THE PHILIPPINES AND THE IMF:
ANATOMY OF A THIRD WORLD DEBT*

SEDREY MARTINEZ CANDELARIA**

INTRODUCTION ................................................................. 20

I. THE IMF AND THE RENEGOTIATIONS .............................. 21
   A. Background .............................................................. 21
   B. The Development Of New International Economic Rules ..... 22
   C. Norm-Creating Functions of the Articles of Agreement .... 25
   D. Mandate of the International Monetary Fund ............... 27
      1. DEVELOPMENT AS A SECONDARY COURSE .................. 28
      2. "FREEDOM FOR PAYMENTS AND EXTERNAL DEBT SERVICE" 30
      3. BALANCE OF PAYMENTS FINANCING .......................... 31
   E. The Development of the Stand-By Arrangement ............ 33
   F. Sovereign-Debt Renegotiation Process ....................... 40
      1. PARIS CLUB RESCHEDULING PROCESS ....................... 42
      2. COMMERCIAL BANKS AND PRIVATE DEBT RESTRUCTURING AGREEMENTS .... 51
   G. A Call For Liberal Enforcement ................................. 57

II. THE STATE OF NECESSITY AND THE HUMAN RIGHT
    TO DEVELOPMENT ...................................................... 58

* Chapters Three and Four of a Thesis Submitted in Partial Fulfillment of The Requirements
   for the Degree of Master of Laws.

** LL.B. '84, Ateneo de Manila University, School of Law; LLM. '89, The University of
   British Columbia; Assistant Dean For Student Affairs and Member of the Faculty, Ateneo de Manila
   University School of Law. This article was prepared for publication by Hans Leo J. Cacdac, Notes
   and Comments Editor 1991-92.
THE PHILIPPINES AND THE IMF: ANATOMY OF A THIRD WORLD DEBT

Sefrey Martinez Candelaria

We have decided to publish this 1989 work primarily for two reasons: (1) to familiarize our readership with the IMF, the IMF Stand-by Arrangement, debt renegotiations, and principles of international law involved therein; such a familiarization, in turn, would (2) place them in a more knowledgeable standpoint so that, at the very least, they may assess the present administration insofar as foreign debt policy and its enforcement are concerned. How to make known these subsequent assessments is left to one's own free will and imagination. But the Journal would definitely want to set things off, and so we leave you with your possible legal arsenal.

An update on present-day circumstances is in order.

1. As of late, the Philippine government has hurdled the second performance review by the IMF under the existing economic stabilization program (ESP). By passing this review, the Philippines is slated to receive $1.40M in October, $60M of which represents the half of the three drawdowns on the standby facility involving a $4.6B debt relief deal with foreign bank lenders. The remaining $80M was thrown in as IMF cash assistance. The release of this amount, however, would only be effected should the Philippines meet the performance criteria for the months of August and September.

The Philippine government has set its economic policy for the rest of 1992 based on the ESP. Macroeconomic policies ensuring continued fiscal and monetary stability would still have to be enforced. Higher revenue measures through improved tax administration and other revenue-making efforts are encouraged. For instance, Secretary of Finance Ramon del Rosario backed a proposal to revert the taxation on cigarettes to specific tax from the present ad valorem.

In addition, structural measures to enhance external competitiveness particularly through liberalization of investment, trade and exchange regulations. For instance, foreign exchange transactions have been fully deregulated by the Ramos administration.

Recently, the present ESP has been extended ("technical extension" is what Secretary del Rosario calls it) up to March, 1993. There are plans to negotiate for the growth-oriented extended fund facility (EFF).

2. Bills which intend to place a cap on Philippine foreign debt payments were filed both in the House of Representatives and the Senate. President Ramos has assured Mr. Kazo Watanabe, Japan's Minister of International Trade and Investment, that congressional moves towards a debt cap would not prosper.

Speaker Jose de Venecia and Rep. Rolando Andaya, Chairman of the House Appropriations Committee, have expressed their objections over the House debt cap bill. Secretary del Rosario is of the view that a debt cap measure would be 'disadvantageous to the country at this time when the Philippines' credit standing has visibly improved'.

On the other hand, bill sponsor Sen. Alberto Romulo is optimistic that the debt cap bill will be approved by the Senate. But, legislators in both houses are doubtful that any debt cap measure will be approved by President Ramos.

3. As of April, 1992, official documents showed that the Philippines has a $29.6B foreign debt. Foreign commercial creditor banks comprise the highest total loan exposure representing 34.31% or $10.2B of total foreign debts. (Note that this figure does not include the $4.6B debt relief package signed last July by Central Bank Governor Cuisia and Secretary del Rosario).

Multilateral creditors are second with a total exposure to the country of $6.7B, amounting for 22.51% of the government's foreign exchange liabilities. Bilateral creditors account for 31.89% or $9.5B of the foreign debt. Among the bilateral creditors, the Philippines owes the Japanese government some
$4.1B, roughly 42.98% of the aggregate of $9.5B. Liabilities to the United States government were placed at $730M.

Medium and long-term obligations worth $23.8B accounted for 80.40% of our debt. The rest of the country's foreign debt comprised short-term loans, $5B or 16.74%, and 2.93% or $8.7M in the form of bonds.

4. Congressmen supporting a debt cap claim that pursuant to P.D. 1177, the government allots an average of 40% of the national budget for debt payments.

INTRODUCTION

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.

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 the loan agreements with a debtor state.

1 This data was culled from the Manila Bulletin Business Section, spanning the period August 15 to September 7, 1992.

1992
THE PHILIPPINES AND THE IMF

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.

I. THE IMF AND DEBT RENEGOTIATIONS

A. Background

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." 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

$4.1B, roughly 42.98% of the aggregate of $9.5B. Liabilities to the United States government were placed at $730M.

Medium and long-term obligations worth $23.8B accounted for 80.40% of our debt. The rest of the country's foreign debt comprised short-term loans, $5B or 16.74%, and 2.93% or $8.7M in the form of bonds.

4. Congressmen supporting a debt cap claim that pursuant to P.D.1177, the government allots an average of 40% of the national budget for debt payments.¹

INTRODUCTION

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.

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 the loan agreements with a debtor state.

¹ This data was culled from the Manila Bulletin Business Section, spanning the period August 15 to September 7, 1992.

1992

THE PHILIPPINES AND THE IMF

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.

I. THE IMF AND DEBT RENEGOTIATIONS

A. Background

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."¹¹ 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 international 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. The best point of discussion pertains to this "new" role that the IMF-SBA had assumed in the current renegotiation process.

B. 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, states had abandoned 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."5

2 Id at 3-4.
3 Id at 5.
4 Id.

1992 THE PHILIPPINES AND THE IMF

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

I 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: (1) the development of the concept of abusive exercise of powers by international tribunals; (2) the development of the concept of the basic human right to trade limited only by reasonable government control in the public interest; (3) the establishment of an international economic commission charged with the task of conciliating claims and controversies arising from unjust governmental acts of business concerns; (4) the founding of an international economic organization which could investigate and publicize the commercial practices of states; (5) the negotiation of bilateral treaties on the basis of reciprocal and unconditional most-favored-nation treatment gradually reducing tariffs and eliminating other obstacles to trade; and (6) through multilateral treaties a code of fair practice in international commerce could be evolved.7

In 1942, as a response to the experience of the 1930s and anticipating the economic needs after the war, the United States and Great Britain at Bretton Woods, N.H., led other Allied powers 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 Andres Lowenstein 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

7 Id. at 37-38.
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 upholding 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.'

Out of these policy objectives emerged proposals to establish a trade organization (whose function now rests upon the General Agreement on Tariffs and Trade)\(^9\), an international bank (International Bank for Reconstruction and Development or World Bank)\(^10\) 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 again proposed 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.\(^11\) 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"\(^12\) to which Mr. Harry Dexter White of the United States, then Secretary

---


\(^12\) Lowenfeld, supra note 9, at 16-17.

\(^13\) Id. at 16.
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 According to Gold, Article VI. Section 3, 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 of 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

D: 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 briefly 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)

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." 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." As we are now aware, the two functions have been divided between the Fund and the World Bank, respectively. According to Gold while the

35 Gold, "...To Contribute Thereby to ... Development... Aspects of the Relations of the IMF with its Developing Members" 10:2 COLUM. J. TRANSNAT'L L. at 267 (1971) [hereinafter cited as To Contribute].

36 Id.
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 abovementioned 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;

41 See IMF ARTICLES OF AGREEMENT art. VIII, section 3(b) and XIV, section 2.

42 J. GOLD INTERNATIONAL MONETARY FUND AND PRIVATE BUSINESS TRANSACTIONS 7 (1965) [HEREIN AFT ER CITED AS PRIVATE BUSINESS].

43 Id. at 8.

44 This is formerly Art. XIX (i) of the original IMF Articles of Agreement.

3. 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.45 Under the present arrangement each member is assigned a quota expressed in special drawing rights.46 Many of the rights and duties of membership under the Article 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

45 PRIVATE BUSINESS supra note 42, at 13.

46 Id. at 13.

47 J. GOLD, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL LAW: AN INTRODUCTION, at 22 (1965) [HEREIN AFT ER CITED AS INTERNATIONAL LAW].

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.42 (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."43 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 assume statistics or ... to prevent the illicit transfer of capital."44 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 abovementioned provision is "current international transactions." Article XXX (d)45 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;

41 See IMF ARTICLES OF AGREEMENT art. VIII, section 3(b) and XIV, section 2.

42 J. GOLD INTERNATIONAL MONETARY FUND AND PRIVATE BUSINESS TRANSACTIONS 7 (1965) [HEREINAFTER CITED AS PRIVATE BUSINESS].

43 Id. at 8.

44 This is formerly Art. XIX (i) of the original IMF Articles of Agreement.

3. 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.46 Under the present arrangement each member is assigned a quota expressed in special drawing rights.47 Many of the rights and duties of membership under the Article 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

45 PRIVATE BUSINESS supra note 42, at 13.

46 Id. at 13.

47 J. GOLD, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL LAW: AN INTRODUCTION, at 22 (1965) [HEREINAFTER CITED AS INTERNATIONAL LAW].

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), the Fund had interpreted the temporary character of its balance of payments financing scheme as not exceeding three to five years at the most.

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." 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." 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.

---


50 International Law, supra note 47, at 23.

51 Id.


53 Id.
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 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 increase the
Fund's holdings of the purchasing member's currency from 125 per cent of quota
to no more than 200 per cent 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

59 STAND-BY ARRANGEMENTS, supra note 54, at 13-14.
60 FINANCIAL ASSISTANCE, supra note 49, at 27
61 Id.
62 For a discussion of other facilities see id. at 29-37.
63 Id. at 27-29.
64 Id. at 27.
65 Id. at 28.
66 Id.
67 Id.
68 Id.
69 A more recent treatment of the SBA is found in J. GOLD, THE LEGAL CHARACTER OF THE
FUND'S STAND-BY ARRANGEMENTS AND WHY IT MATTERS (1980) [hereinafter cited as LEGAL
CHARACTER].
70 This is a new provision.
71 STAND-BY ARRANGEMENTS, supra note 54, at 29.
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 to 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 1/4 per cent per annum would be payable to the Fund at the time a stand-by arrangement is agreed. This charge 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 1/4 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 with generally (under Article XVI, Section 1(a)(i)) 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 circumstances:

... 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 be 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. (Iulics mine)75

The effect of this 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

---

72 Decision No. 102 (52/11), February 13, 1952 in Id.
73 Id. Appendix E.
74 Id. at 245-246.
75 Decision No. 270 (52/95), December 23, 1953 in id.
76 Id. at 29-30.
77 Id. at 30.
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, 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 objective, 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.  

Increased use of the stand-by arrangement during the seventies by the developing countries required further clarification of the Fund's policy if conditionality and the framework of the stand-by arrangement. The new guidelines on conditionality were approved by the Executive Board in its decision of March 2, 1979. 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 payments 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

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 it 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.

5. 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 tranche 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.

6. 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 member.

7. 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.

8. Paragraph 5 of the new guidelines reiterates paragraph 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. 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.” A letter of intent and the stand-by arrangement are drafted with the understanding that “the mission must refer them to headquarters.” 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. 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 the Executive Directors a memorandum con proposed stand-by arrangement and the letter of intent.

F. Sovereign-Debt Renegotiation Process

According to Gold, the uniqueness of the stand-by arrangement as a form

---

60 STAND-BY ARRANGEMENTS, supra note 54, at 40-44.
61 Id. at 41.
62 Id.
63 Id.
64 Id. at 43.
65 Id. at 36-40.
66 Id. at 37.
67 Id.
69 STAND-BY ARRANGEMENTS, supra note 54, at 39.
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." 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 trend and payments relations, and to provide for the renegotiation of supplier credits insured by the participating creditor governments. 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 help 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 a uniform process observed during the meeting with the debtor state. One writer explains that this non-legal approach reflects the creditor’s point of view that the debtor rescheduling is an extraordinary event justified only in 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.

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 the coup in the 1960's.

92 Rieffel, supra note 90 at 91-92.

Three underlying principles govern the financial relationship between the participating official creditors and the debtor states, and among the creditors themselves, whether participating or not. Firstly, there must be 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." 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." 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. Finally, the principle of burden-sharing engages creditors to "provide relief that is commensurate with their exposure in the debtor country." Excluded from the operation of this principle are the multilateral lending institutions such as the 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.

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. 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 policies under an IMF stand-by arrangement), and a closed meeting of delegates from the creditor governments. The whole exercise is usually concluded after two or three days.

Official creditors sign ad referendum an agreement known as the "Agreed Minute" 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 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." 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.

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 insists 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." 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. Future renegotiation of debt service payments have also been made conditional upon the continued eligibility of the debtor state to make

---

100 For a more detailed account of the proceedings in a Paris Club meeting, see id. at 97-99.
102 Bothe and Brink, Public Debt Restructuring, the Case of International Economic Cooperation, 7 GERMAN YEARBOOK OF INTERNATIONAL LAW 105 (1986).
104 Hawn, supra note 93, at 863-864 (n. 42).
105 See various Agreed Minutes, supra note 101.
purchases under the upper tranche conditionality of the Fund. 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. 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. 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." Subsequently, at a Conference 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. 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

---

106 Id.

107 This shall be discussed further in the next section.


1992 THE PHILIPPINES AND THE IMF

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 underpinning 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.\textsuperscript{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.\textsuperscript{112} In the latter case, the creditors recommended the following procedure: first, the developing country concerned would, before the problem had 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 efforts directed towards increasing the quantity of aid in appropriate forms and improving its quality. The developing country, for its part, would demonstrate its willingness to take corrective measures on its own behalf, in so far as it was able.\textsuperscript{113}

The developing countries submitted two proposals, one dealing with immediate and generalized debt relief,\textsuperscript{114} and another on the future debt reorganization.\textsuperscript{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

\textsuperscript{111} Debt Problems of Developing Countries, draft resolution of the Trade and Development # TDB/L.498, March 8, 1978.

\textsuperscript{112} This joint proposal of the European Economic Community and the United States was presented at the earlier Conference on International Economic Cooperation. See the annex to the Report of the Conference on International Economic Cooperation in Doc. No. A/31/476/Add.1.

\textsuperscript{113} Wasserman, supra note 110, at 77.

\textsuperscript{114} Id. at 78.

\textsuperscript{115} Id. at 79-80.

\textsuperscript{116} Id. at 80-81.

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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{116} Id. at 82.

\textsuperscript{117} Id. at 83.
framework consisting of the interest 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 measures;

(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 cooperation.\textsuperscript{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.\textsuperscript{119} After three plenary meetings the group produced an informal note which served as a provisional document but deemed as non-opinion in character.\textsuperscript{120} The work was endorsed by the Trade and Development Board in resolution 222 (XXI) of September 27, 1980.\textsuperscript{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.

\textsuperscript{118} UNCTAD Resolution 165 (S-IX), 11 March 1978, Debt and Development Problems of Developing Countries.


\textsuperscript{120} Id.

\textsuperscript{121} UNCTAD Resolutions and Decisions Supplement No. 1, September 1980.

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.\textsuperscript{122} The focus on the restoration of debt servicing capacity in the short term have failed to enhance the development prospects of the debtor states.\textsuperscript{123} 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.\textsuperscript{124}

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\textsuperscript{125} but the method adopted by the lenders was characteristically \textit{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 rescheduling and those which transpired in the latter part of the 1970s one writer observed that: "What distinguished the rescheduling of the 1970s, then was not so much their novelty as their scope. Instead of the relative handful of banks, often from a single country that one 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

\textsuperscript{122} U.N. Doc. No. TD/B/980, at 11.

\textsuperscript{123} U.N. Doc. No. TD/B/945.

\textsuperscript{124} U.N. Doc. No. TD/B/945 at 1.

\textsuperscript{125} See K.B. Dillon, G. Olveros, Recent Experience With Multilateral Official Debt Rescheduling 14-16 (1987).

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 the refinancing scheme

127 Id.


129 Huff, supra note 126, at 50.

130 Id. at 51.

121 Id.

132 Id. at 53-55.

133 See The introductory remarks by the Chairman during the 78th Annual Meeting of the American Society of International Law Proceedings, at 301 (1984) [hereinafter cited as A.S.I.L. Proc.].

134 Id. at 301-302.

1992

THE PHILIPPINES AND THE IMF

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 upon 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 stabilisation 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


136 Id. at 414.

conditions set forth in Clause 12), loans will be made to the Borrower at anytime and from time to time during the commitment periods... (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 such time and no Default has occurred and is continuing or would result from the proposed loan. (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. (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." One writer has expressed the view that the use of compliance with performance criteria under the IMF stand-by agreement as an express condition would have the effect of incorporating directly all of the performance criteria into the new money or restructuring Agreement.

Finally, Clause 16 on "Events of Default" induced the following

(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 ...

In a more recent development, commercial loan documentation has 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 bank 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:

(c) 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

138 Id. at 400.
139 Id. at 410.
140 Id. at 413.
141 ASIL Proc., supra note 133, at 312.
143 ARORA, supra note 137, at 416.
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 Principle (including, without limitation, each report specifically referred to in the fourth and penultimate paragraphs of Part 2 or 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:

(i) 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 service; or

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

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 arrangements there is 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, IMF cannot risk losing the confidence of its developing country members who have continually exerted their best efforts to respect the evolving renegotiation procedure.

G. A Call For Liberal Enforcement

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.

---

II. THE STATE OF NECESSITY AND THE HUMAN RIGHT TO DEVELOPMENT

A. Non-Compliance with the Stand-by Arrangement

1. GENERAL PRINCIPLES OF STATE RESPONSIBILITY

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 international 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 contemplate responsibility arising either from a breach of an international agreement or a violation of any other obligation under international law. 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.

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.\footnote{147}

2. CHARACTERIZATION OF THE STAND-BY ARRANGEMENT

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."\footnote{148}

Later, the IMF Executive Board in its decision dated March 2, 1979 made further 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."\footnote{149}

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 rebuttable."\footnote{150} However, he admitted that the case of a stand-by arrangement "is not so simple."\footnote{151} His arguments proceeded as follows:

\footnote{147} 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 181-82 (1973) [hereinafter YILC].

\footnote{148} See supra note 78.

\footnote{149} See supra note 79.

\footnote{150} Fawcett, The Place of Law in an International Organization 36 BRITISH YEARBOOK OF INTERNATIONAL LAW 339 (1960) [hereinafter cited as The Place of Law].

\footnote{151} Id.

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 of 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 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.\footnote{152} (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 in calculable 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, intent to establish legal relations."\footnote{153}

On the other hand, a contrary view has been repeatedly asserted by Gold even before the Executive Board's decision in 1968 and 1979. He argues that it is a familiar doctrine that when parties have reached common understandings, the answer to the questions 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.

\footnote{152} Id. at 339-340.

\footnote{153} Fawcett, The IMF and International Law, 40 BRITISH YEARBOOK OF INTERNATIONAL LAW 70-71 (1964) [hereinafter cited as IMF]
and in detail and yet may not amount to an agreement.\textsuperscript{154}

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.\textsuperscript{155}

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 effectiveness 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 that general international law, whether the law peculiar to an organization, the national 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.\textsuperscript{156}

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).”\textsuperscript{157}

\textsuperscript{154} See supra note 69, at 4-5.

\textsuperscript{155} Id. at 6.

\textsuperscript{156} 2 Y.I.L.C. at 13 (1982).

\textsuperscript{157} Id.

There is evidence to show in the light of Fund practice that specific legal order applies to stand-by arrangements often concluded between the Fund and its member-states.\textsuperscript{158} 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.\textsuperscript{159}

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.\textsuperscript{160}(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.\textsuperscript{161}(Italics mine)

In this regard, it is relevant to raise the existence under the IMF Articles of

\textsuperscript{158} White, Legal Consequences of Wrongful Acts in International Economic Relations, 16 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 137 (1985).

\textsuperscript{159} Id. at 145.

\textsuperscript{160} 2 Y.I.L.C. at 78.

\textsuperscript{161} Id. at 80.
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."162

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.153 (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."164 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."165 And it is recognized that this legal principle is an integral part of the nunc pacta sunt servanda.166 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

162 LEGAL CHARACTER, supra note 69, at 4.
163 Id. at 23.
164 Id.
165 HENKIN, supra, note 145, at 615.
166 Id.
168 White, supra note 158, at 150.
169 Id., citing Gold.
170 Bothe, supra note 167, at 83.
commercial bank restructuring agreements, does not apply. Instead, the official
and private creditors must rely on the separate subsystem or leges specialles which
lay 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.

3. 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 been shown previously 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 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". 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 out 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 deeming 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.

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

171 J. GOLD, ORDER IN INTERNATIONAL FINANCE: THE PROMOTION OF INTERNATIONAL
MONETARY FUND STAND-BY ARRANGEMENT AND THE DRAFTING OF PRIVATE LOAN AGREEMENTS
18 (1983) [hereinafter cited as ORDER].

172 Id.

173 Id. at 19.

174 Id. at 21.

175 Id. at 23.

176 Id.

177 There are two versions of this paragraph.

178 ORDER, supra note 171, at 25.

179 Horn, The Restructuring of International Loans and the International Debt Crisis, INT'L.
Standard loan agreements and rescheduling agreements can accommodate this suggestion through the application of materiality tests. 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 which 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.

B. 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 ..." 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." 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...)

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 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


197. Art. 1, par. (iv), IMF Articles of Agreement.

198. See the previous discussion.

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 provides 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.

C. The Principle of the State of Necessity

1. DISTINGUISHED FROM OTHER CIRCUMSTANCES

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 preeminent 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.\(^{185}\)

In its commentary, the ILC distinguished this legal concept from the other circumstances precluding 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-defense (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."\(^{186}\)

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,"\(^{187}\) that the invoking state "must have been induced by an external factor to adopt conduct not in conformity with the international obligation."\(^{188}\) But the ILC notes in contrast to force majeure and fortuitous events that "in the case of a state of necessity 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 the international obligation."\(^{189}\)

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 person acting on behalf of a state and those entrusted to his care may adopt a conduct that leaves the impression of an intentional and an entirely free

\(^{184}\) BROWN, supra note 146, at 262.

\(^{185}\) The preliminary discussions on this article may be found in 2 Y.I.L.C., at 14-51 (1980).

\(^{186}\) 2 Y.I.L.C. at 34 (1980).

\(^{187}\) Id.

\(^{188}\) Id.

\(^{189}\) Id.
act, although in reality "the choice is not a 'real choice.'" But the state of necessity is evidently distinguishable in that...the situation of extreme peril alleged by the state consists not in the 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.

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." It appears, however, that this notion, which gave the 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. Lauterpacht rejected outright the traditional concept arguing that "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." 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 super right." 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.

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. Furthermore, the invoking state is legally justified to voluntarily adopt a measure contrary to its international obligation in order to protect an essential interest.

2. CURRENT RELEVANCE OF INTERNATIONAL JURISPRUDENCE

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 existence of the state"; (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"; (c) "the state claiming the benefit of the existence of necessity must not itself have provoked, either deliberately or by negligence, the occurrence of the state of necessity"; and (d) "the interest sacrificed to the need of assuring the otherwise impossible defence of an 'essential' interest of the state must itself be

---

193 Barboza, Necessity (revised) in International Law, ESSAYS IN INTERNATIONAL LAW IN HONOR OF MANFRED LACHS 28 (1984).

194 Id.

195 Cited in Id.

196 Id. Barboza comments on Judge Ago’s reports are 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 right of 'self-preservation.' Obviously, the other subjective right was to be sacrificed to it.

197 Id. at 41.


199 Id.

200 Id. at 50.
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 upheavals 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 state 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...

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.

201 Id.


D. Legislation for Limiting External Debt Service

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. 5365, entitled "An Act Establishing Limits of Foreign Debt Service Payments and, Under Certain Conditions, Net Resource Outflow therefore Amending for The Purpose Republic Act Number Forty-Eight Hundred Sixty, As Amended, and For Other Purposes", 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 per cent (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 per cent (20%) of the foreign exchange receipts from exports of goods.

The abovementioned twenty per cent (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 per cent (20%) of 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 the Congress a program for attaining the said twenty per cent (20%) debt service ceiling during the economic recovery period: Provided, further, That whenever applicable the excess over the said twenty per cent (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 the Congress. Such report shall contain the details thereof including the specific purpose, credit terms and the loan 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 benefitted 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 Belgique 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 debts to grants;

(b) Negotiate a Debt-for-Bond Swap;

(c) Limit interest payments to only five per cent (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.

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." 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." These points raised by the ILC are relevant particularly to the situation of the 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." 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." 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

---


207 Id.

208 IMF Articles of Agreement, art. V., sec. 5.

209 Taken from the amendment to section 5 of the Philippine Senate Bill.
circumstances of members, including the causes of their balance of payment
problems.\footnote{Paragraph 4 of the Executive Board Decision of 2 March, 1979.} 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 of medium term should facilitate and not obstruct a member's economic priority of development in the longer run and longer term investments"\footnote{J. GOLD, CONDITIONALITY, 23 (1979) [hereinafter cited as CONDITIONALITY].} and that "in making its resources available the Fund cannot underwrite a particular level of growth for its members."

Reiterating this latter point, Mr. Je De Losariere had also declined 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."\footnote{IMF SUMMARY PROCEEDINGS 24-25 (1986).} This writer submits that the conduct of the Philippine government is a lawful expression of its desire 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.

\section*{E. International Responsibility of the IMF}

\subsection*{1. THE PRESSING PROBLEM}

When credit agencies consider the situation solely from the economic and monetary angle, they often impose on the other 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.

\ldots Economic structures and financial mechanism are at the service of the human persons and not vice-versa.\footnote{Pontificial Commission "Justitia Et Pax," AT THE SERVICE OF THE HUMAN COMMUNITY: AN ETHICAL APPROACH TO THE INTERNATIONAL DEBT QUESTION 4-5 (1986).}

Roger Card Echagaray (President
Pontificial Commission, "Justitia 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 functions 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 states. Most developing country members of the IMF now question, for example, some of the economic adjustments 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.

\section*{2. PRINCIPLE OF FUNCTIONAL LIMITATION}

In defining the scope of the Draft Articles on State Responsibility, the ILC expressed the view that "it does not undate the importance of studying questions relating to the responsibility of subjects other than States."\footnote{2 Y.I.L.C., 169 (1973).} 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, 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 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 superstate', 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.

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

---


214 Id. at 179.

215 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," and will "depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." 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 parties, that the constitutional texts may afford no guidance to the problems raised. The problems are either choice of law problems or jurisdictional problems.

In the case of the IMF, attribution of responsibility for international acts affecting human rights in its member states must be qualified to certain more on the question of "responsibility for [technical and economic] advice given, even though the action is taken by the state."
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 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.220

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)."221 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 19 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.222

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."223 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."224 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 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

222 Id.

223 Id.

224 Compare this with the mandatory language of art.IV, section 3(b) of the Second Amendment of the Articles of Agreement.
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 transaction would be inconsistent with the last sentence of Article I.225

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 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.226 (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 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 unfavorable 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

225 THE RULE OF LAW, supra note 16, at 60.

226 Id. at 62.

States, actually resides with the IMF.227

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 the 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 as 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".

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 has 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 Générale de Droit International dated April 1907, Senor Drago argued as follows:

Sovereignty is a historic fact and may 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 ....228 (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.

228 Williams, State Loans in Their Relation to International Policy, 1 A.J.I.L. 700 (1907).

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.229 According to them, the promotion of human rights can only receive an 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 preoccupations 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. 230

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. 231 By 1969, the Algerian Commission on Justice and Peace report had invoked the "right of underdeveloped peoples to development". 232 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. 233 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 argues, 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 ...

---


233 Id.

---

1992

THE PHILIPPINES AND THE IMF

... 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. 234 (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. 235 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) 236 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 .... 237

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:

---


236 UNITED NATIONS COMMISSION ON HUMAN RIGHTS RES 14 (XXXIII), para. 4.

237 BENEDECK, supra note 231, at 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/110/34, 2 January 1979 [hereinafter cited as Report of the Sec. Gen.].
We have noted the proposed study to be undertaken by the Secretary-general in co-operation with the 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.  

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 ... (it) 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 fulfillment of those needs and the enjoyment of other human rights are intimately linked.  

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" 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 ..." 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

---

239 Id. at 4-5.
242 Id. at 7-8.
243 UNCHR Res. 5 (XXXV) 11 March 1981.
244 De Mesdag 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 favor tabled a declaration emphasizing the need to define the substance of the right to development. See De Mesdag, supra note 233, at 149.
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 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.266

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 1986.247 The pertinent portions of the Declaration read as follows:

6.1. The right 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 cooperation 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 recognized human rights and of the principles of public international law concerning friendly relations and cooperation 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.

F. The UN Declaration on the Right To Development

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 development248 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 pace 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.

247 Kunigs The Inner Dimension, LAW AND STATE 3-6 (n. 2) (1979).
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."250 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.251 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 legal value or consequence.

In the South West Africa, Voting Procedure Case,252 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

---

250 H. KINDRED, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 201 (1978).


1992 THE PHILIPPINES AND THE IMF 95

recommendation, is bound to give it due consideration in good faith.253

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.254 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 Secretary 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.255 (Italics mine)

Later, in the Western Sahara Case,256 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"257 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".258 Some elements

253 Id. at 118-119.


255 Id., Paragraph 114 is also cited in KINDRED, supra note 238, at 65.

256 Namibia Case, supra note 252, at 31.

257 Western Sahara Case, supra note 254, at 12.
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."

Finally, the Court in recognizing the non-use of force as a principle of customary international law in the Case Concerning Military and Paramilitary Activities in and against Nicaragua reasoned in the following manner:

The Court has however to be satisfied that there exists in customary international law an opinion juris as to the binding character of such abstention (from the use of force). This opinion 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 consent to the text of such resolutions can not be understood as merely that of a "renunciation 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 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.

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.

258 Id.


260 Id. at 99-100.

261 Sloan, General Assembly Resolutions Revisited (Forty Years After), 58 B.Y.L.L. 139 (1987).

262 Id. at 138.

263 Id. at 139.

264 Id. at 140.

265 CHANGE AND STABILITY IN INTERNATIONAL LAWMAKING 48 (A. Cassese & Weiler eds. 1988).
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." 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... (italics mine)

Finally, there is an emerging consensus among international legal scholars today as regards the relevance of the concept of "soft law" 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 behavior in relation to trade, finance, transnational corporations' activities and other economic matters. Commenting on this recent phenomenon, Professor Brownlee 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 behavior 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.

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.

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." But he emphasized that "the adoption of the Declaration opened a new era with regard to the right to

266 Id. at 49.
267 Id.
269 CASSESE, supra note 244.
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." 260 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. 261 (italics mine)

Finally, there is an emerging consensus among international legal scholars today as regards the relevance of the concept of "soft law" 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 behavior 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, which may not be law as such, obviously have significance in terms of political behavior 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. 262 (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 other developed States must be closely examined in connection with the

260  Id. at 49.
261  Id.
263  CASSESE, supra note 244.

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. 270

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." But he emphasized that "the adoption of the Declaration opened a new era with regard to the right to

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." 266 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... 267 (Italics mine)

Finally, there is an emerging consensus among international legal scholars today as regards the relevance of the concept of "soft law" 268 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 behavior 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 behavior 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. 269 (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. 270

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." 271 But he emphasized that "the adoption of the Declaration opened a new era with regard to the right to

266 Id. at 49.
267 Id.
269 Cassesse, supra note 244.
development, in which the principal task of the international community was to find ways and means to promote that right.  

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. 272 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. 273 (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 favorable climate for the demands of the developing countries at international conference and... multilateral negotiations." 275 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." 276 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 the 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. 277

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.

3. THE RIGHT TO DEVELOPMENT AND THE SBA

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.


Negotiation of stand-by arrangements is often governed by a code of

---

272 Id. at 4.


274 Id.

275 Id.

276 Id. at 49.

277 Id. at 49.
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-constructive. A staunch critic of this policy argues that the existing norm of conduct involving "farther-reaching general interests" amounts to an "infringement of parliamentary prerogative," which ultimately undermines the "will of the electorate." Although the present writer generally agrees with the interpretation advanced by Sir Joseph Gold in regard to the Fund's characterization of the 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 license 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.

278  KNEIPER, supra note 226, at 48.

279  Id. at 50.

280  Id.

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..." 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. 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." 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

281  De Mestdagh, supra note 233, at 170-171.

282  Id. at 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.

policies under IMF surveillance, on the other hand, 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. 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, such reasons may not be truly 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 programs which the government can use at its discretion to promote fuller understanding." 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 (NGO's) 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.

---


286 Id. at 990.

1992

THE PHILIPPINES AND THE IMF

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 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.

b. Substantive Aspect: Entitlement Of The Poor To The Satisfaction Of Their Basic Human Needs

Several commentators 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." 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:


288 Sachs, supra note 183, at 990.
policies under IMF surveillance, on the other hand, 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. 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". 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 (NGO's) which would have direct linkages with the poor in most debtor States. On this subject, the following provisions in Article XII 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.

---


286 Id. at 990.

---

1992 THE PHILIPPINES AND THE IMF

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 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.

b. Substantive Aspect: Entitlement Of The Poor To The Satisfaction Of Their Basic Human Needs

Several commentators 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." 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:


288 Sachs, supra note 183, at 990.
...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 or 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. 290

In an exclusive study, 290 some Fund members themselves 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." They also emphasized the need "to improve the efficiency of design of Fund-supported programs and to minimize the economic and human cost of adjustment". 292 This expression of genuine concern, in the writer's mind, constitutes a significant step away from the "restrictive approach to economic law" 293 which has often been the object of criticisms against the controlling members of the IMF. Even more encouraging in this regard are Mr. Camdessus' well-received convictions that


291 Id. at 1.

292 Id.


1992

The Philippines and the IMF

...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, 294 and a summary of the IMF Board's discussion of a joint Fund-World Bank report on poverty issues in economic adjustment states 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. 295

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 succinctly 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 contest 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. 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”.297

To 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 serviced availed of by core poverty groups. It appears from the IMF study that many programs already exempt these goods.298 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"299 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.” 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 equality, equality, and fair play.” 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 cooperate with each other in ensuring development and eliminating obstacles to development. States should fulfill their rights and duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation 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

296 Id. at 37.


298 Heller, supra note 289, at 34.

299 Id. at 32.


301 Id. at 97.
financing facility, designed to stabilize export earnings and the cost of cereal imports, with a contingency element to protect adjustment programs from external shocks.\textsuperscript{302}

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."\textsuperscript{303} More recently, in May 1989, the Fund adopted some "broad guidelines" for its support for debt reduction operations.\textsuperscript{304} 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 buy backs or exchanges... normally... around 25 percent" up to 40 percent of the member's quota could be used for interest support... under certain circumstances.\textsuperscript{305} 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.\textsuperscript{306}

Finally, the loosening of a Board's policy on stand-by arrangement financing assures 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.\textsuperscript{307} 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."\textsuperscript{308} 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."\textsuperscript{309}

Substantive changes in IMF policy over the negotiation of stand-by arrangements have added a new dimension to the institution's practices. 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.

CONCLUSION

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 arrangements and policies among member states, and, eventually, ensuring the growth of world trade. In assisting member states to 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

\textsuperscript{302} IMF 1989 Annual Report 30.

\textsuperscript{303} Id.

\textsuperscript{304} Id. at 25.

\textsuperscript{305} Id.

\textsuperscript{306} Id.

\textsuperscript{307} Id. at 26.