national airlines, prestige development projects, and the military - have not borne a proportionate share of the cuts in public spending ... With some honourable exceptions, the services which have been most radically pruned are health services, free primary education, and food and fuel subsidies - the services on which the poor are most

dependent and which they have least opportunity to replace by any other, private, means.[183]

In an exclusive study[184] by some Fund members they have admitted "that the mitigation of the adverse distributional implications of exogenous shocks or of the economic adjustments necessitated by past, inappropriate policies has not been an explicit objective of Fund-supported programs"[185] and emphasized the need "to improve the efficiency of design of Fund-supported programs and to minimize the economic and human cost of adjustment".[186] This expression of genuine concern, in this writer's mind, constitutes a significant step away from the "restrictive approach to economic law"[187] which has often been the object of criticisms against the controlling members of the IMF. Even more encouraging in this regard is Mr. Camdessus' well-received convictions to the effect that

> ... adjustment does not have to lower basic human standards ... [and] that the more adjustment efforts give proper weight to social realities-especially the implications for the poorest - the more successful they are likely to be.[188]

and a summary of the IMF Board's discussion of a joint Fund-World Bank report on poverty issues in economic adjustment stating as follows:

> ... [The Board] welcomed the increased attention being paid to the important impact of Fund-supported adjustment programs on income distribution and on the poorest population groups. The Board saw this as justified not only on moral grounds but also because it enhanced adjustment programs' chances of success by minimizing public resistance to them.
>
> ... [The] Directors recognized that some poverty-stricken groups could be disadvantaged in the short run by increases in the prices of necessities, reductions in employment, and cutbacks in public services. They supported the occasional use of compensatory measures to cushion the impact of adjustment on these groups.

> The Board recommended that the Fund staff conduct more research, policy studies, and in-house training programs on poverty and that it consider income distribution issues during annual consultations and program discussions with members.[189]

The evolving shift in IMF policy brings to mind the institution's increased recognition of two concepts inherent in the principle of the right to development, namely: (1) the entitlement of every human person to the satisfaction of his basic needs, and (2) international social justice.

The first concept is defined succintly in Article 8, paragraph 1 of the Declaration:

> States shall undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income .... Appropriate economic and social reforms should be made with a view to eradicating all social injustices.

In this writer's opinion, an effective means of assuring the maintenance of basic human needs standards within the context of our investigation is through the incorporation of these standards or their equivalent in terms of policy instruments into the stand-by arrangements as performance criteria. However, the recent pronouncement by the IMF Directors rejecting this approach on the ground "that ... it [is] the prerogative of member countries to make social choices involved in adjustment" actually weakens the institution's avowed changing attitude

towards conditionality.[190] Nevertheless, it may be suggested that the obligation under Article 8, paragraph 1 requires the state, in collaboration with Fund experts, to "forbear from measures which would deprive those in need of food and other essential resources".[191]

Two other specific policy areas where the basic human needs standards could have direct influence in adjustment programs are taxation and reduction of expenditure.

With respect to taxation, government revenue raising measures, usually in the form of excises and indirect taxes should provide standard exemptions of goods consumed and services availed of by core poverty groups. It appears from the IMF study that many programs already exempt these goods.[192] Thus, as in the case of reduction or lifting of food and fuel subsidies, the group's recommendation, for instance, that a policy instrument increasing indirect taxes should be accompanied by rationing schemes targeted at the poor, would be in compliance with the basic human needs standards.

Finally, expenditure cuts in health and educational services to the poor have been found by the group to be costly "in both the short and the long run"[193], making such policy instrument inadmissible by all means in the light of the basic human needs approach.

Victor Umbricht maintains that "a developing state has a ... right to expect assistance in its development, based on generally accepted principles of international social justice."[194] He explains that the latter principles are actually derived from "the common recognition of social justice at [the international] level ... which originated in national notions of equity, equality, and fair play."[195] Applying this

principle to the present case of debtor states, it is crucial that a commitment by an adjusting state to national economic and social reforms and the protection of the poor during an adjustment period must be complemented with specific duties on the part of the international community aimed at the promotion of social justice on the inter-state level. On this point, the Declaration provides the following obligations of conduct for the developed states and international institutions engaged in development assistance:

> Article 3(3) States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. *States should fulfil their rights and duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation* among all States, as well as to encourage the observance and realization of human rights.
>
> Article 4(1) *States shall have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the right to development.*
>
> (2) ... As a complement to the efforts of developing countries *effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their development.* (Italics mine)

Defining the various far-reaching implications which may arise from the above prescriptions is beyond the immediate task of this writer; instead, it would be more appropriate to confine the discussion to an assessment of the significance of the Fund's evolving practice on the matter of extending adequate resources for purposes of adjustment, including the role that this institution has assumed in promoting a new strategy to reduce the debt burden of adjusting States, in accordance with Article 4(2).

Evidence now exists confirming the policy of the Fund towards increased financial assistance specifically for the protection of the

vulnerable groups in adjusting states. The IMF 1989 annual report states that

> In August 1988 the Fund established the compensatory and contingency financing facility, designed to stabilize export earnings and the cost of cereal imports, with a contingency element to protect adjustment programs from external shocks.[196]

From the Board's perspective, this is the institution's way of "paying increased attention to the impact of adjustment programs on income distribution and on the poorer segments of society."[197]

More recently, in May 1989, the Fund adopted some "broad guidelines" for its support for debt reduction operations.[198] An agreement within the Board was reached "that certain proportion of Fund resources commitment under an extended or stand-by arrangement could be set aside to reduce the stock of debt through buybacks or exchanges ... normally ... around 25 percent" and up to 40 percent of the member's quota could be used for interest support ... under certain circumstances."[199] However, disbursement of Fund resources would be subject to the following conditions: "... when the Fund-supported adjustment program is on track; if the Board is satisfied with the authorities' description of the debt reduction plan agreed between the debtor and its commercial bank creditors; and an understanding that the debt reduction operations are market based (or at market-related prices) and involve substantial discounts."[200]

Finally, the loosening of a Board's policy on stand-by arrangement financing assurances pending negotiation between the adjusting State and its commercial bank creditors could enhance the debtor State's creditworthiness and maintain continuity in adjustment program

implementation.[201] Essentially, it shall now be the policy of the Board to "approve an arrangement outright before the conclusion of an appropriate package is agreed between the member and commercial bank creditors if it is judged that prompt Fund support is essential for program implementation, that negotiations between the member and the banks have begun, and that a financing package consistent with external viability will be agreed within a reasonable period of time."[202] A relatively significant complement of this policy is tolerance of "accumulation of arrears to banks ... where negotiations continue and the country's financing situation does not allow them to be avoided."[203]

Substantive changes in IMF policy over the negotiation of stand-by arrangements have added a new dimension to the institution's practice. It may be argued that these changes constitute concrete evidence of the Fund's implied recognition of the principles of international social justice mandated by the Declaration.

CHAPTER 5

CONCLUSION

In the earliest stage of the evolution of the law of responsibility for international financial obligations, the Grotian theory of restitution recognized the right of a creditor monarch to wage war as a means to satisfy his pecuniary claims or those owing to his subjects. Grotius recognized, however, that implied in this rule was a deference to considerations of humanity in the exercise of the monarch's right. But as monarchs were reluctant to espouse these claims, no clear practice grew up and thus no clear rule on the matter of responsibility for international financial obligations developed.

During the nineteenth and early twentieth centuries, the emergence of a distinction between the personality of the monarch and that of the state radically affected the character of international financial transactions, including the remedies available to public and private international creditors. At this stage, financing by the imperial states, mainly through the issuance of bonds, flowed into the developing regions of the world. However, on account of the conflicting views on the characterization of this financial transaction and the extent of the liability of a defaulting state under international law, private bondholders preferred to avail themselves of non-judicial remedies which occasionally included the use of armed force by the bondholders' government. Resort to armed force for the recovery of contract debts subsequently came under international regulation through a convention adopted during the Second Hague Peace Conference in 1907. The practice of negotiating the settlement of defaulted intergovernmental loans in the early part of this century was particularly significant in that it laid the foundations for the development of principles and procedures reflected in sovereign debt renegotiations during the inter-war period

and after the Second World War. These include the now familiar concepts of equality and non-discrimination in the treatment of some classes of state debts, preferences for trade debts, short-term credits and international law debts.

In addition, private protective committees of bondholders induced upon debtor states the adoption of readjustment plans which included, among other elements, an expression by debtor states of their goodwill either by taking the initiative in introducing internal reforms or by heeding the advice of independent organs in order to improve their financial condition. This practice provided a precedent for the development of similar instruments after the Second World War in the form IMF stand-by arrangements.

A remarkable contribution of the Bretton Woods system to international law was the development of legal standards regulating inter-state economic relationships. Treaty obligations assumed by states in regard to trade and finance represented the international community's awareness of global economic interdependence. The IMF Charter, in particular, prescribed rules of conduct primarily aimed at maintaining orderly exchange rate arrangement and policies among member states, and, eventually, ensuring the growth of world trade. In assisting member states attain these goals, the Fund makes its general resources temporarily available to member states experiencing severe balance of payments problems. The Fund's concept of conditional balance of payments financing using the stand-by arrangements actually evolved from the idea of a confirmed line of credit into a framework for introducing economic programs designed in collaboration with the Fund staff for the purpose of increasing the international creditworthiness

of heavily indebted members. International creditors have availed themselves of this unique arrangement between the Fund and its members more frequently since the onset of the international debt crisis in 1982. This was reminiscent of earlier readjustment plans recommended by private bondholders' protective committees to debtor states. IMF stand-by arrangements are distinguishable from readjustment plans in that some provisions of these arrangements are reflective of norms of international monetary law.

Stand-by arrangement provisions have often been construed strictly by the Fund's governing body and other international creditors. On a number of occasions, the stringency of Fund policy over the implementation of economic austerity measures in the short-term has led to political unrest and increased social costs in the adjusting states.

The present writer undertook this research recognizing that IMF stand-by arrangements will remain a key feature of future sovereign debt renegotiations. Debtor states, too, acknowledge in practice the need to institute economic reforms within the context of these arrangements. However, the impact of economic adjustment particularly upon the marginalized sectors in most heavily indebted developing members of the IMF, and the unfavorable international market conditions affecting the capacity of these states to service their growing external debts, among other factors, warrant a more liberal interpretation of stand-by arrangement provisions.

This writer has endeavoured to demonstrate how an equitable approach to economic adjustment within the context of IMF stand-by arrangements may be achieved. Firstly, the use of compliance with the provisions of the stand-by arrangements as a formal condition for the

continued enforceability of private loan agreements or restructuring arrangements should either be avoided or construed liberally by international creditors to prevent costly interruptions of financial flow to debtor states. Secondly, the application of the international law principle of state of necessity provides debtor states with a basis to undertake unilateral measures affecting debt service obligations in response to extreme economic crisis. It should be emphasized, however, that this legal remedy must be availed of temporarily within the context of an economic development plan aimed at alleviating the plight of debtor states. Finally, an evolving principle of a human right to development contains useful standards which may facilitate the negotiations of stand-by arrangements and ensure political sustainability of adjustment programs. Recognition of the last two principles by the governing body of the IMF is crucial in the organization's goal of encouraging debtor states to undertake the much-needed reforms to revitalize their economies and improve their balance of payments position.

The Fund's conservative view of its role in the management of the present debt crisis left debtor states with the impression of the organization as a mere broker for the international creditors. It can be argued that a more activist role by the IMF consistent with its mandate is urgently needed. In this regard the IMF could begin by undertaking a comprehensive review of its stand-by arrangement policies in order to make them reflective of the economic conditions of the debtor states and thereby transform the arrangement into a positive instrument of cooperation in the adjustment process of these states.

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> "...King Solomon, in the tenth century B.C., owed money to Hiram, King of Tyre, and settled his liability by the cession of territory in Galilee; later, kings of Judah borrowed money from the Treasury of the Temple; in the fifth and fourth centuries B.C. Greek city-states owned money to creditors and lent money to each other on bonds, one of which given by the Thessalians to the Thebans, seized by Alexander the Great on the capture of Thebes and by him returned to the Thessalians, was the occasion of a famous international lawsuit in antiquity, (so early were these international financial dealings recognized as a proper subject for legal decision); rich Jews of Alexandria in the first century of the Christian era lent money to the subject-kings of the oriental world; in the eleventh century Duke Robert of Normandy, when he went crusading, mortgaged his duchy to his more prudent brother; in the twelfth century King John of England (who if tradition may be believed had his own methods of repayment), and his brother monarchs, borrowed money from the Jews; in the thirteenth century on two occasions (in 1256 and 1294) a French monarch evaded liability for his predecessor's debts with the help of the lawyers of Paris; and even at the present day the legal title of the United Kingdom to the Orkney and Shetland Islands is derived from their mortgage in 1468 to secure the dowry -- still unpaid -- of the daughter of the King of Denmark who married a Scottish King. In the time of the Renaissance most monarchs were borrowers; the king of France owed money to Jacques Coeur, the Fugers, who lent 4,000,000,000 ducats of the King of Spain and 8,000,000,000 florins to other monarchs of the House of Hapsburg, anticipated the melancholy experience of some nineteenth century investors in foreign Government loans; Philip II of Spain pleaded his conscientious scruples as to usury when pressed for his debts. Francis I of France, a little earlier, owed money to Henry VIII of England, and the frugal Elizabeth lent money, not without security, to the revolting provinces of the Netherlands."

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24. White, supra. note 14, p. 150.

25. Ibid., citing Joseph Gold.

26. Bothe, supra. note 23, p. 83.

27. Joseph Gold, Order in International Finance: The Promotion of International Monetary Fund Stand-By Arrangement and the Drafting of Private Loan Agreements (Washington, D.C.: International Monetary Fund, Pamphlet Series No. 39, 1982), p. 18.

28. Ibid.

29. Ibid., p. 19.

30. Ibid., p. 21.

31. Ibid., p. 23.

32. Ibid.

33. See Appendix C for the two versions of this paragraph.

34. Gold, supra. note 27, p. 25.

35. Norbert Horn, "The Restructuring of International Loans and the International Debt Crisis," International Business Lawyer (October, 1984): 407.

36. Daniel Bradlow and Willis, Jourdin, Jr. eds., International Borrowing: Negotiation and Renegotiation (Washington, D.C.: International Law Institute, 1984), p. 5.2B.26.

37. Article I, par. (iv), IMF Articles of Agreement.

38. See the previous discussion in Chapter 3.4.2.

39. Jeffrey D. Sachs, "Conditionality, Debt Relief, and the Developing Country Debt Crisis" in Jeffrey Sachs, ed., Developing Country Debt and the World Economy (Chicago: The University of Chicago Press, 1989), p. 279.

40. Brownlie, supra. note 2, p. 262.

41. The preliminary discussions on this Article may be found in YILC, 1980, Vol. II, Part One, pp. 14-51.

42. YILC, 1980, Vol. II, Part Two, p. 34.

43. Ibid.

44. Ibid.

45. Ibid.

46. Ibid., p. 35.

47. Ibid.

48. Ibid.

49. Julio Barboza, "Necessity (Revisited) In International Law," in J. Makarczyk, ed. Essays In International Law in Honor of Manfred Lachs (The Hague: Martinus Nijhoff Publishers, 1984), p. 28.

50. Ibid.

51. Cited in ibid.

52. Ibid. Barboza comments on Judge Ago's report as follows:

> In his Report, Judge Ago also rejected the notion that state of necessity (sic.)(within the scope of Article 33) could be founded in self-preservation. He expressed his conviction that some inherited conceptions distorted the correct understanding of this matter, in particular the natural law notion that the inherent problem of necessity was that of stemming from a conflict of two subjective rights, one of them being the right of "self-preservation." Obviously, the other subjective right was to be sacrificed to it.

53. Ibid., p. 41.

54. YILC, supra. note 42, p. 49.

55. Ibid.

56. Ibid., p. 50.

57. Ibid.

58. Florentino P. Feliciano, "Reflections on the Voluntary Rescheduling Approach to the International Debt Problem: Framework and General Principles," Working Paper For The International Monetary Law Committee, International Law Association, April, 1987, pp. 25-26. This paper has been published in the Legal Management Council of the Philippines Bulletin 35 (December 1987): 2.

59. United Nations Reports of International Arbitral Awards, Vol. X, pp. 285-355.

60. Ibid., p. 339.

61. Ibid, pp. 353-354.

62. Ibid, p. 353.

63. Russian Indemnity Arbitration (1912), Reports of International Arbitral Awards. Vol. II, p. 431. The English translation may be found in the American Journal of International Law 7 (1913), p. 178.

64. Ibid., American Journal of International Law, p. 183.

65. Ibid., p. 188.

66. Ibid., p. 189, citing Ottoman Counter-Case, p. 33, No.91.

67. Ibid, pp. 195-196, citing paragraph 6 of the Decision.

68. This was cited by the Counsel for Greece in the Societe Commerciale de Belgique Case. See YILC, 1978, Vol.II, Part One p.133.

69. Case Concerning the Payment of Various Serbian Loans Issued in France (1928), Permanent Court of International Justice, Series C, No. 16-III, p. 461. For the English digest, see Hersch Lauterpacht, Annual Digest of Public International Law Cases, 1929-1930, pp. 466-471 and ibid, YILC (Secretariat Survey), pp. 126-128.

70. Ibid. YILC (Secretariat Survey), p. 127.

71. Ibid.

72. Ibid., p. 127-128.

73. YILC, supra. note 41, p. 24. See further YILC, 1956, Vol. II, p. 223, document A/CN.4/96, annex 2.

74. Affairs Des Forets Du Rhodope Central (1931),United Nations, Reports of International Arbitral Awards. Vol. III, pp. 1405-1436. The discussion of the ILC on this case is found in YILC, supra. note 41, pp. 23-24.

75. Ibid., p. 23.

76. Ibid.

77. The Societe Commerciale De Belgique Case (1939), Permanent Court of International Justice, Series C, No. 87, p. 141. For the English translation, see YILC, (Secretariat Survey), supra. note 68, pp. 129-141.

78. Ibid., YILC, p. 132, citing the Greek counsel's oral presentation.

79. Ibid., p. 130.

80. Ibid.

81. Ibid., pp. 130-131.

82. Ibid., p. 132.

83. Ibid.

84. Ibid., p. 134.

85. Ibid.

86. Ibid., p. 135.

87. Ibid.

88. Ibid.

89. Ibid., p. 138.

90. Ibid., p. 136.

91. Ibid., supra. note 89.

92. Ibid., p. 139.

93. Sachs, supra. note 39, pp. 279-280.

94. Article V, Sections 7 (c), (d), and (e) provide:

> (c) A member that has made a purchase under Section 3 of this Article shall repurchase the Fund's holdings of its currency that result from the purchase and are subject to changes under Section 8(b) of this Article not later than 5 years after the date on which the purchase was made. The Fund may prescribe that repurchase shall be made by a member in instalments during the period beginning three years and ending five years after the date of a purchase. The Fund, by an eight-five percent majority of the total voting power, may change the periods for repurchase under this subsection, and any period so adopted shall apply to all members.
>
> (d) The Fund, by an eight-five percent majority of the total voting power, may adopt periods other than those that apply in accordance with (c) above, which shall be the same for all members, for the repurchase of holdings of currency acquired by the Fund pursuant to a special policy on the use of its general resources.
>
> (e) A member shall repurchase, in accordance with policies that the Fund shall adopt by a seventy percent majority of the total voting power, the Fund's holdings of its currency that are not acquired as a result of purchases and are subject to changes under Section 8(b)(ii) of this Article.

95. See Appendix M, pp. 1-3, 4-5 of the text.

96. Ibid., p. 3 of the text.

97. YILC, supra. note 42, p. 50.

98. Ibid.

99. IMF Articles of Agreement, Article V, Sec. 5.

100. See the continuation of the amendment to Section 5 of the Philippine Senate Bill, supra. note 95.

101. Paragraph 4 of the Executive Board Decision of 2 March 1979, see Chapter Three footnote no. 79.

102. Joseph Gold, Conditionality (Washington, D.C.: International Monetary Fund, Pamphlet Series No. 31, 1979), p. 23.

103. Ibid.

104. IMF Summary Proceedings, 1986, pp. 24-25.

105. Pontifical Commission "Iustitia Et Pax", At the Service of the Human Community: An Ethical Approach to the International Debt Question (Vatican City, 1986), pp. 4-5.

106. YILC, 1973, Vol. II, p. 169.

107. International Court of Justice Reports (1949), p. 174.

108. Ibid., p. 179.

109. Clyde Eagleton, "International Organization and The Law of Responsibility," in Recueil des Cours de l'Academie de Droit International 70 (The Hague: Hague Academy of International Law, 1950): 325.

110. Ibid., p. 329.

111. Ibid., p. 340, citing The Reparations Case.

112. D.W. Bowett, The Law of International Institutions, 3rd ed. (London: Stevens, 1975), pp. 365-366.

113. Eagleton, supra. note 109., p. 390.

114. Leila Prelec, "The Color of Money," 30 days (July-August 1989): 60.

115. See Chapter Three, Gold, supra. note 16, p. 59.

116. Ibid.

117. Ibid.

118. Compare this with the mandatory language of Article IV, Section 3(b) of the Second Amendment of the Articles of Agreement.

119. Gold, supra. note 115, p. 60.

120. Ibid., p. 62.

121. Rolf Knieper, translated by Daniel Smith, "The Conditioning of National Policy-Making by International Law: The Stand-By Arrangements of the IMF," International Journal of the Sociology of Law 11 (1983): 41-64.

122. See Chapter Two, Williams, supra. note 1, p. 21 citing Señor Luis Drago, "State Loans in their Relation To International Policy," American Journal of International Law I (1907): 700.

123. Rhoda Howard, "The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence From Sub-Saharan Africa," Human Rights Quarterly 5 (November 1983): 467.

124. Ved Nanda, "The Right to Development Under International Law Challenges Ahead," California Western International Law Journal 15 (1984): 432-33; citing "Five Year Perspective, 1960-1964," U.N. Doc. E/33471/Rev.1, para. 90 (1960).

125. Philip Alston, "The Right to Development at the International Level," in Rene-Jean Dupuy, ed., The Right to Development at the International Level: Workshop 16-18 October 1979 (The Hague: Sijthoff and Noordhoff, 1980): p. 100. (Hereinafter cited as the Hague Workshop).

126. Wolfgang Benedek, New Perspectives and Conceptions of International Law: An Afro-European Dialogue, edited by K. Ginther and W. Benedek (Wien : New York: Springer-Verlag, 1983), p. 153.

127. Ibid.

128. Karel de Mestdagh, "The Right to Development From Evolving Principle to 'Legal Right': In Search of Its Substance," in International Commission of Jurists, "Development, Human Rights, and the Rule of Law: Report of a Conference Held in The Hague on 27 April-1 May 1981, 1st edition (Oxford:New York: Pergamon Press, 1981), p. 147.

129. Karel Vasak, "A 30-year Struggle," Unesco Courier (November 1977):29.

130. United Nations Commission on Human Rights Res. 14 (XXXIII), para. 4.(Hereinafter UNCHR)

131. Benedek, supra. note 126, p. 153, citing the Report of the Secretary-General, Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights and Study of Special Problems which the Developing Countries Face in Their Efforts to Achieve these Human Rights, E/.CN.4/1334, 2 January 1979.

132. Ibid., Report of the Secretary-General, Annex, p. 7.

133. Ibid., pp. 4-5.

134. See generally the Panel Discussion, "Basic Human Needs: The International Law Connection," Proceedings of the American Society of International Law 72 (1982):224.

135. Report of the Secretary-General, supra. note 131, pp. 3-4.

136. Ibid., pp. 7-8.

137. UNCHR Res. 5 (XXXV) 11 March 1981.

138. De Mestdagh notes that "Of the over 150 countries with the right to vote in the General Assembly only the US voted against and seven abstained (Belgium, France, West Germany, Israel, Luxembourg, Malawi and the United Kingdom). Many of the Western countries which

voted in favour tabled a declaration emphasizing the need to define the substance of the right to development." See De Mestdagh, supra. note 128, p. 149.

139. Benedek, supra. note 126, p. 153. For the full text of the Chapter see Dr. T.O. Elias, Africa and the Development of International Law, edited and revised by Richard Akinjide (Dordrecht: Martinus Nijhoff Publishers, 1988), p. 275.

140. International Law Association, Report of the Sixty-First Conference, Paris, August 26-September 1, 1984 (London: International Law Association, 1985), p. 137.

141. See footnote No. 2 of Philip Kunig, "The 'Inner Dimension' of the Right to Development," Law and State 36 (1987):60.

142. Oscar Schachter, "The Evolving International Law of Development," Columbia Journal of Transnational Law 15 (1979): 3-6.

143. Hugh M. Kindred, et. al., International Law: Chiefly as Interpreted and Applied in Canada, 4th edition (Canada: Emond Montgomery Publications Limited, 1987):201.

144. See the "Statement By the Representative of the United States of America" in United Nations, Economic and Social Council, Commission on Human Rights, 43rd Session, Report of the Working Group of Governmental Experts on the Right to Development (E/CN.41/1987/10), 29 January 1987, Annex II, p. 12. (Hereinafter cited as Report of the Working Group on the Right to Development, January 1987).

145. International Court of Justice Reports (1955), p. 67.

146. Ibid., pp. 118-119.

147. International Court of Justice Reports (1971), p. 16.

148. Ibid. Paragraph 114 is also cited in Kindred, et.al., supra. note 143, p. 65.

149. International Court of Justice Reports (1975), p. 12.

150. Namibia Case, supra. note 147, p. 31.

151. Western Sahara Case, supra. note 149, p. 12.

152. Ibid.

153. International Court of Justice Reports (1980), p. 14.

154. Ibid., pp. 99-100.

155. Blaine Sloan, "General Assembly Resolutions Revisited (Forty Years After)," British Yearbook of International Law 58 (1987):139.

156. Ibid., p. 138.

157. Ibid., p. 139.

158. Ibid., p. 140.

159. Antonio Cassesse and Joseph H.H. Weiler, eds., Change and Stability in International Law-Making (Berlin: Walter de Gruyter & Co., 1988), p. 48.

160. Ibid., p. 49.

161. Ibid.

162. See generally Ignaz Seidl-Hohenveldern, "International Economic 'Soft Law' " in Recueil des Cours de l'Academie de Droit International 163 (The Netherlands: Sijthoff & Noordhoff, 1980), p. 169.

163. Cassesse and Weiler, supra. note 159.

164. United Nations, Resolutions Adopted on the Reports of the Third Committee, Resolution 41/33 (4 December 1986), p. 378.

165. Report of the Working Group on the Right to Development (January 1987), supra. note 144, para. 15, pp. 3-4.

166. Ibid., p. 4.

167. United Nations, Economic and Social Council, Commission on Human Rights, 44th Session, Report of the Working Group of Governmental Experts on the Right to Development (E/CN.4/1988/10), 29 January 1988, para. 19, p. 5.

168. United Nations, Economic and Social Council, Commission on Human rights, 45th Session, Report of the Working Group of Governmental Experts on the Right to Development (E/CN.4/1989/10), 13 February 1989, p. 5.

169. Kunig, supra. note 141, p. 48.

170. Ibid., p. 49.

171. Ibid.

172. Knieper, supra. note 121, p. 48.

173. Ibid., p. 50.

174. Ibid.

175. De Mestdagh, supra. note 128, pp. 170-171.

176. Ibid., p. 171. De Mestdagh explains that

> ...in a situation of social and economic deprivation forms of government and participation may be chosen which are different from the parliamentary democracies in Western countries. It should also be borne in mind that a highly stable government is generally needed to carry through the often painful process of development, and that in many Third World countries the problems are so great that there has been no chance - certainly not in the short time since

becoming independent - for "Her Majesty's loyal opposition" to develop as in Western democracies.

177. Theo C. van Boven, "The Right to Development," International Commission of Jurists, The Review 28 (June 1982):55.

178. Some interesting arguments on this subject may be found in the following: Henry S. Bienen and Mark Gersovitz, "Consumer Subsidy Cuts, Violence, and Political Stability," Comparative Politics (October 1986):25; Peter Korner, et. al., The IMF and the Debt Crisis: A Guide to the Third World's Dilemma, translated from German by Paul Knight (London: Zed Books Ltd., 1986); Cheryl Payer, The Debt Trap: The International Monetary Fund and the Third World (New York: Modern Reader, 1974); and, Karen L. Remmer, "The Politics of Economic Stabilization: IMF Stand-by Programs in Latin America, 1954-1984," Comparative Politics 19:1 (October 1986):1.

179. Joan M. Nelson, "The Political Economy of Stabilization: Commitment, Capacity, and Public Response," World Development, 12:10 (1984):983.

180. Ibid., p. 990.

181. See Sebastian Edwards, "Structural Adjustment Policies in Highly Indebted Countries," in Sachs, supra. note 39, p. 249; Gerald K. Helleiner, "Stabilization, Adjustment, and the Poor," World Development 15:12 (1987):1499; Tony Killick, et.al., The International Monetary Fund and Stabilization: Developing Country Experiences (Hants: Grower Publishing Co., Ltd., 1984); and Giovanni Andrea Cornia, Richard Jolly, and Francis Stewart, Adjustment with a Human Face, 2 Vols. (Oxford: Clarendon Press, 1987).

182. Ibid., Edwards, p. 249.

183. United Nations Children's Fund, The State of the World's Children 1989 (Oxford: Oxford University Press, 1989), p. 16.

184. Peter S. Heller, et.al., The Implications of Fund-Supported Adjustment Programs for Poverty: Experiences in Selected Countries (Washington, D.C.: International Monetary Fund, May, 1988).

185. Ibid., p. 1.

186. Ibid.

187. Philip Alston, "International Law and the Human Right to Food," in Philip Alston and Katrina Tomasevski, eds., The Right to Food (Netherlands: Martinus Nijhoff Publishers, 1984), p. 15.

188. Cited in UNICEF's 1989 Report, supra, note 183, p. 18.

189. International Monetary Fund, Annual Report of the Executive Board for the Financial Year Ended April 30, 1989 (Washington, D.C.: IMF, 1989), p. 37.

190. Ibid., p. 37.

191. Panel Discussion, supra note 134, p. 231.

192. Heller, supra. note 184, p. 34.

193. Ibid., p. 32.

194. Victor Umbricht, "Right to Development," in the Hague Workshop, supra. note 125, p. 96.

195. Ibid., p. 97.

196. IMF 1989 Annual Report, supra. note 184, p. 30.

197. Ibid.

198. Ibid., p. 25.

199. Ibid.

200. Ibid.

201. Ibid., p. 26.

202. Ibid.

203. Ibid.

Appendix A: Sample: Stand-by Arrangement (One-Year Period)*

1. Annexed hereto is a letter dated December 1, 1969 from the Minister of Finance and the President of the Central Bank of the Republic of Patria setting forth the objectives and policies which the authorities of Patria will pursue.

2. The International Monetary Fund grants this stand-by arrangement to support these objectives and policies.

3. Patria will remain in close consultation with the Fund during the period of the stand-by arrangement and, in particular, will consult the Fund in accordance with paragraph 10 of the annexed letter. These consultations may include correspondence and visits of officials of the Fund to Patria or of representatives of Patria to Washington, D.C. For the purposes of these consultations, Patria will keep the Fund informed of developments in the exchange, trade, credit, and fiscal situation through reports at intervals or dates requested by the Fund during the period the stand-by arrangement is in effect.

4. For a period of one year from January 1, 1970, Patria will have the right, after making full use of any gold tranche that it may have, to purchase from the Fund the currencies of other members in exchange for its own currency in an amount equivalent to $50 million, provided that

   (i) purchases under the stand-by arrangement shall not, without the consent of the Fund, exceed the equivalent of $2.5 million until April 1, 1970, the equivalent of $30 million until July 1, 1970, and the equivalent of $40 million until October 1, 1970; and

   (ii) the right of Patria to make purchases under this stand-by arrangement shall be subject to paragraph 9 of the annexed letter to the extent that such purchases would increase the Fund's holding of Patria's currency beyond the first credit tranche. If at any time any limit in (i) above would prevent a purchase under the stand-by arrangement that would not increase the Fund's holdings of Patria's currency beyond the first credit tranche, the limit will not apply to that purchase.

Source: Gold, The Stand-By Arrangements of the International Monetary Fund, pp. 57-59.

The amounts available in accordance with this paragraph 4 shall be augmented by amounts equivalent to repurchases in respect of purchases under the stand-by arrangement, unless, when any such repurchase is made, Patria informs the Fund that it does not wish the stand-by arrangement to be augmented by the amount of that repurchase.

5. Patria will pay charges for the stand-by arrangement in accordance with Executive Board Decisions Nos. 270-(53/95), 1959; and 1345-(62/63), adopted May 23, 1962.

6. Subject to paragraph 4 above, Patria will have the right to engage in transactions covered by this stand-by arrangement without further review by the Fund. This right can be suspended only with respect to requests received by the Fund after (a) a formal ineligibility, or (b) a decision of the Executive Board to suspend transactions, either generally (under Article XVI, Section 1 (a)(ii) or in order to consider a proposal, made by an Executive Director or the Managing Director, formally to suppress or limit the eligibility of Patria. When notice of a decision of formal ineligibility or of a decision to consider a proposal is given pursuant to this paragraph 6, purchases under the stand-by arrangement will be resumed only after consultation has taken place between the Fund and Patria and understandings have been reached regarding the circumstances in which such purchases can be resumed.

7. Not later than three years after each purchase of exchange by Patria under this stand-by arrangement, Patria will repurchase an equivalent amount of the currency of Patria from the Fund; provided that if the currency of Patria held by the Fund as a result of the transactions under this stand-by arrangement is reduced by repurchases under Article V, Section 7, or otherwise, such reductions shall be credited against the earliest amounts that become payable under this paragraph 7. Repurchases shall be made in gold, or in convertible currencies acceptable to the Fund, or in special drawing rights, in accordance with the Fund's policies and practices at the time of repurchase.

8. The rate of exchange at which Patria will purchase currencies from the Fund in exchange for the currency of Patria and at which the Fund will return the currency of Patria in repurchase operations and make all other computations involving the currency of Patria will be such rate as the Fund may from time to time determine under Article IV, Section 8, of the Fund Agreement.]

Appendix B: Sample: Letter of Intent*

December 1, 1969

Managing Director
International Monetary Fund
Washington, D.C.

Dear Mr. Managing Director:

1. This year Patria has been facing balance of payments difficulties caused by the strong expansion of domestic demand, which resulted in a substantial increase in imports. The authorities recognized the need to moderate the rate of expansion in domestic demand to prevent undue pressures on domestic resources and the balance of payments, and in July 1969 the Central Bank initiated a restrictive policy with respect to credit. Reserve requirements were raised to reduce the growth of bank credit to the private sector and interest rates were allowed to rise. However, because of a growing deficit in the government budget, the recourse of the public sector to the banking system became even greater in the course of 1969. This weakened the effect of the restrictive monetary measures on domestic demand, and there have been few signs so far of a lessening of the rate of expansion in domestic demand. The pressures on the balance of payments continue: the reserves of the Central Bank declined by $125 million in the period January to November 1969, to $300 million at the end of November 1969.

2. In order to help to ease the pressure on Patria's international reserves while additional policy measures to correct the balance of payments are being implemented, Patria requests of the International Monetary Fund a stand-by arrangement for one year for the equivalent of $50 million, to be augmented by amounts equivalent to repurchases in respect of purchases under the stand-by arrangement, Patria will consult the Managing Director of the Fund on the currencies to be purchased from the Fund.

3. The objectives of the Government are to limit the net reserve loss to less than the equivalent of $60 million in 1970, and to obtain a small surplus, or in any event a balance, in 1971. The Government recognizes that additional measures are necessary to meet its objectives. Up to now the burden of adjustment has fallen primarily on credit to the private sector. The Government recognizes that a major part of the adjustment has to fall on fiscal policy. The fiscal measures will be aimed primarily at

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Source: Gold, The Stand-By Arrangements of the International Monetary Fund, pp. 60-64.

reducing the growth of private consumption so as to make sufficient room in the economy for the further expansion of exports and for the level of investment needed for the sustained growth of the economy over the long run.

4. The increasing fiscal deficit in 1969 arose primarily from growing development expenditures, including a rapid rise in payments on suppliers' credits received from abroad. Although revenues are estimated to increase by 7 per cent in 1969 and are expected to increase by further 8 per cent in 1970, this increase will not be sufficient to prevent a further large budget deficit in 1970 if the government investment program is to be implemented. The authorities have decided that the surplus in the current budget must be increased substantially in 1970, to allow the development effort to be maintained while reducing the total budget deficit and to contribute thereby to an improvement in the balance of payments. The 1970 budget, which recently has been approved by parliament, includes expenditure economies and new revenue measures that are expected to yield L 300 million 1970. The objective is to achieve a current surplus of L 500 million, and to confine the total budget deficit to L 250 million, compared with an estimated L 500 million for 1969. The Government intends to meet a part of the deficit in 1970 by continuing its borrowing from the public, so that recourse to the banking system will be sharply reduced. With the assistance of the further growth in revenue from the new measures and continued improvement in the control of current expenditures, it is the Government's firm intention to avoid net recourse by the public sector to the banking system in 1971.

5. The operations of the Central Bank, aided by the fiscal measures to be taken by the Government, will ensure developments in bank credit that will be consistent with the achievement of the objectives of the program. The authorities will take appropriate measures to ensure that the net domestic assets of the banking system (defined as bank loans and advances plus bank holdings of government securities minus government deposits), the total of which amount to L 5.0 billion as of November 30, 1969, do not rise above that level by more than the following amounts: L 200 million during the period up to March 31, 1970; L 300 million during the period up to June 30, March 31, 1970; L 300 million during the period up to June 30, 1970; L 450 million during the period up to September 30, 1970 and L 500 million during the remaining period of the stand-by arrangement. Within the comprehensive ceilings as defined above, net claims of the banking system on the Government, the total of which amounted to L 1.5 billion as of November 30, 1969, will not exceed L 1.65 billion during any period of the stand-by arrangement. The Central Bank will keep the need for further adjustments under close review.

6. There has been a considerable increase in Patria's foreign indebtedness in recent years, especially in the form of suppliers' credits to government agencies. The Government has reorganized the procedure for the authorization of the acceptance of credits by government agencies or with government guarantees. With the new arrangements now in effect, the Government is following policies designed to limit the amount of new debt and improve the terms of payment, in order to avoid a heavy debt servicing burden in the years ahead. To that end, the government will limit the authorization for new foreign borrowing with maturities of up to ten years, on government account or with government guarantee, to the equivalent of $40 million during the period of the stand-by arrangement.

7. Wage increases were moderate in the past two years. New wage negotiations are scheduled for March 1970. The Government expects that any wage increases will be moderate and that prices will not rise by more than 2 to 3 per cent, so that international competitive position of Patria can be preserved.

8. The Government has made steady progress in recent years in reducing the restrictions on trade and payments and will continue its declared policy of exposing domestic production to increasing foreign competition. It does not intend to introduce any new restrictions, or intensify existing ones, on payments and transfers for current international transactions or to conclude any new bilateral payments agreements with Fund members. The remaining agreements with Fund members will be eliminated as soon as this is practicable.

9. During any period of the stand-by arrangement in which the credit ceilings in paragraph 5 are not observed, or the intentions in the second sentence of paragraph 8 are not carried out, Patria will not request any purchase under the stand-by arrangement which would raise the Fund's holdings of its currency beyond the first credit tranche, except after reaching understandings with the Fund regarding the circumstances in which such purchases may be made.

10. The Government believes that the policies set forth in this letter are adequate to achieve the objectives of its program, but will take any further measures that may become appropriate for this purpose. During the period of the stand-by arrangement, Patria will consult the Fund on the adoption of any measures that may be appropriate at the initiative of Patria or whenever the Managing Director requests consultation because any of the criteria in paragraph 9 above are not being observed or because he considers

that consultation on the program is desirable. In addition, after the period of stand-by arrangement and while any Fund holdings of Patria's currency above the first credit tranche include currency resulting from purchases under the stand-by arrangement, Patria will consult the Fund from time to time, at the initiative of Patria or at the request of the Managing Director, concerning Patria's balance of payments policies.

Sincerely yours,

/s/
Minister of Finance

/s/
President of Central Bank

APPENDIX C: Sample: Stand-By Arrangement Under Enlarged Access Policy*

Attached hereto is a letter [, with annexed memorandum,] dated _____ from (Minister of Finance and/or Governor of Central Bank) requesting a stand-by arrangement and setting forth:

(a) the objectives and policies that the authorities of (member) intend to pursue for the period of this stand-by arrangement;

(b) the policies and measures that the authorities of (member) intend to pursue for the [first year] of this stand-by arrangement; and

(c) understandings of (member) with the Fund regarding [a] review[s] that will be made of progress in realizing the objectives of the program and of the policies and measures that the authorities of (member) will pursue for the remaining period of this stand-by arrangement.

To support these objectives and policies the International Monetary Fund grants this stand-by arrangement in accordance with the following provisions:

1.[103] [For a period of ____ years from _____] [For the period from _____ to _____] (member) will have the right to make purchases from the Fund in an amount equivalent to SDR _____, subject to paragraphs 2, 3, 4, and 5 below, without further review by the Fund.

2.[103] (a) Until (end of first year) purchases under this stand-by arrangement shall not, without the consent of the Fund, exceed the equivalent of SDR _____, provided that purchases shall not exceed the equivalent of SDR _____ until _____, the equivalent of SDR _____ until _____, and the equivalent of SDR _____ until _____.

(b) The right of (member) to make purchases during the remaining period of this stand-by arrangement shall be subject to such phasing as shall be determined.

(c) None of the limits in (a) or (b) above shall apply to a purchase under this stand-by arrangement that would not increase the Fund's holdings of (member's) currency in the credit tranches beyond 25 per cent of quota or increase the Fund's holdings of that currency resulting from purchases of supplementary financing or borrowed resources beyond 12.5 per cent of quota.

3. Purchases under this stand-by arrangement shall be made from . . .,[104] provided that any modification by the Fund of the proportions of ordinary and borrowed resources shall apply to amounts that may be purchased after the date of modification.

4. (Member) will not make purchases under this stand-by arrangement that would increase the Fund's holdings of (member's) currency in the credit tranches beyond 25 per cent of quota or increase the Fund's holdings of that currency resulting from purchases of supplementary financing or borrowed resources beyond 12.5 per cent of quota:

(a) during any period in the first year in which [the data at the end of the preceding period indicate that][105]

Source: Joseph Gold, Order in International Finance, The Promotion of International Monetary Fund Stand-By Arrangement and the Drafting of Private Loan Agreements, pp. 43-45.

(i) [the limit on domestic credit described in paragraph ____ of the attached letter], or

(ii) [the limit on credit to the public sector described in paragraph ____ of the attached letter], or

(iii) . . . [These provisions would incorporate other quantitative performance criteria of the program]

are not observed, or

(b) if (member) fails to observe the limits on authorizations of new public and publicly guaranteed foreign indebtedness described in paragraph ____ of the attached letter; or

(c)[106] during the second or third year of this stand-by arrangement until suitable performance criteria have been established in consultation with the Fund as contemplated by paragraph ____ of the attached letter, or after such performance criteria have been established, while they are not being observed;

(d)[106] during the entire period of this stand-by arrangement, if (member)

(i) imposes [or intensifies] restrictions on payments and transfers for current international transactions, or

(ii) introduces [or modifies] multiple currency practices, or

(iii) concludes bilateral payments agreements which are inconsistent with Article VIII, or

(iv) imposes [or intensifies] import restrictions for balance of payments reasons.

When (member) is prevented from purchasing under this stand-by arrangement because of this paragraph 4, purchases will be resumed only after consultation has taken place between the Fund and (member) and understandings have been reached regarding the circumstances in which such purchases can be resumed.

5. (Member's) right to engage in the transactions covered by this stand-by arrangement can be suspended only with respect to requests received by the Fund after (a) a formal ineligibility, or (b) a decision of the Executive Board to suspend transactions, either generally or in order to consider a proposal, made by an Executive Director or the Managing Director, formally to suppress or to limit the eligibility of (member). When notice of a decision of formal ineligibility or of a decision to consider a proposal is given pursuant to this paragraph 5, purchases under this arrangement will be resumed only after consultation has taken place between the Fund and (member) and understandings have been reached regarding the circumstances in which such purchases can be resumed.

6. Purchases under this stand-by arrangement shall be made in the currencies of other members selected in accordance with the policies and procedures of the Fund, and may be made in SDRs if, on the request of (member), the Fund agrees to provide them at the time of the purchase.

7. The value date of a purchase under this stand-by arrangement involving borrowed resources will be normally either the fifteenth day or the last day of the month, or the next business day if the selected day is not a business day. (Member) will consult the Fund on the timing of purchases involving borrowed resources.

8. (Member) shall pay a charge for this stand-by arrangement in accordance with the decisions of the Fund.

9. (a) (Member) shall repurchase the outstanding amount of its currency that results from a purchase under this stand-by arrangement in accordance with the provisions of the Articles of Agreement and decisions of the Fund, including those relating to repurchase as (member's) balance of payments and reserve position improves.

(b) Any reductions in (member's) currency held by the Fund shall reduce the amounts subject to repurchase under (a) above in accordance with the principles applied by the Fund for this purpose at the time of the reduction.

(c) The value date of a repurchase in respect of a purchase financed with borrowed resources under this stand-by arrangement will be normally either the sixth day or the twenty-second day of the month, or the next business day if the selected day is not a business day, provided that repurchase will be completed not later than seven years from the date of purchase.

10. During the period of the stand-by arrangement (member) shall remain in close consultation with the Fund. These consultations may include correspondence and visits of officials of the Fund to (member) or of representatives of (member) to the Fund. (Member) shall provide the Fund, through reports at intervals or dates requested by the Fund, with such information as the Fund requests in connection with the progress of (member) in achieving the objectives and policies set forth in the attached letter [and annexed memorandum].

11. In accordance with paragraph ____ of the attached letter (member) will consult the Fund on the adoption of any measures that may be appropriate at the initiative of the government or whenever the Managing Director requests consultation

Version A

[because any of the criteria in paragraph 4 above have not been observed or because he considers that consultation on the program is desirable. In addition, after the period of the arrangement and while (member) has outstanding purchases in the upper credit tranches, the government will consult with the Fund from time to time, at the initiative of the government or at the request of the Managing Director, concerning (member's) balance of payments policies.]

Version B

[because he considers that consultation on the program is desirable].

APPENDIX D: Sample: Stand-By Extended Arrangement Under Enlarged Access Policy*

Attached hereto is a letter [, with annexed memorandum,] dated _____ from (Minister of Finance and/or Governor of Central Bank) requesting an extended arrangement and setting forth:

(a) the objectives and policies that the authorities of (member) intend to pursue for the period of this extended arrangement;

(b) the policies and measures that the authorities of (member) intend to pursue for the first year of this extended arrangement; and

(c) understandings of (member) with the Fund regarding reviews that will be made of progress in realizing the objectives of the program and of the policies and measures that the authorities of (member) will pursue for the second and third years of this extended arrangement.

To support these objectives and policies the International Monetary Fund grants this extended arrangement in accordance with the following provisions:

1. For a period of [three years] from _____ (member) will have the right to make purchases from the Fund in an amount equivalent to SDR _____, subject to paragraphs 2, 3, 4, and 5 below, without further review by the Fund.

2. (a) Until (end of first year) purchases under this extended arrangement shall not, without the consent of the Fund, exceed the equivalent of SDR _____, provided that purchases shall not exceed the equivalent of SDR _____ until _____, the equivalent of SDR _____ until _____, and the equivalent of SDR _____ until _____.

(b) Until (end of second year) purchases under this extended arrangement shall not, without the consent of the Fund, exceed the equivalent of SDR _____.

(c) The right of (member) to make purchases during the second and third years shall be subject to such phasing as shall be determined.

3. Purchases under this extended arrangement shall be made from . . .[107] provided that any modification by the Fund of the proportions of ordinary and borrowed resources shall apply to amounts that may be purchased after the date of modification.

4. (Member) will not make purchases under this extended arrangement:

(a) throughout the first year, during any period in which the data at the end of the preceding period indicate that[108]

(i) [the limit on domestic credit described in paragraph ____ of the attached letter], or

(ii) [the limit on credit to the public sector described in paragraph ____ of the attached letter], or

(iii) . . . [These provisions would incorporate other quantitative performance criteria of the program]

are not observed; or

(b) if (member) fails to observe the limits on authorizations of new public and publicly guaranteed foreign indebtedness described in paragraph ____ of the attached letter; or

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Source: Gold, Order in International Finance, pp. 45-48

(c) throughout the second and third years, if before the beginning of the second year and the beginning of the third year of the extended arrangement suitable performance clauses have not been established in consultation with the Fund as contemplated in paragraph ____ of the attached letter or such clauses, having been established, are not being observed; or

(d) throughout the duration of the extended arrangement, if (member)

(i) imposes [or intensifies] restrictions on payments and transfers for current international transactions, or

(ii) introduces [or modifies] multiple currency practices, or

(iii) concludes bilateral payments agreements which are inconsistent with Article VIII, or

(iv) imposes [or intensifies] import restrictions for balance of payments reasons.

When (member) is prevented from purchasing under this extended arrangement because of this paragraph 4, purchases will be resumed only after consultation has taken place between the Fund and (member) and understandings have been reached regarding the circumstances in which such purchases can be resumed.

5. (Member's) right to engage in the transactions covered by this extended arrangement can be suspended only with respect to requests received by the Fund after (a) a formal ineligibility, or (b) a decision of the Executive Board to suspend transactions, either generally or in order to consider a proposal, made by an Executive Director or the Managing Director, formally to suppress or to limit the eligibility of (member). When notice of a decision of formal ineligibility or of a decision to consider a proposal is given pursuant to this paragraph 5, purchases under this arrangement will be resumed only after consultation has taken place between the Fund and (member) and understandings have been reached regarding the circumstances in which such purchases can be resumed.

6. Purchases under this extended arrangement shall be made in the currencies of other members selected in accordance with the policies and procedures of the Fund, and may be made in SDRs if, on the request of (member), the Fund agrees to provide them at the time of the purchase.

7. The value date of a purchase under this extended arrangement involving borrowed resources will be normally either the fifteenth day or the last day of the month, or the next business day if the selected day is not a business day. (Member) will consult the Fund on the timing of purchases involving borrowed resources.

8. (Member) shall pay a charge for this extended arrangement in accordance with the decisions of the Fund.

9. (a) (Member) shall repurchase the amount of its currency that results from a purchase under this extended arrangement in accordance with the provisions of the Articles of Agreement and decisions of the Fund, including those relating to repurchase as (member's) balance of payments and reserve position improves.

(b) Any reductions in (member's) currency held by the Fund shall reduce the amounts subject to repurchase under (a) above in accordance with the principles applied by the Fund for this purpose at the time of the reduction.

(c) The value date of a repurchase in respect of a purchase financed with borrowed resources under this extended arrangement will be normally either the sixth day or the twenty-second day of the month, or the next business day if the selected day is not a business day, provided that repurchase will be completed not later than seven years from the date of purchase.

10. During the period of the extended arrangement (member) shall remain in

close consultation with the Fund. These consultations may include correspondence and visits of officials of the Fund to (member) or of representatives of (member) to the Fund. (Member) shall provide the Fund, through reports at intervals or dates requested by the Fund, with such information as the Fund requests in connection with the progress of (member) in achieving the objectives and policies set forth in the attached letter [and annexed memorandum].

11. In accordance with paragraph ____ of the attached letter (member) will consult the Fund on the adoption of any measures that may be appropriate at the initiative of the government or whenever the Managing Director requests consultation because any of the criteria under paragraph 4 above have not been observed or because he considers that consultation on the program is desirable. In addition, after the period of the extended arrangement and while (member) has outstanding purchases under this extended arrangement, the government will consult with the Fund from time to time, at the initiative of the government or at the request of the Managing Director, concerning (member's) balance of payments policies.

APPENDIX E: Summary of Arrangements Approved During the Financial Years Ended April 30, 1953-1989*

Financial Year	Number of Arrangements Approved					Amount Committed Under Arrangements (*In millions of SDRs*)				
	Stand-by	EFF	SAF	ESAF	Total	Stand-by	EFF	SAF	ESAF	Total
1953	2				2	55 00				55 00
1954	2				2	62 50				62 50
1955	2				2	40 00				40 00
1956	2				2	47 50				47 50
1957	9				9	1,162 28				1,162 28
1958	11				11	1,043 78				1,043 78
1959	15				15	1,056 63				1,056 63
1960	14				14	363 88				363 88
1961	15				15	459 88				459 88
1962	24				24	1,633 13				1,633 13
1963	19				19	1,531 10				1,531 10
1964	19				19	2,159 85				2,159 85
1965	24				24	2,159 05				2,159 05
1966	24				24	575 35				575 35
1967	25				25	591 15				591 15
1968	32				32	2,352 36				2,352 36
1969	26				26	541 15				541 15
1970	23				23	2,381 28				2,381 28
1971	18				18	501 70				501 70
1972	13				13	313 75				313 75
1973	13				13	321 85				321 85
1974	15				15	1,394 00				1,394 00
1975	14				14	389 75				389 75
1976	18	2			20	1,188 02	284 20			1,472 22
1977	19	1			20	4,679 64	518 00			5,197 64
1978	18	0			18	1,285 09	—			1,285 09
1979	14	4			18	507 85	1,092 50			1,600 35
1980	24	4			28	2,479 36	797 35			3,276 71
1981	21	11			32	5,197 93	5,220 60			10,418 53
1982	19	5			24	3,106 21	7,907 75			11,013 96
1983	27	4			31	5,449 98	8,671 26			14,121 24
1984	25	2			27	4,287 33	94 50			4,381 83
1985	24	0			24	3,218 33	—			3,218 33
1986	18	1			19	2,123 40	825 00			2,948 40
1987	22	0	10		32	4,117 51	—	487 69		4,605 20
1988	14	1	15		30	1,701 90	245 40	1,008 63		2,955 93
1989	12	1	4	7	24	2,956 03	207 30	441 42	954 97[1]	4,559 72

[1] Includes SDR 194 7 million previously committed under SAF arrangements that were subsequently replaced by ESAF arrangements

*Source: IMF Annual Report, 1989, Appendix II, p. 60, Table II.2

APPENDIX F: Summary of Arrangements in Effect as of April 30, 1953-89*

Financial Year	Number of Arrangements in Effect as of April 30					Amount Committed as of April 30 (*In millions of SDRs*)				
	Stand-by	EFF	SAF	ESAF	Total	Stand-by	EFF	SAF	ESAF	Total
1953	2				2	55 00				55 00
1954	3				3	112 50				112 50
1955	3				3	112 50				112 50
1956	3				3	97 50				97 50
1957	9				9	1,194 78				1,194 78
1958	9				9	967 53				967 53
1959	11				11	1,013 13				1,013 13
1960	12				12	351 38				351 38
1961	12				12	416 13				416 13
1962	21				21	2,128 63				2,128 63
1963	17				17	1,520 00				1,520 00
1964	19				19	2,159 85				2,159 85
1965	23				23	2,154 35				2,154 35
1966	24				24	575 35				575 35
1967	25				25	591 15				591 15
1968	31				31	2,227 36				2,227 36
1969	25				25	538 15				538 15
1970	23				23	2,381 28				2,381 28
1971	18				18	501 70				501 70
1972	13				13	313 75				313 75
1973	12				12	281 85				281 85
1974	15				15	1,394 00				1,394 00
1975	12				12	337 25				337 25
1976	17	2			19	1,158 96	284 20			1,443 16
1977	17	3			20	4,672 92	802 20			5,475 12
1978	19	3			22	5,075 09	802 20			5,877 29
1979	15	5			20	1,032 85	1,610 50			2,643 35
1980	22	7			29	2,340 34	1,462 85			3,803 19
1981	22	15			37	5,331 03	5,464 10			10,795 13
1982	23	12			35	6,296 21	9,910 10			16,206 31
1983	30	9			39	9,464 48	15,561 00			25,025 48
1984	30	5			35	5,448 16	13,121 25			18,569 41
1985	27	3			30	3,925 33	7,750 00			11,675 33
1986	24	2			26	4,075 73	831 00			4,906 73
1987	23	1	10		34	4,313 10	750 00	327 45		5,390 55
1988	18	2	25		45	2,187 23	995 40	1,357 38		4,540 01
1989	14	2	23	7	46	3,054 05	1,032 30	1,566 25	954 97[1]	6,607 57

[1] Includes SDR 194 7 million previously committed under SAF arrangements that were subsequently replaced by ESAF arrangements

*Source: IMF Annual Report, 1989, Appendix II, Table II.3, p. 61

APPENDIX G: Stand-By and Extended Fund Facility Arrangements in Effect During the Financial Year Ended April 30, 1989*

Member	Number[1]	Arrangement Dates: Date of inception	Arrangement Dates: Date of expiration	Approved in 1986/87: Total amount	Approved in 1986/87: Borrowed resources	Approved in 1987/88: Total amount	Approved in 1987/88: Borrowed resources	Approved in 1988/89: Total amount	Approved in 1988/89: Borrowed resources	Undrawn Balance: At date of termination	Undrawn Balance: As at 4/30/89
Argentina	12	07/23/87	09/30/88	—	—	947 50	631.67	—	—	331 00	—
Brazil	11	08/23/88	02/28/90	—	—	—	—	1,096 00	—	—	730 70
Cameroon	1	09/19/88	03/31/90	—	—	—	—	69 53	—	—	46 35
Central African Republic	6	06/01/87	05/31/88	—	—	8 00	—	—	—	7 00	—
Costa Rica	10	10/28/87	03/31/89	—	—	40 00	—	—	—	40 00	—
Côte d'Ivoire	4	02/29/88	04/30/89	—	—	94 00	62 67	—	—	87 00	—
Ecuador	13	01/04/88	02/28/89	—	—	75 35	65 38	—	—	80 28	—
Egypt	4	05/15/87	11/30/88	—	—	250 00	—	—	—	134 00	—
Gabon	2	12/22/86	12/31/88	98 69	56 65	—	—	—	—	—	—
Guatemala	11	10/26/88	02/28/90	—	—	—	—	54 00	—	—	30 84
Guinea	3	07/29/87	08/28/88	—	—	11 60	—	—	—	11 60	—
Hungary	3	05/16/88	05/15/89	—	—	—	—	265 35	—	—	50 00
Jamaica	7	03/02/87	05/31/88	85 00	56 67	—	—	—	—	—	—
		09/19/88	05/31/90[2]	—	—	—	—	82 00	54 67	—	68 30
Kenya	8	02/01/88	07/31/89	—	—	85 00	—	—	—	—	22 40
Madagascar	9	09/02/88	07/01/89	—	—	—	—	13 30	—	—	10 50
Malawi	6	03/02/88	05/30/89	—	—	13 02	—	—	—	—	3 77
Mali	12	08/05/88	10/04/89	—	—	—	—	12 70	—	—	10 16
Mauritania	2	05/04/87	05/03/88	—	—	10 00	—	—	—	—	—
Morocco	8	08/30/88	12/31/89	—	—	—	—	210 00	140 00	—	140 00
Nigeria	16	02/03/89	04/30/90	—	—	—	—	475 00	—	—	475 00
Pakistan	7	12/28/88	03/27/90	—	—	—	—	273 15	—	—	104 89
Philippines	12	10/24/86	08/23/88[3]	198 00	131 17	—	—	—	—	—	—
Senegal	7	10/26/87	10/25/88	—	—	21 28	—	—	—	2 64	—
Somalia	1	06/29/87	02/28/89[4]	—	—	33 15	22 10	—	—	27 62	—
Togo	7	03/16/88	04/15/89	—	—	13 00	8 67	—	—	—	—
Trinidad and Tobago	11	01/13/89	02/28/90	—	—	—	—	99 00	—	—	56 50
Tunisia	8	11/04/86	05/31/88[5]	103 65	—	—	—	—	—	12 65	—
Yugoslavia	11	05/28/88	05/27/89	—	—	—	—	308 00	—	—	183 60
Zaire	8	05/15/87	05/14/88	—	—	100 00	80 66	—	—	75 50	—
Subtotal Stand-By Arrangements				485 34	244 49	1,701 90	871 14	2,956 03	194 67	789 29	1,933 01
Chile	1	08/15/85	08/14/89[6]	825 00	370 83	—	—	—	—	—	37 50
Ghana	1	11/06/87	11/05/90[7]	—	—	245 40	89 57	—	—	147 85	—
Tunisia	1	07/25/88	07/24/91	—	—	—	—	207 30	70 27	—	207 30
Subtotal Extended Arrangements				825 00	370 83	245 40	89 57	207 30	70 27	147 85	244 80
Total Stand-By and Extended Arrangements				1,310 34	615 32	1,947 30	940 71	3,163 33	264 94	937 14	2,177 81

[1] Total number of stand-by or extended arrangements approved for member since 1953
[2] Extended from November 30, 1989
[3] Extended from April 23, 1988
[4] Canceled as at June 28, 1988
[5] Extended from May 3, 1988
[6] Approved in 1985/86; mix of resources modified, extended from August 14, 1988 and amount increased from SDR 750 million
[7] Canceled as at November 9, 1988

*Source: IMF Annual Report, 1989, Appendix II, Table II.4, p. 62

APPENDIX H: Summary of Purchases and Disbursements, and Repurchases and Repayments, Financial Years Ended April 30, 1989*

Financial Year	Purchases and Disbursements					Repurchases and Repayments			Fund Credit Outstanding[3]
	Purchases[1]	Trust Fund loans	SAF loans	ESAF loans	Total	Repurchases[2]	Trust Fund repayments	Total	
1948	606 04				606 04	—		—	133 90
1949	119 44				119.44	—		—	192 70
1950	51 80				51 80	24 21		24 21	204.10
1951	28 00				28 00	19 09		19 09	175 80
1952	46 25				46 25	36 58		36 58	213 50
1953	66 12				66 12	184 96		184 96	178.20
1954	231 29				231 29	145 11		145 11	132.10
1955	48 75				48 75	276 28		276 28	54 90
1956	38 75				38 75	271 66		271.66	72.00
1957	1,114 05				1,114 05	75 04		75.04	610 60
1958	665 73				665 73	86 81		86 81	1,026 50
1959	263 52				263 52	537 32		537 32	897 60
1960	165 53				165 53	522 41		522 41	329 60
1961	577 00				577 00	658 60		658 60	551 50
1962	2.243 20				2.243 20	1,260 00		1,260 00	1.022 80
1963	579 97				579 97	807 25		807 25	1.058 90
1964	625 90				625 90	380 41		380 41	951 80
1965	1.897 44				1,897 44	516 97		516 97	1.480 10
1966	2.817 29				2.817 29	406 00		406 00	3.039 00
1967	1.061 28				1.061 28	340 12		340 12	2.945.30
1968	1.348 25				1.348 25	1,115 51		1,115 51	2.462 50
1969	2.838 85				2.838 85	1,542 33		1.542 33	3.299 00
1970	2.995 65				2.995 65	1.670 69		1.670 69	4.020 20
1971	1.167 41				1.167 41	1.656 86		1.656 86	2.556 30
1972	2.028 49				2.028 49	3.122 33		3.122 33	840 20
1973	1.175 43				1.175 43	540 30		540 30	998 20
1974	1.057 72				1.057 72	672 49		672 49	1.084 70
1975	5.102 45				5.102 45	518.08		518 08	4.869 20
1976	6.591 42				6.591 42	960 10		960 10	9.759 80
1977	4.910 33	31 61			4.941 94	868 19		868 19	13.686 91
1978	2.503 01	268 24			2.771 25	4.485 01		4.485 01	12 366 05.
1979	3.719 58	670 05			4.389 63	4.859 18		4.859 18	9.843.30
1980	2.433 26	961 54			3.394 80	3.775 83		3.775 83	9.967 44
1981	4.860 01	1.059 87			5.919 88	2.852 93		2.852 93	12.536 13
1982	8.040 62				8.040 62	2.009 88		2.009 88	17.792 93
1983	11.391 89				11.391 89	1.546 64	18 45	1.565 09	26.562 76
1984	11.517 73				11.517 73	2.015 09	110 97	2.126 06	34.603.47
1985	6.288 87				6.288 87	2.730 39	212 34	2.942 73	37.622 18
1986	4.101 22				4.101 22	4.289 01	412 71	4.701 72	36.877 03
1987	3.684 56		139 34		3.823 90	6.169 32	579 32	6.748 64	33.443 29
1988	4.152 56		444 87		4.597 43	7.934 57	528 15	8.462 72	29.542 99
1989	2.541 18		290 14	264 00	3.095 32	6.257 74	447 23	6.704 97	25.520 37

[1] Includes reserve tranche purchases
[2] Includes repurchase of reserve tranche purchases prior to the Second Amendment, and excludes sales of currencies, which have the effect of repurchase
[3] Includes SAF/ESAF and Trust Fund loans

*Source: IMF Annual Report, 1989, Appendix II, Table II.7, p. 65

APPENDIX I: Arrears to the Fund of Members with Obligations Overdue by Six Months or More, by Type and Duration, as of April 30, 1989*

[1] (In millions of SDRs)

Member	Arrears							
		By Type			By Duration			
	Total	General Department	SDR Department	Trust Fund	Less than one year	One–two years	Two–three years	Three years or more
Guyana	92 1	86 5	—	5 7	15 4	20 3	21 2	35 2
Kampuchea, Democratic	33 7	28 7	5 0	—	2 0	1 8	1 8	28 0
Liberia	260 6	233 4	3 1	24 1	53 6	65 5	74 6	67 0
Panama	117 0	114 8	2 1	—	77 1	39 8	—	—
Peru	572 8	572 8	—	—	151 6	163 3	188 3	69 5
Sierra Leone	59 9	48 9	2 2	8 8	20 5	34 4	5 0	—
Somalia	59 8	55 5	—	4 3	34 4	25 4	—	—
Sudan	764 5	698 9	—	65 7	148 7	193 7	177 0	245 2
Viet Nam	100 2	39 9	13.8	46 5	12 5	18 8	18 7	50 2
Zaire[1]	108 9	108 9	—	—	108 9	—	—	—
Zambia	631 9	605 9	8 8	17 2	199 9	253 2	178 8	—

[1] Zaire completed settlement of its overdue obligations to the Fund on May 17, 1989

*Source: IMF Annual Report, 1989, Appendix II, Table II.6, p. 76

APPENDIX J: Illustrative Consolidation and Rescheduling of Certain Debts*

J-1. Agreement Between the United States of America and the Democratic Republic of The Sudan Regarding the Consolidation and Rescheduling of Certain Debts Owed to, Guaranteed or Insured by the United States Government and Its Agencies. Signed at Khartoum on May, 17, 1980.

AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA
AND THE DEMOCRATIC REPUBLIC OF THE SUDAN
REGARDING THE CONSOLIDATION AND RESCHEDULING OF
CERTAIN DEBTS OWED TO,
GUARANTEED OR INSURED BY THE
UNITED STATES GOVERNMENT AND ITS AGENCIES

The United States of America (The "United States") and the Democratic Republic of the Sudan ("Sudan") agree as follows:

ARTICLE I

Application of the Agreement

1. In accordance with the provisions of the Agreed Minute on the Consolidation of Sudan's Debts, signed at Paris on November 13, 1979 [1] (the "Paris Minute") by the representatives of certain nations, including the United States, agreed to by the representative of Sudan, and annexed hereto as Annex A, the United States and Sudan hereby agree to consolidate and reschedule certain Sudanese debts which are owed to, guaranteed by or insured by the United States or its agencies, as provided for in this Agreement.

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*32 U.S.T. 9952, T.I.A.S. No. 9952

2. This Agreement shall be implemented by separate agreements (the "Implementing Agreements") between Sudan and the United States with respect to PL-480 [1] Agreements, and between Sudan and each of the following United States agencies: The Agency for International Development and the Export-Import Bank of the United States.

ARTICLE II

Definitions

1. "Contracts" means those loan agreements pertaining to the transactions between Sudanese obligors and U.S. agencies as identified in Annex B, executed prior to January 1, 1979 with original maturities of more than one year.

2. "Arrearages" means the United States dollar amount of the sum of principal and interest, payable with respect to Contracts, and due prior to and remaining unpaid on October 1, 1979.

3. "Debt" means the sum of principal and interest payable with respect to the Contracts and due between October 1, 1979 and June 30, 1980 inclusive ("1979/80 Debt") and between July 1, 1980 and June 30, 1981 ("1980/81 Debt") inclusive.

4. "Consolidated Debt" means eighty-five percent of the dollar amount of the Debt. "Non-consolidated Debt" means the remaining fifteen percent of the dollar amount of the Debt.

5. "Interest" means interest on Arrearages and on Consolidated Debt. "Additional Interest" means interest on due but unpaid installments, as specified in Article III hereof, of Arrearages, Consolidated Debt and Interest.

6. "Agency" means: United States Agency for International Development and the Export-Import Bank of the United States.

ARTICLE III

Terms and Conditions of Payment

1. The United States agrees to reschedule 1980/81 Debt on the condition that the prerequisite stated in paragraph 4(D) of the Paris Minute has been fulfilled.

2. Sudan agrees to repay the Arrearages, Consolidated Debt, and Interest in United States dollars in accordance with the following terms and conditions:
   (a) Arrearages will be repaid in fourteen installments according to the following schedule:
      (1) 3.5 percent of the total in each of four payments on July 15 and October 1, 1980 and April 1 and October 1, 1981;

(2) 7 percent of the total in each of four payments on April 1 and October 1 of 1982 and April 1 and October 1 of 1983;

(3) 8.5 percent of the total in each of two payments on April 1 and October 1 of 1984;

(4) 10 percent of the total in each of two payments on April 1 and October 1 of 1985;

(5) 10.5 percent of the total in each of two payments on April 1 and October 1, 1986.

(b) The Consolidated Debt relating to Debt due between October 1, 1979 and June 30, 1980 and amounting to $3.1 million shall be repaid in fourteen equal semi-annual installments, commencing on June 30, 1983 with the final installment payable on December 31, 1989.

(c) The Consolidated Debt relating to Debt falling due between July 1, 1980 and June 30, 1981 and amounting to $5 million shall be repaid in fourteen equal semi-annual installments commencing on June 30, 1984 with the final installment payable on December 31, 1990.

(d) Interest shall begin to accrue at the rates set forth in this agreement (a) on October 1, 1979 for Arrearages and (b) on the respective due dates specified in each of the Contracts for each scheduled payment of Consolidated Debt; and shall continue to accrue until the Arrearages and Consolidated Debt are repaid in full. Additional Interest shall accrue on due but unpaid amounts

of Arrearages and Consolidated Debt and Interest scheduled pursuant to this Agreement until such amounts are paid in full. The rate of Interest shall be six percent per calendar year on the outstanding balance of the Arrearages and Consolidated Debt due to the Agency for International Development and to the United States with respect to PL-480 agreements. For Arrearages and Consolidated Debt due to, guaranteed by, or insured by the Export-Import Bank of the United States, the rate of interest shall be 8.25% per calendar year with respect to Arrearages and Consolidated Debt due between October 1, 1979 and June 30, 1980 inclusive and 8.375% per calendar year with respect to Consolidated Debt due July 1, 1980 and June 30, 1981 inclusive. All interest payable with respect to the Arrearages and the Consolidated Debt shall be payable semi-annually on April 1 and October 1 of each year commencing on April 1, 1980. The rates of Additional Interest shall be the same as the rate of Interest.

(e) A table summarizing the amounts of the Arrearages and Consolidated Debt owed to each Agency is attached hereto as Annex C.

3. Except as they may be modified by this Agreement or subsequent Implementing Agreements, all other terms and conditions of the Contracts remain unchanged. In particular, Sudan agrees to pay that portion of the Debt not constituting Consolidated Debt and interest on such debt as provided in the Contracts.

Any payment on Debt not constituting Consolidated Debt due between October 1, 1979 and the date of signature of this Agreement shall be due within two months following the date of signature.

4. It is understood that adjustments will be made in the amounts of Consolidated Debt specified in Annex C of this Agreement by the Implementing Agreements.

ARTICLE IV

General Provisions

1. Sudan agrees to grant the United States and its Agencies, and any other creditor which is party to a Contract, treatment and terms no less favorable than that which may be accorded to any other creditor country for the consolidation of debts covered by the Paris Minute.

2. As provided for in paragraph 7 of the Paris Minute, Sudan undertakes to secure from private creditors, including banks, financing or refinancing arrangements comparable to those detailed in this Agreement, making sure to avoid any discrimination between different categories of creditors.

ARTICLE V

Entry Into Force

1. This Agreement shall enter into force for 1979/80 Debt upon receipt by Sudan of written notice that domestic United States laws and regulations covering debt rescheduling concerning this Agreement have been complied with.

2. This Agreement shall enter into force for 1980/81 Debt upon receipt by Sudan of written notice from the United States Government that the United States considers Sudan in compliance with the condition stated in Article III, paragraph 1, of the Agreement.[1]

J-2. Agreed Minute (of the Paris Club) on the Consolidation of the Democratic Republic of The Sudan's Debt. Done in Paris on November 13, 1979.

ANNEX A

AGREED MINUTE
ON THE CONSOLIDATION OF THE DEMOCRATIC REPUBLIC OF THE SUDAN'S DEBT

1) Representatives of the Governments of Austria, Belgium, Denmark, France, the Federal Republic of Germany, Italy, Japan, the Netherlands, Switzerland, the United Kingdom and the United States of America, hereinafter called "the Participating Countries" met in Paris on November 12 and 13, 1979, with the representatives of the Government of the Democratic Republic of the Sudan, in order to examine the request for alleviation of that country's external debt service obligations. Observers of the International Monetary Fund, the International bank for Reconstruction and Development, the Secretariat of the U.N.C.T.A.D., the European Economic Community and the Organization for Economic Cooperation and Development as well as from, Australia, Canada Norway, Spain and Sweden also attended the meeting.

2) The representatives of the International Monetary Fund described the economic situation of the Sudan and the major elements of the economic stabilization program undertaken by the Sudanese Government and supported by an arrangement with the International Monetary Fund under the extended Fund facility approved by the Executive Board on May 4, 1979. This arrangement contains specific commitments in both the economic and financial fields including ceilings on the country's external borrowing.

The Sudanese delegation underlined the current difficulties faced by the country in the economic field and the strong determination of the Government to comply with the target of the economic and financial program underlying the extended Fund facility arrangement of the International Monetary Fund. They also stressed that their Government had recently set up mechanism for monitoring, controlling and registering all external debts contracts and had established a high level standing committee to keep the foreign debt situation under constant surveillance.

The representatives of the Participating Countries expressed their satisfaction with this program and stressed the importance attached to its continued implementation. They took formal note of the measures undertaken by the Government of the Democratic Republic of the Sudan in order to improve the control and the management of the external debt.

3) Mindful of the serious balance of payments difficulties faced by the Sudan, the representatives of the Participating Countries agreed to recommend that their Governments or appropriate Governmental institutions should provide debt consolidation for the Sudan's external debt by means of :

a) a rescheduling or a refinancing of amounts falling due before October 1, 1979 and not paid,

b) A rescheduling or a refinancing of amounts payable between October 1, 1979 and June 30, 1980 inclusive, and not paid,

c) a rescheduling or a refinancing of amounts payable between July 1, 1980 and June 30, 1981 inclusive.

4) This debt consolidation will apply as follows :

A.- The debts to which this consolidation will apply are :

a) Commercial credits guaranteed or insured by the governments or appropriate agencies of the Governments of the Participating Countries which had original maturities of more than one year and which were covered by an agreement or other financial arrangement before January 1, 1979.

b) Loans from Governments or Governmental agencies of the participating countries which had original maturities of more than one year and which were concluded before January 1, 1979.

B.- The amounts of principal and interest relative to debts mentioned in the above mentioned paragraph 3 a) will be repaid by the Government of the Democratic Republic of the Sudan according to the following schedule :

3,5 % on July 15, 1980	7 % on October 1, 1983
3,5 % on October 1, 1980	8,5 % on April 1, 1984
3,5 % on April 1, 1981	8,5 % on October 1, 1984
3,5 % on October 1, 1981	10 % on April 1, 1985
7 % on April 1, 1982	10 % on October 1, 1985
7 % on October 1, 1982	10,5% on April 1, 1986
7 % on April 1, 1983	10,5% on October 1, 1986

C.- Subject to the provisions of paragraph D, the rescheduling or refinancing of amounts relative of debts mentioned above in paragraph 3b) and c) will be effected as follows :

For the period starting on October 1, 1979 up to June 30, 1980 and for the period from July 1, 1980 up to June 30, 1981, 85% of the principal and interest falling due during these periods will be rescheduled or refinanced.

Repayment by the Sudan of these sums will be made in 14 semi-annual, equal and successive payments beginning on June 30, 1983 for maturities falling due from October 1, 1979 up to June 30, 1980 and beginning on June 30, 1984 for maturities falling due from July 1, 1980 up to June 30, 1981.

Payment by the Sudan of the remaining 15% will be made as originally scheduled. As for the maturities falling due between October 1, 1979 and the date of the signature of bilateral agreements the remaining 15% will be paid one month after the date of signature of these agreements unless the two parties agree otherwise.

D.- These privisons will continue to apply to maturities coming due between July 1, 1980 and June 30, 1981 under the condition that the Government of the Democratic Republic of the Sudan has observed the policies set out in the letter of intent dated March 27, 1979 or any amendment thereto and that the Sudan has reached no later than July 1, 1980 an understanding with the I.M.F. on the policy intentions and performance clauses related to the implementation of the extended Fund facility until June 1981.

E.- The detailed arrangements for the consolidation or refinancing referred to in paragraphs 3 and 4 above will be established by bilateral agreements to be concluded by each of the creditor countries with the Government of the Democratic Republic of the Sudan on the basis of the following principles :

a) The creditor countries will place the relevant amounts mentioned in paragraphs B and C above at the disposal of the Government of the Democratic Republic of the Sudan in proportion with and pari passu to the payments that will fall due during the periods defined above or will reschedule the corresponding payments.

b) The rate and terms governing the interest payable in respect of these financial arrangements will be determined bilaterally between the Sudan and each of the Participating Countries.

c) Each participating country will effect consolidation of the external debt of the Sudan in accordance with such rules which will be laid down in the bilateral agreements to be concluded and which involve rescheduling or refinancing according to be circumstances.

5) The Government of the Democratic Republic of the Sudan will accord to each of the Participating Countries treatment no less favourable than that which it may accord to any other creditor country for the consolidation of debts of a comparable term.

6) The provisions set forth in paragraphs 3 and 4 above do not apply to those countries whose principal and interest payments are less than 1 million SDR in arrears or falling due in each of the consolidation periods.

7) The delegation of the Sudan stated that its Government undertakes to secure from private creditors, including banks, refinancing or rescheduling arrangements under conditions similar to those negotiated for credits of comparable maturity covered by this Minute, making sure to avoid any discrimination between different categories of creditors.

8) The Participating Countries, noting that any previous creditor country reservations on this issue would be respected, agreed to make available, upon the request of another Participating Country, a copy of its bilateral agreement with the Government of the Democratic Republic of the Sudan which implements this Agreed Minute. The Government of the Democratic Republic of the Sudan acknowledges this arrangement.

9) The representatives of the Participating Countries and of the Sudan agreed to recommend to their Governments to initiate bilateral negotiations at the earliest opportunity and to conduct them on the principles set forth above.

Done in PARIS, November 13, 1979

The Chairman of the Paris Club,

The Chairman of Sudanese Delegation,

Austrian Delegation,

Netherlands Delegation,

Belgium Delegation,

Swiss Delegation,

French Delegation,

United Kingdom Delegation,

The Delegation of the Federal Republic of Germany,

The United States of America Delegation,

Italian Delegation,
Itlaian Delegation reserved their position paragraph 4B of this Agreed Minute

Danish Delegation,

Japanese Delegation,

APPENDIX K: Selected Clauses of a Specimen Syndicated Term Loan Agreement*

12. Conditions Precedent

(1) CONDITIONS TO ALL LOANS

17.21 The obligations of each Bank hereunder are subject to the condition that the Dollar Agent shall have received all of the following in form and substance satisfactory to the Dollar Agent not less than two Business Days' prior to the Borrower serving a notice to make the first borrowing hereunder:

(i) a copy of an extract from Law Number ..... of ....., authorising the borrowing of loans in foreign currencies by the Borrower on conditions to be determined by Decree Law, certified as being true and in full force and effect as at a date no earlier than the date hereof;

(ii) a copy of Decree-Law Number ..... of ....., of the Borrower, approving the terms of the facility governed by this Agreement and empowering the Minister for Finance and Planning (or a person or persons authorised by him) to execute and deliver this Agreement on behalf of the Borrower, certified as being true and in full force and effect as at a date no earlier than the date hereof;

(iii) a declaration of the Director General for Treasury, stating that the Total Commitments at the date hereof fall within the monetary limits from foreign currency borrowings by the Borrower presently authorised by law;

(iv) a certified true copy of the signatures of the person(s) authorised to execute this Agreement on behalf of the Borrower and of the persons authorised to sign all notices, certificates and other documents to be delivered by the Borrower hereunder;

(v) a copy of the exemption of the Ministry for Finance and Planning, exempting all payments to be made by the Borrower hereunder from ..... Taxes on interest in accordance with Articles ..... and of the Capital Tax Code, as introduced by Decree-Law Number ..... of ....., certified as being true and in full force and effect as at a date no earlier than the date hereof;

(vi) a copy of all other authorisations, approvals, consents, licences and exemptions required in connection with the execution, delivery, performance, validity and enforceability of this Agreement, certified as being true and in full force and effect as at a date no earlier than the date hereof;

(vii) evidence that the Ambassador of the Republic of ..... to the Court of St. James's and the Consul General of the Republic of ..... in New York have agreed, for themselves and their successors to such offices, to act as the agent of the Borrower for receipt of service of process in England and New York respectively;

(viii) a legal opinion of the Attorney General of .....;

(ix) a legal opinion of ..... addressed to the Agents, the Managers and the Banks, to the effect set forth in Exhibit D; and

(x) a legal opinion of ....., addressed to the Agents, the Managers and the Banks, to the effect set forth in Exhibit E.[1]

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*Source: A. Arora, G.A. Penn, and A.M. Shea, Law and Practice of International Banking, (London: Sweet and Maxwell, 1987), p. 393

(2) CONDITIONS TO EACH LOAN

The obligations of each Agent and each Bank hereunder are subject to the further condition precedent that, both at the time of the request for and at the time for the making of each Loan, the representations and warranties of the Borrower set out in Clause 13(1) are true and accurate on and as of such times as if made at each such time and no Default has occurred and is continuing or would result from the proposed Loan.

13. Representations and Warranties

17.22 (1) The Borrower makes the following representations and warranties for the benefit of each Agent, each Manager and each Bank:

(*a*) *Powers and authority*

The Borrower has the power to enter into and perform this Agreement and to borrow hereunder and has taken all necessary action to authorise the borrowing of the Loans upon the terms and conditions of this Agreement and to authorise the execution, delivery and performance of this Agreement in accordance with its terms;

(*b*) *Legal validity*

This Agreement constitutes a legal, valid and binding obligation of the Borrower enforceable in accordance with its terms;

(*c*) *No conflict with laws relating to borrower*

The execution, delivery and performance of this Agreement will not violate in any respect any provision of (i) the constitution of the Republic of ....., (ii) any ..... law, regulation or order applicable to the Borrower, or (iii) any mortgage, agreement or other undertaking, instrument or obligation to which the Borrower is a party or which is binding upon it or any of its assets, nor result in the creation or imposition of any Encumbrance on any of its assets pursuant to the provisions of any such mortgage, agreement or other undertaking, instrument or obligation;

(*d*) *No default*

There has not occurred any Default;

(*e*) *Consents*

All authorisations, approvals, consents, licences, exemptions, filings, registrations, notarisations and other requirements under those ..... laws, regulations and orders which are applicable to the Borrower and required in connection with the execution, delivery, performance, validity and enforceability of this Agreement and, with the exception of the payment of the Stamp Tax, its admissibility in evidence in the Republic of ..... have been obtained or effected and are in full force and effect, there has been no default in the performance of any of the terms or conditions thereof, no fees are payable in connection therewith and the Borrower has full authority to make all payments hereunder to each Agent in the currency required hereunder for the account of the relevant Banks to the accounts provided for in Clause 10(1);

(*f*) *No litigation*

17.23 No litigation, arbitration or administrative proceeding is pending or, to the best of the Borrower's knowledge and belief, threatened against or with respect to the Borrower or any of its assets which might materially and

adversely affect the ability of the Borrower to perform its obligations under this Agreement;

(*g*) *No breach of obligations owed to third parties*

The Borrower is not in breach of or in default under any mortgage, agreement or other undertaking, instrument or obligation to which it is a party or which is binding upon it or any of its assets to an extent or in a manner which might materially and adversely affect the ability of the Borrower to perform its obligations under this Agreement;

(*h*) *Information memorandum*

As at the date of this Agreement the statements in the Information Memorandum are correct in all material respects and are not misleading and the Information Memorandum does not omit any material facts and, without prejudice to the generality of the foregoing, there has been no material adverse change in the financial condition of the Borrower from that disclosed by the Information Memorandum;

(*i*) *No immunity from suit*

The Borrower is subject to civil and commercial law with respect to its obligations under this Agreement; the execution and delivery by the Borrower of, and the borrowing of the Loans hereunder and exercise of its other rights and performance of its obligations under this Agreement constitute private and commercial acts rather than governmental or public acts and neither it nor any of its assets or revenues (save for assets in the public domain or in use for public utility purposes) enjoys under ..... law any right of immunity from suit (including immunity based on grounds of sovereignty), judgment or execution on a judgment or attachment (whether before judgment, in aid of execution or otherwise) in respect of its obligations under this Agreement and the waiver contained in Clause 29(1) by the Borrower of any such right of immunity is irrevocably binding on the Borrower;

(*j*) *Not necessary to be licenced*

It is not necessary under the law and constitution of the Republic of ..... (i) in order to enable any of the Agents, the Managers and the Banks to enforce its rights under this Agreement or (ii) by reason of the execution, delivery and performance of this Agreement by each of them that any of them should be licensed, qualified or otherwise entitled to carry on business in the Republic of .....;

(*k*) *No residence*

None of the Agents, the Managers and the Banks is or will be deemed to be resident, domiciled or carrying on business in the ..... or subject to taxation in the Republic of ..... by reason only of the execution, performance and/or enforcement of this Agreement; and

(*l*) *IMF membership*

The Borrower is a member in good standing of the International Monetary Fund and no limitation or restriction has been imposed on its use of the resources thereof.

(2) "EVERGREEN" REPRESENTATIONS AND WARRANTIES

17.24 The representations and warranties set out in Clause 13(1) shall survive the execution of this Agreement and the making of each Loan hereunder and shall be deemed to be repeated at the time of each request for a Loan and on each Interest Date with reference to the facts and circumstances then subsisting, as if made at each such time.

The following representations and warranties may be required in the case of a corporate Borrower: (i) a representation that the Borrower is duly incorporated and has power to execute the agreement under its terms (ii) a representation that the most recent audited accounts of the Borrower reflect a fair and true picture of its financial condition, (iii) a representation that the borrower or any of its subsidiaries is not in default under this or any other loan agreement.

14. Covenants

17.25 The Borrower undertakes that from and after the date hereof and so long as any amount payable hereunder is outstanding or any of the Total Commitments is in force:

(i) the Borrower shall furnish to the Dollar Agent in sufficient copies for all the Banks the printed annual report of Banco de ..... for each of its financial years as soon as practicable;

(ii) the Borrower shall furnish to the Dollar Agent in sufficient copies for all the Banks within 120 days after the end of each calendar year a statement of its balance of payments for such period, prepared in accordance with the standard format of the International Monetary Fund, a statement of the composition of its holdings of gold, foreign exchange and Special Drawing Rights as of the end of such period and a description of any exchange restrictions affecting it in effect during such period;

(iii) the Borrower shall furnish to the Dollar Agent in sufficient copies for all the Banks from time to time, with reasonable promptness, such further information regarding the financial condition of the Borrower or any Public Establishment as either Agent or any Bank which the Dollar Agent may reasonably request;

(iv) the Borrower shall obtain and promptly renew from time to time all authorisations, approvals, consents, licences and exemptions as may be required under any applicable ..... law or regulation to enable it to perform its obligations under this Agreement, or required for the validity or enforceability of this Agreement, shall comply with the terms of the same and will ensure the availability of sufficient foreign exchange to enable it to comply with its obligations under this Agreement; and

(v) the Borrower will notify the Dollar Agent (which shall promptly notify the ECU Agent and all the Banks) of any Default forthwith upon the occurrence thereof, and, in the case of the Borrower having notified the Dollar Agent of the commencement of negotiations with one or more of its creditors with a view to entering into any arrangement or composition with or for the benefit of its creditors or any of

them (being an Event of Default pursuant to Clause 16(*f*)), the Borrower will use its best efforts to permit the Dollar Agent and the ECU Agent to participate in any such negotiations.

The following conditions may be required in the case of a corporate Borrower:

(*a*) a condition that neither the Borrower, nor any of its subsidiaries will dispose of any assets except with the prior written consent of the lending bank(s).

(*b*) a condition that neither the Borrower nor its subsidiaries will make any substantial change in its business, except with the prior written consent of the lending bank(s).

(*c*) a condition that neither the Borrower nor its subsidiaries will enter into any merger or consolidation, except with the written consent of the lending bank(s).

(*d*) a condition that the Borrower and its subsidiaries will maintain reasonable insurance covering its assets and business.

(*e*) a condition that the Borrower will maintain its corporate existence.

(*f*) a condition that the Borrower will maintain current assets, current liabilities, working capital, tangible net worth and total liabilities over or below a certain specified figure as the case may be.

15. Pari Passu and Negative Pledge

(1) The Borrower warrants and undertakes that its obligations hereunder will at all times constitute direct, unconditional, unsecured, unsubordinated and general obligations of, and will rank at all times at least *pari passu* in all respects with all other present and future outstanding unsecured indebtedness issued, created or assumed by, the Borrower. **17.26**

(2) The Borrower undertakes that from and after the date hereof and so long as any amount payable hereunder is outstanding or any of the Total Commitments is in force, the Borrower will not, and will procure that no Public Financial Establishment will, create or permit to exist any Encumbrance on or over any of the present or future assets (including the gold and foreign currency reserves of the Borrower) or revenues of any of them as security for any present or future loan, debt, guarantee or other obligation (whether of the Borrower, any Public Establishment or any other person, firm, body, company or other legal entity) unless all the Borrower's obligations hereunder (whether in respect of principal, interest or otherwise) either:

(i) share (in a manner satisfactory to the Majority Banks) the security afforded by such Encumbrance equally and rateably with the loan, debt, guarantee or other obligation secured thereby, or

(ii) receive (in a manner satisfactory to the Majority Banks) the benefit of an Encumbrance on other assets or revenues of the Borrower which the Majority Banks judge to be equivalent to that granted to such loan, debt, guarantee or other obligation.

Notwithstanding the above, there shall be disregarded for the purposes of this Clause 15(2):

(i) pledges of or charges on the present or future assets or revenues of the Borrower or ..... created or granted at any time hereafter in favour of the central government or central bank of any country or the Bank for International Settlements or the International Bank for Reconstruction and Development;

(ii) any Encumbrance created or granted previously or at any time hereafter on any fixed asset of the Borrower or any Public Financial Establishment to secure the purchase price or cost of construction thereof or improvement or addition thereto or to secure any loan incurred no later than sixty days after such acquisition or after the completion of such construction, improvement or addition and which is used solely to pay such purchase price or cost; and

(iii) liens which arose or may arise by operation of law, including tax or other statutory liens, to secure obligations incurred in the ordinary course of the affairs of any Public Financial Establishment which are either not due and payable or are being contested in good faith and with respect to which, in either case, adequate reserves are being maintained.

16. Events of Default

17.27 Upon the occurrence of any of the following events:

(*a*) the Borrower shall fail to pay when due any principal of or interest on any of the Loans hereunder or any other amount payable hereunder or under any agreement in connection herewith entered into with either Agent, any Manager and/or any Bank; or

(*b*) the Borrower shall default in the due performance and observance of any other provision contained in this Agreement and such default (if capable of remedy) shall remain unremedied for thirty days after notice thereof shall have been given by the Dollar Agent to the Borrower; or

(*c*) any representation, warranty or statement made or deemed to be repeated in this Agreement or in any notice, certificate, statement or the Information Memorandum delivered, made or issued by or on behalf of the Borrower hereunder or in connection herewith or any information provided by the Borrower to any of the Agents, the Managers and the Banks hereunder shall be at any time incorrect in any respect or any such representation, warranty or statement would, if made or repeated at any time with reference to the facts and circumstances then subsisting, be incorrect in any respect at that time; or

(*d*) there shall occur any default by the Borrower or any Public Establishment in the due and punctual payment of the principal of, or premium or prepayment charge, if any, or interest on, any other loan indebtedness or indebtedness in respect of monies raised by the issue of debentures, notes, bonds or other similar securities in a capital market, of or assumed or guaranteed by the Borrower of such Public Establishment (other than in respect of Internal Indebtedness of a Public Establishment which is not a Public Financial Establishment) when as the same shall become due and payable, and such default shall continue for more than the original period of grace, if

any, applicable thereto, unless such payment is being contested in good faith by the Borrower or such Public Establishment and reserves at least equal to the amount of the contested payment are being maintained by it (the term "original period of grace" as used herein meaning that grace period fixed by the terms of the agreement or instrument under which such indebtedness was created, but specifically not including any extension in the time permitted for such payment or any waiver or delay in the requirement for such payment which has been separately agreed to between the obligor and obligee); or

(*e*) there shall occur any event (other than a default in payment) giving the creditor the right to demand repayment in respect of any other loan indebtedness or indebtedness in respect of monies raised by the issue of debentures, notes, bonds or other similar securities in a capital market, of or assumed or guaranteed by the Borrower or any Public Establishment (other than in respect of Internal Indebtedness of a Public Establishment which is not a Public Financial Establishment) whether such event shall be acted upon or not, or any such loan indebtedness or other indebtedness as aforesaid shall become due and payable prior to its stated maturity; or

(*f*) the Borrower:

(i) shall be unable to pay its debts as they fall due; or
(ii) shall propose, commence negotiations with a view to or enter into any arrangement or composition with or for the benefit of its creditors or any of them; or
(iii) shall propose, declare or impose a moratorium on the payment of indebtedness of or assumed or guaranteed by it; or

(*g*) any encumbrance shall become entitled to attach, to foreclose or otherwise to realise any security interest in, or any judgment or other creditor shall become entitled to levy any execution on, any material part of the assets of any Public Establishment other than a Secondary Public Establishment (the term "Secondary Public Establishment" as used herein meaning any domestic corporation the majority of whose capital or voting stock is owned directly or indirectly by the Borrower and which is not a Public Financial Establishment or public utility, does not hold or enjoy a monopoly granted, sanctioned or otherwise provided by the Borrower directly or indirectly with respect to any goods or services, does not hold any concession or licence granted or provided directly or indirectly by the Borrower and is not organised or established directly or indirectly by the Borrower pursuant to any statute, regulation or authorisation other than the general corporation law of the Republic of .....), or any attachment, levy or similar measure shall be made in respect of any such assets and has not been discharged, cancelled or withdrawn within thirty days after the making thereof; or **17.28**

(*h*) there shall occur any other event, of an extraordinary nature, which, in the reasonable judgment of the Majority Banks, would materially and adversely affect the ability of the Borrower to perform its obligations hereunder,

then and in any such event, and at any time thereafter if any such event shall then be continuing, the Dollar Agent may and shall if so directed by the Majority Banks by notice to the Borrower:

(i) declare that the obligations of the Agents and the Banks hereunder and the undrawn amount of the Total Commitments shall be cancelled forthwith whereupon the same shall be so cancelled forthwith; and/or
(ii) declare all the Loans immediately due and payable whereupon the same shall become immediately due and payable together with all interest accrued thereon and all other amounts payable hereunder.

APPENDIX L: Draft Articles on State Responsibility Adopted by the International Law Commission on First Reading*

PART 1

Chapter I

GENERAL PRINCIPLES

Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2. Possibility that every State may be held to have committed an internationally wrongful act

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

Article 3. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:
(a) conduct consisting of an action or omission is attributable to the State under international law; and
(b) that conduct constitutes a breach of an international obligation of the State.

Article 4. Characterization of an act of a State as internationally wrongful

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.

* Draft articles 1 to 35 of Part 1 are published in YILC 1980, vol.II (Part 2), pp.30-34. Draft articles 1 to 5 of Part 2 are published in the Report of the International Law Commission on the Work of its Thirty-seventh Session (1985), doc. A/40/10, pp.52-53.

Source: Marina Spinedi and Bruno Simma, eds., United Nations Codification of State Responsibility (New York: Oceana Publications, 1987), pp. 325-335.

Chapter II

THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW

Article 5. Attribution to the State of the conduct of its organs

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

Article 6. Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

(a) it is established that such person or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ which has been placed at the disposal of a State by

another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

Article 11. Conduct of person not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

Article 12. Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

Article 13. Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

Article 14. Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

Chapter III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 16. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

Article 17. Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

Article 18. Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the

obligation is in force for that State.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

Article 19. International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21. Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

Article 22. Exhaustion of local remedies

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

Article 23. Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment

when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Article 26. Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

Chapter IV

IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

Article 28. Responsibility of a State for an internationally wrongful act of another State

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.

2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other articles of the present draft, of the State which has committed the internationally wrongful act.

Chapter V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 29. Consent

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present draft articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 30. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

Article 31. Force majeure and fortuitous event

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

Article 32. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the

wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.

Article 34. Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 35. Reservation as to compensation for damage

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act.

PART 2

Article 1

The international responsibility of a State which, pursuant to the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in the present Part.

*Article 2**

Without prejudice to the provisions of articles 4 and (12), the provisions of this Part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

* The draft article provisionally adopted by the ILC in 1983 made reference to "articles (4) and 5". The reference was changed to "article 4 and (12)" in 1985 as a result of the re-numbering of draft article 5.

*Article 3**

Without prejudice to the provisions of articles 4 and (12), the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present Part.

*Article 4***

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present Part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 5

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One of the present articles, an internationally wrongful act of that State.

2. In particular, "injured State" means

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

* The draft article provisionally adopted by the ILC in 1983 made reference to "articles (4) and 5". The reference was changed to "article 4 and (12)" in 1985 as a result of the re-numbering of draft article 5.

** Provisionally adopted by the ILC in 1983 as article 5 and re-numbered in 1985.

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime (and in the context of the rights and obligations of States under articles 14 and 15), all other States.

APPENDIX M: Philippine Senate Bill No. 535, "AN ACT ESTABLISHING LIMITS OF FOREIGN DEBT SERVICE PAYMENTS AND, UNDER CERTAIN CONDITIONS, NET RESOURCE OUTFLOW THEREFOR, AMENDING FOR THE PURPOSE REPUBLIC ACT NUMBERED FORTY-EIGHT HUNDRED SIXTY, AS AMENDED, AND FOR OTHER PURPOSES"*

CONGRESS OF THE PHILIPPINES
Second Regular Session

SENATE

S. No. 535

INTRODUCED BY SENATORS ROMULO, SALONGA, GUINGONA, JR., GONZALES AND MACEDA

AN ACT ESTABLISHING LIMITS OF FOREIGN DEBT SERVICE PAYMENTS AND, UNDER CERTAIN CONDITIONS, NET RESOURCE OUTFLOW THEREFOR, AMENDING FOR THE PURPOSE REPUBLIC ACT NUMBERED FORTY-EIGHT HUNDRED SIXTY, AS AMENDED, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

SECTION 1. The second paragraph of Section 2 of Republic Act No. 4860, as amended, is hereby further amended to read as follows:

"SEC. 2.

"x x x x

"The Monetary Board of the Central Bank of the Philippines shall promulgate and enforce such measures

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*Source: Office of Senator Alberto Romulo, Congress of the Philippines

as shall be necessary to reduce the external debt service burden to an annual level not exceeding twenty percent (20%) of the total foreign exchange receipts of the immediately preceding year: *Provided, however,* That during the critical economic recovery period 1988–1992 inclusive, the external debt service shall not exceed twenty percent (20%) of the foreign exchange receipts from exports of goods.

"The abovementioned twenty percent (20%) ceiling (20% of foreign exchange receipts from exports of goods) may be exceeded upon the approval of the President as recommended by the Monetary Board: *Provided,* That the net resource outflow from the Philippines, as defined hereunder, is reduced to at least the amount of the twenty percent (20%) debt service ceiling (20% of foreign exchange receipts from exports of goods): *Provided, further,* That the President, in allowing the aforesaid excess, shall submit to Congress a program for attaining the said twenty percent (20%) debt service ceiling during the economic recovery period: *Provided, further,* That whenever applicable the excess over the said twenty percent (20%) limit on debt service shall be on account of interest payments on new loans and new money necessary and expedient to finance programs in support of the

Government's economic development plan: *Provided, finally,* That the proposals for such new money and new loans causing the projected incremental interest payments shall be submitted by the Monetary Board to Congress. Such report shall contain the details thereof including the specific purpose, credit terms and the loans' impact on the country's balance of payments.

"Concurrently with the foregoing, the Government shall exert all efforts towards the reduction of the external debt service burden through, but not limited to the following approaches:

(a) Negotiate a restructuring of the Paris Club debt and/or conversion of certain portions of the debt to grants;

(b) Negotiate a Debt-for-Bond Swap;

(c) Limit interest payments to only five percent (5%) and capitalize the unpaid interest portion;

(d) Convert foreign debt for use in promoting nature, wildlife conservation and child survival programs; and

(e) Negotiate a debt for commodities program."

SEC. 2. Section 2 of the same Act is hereby further amended by inserting a new paragraph after the last paragraph thereof, to read as follows:

"For purposes of determining the debt service ceiling provided for in the preceding paragraphs, the terms "debt service burden," "foreign exchange receipts" and "net resource outflow" are hereby defined as follows:

(a) *Debt Service Burden* shall include the principal and interest payments on external short, medium and long-term monetary and non-monetary credits; International Monetary Fund credits; and payments under such rescheduling and, new money agreements that have been or will be incurred, assumed, and guaranteed by the Philippine Government with foreign creditors;

(b) *Foreign Exchange Receipts* shall refer to actual cash receipts of foreign exchange from the exports of goods, services and transfers;

(c) *Net Resource Outflow* shall mean the difference between payments to and receipts from all international creditors, official and private."

SEC. 3. Section 5 of the same Act is hereby amended by adding a second paragraph therein to read as follows:

"SEC. 5.

"x x x x

"The Monetary Board of the Central Bank of the Philippines shall publish in newspapers of general circulation the source, amount, purpose and the terms

and conditions of all foreign loans and credits secured and guarantees extended by the Government within thirty (30) days after the approval of the pertinent loan or guarantee agreements."

SEC. 4. Section 7 of Presidential Decree No. 1961, as amended by Presidential Decree No. 1977, which authorizes the President of the Philippines, upon the recommendation of the Monetary Board to exclude specific categories of external debt contracted or obtained under the provisions of the said Decree from the twenty percent (20%) ceiling on external debt service under Republic Act No. 4860, as amended, is hereby repealed.

SEC. 5. In enforcing the debt service ceiling, the following shall be given priority:

(1) Trade, revolving or suppliers credits and such other financing facilities necessary to ensure continued conduct of international trade by the Philippines;

(2) Loans from official creditors;

(3) New loans originally contracted after February 25, 1986; and

(4) Debts which benefited the country and were used for the purposes for which they were contracted.

The amount released from the debt service burden by virtue of the reduction in debt service shall be set aside to

constitute a fund which shall be utilized exclusively for projects identified by the Legislative-Executive Development Council and shall be aimed at achieving a sustainable economic growth and development.

SEC. 6. Any provision of law, decree, order or rules and regulations as are inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

SEC. 7. This Act shall take effect after fifteen (15) days following its publication in the *Official Gazette* or in two (2) newspapers of general circulation.

Approved,

022088

APPENDIX N: The 1986 Declaration on the Right to Development*

Right to development

The General Assembly,

Having considered the question of the right to development,

1. Decides to adopt the Declaration on the Right to Development, the text of which is annexed to the present resolution.

ANNEX

Declaration on the right to development

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Considering that under the provisions of the Universal Declaration of Human Rights 2/ everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights 6/ and the International Covenant on Civil and Political Rights, 6/

6/ See resolution 2200 A (XXI), annex.

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*Source: Report of the Third Committee on "Alternative Approaches and Ways and Means Within the United Nations System for Improving The Effective Enjoyment of Human Rights and Fundamental Freedoms", 1 December 1986, document no. A/41/925, ANNEX, pp. 21-26.

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for, and observance of, human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling further the right of peoples to exercise, subject to relevant provisions of both International Covenants on Human Rights, 6/ their full and complete sovereignty over all their natural wealth and resources,

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for, and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released

through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts to promote and protect human rights at the international level should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the right to development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect of their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.

3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should fulfil their rights and duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 6

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language and religion.

2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights.

Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be made with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects of the right to development set forth in this Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.

2. Nothing in this Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

Article 10

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

APPENDIX O: Summary of Central Government Social Spending in Selected Countries Between 1972 and 1986*

Fig. 7 Decline in social spending

Adjustment to the debt crisis has forced many governments into reduced public spending. But health and education, which help to meet basic human needs now and to invest in human capacity for the future, have been cut back disproportionately.

Central government expenditure on education, health and defence, as a percentage of total government expenditure, 1972 and 1986.

	EDUCATION		HEALTH		DEFENCE	
	1972	1986	1972	1986	1972	1986
Bangladesh	14.8	9.9	5.0	5.3	5.1	11.2
Burkina Faso	20.6	17.7	8.2	6.2	11.5	19.2
Kenya	21.9	19.7	7.9	6.4	6.0	8.7
Malawi	15.8	11.0	5.5	6.9	3.1	6.0
Pakistan	1.2	3.2	1.1	1.0	39.9	33.9
Sri Lanka	13.0	8.4	6.4	4.0	3.1	8.0
Tanzania	17.3	7.2	7.2	4.9	11.9	13.8
Uganda	15.3	15.0	5.3	2.4	23.1	26.3
Zaire	15.2	0.8	2.3	1.8	11.1	5.2
Low-income developing countries						
Bolivia	31.3	11.6	6.3	1.4	18.8	5.8
Botswana	10.1	17.7	6.1	5.0	0.0	6.4
Chile	14.3	12.5	8.2	6.0	6.1	10.7
El Salvador	21.4	17.5	10.9	7.5	6.6	28.7
Morocco	19.2	16.6	4.8	2.8	12.3	16.4
Tunisia	30.5	14.3	7.4	6.5	4.9	7.9
Turkey	18.1	11.9	3.2	2.2	15.5	13.5
Lower middle-income developing countries						
Korea Rep.	15.8	18.1	1.2	1.5	25.8	29.2
Mexico	16.4	11.5	5.1	1.4	4.2	2.5
Oman	3.7	10.1	5.9	5.0	39.3	41.2
Uruguay	9.5	7.1	1.6	4.8	5.6	10.2
Upper middle-income developing countries						

*Source: United Nations Children's Fund, The State of the World's Children 1989, (Oxford: Oxford University Press, 1989), p. 17.

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