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# The Evolving and Challenging Roles of Certain International Financial Institutions in Developing Countries Under International Law with Particular Reference to Nigeria, South Korea, and Brazil

Sunday C. Ogbodo
*Golden Gate University School of Law*

# THE EVOLVING AND CHALLENGING ROLES OF CERTAIN INTERNATIONAL FINANCIAL INSTITUTIONS IN DEVELOPING COUNTRIES UNDER INTERNATIONAL LAW WITH PARTICULAR REFERENCE TO NIGERIA, SOUTH KOREA, AND BRAZIL

BY

SUNDAY C. OGBODO

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Submitted to the Dissertation Committee Members made up of:

PROFESSOR (DR) CHRISTIAN N. OKEKE
PROFESSOR (DR) SOMPONG SUCHARITKUL
PROFESSOR (DR) NDIVA KOFELE-KALE

GOLDEN GATE UNIVERSITY
SCHOOL OF LAW
CENTER FOR ADVANCED INTERNATIONAL LEGAL STUDIES
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To Sunday N. Ogbodo Sr., my late father, and Bridget N. Ogbodo, my mother, for everything

And to Zubbie Okoye and Charles Igboji, friends who died in their quests to better their lives in America

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# PREFACE

The twenty first (21st) century has begun as a more challenging century than the international community has ever imagined or experienced. From the positive impact of the World Wide Web (www) and the internet, the international community is experiencing first hand the fabled global village. Further, with the realization of the decades-long dream for a united Europe in the European Union, and the consequential implications on trade, labor, education, environment, etc., the new century has become a very unique one.

On the negative side, however, the new century has also begun with unprecedented global health challenges, particularly, the AIDS/HIV scourge which is spreading the globe like wild fire. The threat of global terrorism has equally contributed in making the world more insecure than during the Cold War era. Peace in the Middle East has continued to elude both the affected region and the world. Thus, the once clearly identifiable hot spots of the world have multiplied to the point that it appears that no part of the world is immune to threats of violence or war.

It is against this background that the topic of this work was chosen as follows: *"The Evolving and Challenging Roles of Certain International Financial Institutions in Developing Countries under International Law with particular reference to Nigeria, South Korea, and Brazil."* The goal is to examine how these IFIs have been impacted by these global challenges that were not in contemplation when the IFIs were created. We shall also analyze how the constituent instruments that created these IFIs equipped or prepared them to combat these global challenges. Further, we shall critically examine the fate of the developing countries under the circumstance, using the selected countries of Nigeria, the Republic of Korea and Brazil as our practical samples.

It is no secret that the developing countries and their fragile economies have been struggling all the way from the twentieth ($20^{th}$) century into the twenty first ($21^{st}$) century. It is equally known that the roles of the IFIs have been evolving partly as a result of their internal developments, and partly as a result of external developments occurring in the international environment that they operate in. It is the realization of the foregoing, and with hopes of finding ways that the IFIs can positively impact the developing countries in their quest for sustained development, that this research is anchored.

This research, therefore, aims to accomplish the following: (1) argue that the roles of the IFIs as conceived by their founding fathers were limited to Euro-American interests; and (2) in light of the developments both within these IFIs and in the international community, these roles have been greatly impacted, (3) that given the precarious nature of the economies of the developing countries, the IFIs must take due cognizance of that in formulating policies and practices that impact these economies, and (4) that failure to show sensitivity to the economies of the developing countries will result in catastrophic consequences for both the developing countries and the international community.

The limitation placed on this work can not permit one to claim to have exhausted all the ingredients of this novel topic. My hope is that this will signal the beginning of further and more robust exploration of this area of international law. Hopefully, we have begun a crusade that will attract more positive attention of the IFIs to the precarious state of the economies of the developing countries. If that is all we have accomplished here, we shall have made a very good effort.

*Sacramento, April 2007* S.C. OGBODO

# ACKNOWLEDGEMENTS

Although I have labored alone in the actual research and writing of this work, I can not, in good conscience, claim that I could have done it by myself. Some people contributed immensely to the successful completion of this work. First, I recognize and appreciate the members of my dissertation committee in the persons of Professor (Dr.) Christian N. Okeke, Distinguished Professor (Dr.) Sompong Sucharitkul, and Professor (Dr.) Ndiva Kofele-Kale. Professors Okeke and Sucharitkul are of the Law School of Golden Gate University, San Francisco, while Professor Kofele-Kale is of the Law School of Southern Methodist University, Dallas, Texas. In the course of this work and in my interaction with the three gentlemen, I have imbibed not just advanced legal reasoning and writing skills, but the richness of their combined jurisprudential backgrounds. I shall forever remain indebted to them. I appreciate, particularly, the countless hours that Professor Okeke spent with me in the course of this work.

I also recognize and appreciate the prayers and support from friends and family during the course of this work, without which I may have lacked the emotional balance to complete the project. I am equally grateful to each and every one of them.

Finally, I thank God who makes all things possible. Although all the academic responsibilities for this work rests with me, yet, I feel confident to give God all the glory that may come with the completion of this work.

# CHAPTER ONE

# THEORETICAL EXAMINATION OF INTERNATIONAL FINANCIAL INSTITUTIONS

## I INTRODUCTION

In order to better appreciate the relationship between international law and the international financial institutions (IFIs), it is pertinent to make some critical distinctions or clarifications. The first is that the IFIs comprise of two major components: the international organizations1 and the international monetary system2. Second, is an appreciation of the origin of both the international organizations and the international monetary system as products of multilateral treaties of sovereign states. Third, is to make a clarification of

1. International organizations in this context refer only to the organizations whose membership comprise of governments or other governmental agencies or organs.
2. International monetary system in this context will permit all organizations, institutions, and agencies that deal primarily with fiscal and monetary policies, whether solely owned by governments or in partnership with private investors.

the fact that the Bretton Woods institutions3 are not the only ones envisaged in this research4, rather; they form an integral and very important component of the entire International Financial Institutions that we plan to cover. Fourth, is to address the question of whether or not the IFIs come under the regulation of international law and the implications of such regulation.

While the use of the words, "international monetary system," may not create illusions in appreciation and understanding, the use of the words, "international organizations" cause some conceptual confusion. Why? Because a lot of people confuse international organizations5 with non-governmental organizations, otherwise popularly called NGOs.6 Such groups that are called NGOs are outside the purview of our research because they are principally comprised of individual or private membership. Further, most of

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3 The Bretton Woods institutions are those that were created at the conclusion of the United Nations conference that held in Bretton Woods, New Hampshire, in the United States of America in 1944. The conference gave birth to the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD). Although the conference had set out to establish a tripartite organization called the International Trade Organization (ITO), the failure of the ITO gave birth to the General Agreement on Tariffs and Trade (GATT).

4 Other institutions envisaged in this research are those that were created outside the Bretton Woods conference, which nonetheless, play very critical and important financial and monetary roles in the affairs of the developing countries. For example, the World Trade Organization (WTO), the European Union, the Paris Club and the London Club.

5. Supra, note 3.

6 Non-governmental organizations (NGOS) are comprised of individual members who come together to form such a group in pursuance of a common public goal or objective. Many of such groups abound all over, for example,

them focus on causes that are limited to their community or state or country such that they lack the spread and impact of theinternational organization s. Consequently, our research will focus mainly on those two major groups that comprise the international financial institutions (IFIs) – international organizations and the international monetary system. In light of the foregoing, we shall attempt to define and elaborate on the legal meaning of the key components of this work by first striving to analyze the theoretical definition of international law.

## II INTERNATIONAL LAW

International law is the branch of the law that confers rights and demands obligations from subjects in international relationships.7 Subjects of international law, indeed, like subjects of any given legal order, implies such entities that the norms of the legal order in question apply to, as well as the

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Mothers Against Drunk Driving (MADD), Africa Health Organization (AHO), American Association of Retired Persons (AARP), etc.

7 Okeke, C.N., The Expansion of New Subjects of Contemporary International Law Through Their Treaty-Making

regulation of their conduct, by the imposition of duties and conferment of rights.8

Theoretically, international law has been broken into two main components as follows: international private law and the international public law. International private law involves international relationship between individuals while international public law, on the contrary, involves international relationship between states, public agencies or organizations. For the purposes of our inquiry, we shall be limiting our focus on international public law because of the states, international public agencies and organizations subject of our review.

Although international law dominates almost every aspect of our existence, particularly, in the new 'global village' that the world has developed into, yet, questions still arise whether international law is a true law. Apparently, the unique features of international law lend credence to the debate as to the authenticity of international law in the comity of laws. Some of the peculiar

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Capacity, 1973.
8 Ibid, p. 181

characteristics of international law include the following9:

1. There is no single legislative source of international law. All countries of the world and the international organizations are empowered to enact international laws.10
2. There is no world court that is exclusively empowered to interpret international laws. There are many courts and tribunals that are empowered to hear and interpret international law if the parties bring their cases before the courts.11
3. There is also no world executive branch that is empowered to enforce international laws. Consequently, states and organizations may or may not respect international legal obligations.12

Another point that must be addressed here, not so much in justification of the authenticity of international law as much as in thedetermination of the status of the IFIs under international law, is to review the sources of international law. The sources of international law form the basis for the

9 Cheeseman, H.R., Contemporary Business Law, 3rd ed, 2000, p. 165
10 Ibid
11 Ibid
12 Ibid

adjudication of international disputes by international courts.13 According to Article 38(1) of the Statute of the International Court of Justice14, there are four major sources of international law as follows15:

1. Treaties and conventions –

Treaties and conventions are synonymous with legislations made by sovereign states at the international level. Treaties are agreements or contracts entered into between two or more states by the authorized representatives of the states and duly ratified by the heads of government of the respective states. While bilateral treaties are made between two states; multilateral treaties are made among more than two states. Conventions, on the contrary, although enjoying the same prestige as treaties, are entered into by duly authorized representatives of international organizations16.

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13 Ibid

14 Otherwise called the ICJ Statute

15 It is noteworthy that most courts rely on the hierarchy of the sources in their application and authority. Consequently, most courts will apply and accord more authority to treaties and conventions before they apply any other source on the list.

16 Some examples of the conventions include the United Nations Convention against Corruption (signing began in 2003), the United Nations Convention of the Carriage of Goods by Sea, the United Nations Convention on Contracts for the International Sale of Goods, the United Nations Convention on the International Sale of Goods, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, etc.

2. Custom –

Custom is the general pattern of relationship between two or more states over a reasonably long period of time, which has become obligatory in such a relationship. In order for a practice to become a binding custom in international law, it must enjoy two critical qualities as follows17:

(a) It must be a consistent and recurring practice over a reasonably long period of time.18

(b) It must be a binding practice, not one done out of courtesy.19

Such practice can be found in official government statements, diplomatic correspondences, policy statements, press releases, speeches, and other government sources. Since international customs, like domestic customs, are constantly evolving, such established and internationally recognized customs generally result in formal treaties between or among such states.20

3. General principles of law –

The international courts may also refer to the general principles of law

17 Cheeseman, H.R., supra, p. 166
18 Ibid
19 Ibid

applicable to civilized nations21. Such laws are typically laws applicable to the disputing nations which may be traced to their constitutions, statutes, regulations, common law, or other sources of law.22

4. Judicial decisions and teachings.

Although international courts emphasize the point that they are not bound like the national courts by the doctrine of *stare decisis,23* they nevertheless, refer to their past decisions for guidance. Also, the courts refer to the teachings and writings of the most qualified legal scholars of the states in dispute for guidance and direction.24

A variety of courts have jurisdiction to decide cases arising from international law. Such courts are generally called the international courts. The most notable are the following courts:

1. The International Court of Justice (ICJ) –

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20 Ibid

21 This qualification that the general principles of law must meet the acceptance or recognition of 'civilized nations', have raised intellectual dust as to whose standard of civilization was intended by the drafters of the statute. Certainly, the word 'civilized' is very subjective and depends a lot on the perspective of the party applying the standard. No doubt, what an African considers 'civilized' varies to a great extent from what an American considers 'civilized'. Ditto for South Koreans and Brazilians.

22 Cheeseman, H.R., supra, p. 167

23 This principle encourages national courts to attempt as much as judicially feasible to follow their past rulings and decisions in order to promote judicial harmony and stability. However, international courts make a strong effort to assert that they are not guided by the principle even when they refer to their own past decisions.

24 Cheeseman, H.R., supra, p. 167.

The ICJ is popularly called the World Court25. It is located in The Hague in Netherlands and serves as the principal judicial organ of the United Nations. Only nations or sovereign states may bring suit before the ICJ arising from bilateral or multilateral relationships26, and the court may be requested by the General Assembly, the Security Council27 or other organs and specialized agencies28 of the United Nations to give an advisory opinion on any legal question. The court is composd of 15 judges with nine-year tenures, and not more than two judges may be appointed from the same country.

The ICJ's jurisdiction is, however, limited by the following factors:

(a) nations must voluntarily agree to allow the court to hear a case29, and

(b) nations are not bound by a decision of the ICJ.30

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25 See the UN Charter of 1945, supra. Chapter XIV of the UN Charter created The International Court of Justice (ICJ), and designated the court as "the principal judicial organ of the United Nations." The Court was empowered to "function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice" and forms an integral part of the Charter. (Article 92)

26 Article 93 (1) provides that all Members of the United Nations are *ipso facto* parties to the Statute of the ICJ. Article 93 (2) provides, however, that a state which is not a Member of the United Nations may become a party to the Statute of the ICJ if they meet certain conditions set by the General Assembly upon the recommendation of the Security Council.

27 Article 96 (1) of the UN Charter, supra.

28 Article 96 (2) of the UN Charter, supra.

29 Article 94 (1) of the UN Charter, supra.

30 Article 94 (2) of the UN Charter, supra.

The ICJ may resolve a case by awarding monetary damages to the successful party or injunctive relief to the aggrieved party. It may also authorize the Security Council to take further action.31

2. The European Court of Justice –

The ECJ is the judicial branch of the European Union. It is located in Luxembourg and has jurisdiction to enforce European Union law. The court is composed of judges appointed to represent each member of the EU, and they serve a six-year tenure. Although the ECJ lacks the enforcement capability, it relies upon the national courts for the enforcement of its decisions.

3. Other International Courts –

Other international courts have been created by other treaties32 to adjudicate the disputes that are bound to arise from the application and interpretation of the treaty in question.

4. National Courts –

The national courts of member states form the bulk of the international court

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31 Ibid

32 See for example, the courts created by the treaties that created the regional organizations like Andean Common Market (ANCOM), The Economic Community of West African States (ECOWAS), Central American Common

system because they adjudicate the majority of cases arising from international law. They also possess the enforcement machinery to ensure that the decision of the court is obeyed. While some countries have designated courts for international disputes, others channel such cases through their regular court system.33

## III INTERNATIONAL ORGANIZATIONS

International organizations are those whose membership consists of sovereign governments that come together in pursuance of mutual benefits based upon multilateral cooperation.34 As we stated earlier, such organizations are formed by the instrumentality of a multilateral treaty signed by a group of countries. International organizations, therefore, derive their legitimacy from the most important source of international law – treaty. A typical example and the most important of all international organizations is

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Market, etc.

33 In the United States, for example, commercial disputes between U.S. companies and foreign governments or parties may be brought in the federal court under the Alien Tort Statute (28 U.S.C., 1350). The statute permits a noncitizen to sue another noncitizen in federal district court if the breach outside the U.S. was in violation of a U.S. treaty or the law of nations.

34 Supra, note 3.

the United Nations35 which was created by a multilateral treaty signed on October 24, 1945.

The origin of modern 'universal' international organization can be traced to the Versailles Treaty of 1919 at the end of World War I. The treaty gave birth to the League of Nations and the International Labor Organization36. However, the League failed to live up to its mandate by its failure to prevent such peace-threatening actions of some of the members. For example, the League could not avert the invasion of China by Japan in 1931, or the invasion of Finland by the Soviet Union which resulted in the expulsion of the Soviet Union from the League in 1939. The continued aggression of Germany at the time could not be contained under the machinery of the League which ultimately resulted in the outbreak of World War II (1939-1945). After World War II, the leaders of the victorious Allied Powers decided to form a new organization to replace the League of Nations, thus, the United Nations was formed.37

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35 The United Nations Charter came into force on October 24, 1945.
36 The Versailles Peace Treaty was signed in 1919 after the end of World War I (1914 – 1918). The objective of the Treaty was to establish a multilateral organization that will maintain international peace and security, thus, the League of Nations was established in 1920. However, the League failed to live up to the task due to the non-participation of the United States and the expulsion of the Soviet Union.
37 Note 34, supra

The importance of these international organizations, like the United Nations, cannot be over-emphasized in the orderly and peaceful relationship of the world and in the management of international business38. Given the tremendous changes that the world is constantly faced with, particularly, in the twenty-first (21st) century, the need for a more orderly world becomes more paramount. The concept of globalization39 has, indeed, reduced the world to a global village. As the world continues to be more interconnected, the physical barriers that separated one part of the world from another are dismantled. As labor, goods, services, information, technology, etc., are transported from one part of the world to another, so are drugs, crimes, diseases, terrorism40, etc.

Consequently, these institutions have grown to supplement some of the functions of national governments. They serve as sources of information or

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38 It is important to note that within the UN alone, there are 28 major organizations whose functions facilitate international exchange of goods, services, money, and information. Former UN Secretary-General Kofi Annan called these organizations "soft infrastructure" for international trade.

39 Our focus will be limited to economic globalization although there are other dimensions of globalization that includes technological, political, cultural, environmental, etc. Economic globalization has been defined as the international integration of goods, technology, labor, and capital; that is, firms implement global strategies that link and coordinate their international activities on a worldwide basis. See Mathew J. Slaughter and Phillip Swagel, *Does Globalization Lower Wages and Export Jobs?* (Washington, DC; IMF, 1997), p.1, cited in Donald A. Ball, et al, International Business: The Challenge of Global Competition, 10th ed, 2006.

40 Although there have been previous acts of international terrorism that affected different parts of the world with varying number of casualties, the September 11, 2001 attacks on the United States gave a new meaning to terrorism when the US President, George W. Bush, declared a war on terrorism. Pursuant to the war on terrorism, the US has

sources of financing41. They also serve as a source of regulation or a source of jobs42. Increasingly, they provide many services on behalf of the member states that mutually benefit the members as well as non-members.43 The size and influence of these organizations differ, as well as the areas of their operations44. While some are better known due to their political and economic impact on the international arena, others are more confined to specific and limited geographical areas.45

Regardless, these organizations qualify to be called 'international' because they meet the criteria of being comprised of two or more States in their membership. They also qualify to be called 'organizations,' because they meet the criteria of having specific and general goals and objectives. Some of the well-known ones include the United Nations and its predecessor, the League of Nations, the European Union (EU), the International Labor

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invaded Afghanistan and Iraq.

41 For example, see the UN Commission on International Trade Law which sets conditions and protocols for international transactions.

42 The International Civil Aviation Organization coordinates all international agreements regulating the smooth operation of commercial airlines across the globe. The World Health Organization coordinates the standardization of pharmaceutical quality and the names of drugs, while the Protocols of the universal Postal Union coordinate the smooth movement of all postal materials across the globe. See www.un.org/partners/business/index.asp last visited February 9, 2007.

43 Ibid

44 Ibid

45 The wide popularity enjoyed by the World Health Organization cannot be attributed to the International Telecommunication Union which coordinates and allots air wave frequencies to international operators. Although

Organization (ILO), the World Health Organization (WHO), etc.

## IV INTERNATIONAL MONETARY SYSTEM

The international monetary system, on the other hand, is a group of organizations that deal specifically with monetary and fiscal policy formulation and enforcement. Again, the international monetary system was a product of multilateral treaties signed by a group of countries. Thus, they derive their legitimacy under international law from the most important source of international law – the treaty. Some of these organizations, like universal international organizations, consist of sovereign states. On the contrary, while some of the organizations are not specifically comprised of sovereign states, they are financed and controlled by the governments behind their formation. The common characteristic underlying the organizations in the international monetary system is the fact that they are limited to solely monetary policy formulation and enforcement in their respective environment.

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both organizations serve very critical purposes in the facilitation of international trade, yet the WHO has become a

It is noteworthy that a few of the international organizations may enjoy all the characteristics of both an international organization as well as an international monetary system. A good example is the United Nations. It is comprised of member states while its goals and objectives cover every conceivable human concern and activity. It is one of the world's largest employers,46 and has offices and operations in virtually all parts of the world. The United Nations is also one of the key players in the monetary environment, making rules and regulations that tremendously impact the world's economy, while providing critical enforcement tools and agencies that monitor and enforce compliance. In the same vein, the European Union47 has developed into another major player in the international

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better known organization.

46 It is estimated that about 8,600 people from 170 countries make up the UN staff. The Secretary-General and his staff take an oath not to seek or receive instructions from any governmental or outside authority. In addition to the core staff, over 52,000 people work for the UN and its related organizations worldwide. See Ball, D.A., et al, International Business: The Challenge of Global Competition, 10th ed, 2006, p. 122.

47 The EU, which came into existence by the Treaty of Rome 1958, is a supranational entity of European countries. This means that the EU is a regional government representing all the members of the union in their quest for economic and political integration. As a supranational entity, the EU must be distinguished from international organizations like the UN or from treaty created entities like NAFTA. While the latter relies upon the goodwill and trust of its members for cooperation and income, the EU enjoys the power and privilege to tax its members, to enact legislation, and to enforce its sanctions through its judiciary system. See Ball, D.A. et al, supra, footnote 48, pp – 130 and 131.

monetary environment. Unlike the United Nations, the EU's membership is limited to sovereign nations in Europe that have come together to form a supra-national state or the United States of Europe as it is jokingly described. With the creation of the European Monetary Union (EMU), and the introduction of the *euro* as a common currency in the Union,48 the European Union has become a critical actor in the monetary environment. Some of the organizations under the international monetary system include the United Nations (UN), the European Union (EU), the World Bank (IBRD), the International Monetary Fund (IMF), the World Trade Organization (WTO), etc.

## V THE LEGAL STATUS OF THE IFIs

It is important to also clarify that the Bretton Woods conference gave birth to the key components of modern day international financial institutions (IFIs).49 Although the Bretton Woods conference successfully mid-wifed the

48 Ibid, p. 135. The *euro* became the official currency of the countries within the European Monetary Union on January 1, 2002.

49 The Bretton Woods conference was held in 1944 at Bretton Woods, New Hampshire, in the United States of

United Nations (UN)[50], the International Monetary Fund (IMF), and the International Bank for Reconstruction and Development (IBRD/WORLD BANK), it nevertheless failed to establish the tripartite International Trade Organization (ITO), which was intended to be the implementation organization for the General Agreement on Tariffs and Trade (GATT). Consequently, the GATT was adopted as a compromise by the conveners of the conference with a promise to continue work on the imperfect agreement. By default, therefore, the GATT assumed the status of both an agreement as well as the implementation organization. That untidy situation was eventually corrected by the Uruguay Round of Talks[51] which created the World Trade Organization which was empowered to administer not just the GATT[52], but the additional GATS[53] and TRIPS[54], thereby expanding the scope of the new organization beyond the limited trade in products which GATT dealt with.

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America. It gave birth to the UN, the IMF, the World Bank, and set the stage for the GATT after the efforts at establishing the ITO failed. The GATT, however, was established later from the conferences that were held between 1946 and 1948.

50 Prior to the establishment of the United Nations in 1945, there had been the United Nations Declaration of 26 Nations on January 1, 1942. The San Francisco Conference of 1945 gave birth to the United Nations.

51 The Uruguay Round of Talks lasted for eight years, beginning from 1986 and ending in 1994.

52 General Agreement on Tariffs and Trade.

53 General Agreement on Trade in Services.

54 General Agreement for the Protection of Intellectual Properties.

The conveners of the conferences that gave birth to all the IFIs were sovereign nations. In exercise of their sovereign rights to enter into a treaty with other sovereign nations, they convened, negotiated and agreed to enter into the agreements that gave rise to the respective IFIs. By so doing, they satisfied all the conditions of membership for the respective organizations and agreed to be bound by the obligations attaching thereto and be conferred with all the benefits accruing therefrom. But more importantly, they conferred upon the IFIs the requisite rights, powers, privileges and immunities that are needed for their independent existence as well as effective operation in the international arena. Such rights and privileges include the conferment of a distinct legal personality upon the institution, the treaty clauses empowerment, the explicit authority to develop relations with other inter-government organizations and non-government organizations, etc. As creations of the sovereign nations under their exercise of their treaty-making powers, the IFIs are, therefore, recognizable subjects of international law. Moreover, they are equipped with all the tools for independent existence and operation as subjects of international law. Further, these 'subjects' have, from inception, asserted their presence and claimed their rights in the

international arena for so long that there presence and influence is well documented.

## VI APPLICATION OF THE GENERAL PRINCIPLES OF INTERNATIONAL LAW TO THE IFIs

In order to address the question whether the IFIs are governed by the general principles of international law; let us examine for a moment the question of whether the IFIs are qualified subjects of international law. If they so qualify, then there will be no scintilla of doubt that they are so governed. If, on the contrary, they do not qualify as subjects of international law, then they are outside the governance of international law.

Generally speaking, the subjects of a legal system are the persons or entities to whom the law attributes rights and duties.55 According to Professor Okeke56, if the question is posed, *"Who is the subject of a certain legal order?', this means: to whom do the norms of this legal order apply, whose*

55 Okeke, C.N., *The expansion of new subjects of contemporary international law through their treaty-making capacity, 1973*, which cited Spiropolous, *L'individu en droit international*, on the same topic of the subjects of a law and concluded as follows: 'A subject of the law is one to whom the rules of a juridical system are immediately

*conduct does this order regulate or license by imposing duties or conferring rights"*. This litmus test for determining who is subjected to a given legal order applies with equal force to both domestic and local law, as well as to international law. Also arising from the litmus test is the issue of the indirect application of a law to certain persons or entities. Situations abound where a law may not be directly applicable to certain persons or groups, nonetheless, the law will impact the activities of such persons or groups indirectly. But for now, we must be guided by the analysis of Spiropolous when he emphasized that the subject of a juridical system must be *immediately* and *directly* impacted by that system.57 By the analysis of Spiropolous, it implies and I agree that if a juridical system fails to immediately and directly impact a person or entity, then that person or entity was not intended to be subjected to that system.

Another legal dimension to the question of whether or not the IFIs are subjects of international law arises from the classical or traditionalist definition of international law. According to the classical or traditionalist

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addressed, that is to say, one who is directly qualified or obligated by the rules of a juridical system.'

56 Ibid

57 Supra, note 16.

definition,58 "*international law directly concerns certain entities alone59, principally States, and reaches individuals only through the medium of such entities by obligating or permitting the latter to regulate or license individual conduct in certain ways.*" Thus, from the classical or traditionalist perspective, international law was created to *immediately* and *directly* regulate the relationship of sovereign states as well as their related entities60. Assuming we proceed on the truth of this perspective, which I respectfully disagree with61, it is therefore not in doubt whether the IFIs are subjects of international law. The IFIs we stated earlier are creations of the sovereign states. By their creation, the states also conferred upon the IFIs all the requisite rights and privileges for the exercise of their legal and corporate personality. It is my position, therefore, that the IFIs were borne in mind in the formulation of the classical and traditionalist definition of international

58 Okeke, C.N., supra. P.9

59 The emphasis of Spiropoulos on the direct application of international law is amplified in this classical definition.

60 Many scholars and writers equate international law with the law of nations, thus re-inforcing the classical and traditionalist view. See Renault in *Encyclopedia Juridique,* French ed., Paris 1888, t.1, p.429. Also see Ahrens in the same publication, all quoted in Okeke, supra.

61 My disagreement with the classical or traditionalist perception of international law is in appreciation of the ground-breaking work begun by Professor C.N. Okeke which recognized, at the time, the new and emerging subjects of international law. Such emerging subjects like The Holy See, Internationally Unrecognized States, National Liberation Movements, as well as International Organizations, have become full and active members of the international community since then. See Okeke, C.N., supra. The modern perception of international law as well as its subjects must, while giving supremacy to sovereign states and individuals, also accord due recognition and appreciation to the critical roles that the other actors in the international community play.

law by the unambiguous inclusion of "state entities" among the subjects of the law. Clearly, the IFIs fall squarely within the perception of the classical or traditionalist's legal prism. Thus, they are intended to be *immediately* and *directly* subjected to, and they are clearly subjects of the general principles of international law.

## VII CONCLUSION

From the foregoing, we have established that the IFIs were creations of sovereign states for the purpose of international cooperation on monetary and financial matters. It is our position that the IFIs qualify as subjects of international law because they fall within the purview of institutions created by sovereign states under the classical or traditionalist perception of international law. Further, even under the expanded and more contemporary perception of international law, the IFIs, as key actors in the international arena possess most of the characteristics expected of subjects of international law. The roles that the IFIs were created to play, and indeed, the roles that they currently play, are of such tremendous consequence that to deny them

their due recognition in international law will amount to ignorance.

We also do appreciate the fact that not all the subjects of a legal system will influence the legal system with the same size and weight. The same applies not just in thecomity of nations but a lso in the comity of the IFIs. Thus, the International Court of Justice in recognizing the international legal personality of the Untied Nations in the *Reparations of Injuries* case, stated as follows:

"The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights…."62

Regardless of the size and influence wielded by any IFI as a bona fide subject of international law, such IFI must *ipso facto* possess certain identifiable qualities that must confer the status of a legal personality to such IFI under international law.

Okeke enumerated some essential elements that must be attributable to a subject of a legal system or a legal personality as follows63:

1. The subject must have duties or responsibilities under that legal system.

2. The subject must have some rights conferred upon it under that legal system.

3. The subject must possess the capacity to enter into contractual or other legal relations with other subjects of the system, as well as the capacity to seek redress under the system.

From the foregoing, therefore, it is clear that the IFIs have obligations under international law which imposes a wide range of duties upon them for their actions in the international arena. Simultaneously, they enjoy a wide range of rights and privileges under the international law system64. Finally, they possess the capacity to enter into contractual relationships and also to enforce their rights under the legal system.65 Having exhausted the issue of the legal personality of the IFIs under international law, let us now turn our attention to the historical developments that gave rise to the formation of the IFIs.

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62 See the ICJ's comments in its Advisory Opinion on Reparations for Injuries, ICJ Reports, 1949, p.178
63 Okeke, supra, p.19
64 Ibid.
65. Ibid

# CHAPTER TWO

# INTERNATIONAL FINANCIAL INSTITUTIONS AND DEVELOPING COUNTRIES

## I INTRODUCTION

The current relationship existing between most developing economies and the International Financial Institutions (hereinafter referred to as IFIs) was developed chiefly by two historical developments. The first development was the outbreak of World War II[66], and the aftermath of it. The second development, particularly, with regard to most colonies of the developed countries, was the attainment of political independence by the former colonies[67].

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[66] World War II spanned from1939 - 1945, in an attempt by the Allied Forces to defeat the threat of German dominance led by Adolph Hitler.

[67] Among the former colonies include many African nations, including Nigeria, which was a former colony of the United Kingdom. Nigeria became independent on October 1, 1960. It

The current relationship existing between most developing economies and the International Financial Institutions (hereinafter referred to as IFIs) was developed chiefly by two historical developments. The first development was the outbreak of World War II[68], and the aftermath of it. The second development, particularly, with regard to most colonies of the developed countries, was the attainment of political independence by the former colonies[69].

However, in order to better address the origin of the relationship between the IFIs and the developing countries during this period, it will be appropriate, if not necessary, to understudy the period covering the slavery era, the internal management era, and finally, the post-independence era. Such a distinctive coverage will, no doubt, shed better historical light on how the relationship between the IFIs was developed and cemented over a long period of time. Further, it will shed more light on how the IFIs became increasingly

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is pertinent to note that the United States was not a former colonial power.

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important in the management of the financial, monetary and political affairs of the developing countries.

## II WORLD WAR II AND ITS AFTERMATH

After World War II, most of Europe and other parts of the world were in ruins. There was urgent need to re-build the damages caused by the war as well as facilitate international trade on a multilateral and nondiscriminatory basis. A series of conferences were held to fashion out these institutions and agreements. The most prominent was held in 1944 at Bretton Woods, New Hampshire, in the United States, where the organizations and agreements on the regulation of the new financial and economic relations were developed. The Bretton Woods conference successfully gave birth to the Bretton Woods System.

Generally, the term "Bretton Woods System" comprises the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD or the World Bank), and the General Agreement on

Tariffs and Trade (GATT).[70] The GATT, however, was developed in another series of conferences, which spanned from the fall of 1946 to mid-1948. The GATT was designed as a multilateral agreement that will succeed the Havana Charter and the International Trade Organization, reflecting commercial policy provisions similar to the Havana Charter chapter on commercial policy.

While the IMF was created to repair the disintegration of the international monetary system after the War, and the World Bank was designed to stimulate and support foreign investment which had declined to insignificant level, the GATT was created to reverse the protectionist and discriminatory practices that had multiplied during the post-war depression years. IMF and GATT were expected to collaborate on exchange policies and trade policies. In essence, IMF, the World Bank and GATT were designed to help the developed nations achieve their multiple objectives of full employment, freer and expanding trade, as well as stable exchange rates.[71]

[70] Horsefield, Keith J., The International Monetary Fund, 1945-1965, 3 ed, 1969

[71] Meier, G.M., The Bretton Woods Agreement - 25 Years After, 39 Stanford L. Rev.

Whilst the IMF and World Bank became instantly effective after their creation, the GATT, on the contrary, was ineffective and virtually non-existent. However, in 1994, the GATT was reinvigorated by the Uruguay Round of talks. The apparent ineffectiveness of the GATT before the Uruguay Round of talks has been attributed to what some commentators called its "birth defects."[72] The framers of GATT never intended it to be an organization, but rather an agreement that will codify the results of the tariff negotiations as well as some general protective clauses, which would prevent evasion of the tariff commitments. Hence, GATT was originally planned to be an embodiment of the results of the tariff negotiations, while the International Trade Organization (ITO) was planned to be the organizational framework for the implementation of the GATT provisions.

Like the IMF and the World Bank, the initiatives for the formation of an ITO and GATT came chiefly from the United States during the end of World War

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235, 237, 245-246 (1971); reprinted in Jackson, J.H., Davey, W.J., Sykes, A.O. Jr., Legal Problems of International Economic Relations, 3 ed., West Publishing Co., 279 (1995).

[72] Jackson, J.H., Davey, W.J., Sykes, Jr, A.O., Legal Problems of International Economic Relations, 3 ed. West Publishing Co., 296 (1995).

II. These initiatives can be traced to two main sources in the American economic policy at the end of the war. The first source was the general "Reciprocal Trade Agreements" program, which originated from the 1934 Act, which empowered the United States President to negotiate mutual reductions on tariffs. The second source was the realization by the United States of the important role played by international economic affairs in the genesis of World War II. The ITO and GATT were thus conceived to achieve the dual objective of providing a multilateral medium for negotiating mutual tariffs reduction and a viable regulator of international economic affairs.

At the inception of the United Nations in 1945, the United Nations Economic and Social Council (ECOSOC), was established as the principal organ for the coordination of economic and social issues. The economic issues that ECOSOC cover includes trade, transport, economic development, and industrialization. The social issues include housing, women's right, racial discrimination, population growth, children, narcotics trafficking, trans-

national crime, youth development, the environment, etc.[73] During the Council's first meeting in February 1946, the United States introduced a resolution calling for the convening of a "United Nations Conference on Trade and Employment." The resolution was adopted with the principal goal of drafting a charter for an international trade organization.[74]

In the fall of 1946, a committee met in London to consider a "Suggested Charter for an International Trade Organization" drafted by the United States government.[75] In early 1947, a drafting subcommittee met at Lake Success, New York.[76] The full preparatory conference convened again in Geneva, beginning in April 1947, and ending in October 1947.[77] It was at this Geneva conference that the General Agreement on Tariffs and Trade (GATT) was drafted, and some progress was made with the tariff negotiations and the ITO

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[73] Ball, McCulloch, Frantz, Geringer, Minor, International Business: The Challenge of Global Competition, 9 ed. McGraw Hill, 149 (2004)

[74] U.S. State Dept. Press Release, Dec. 16, 1945, reproduced in 13 Dept. State Bulletin 970 (1945); 1 U.N. ECOSOC Resolution 13, U.N. Doc. E/22 (1946).

[75] See London Report, First Session of the Preparatory Committee (1946); U.N. Doc. EPCT/CII/1-66 (1946).

[76] See New York Report, U.N Doc. EPCT/34 (1947); U.N. Doc. EPCT/C.6/W.58 (1947)

[77] See U.N. Docs EPCT/A/SR/1-43; EPCT/B/SR/1-33 (1947); U.N. Doc. EPCT/TAC/SR 1-28 (1947).

charter.

It is worthy of note that the tariff agreements were negotiated under the extended authority of the Reciprocal Trade Agreements Act of 1945. The United States Congress had hoped that the President would submit the ITO charter to them for approval. However, when the early drafts of the General Agreement included some provisional semblance of an organization, members of Congress criticized the drafts on the ground that the President had no authority to accept international organization membership for the United States without congressional approval. Congress had expected that GATT would be a subsidiary agreement under the ITO charter, depending upon the ITO charter and the ITO secretariat for servicing and enforcement. This expectation was based upon the fact that most of the general clauses in GATT were drawn from comparable clauses drafted for the ITO.[78]

[78] See Hearings on the Trade Agreements Act and the Proposed ITO before the House Ways and Means Comm., 80th Congress 1st Sess. (1947); Hearings on Operation of the Trade Agreements Act and Proposed ITO before the Senate Finance Comm., 80th Congress. 1st Sess. (1947).

Due to the foregoing reasons and more, neither the ITO charter nor the GATT was able to pass the litmus test of Congressional assent before the expiration of the extended Trade Agreement Act in 1948. The GATT, for instance, needed Parliamentary approval by the Legislature of the other countries before they could assent to some of the general clauses. However, in order to avert a complete loss of their efforts, the 22 original members of GATT signed in late 1947, a "Protocol of Provisional Application" (PPA), which became effective on January 1, 1948.[79] Since then, GATT has been applied by virtue of this protocol with hopes that at the inception of the ITO charter, the Protocol would give way to an unrestricted application of GATT. Unfortunately, this expectation never came through. Although the Havana conference completed the draft charter of the ITO in early 1948, the United States Congress had by then gone through a lot of changes that for two years the President could not get them to approve the ITO, thus causing the demise of the ITO. Without the ITO, GATT consequently became by default, the

[79] Protocol of Provisional Application to the General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. Pts.5,6, TIAS No. 1700, 55 UNTS 308.

central organization for coordinating national policies on international trade. However, the search for a replacement of ITO continued.

At the ninth session of the Contracting Parties of GATT, held between October 1954 and May 1955, a number of amendments were proposed for GATT and a draft charter for the proposed Organization for Trade Cooperation (OTC), was completed.[80] Unfortunately, the OTC charter, like its predecessor (ITO charter), was again rejected by the United States Congress. The amendments to GATT were, however, accepted under the authority of the then existing Trade Agreements Act. The inability to approve an organization that will exercise regulatory oversight over GATT, created the anomaly whereby the nation participants to GATT were referred to as "contracting parties", rather than as "members."

[80] See GATT, 3rd Suppl. BISD (1955); Agreement on the Organization for Trade Cooperation, GATT Doc. Final Act, 9th Session.

By the end of the eight-year Uruguay Round (1986-1994) of trade negotiations, there had emerged what had eluded all previous efforts - a new and better-defined international organization and treaty in the form of a World Trade Organization81. The Uruguay Round did not only succeed in the formation of the WTO, but also made substantial revisions in the dispute settlement procedures. Also, while GATT dealt almost entirely with trade in products, the Uruguay Round included provisions for trade in services (GATS), and another for the protection of intellectual property (TRIPS), procurement, investment and agriculture. The new WTO is thus charged with the responsibility of administering these treaties with hopes of a better regulation of international trade. Further, unlike the predecessor, the WTO is no longer a collection of ad hoc agreement, Panel reports and understandings of the parties82. Rather, all trade obligations are comprehensively dealt with under the WTO and member states are obligated to all the provisions of all the agreements.

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81 *Agreement Establishing the World Trade Organization in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (1994) 33 I.L.M. 1125.

82 *Id.* See also Cameron, J and Gray, K.R., Principles of International Law in the WTO Dispute Settlement Body,

Interestingly, the formation of WTO during the Uruguay Round occurred by historical accident. The agenda and the negotiating structure prepared by the ministers at Punta del Este, Uruguay, in September 1986, did not include the drafting of any organizational charter. Moreover, the planners were aware of the opposition of the United States Congress, which had earlier struck down two attempts at forming such organization. In any case, a group called the FOGS was formed to consider the "Future of the GATT System."

The FOGS group focused on the GATT's relationship with the monetary part of the Bretton Woods system and on designing the new Trade Policy Review Mechanism (TPRM).

In May of 1990, the Government of Canada was the first to formally propose the formation of a World Trade Organization.83 The European Union was in support of this proposal, but suggested a Multilateral Trade Organization (MTO). The Ministerial Meeting held in Brussels in December 1990, ended in an impasse. Afterwards, the then GATT Director-General, Arthur Dunkel, intervened and encouraged the negotiators to go ahead and produce a complete rough draft of the negotiation results. The draft that was presented contained a draft charter for a new organization to be called Multilateral Trade Organization (MTO). From 1990 until December 1993, the negotiators worked out their differences and the oppositions to the draft charter, especially the name MTO. This lasted until December 1993, when the negotiators agreed to a charter proposal with a change of name back to World Trade Organization (WTO). In April 1994, the proposal was finally formalized at the Morocco summit and ready to be submitted to the respective governments for ratification.

83 Supra

Unlike the 1947 General Agreement on Tariffs and Trade (GATT), the 1994 Agreement establishing the World Trade Organization (WTO) covers a much wider range of trade. It extends beyond goods and now covers services, intellectual property, procurement, investment, agriculture, etc. Furthermore, the new trade regime is no longer a collection of *ad hoc* agreements. An important principle contained in the WTO Agreement is that member states have to accept the obligations contained in all the provisions of the agreement as they cannot pick and choose.

As international relations have become increasingly dominated by economic factors, the WTO system has moved away from its former, more power-oriented diplomatic approach to a better enhanced rule-oriented approach, as well as an impartial dispute settlement system. Since it is imperative that there be fairness in international economic relations, the developing countries should be given the opportunity to challenge the trade practices of economically strong countries that usually dominate international negotiations and multilateral decision-making.

## III THE MARSHALL PLAN

Although the Bretton Woods System was already in the making prior to the end of World War II, it provided the initial support system for the urgent reconstruction of Europe after the war. Further, the very supportive efforts of then U.S. Secretary of State George C. Marshall, helped fuel the enormous financial and logistics support that the United States lent to the reconstruction efforts. The plan proposed and implemented by George C. Marshall was so successful that it became popularly known as the Marshall Plan.[84]

The Plan was started in 1948 and was so successful that, in two years of implementation (1950), Europe had achieved a level of industrial production that was 138 percent more than the level reached in 1938. Part of the Plan called for the creation of the Organization for European Economic Cooperation (OEEC) in 1947. The OEEC was charged with the implementation of the Marshall Plan and the facilitation of economic integration within Europe. By 1961, the OEEC was transformed into the

[84] Walker, Martin, "George Marshall: His Plan Helped Rebuild Europe," *Europe,* April 1997, pp 22-23; Ball, McCulloch, Frantz, Geringer, Minor, ibid, p.162

Organization for Economic Cooperation and Development (OECD).

## IV DEVELOPING COUNTRIES AS SECONDARY BENEFICIARIES OF THE IFIs

By the end of World War II, most of the presently developing economies were either under colonial government or just emerging from colonial rule into political independence.85 For those still under colonial government, the support they received from the Bretton Woods System and company were aimed at sustaining the colonial governments and their limited social, economic and political programs. On the contrary, those emerging from colonial rule were rudely shocked at the realization that political independence was meaningless without economic and financial independence.86 They realized to their chagrin that they were, in effect, still tied to the apron string of the former colonial powers that they fought, most times bitterly, for political independence.

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85 In Africa, most of the countries were still under colonial rule after World War II. Nigeria, for example, became independent on October 1, 1960.

86 See Okeke, C.N., International Law in the Nigerian Legal System, *California Western International Law*

## V DEVELOPING COUNTRIES AND POLITICAL INDEPENDENCE ATTAINMENT

Upon the attainment of political independence, most of the developing countries realized that they lacked the institutional framework as well as the economic and industrial base to meet the new challenges of independence. The new political leaders realized to their disappointment that they had to depend financially on the former colonial masters that they fought for political independence. This dependence on the former colonial masters, no doubt, came with a price for the newly independent nations. Thus began a relationship between the developing nations and the countries and organizations that provided the financial lifeline.

## VI THE DEBT BURDEN

The reliance of the developing countries upon the financial and technical assistance of the International Financial Institutions (IFIs) has given rise to the concept of debt burden. 87 The weight of the debt burden on African countries, and indeed, other Third World88 countries, has become so unbearable that the figures speak for themselves. The rate at which the debt of third world countries is increasing exponentially can be illustrated by the fact that in 1970, the total debt of sub-Saharan Africa countries was 3.7 billion dollars. Thirteen years later, in 1983, it had skyrocketed to 36.8 billion dollars.

By the year 1990, it had reached the sky limit of 161 billion dollars. 89

The cost of debt servicing adds a human dimension to the implications of the debt burden on the citizens of any country. According to the United Nations

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87 The huge cost of servicing developmental loans obtained by developing countries from the International Financial Institutions (IFIs).

88 The phrase "Third World" is credited to Alfred Sauvy who in 1952 patterned the phrase after the Third Estate of the 1789 French Revolution. Third World countries have become synonymous with the group of new nations of Africa, Asia, and Latin America. They are also classified as the less developed, developing, underdeveloped, the non-industrialized, the poor, the backward, and/or the Southern countries.

89 IBRD, *The External Debt of Sub-Saharan Africa: Origin, Magnitude and Implications for Action* (K.L. Krumm) World Bank Staff Working Paper No. 741, Table One.

Human Development Report of 1997,90 Africa alone could have saved the lives of 21 million children by the year 2000 if the countries had kept the money devoted to servicing foreign debts. Tanzania, for example, spent between 1997-98, $189.2 million on debt servicing compared to $65.8 million spent on health care. Another country, Mauritania, spent $87.8 million in 1998 on debt servicing, five times more than the meager $17.4 million spent on health care.91 In the same 1998, Mozambique spent $159 million on debt servicing compared to the $40 million spent on health care.92

## VII THE DEBT ORIGIN

As we stated earlier, the second platform that gave rise to the relationship between developing nations and the International Financial Institutions (IFIs), was the attainment of political independence by the former colonies of the developed countries. With respect to these former colonies, the genesis of

90 UNDP, HUMAN DEVELOPMENT REPORT 1997, 93, available at http://www.undp.org/hdro/1997/97.htm.
91 Friedman, E.A., Debt Relief in 1999: Only One Step on a Long Journey, 3 Yale Human Rights & Development Law Journal, 191, 2000.
92 WORLD BANK, Mozambique at a Glance, 2, 1999, available at http://www.worldbank.org/data/countrydata/aag/moz aag.pdf. See also, IMF & Int'l Dev. Ass'n Republic of Mozambique, Initiative for Heavily Indebted Poor Countries (HIPC) Completion Point Document, 15, 1999,

their debt burden can then be traced to the colonial period.93 For the purposes of this thesis, therefore, colonial period will be analyzed from both the*slavery phase* 94 and the*internal management phase* 95, as well as the *post-colonial phase* 96during which time most developing countries accumulated (and still accumulating) more sovereign debts. It is critical to understudy the era from the different phases because of the different *modus operandi* implemented by the colonial masters during the different periods in question. Such a distinctive analysis will also shed better light on the changing roles of the IFIs in the developing countries.

Presently, however, some commentators have attempted to play down the historical origin of the debt burden in the developing countries. They have focused upon the debt acquired by the new leaders of these countries in their efforts to justify their political mandate in the provision of basic amenities, or to preserve their national security in the face of domestic strife and

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available at http://www.worldbank.org/hipc/country-case/Mozambique/mozcompl.pdf.

93 Okeke, C.N., The Debt Burden: An African Perspective, The International Lawyer, Vol.35, No.4, 2001.

94 Slavery phase will be limited to African and other colonies subject of the slavery experience.

95 Internal management phase will cover the period immediately after the abolition of slavery by the national governments of the slavery merchants. This period covers the colonialization era.

96 When the Bretton Woods conference gave birth to the major IFIs in 1944, almost all of the developing countries were still colonies of the developed/industrialized nations. For example, in Africa, only a handful was independent from the colonial rule during that period, thanks to the Berlin Conference of 1884-1885 which shared Africa among the colonial powers.

conflicts,97 or in stolen funds and other corrupt practices of the ruling elite.98 While recognizing the huge proportion of the sovereign debt accumulated by the new leaders, this author, nevertheless, believes that a comprehensive account of the origin of the debt burden must start from the colonial era.

## SLAVERY PHASE

During the initial period of discovering the "black" colonies, particularly in Africa, the colonial masters, like good merchants, targeted the people for exportation to the commercial farms and industries of the west. Their goal was to "recruit" strong and able-bodied men and women that can be "sold" for good prices in Europe and later, America. The stronger they came, the better the price for them. Hundreds of thousands of the strongest and ablest men and women from different parts of the continent were "bought" through

97 It is reported that out of Africa's 250 billion dollars debt burden, about 20% is related to arms credit. See Hussain, I., and Underwood, J., *"The Problems of Sub-Saharan Africa's Debt and the Solutions,"* Washington, World Bank Publications, 1989.

98 Peter Korner, et al described such governments as cleptocracies, where the leadership class loots or squanders the state treasury to the point that it accelerates the sovereign debt of the country. See Peter Korner, et al in The IMF and the Debt Crisis, 1986, p. 36. Many leaders of the developing countries are notorious for corruption while in office. With their tainted vision that public office is the fastest means to acquiring wealth, they have developed a terrible reputation for looting the public treasury with impunity. Classical examples are Zaire under Mobutu, Haiti under Duvalier, the Philippines under Marcos, Nicaragua under Somoza, Uganda under Amin, the Central African

inducement from local chiefs and in many instances through force. In other cases, some parents were compelled to "sell" their errant and stubborn children to the human merchants. In extreme circumstances, some were kidnapped from the villages and sold into slavery without the consent or knowledge of their parents.

As the transaction became more lucrative, the operators became more desperate. In the bid to ship more and more of these unfortunate people to Europe and America, the ships were almost always over-loaded. Many were reported to have died during transit. Those that took ill and could no longer make it to their destinations as healthy and "profitable" labor force were reportedly thrown over-board. In the final analysis, the number of Africans that were taken into slavery can never be known, but it still accounts for the most unjustified and unprovoked displacement and dislocation of any human race in the world.

public under Bokassa, and Nigeria under Abacha. Recently, two Nigerian state Governors have been arrested in ndon on charges of money laundering.

## INTERNAL MANAGEMENT PHASE

Given the huge financial losses suffered by the merchants in their bid to take Africans into slavery, coupled with the increasing riots and resistance of the slaves at different stages of their captivity, the merchants began to modify their operational mechanism. More importantly, with the growing public opinion in Europe and America against the slavery practice, it became increasingly difficult to continue with the trade. The promulgation of the Emancipation Proclamation in America99 and the abolition of slavery in all British territories in the 1800s, compelled the traders to re-direct their efforts.

In the light of these legislative prohibitions against slavery in America and Europe, the merchants changed their strategy by retaining the labor in Africa and working them for the same economic goal. In order to accomplish this new goal, the colonial masters began to infiltrate the local people through their chiefs and existing governmental structures.100 The infiltration began

99 This was a proclamation issued by President Abraham Lincoln on January 1, 1863, declaring free all Negro slaves in the seceded States. It was later reinforced by the 13th Amendment of 1865, which freed the slaves in the remaining eight states.

100 Davidson, B, AFRICA IN HISTORY, 286 (1991). According to the author, ".....(the) process of infiltration, steadily advanced until the stage of 'effective occupation' could be reached, behind the screen of 'treaties of protection,' sometimes described as 'cession' treaties. These were 'signed' with one or another European power by

on a veiled peaceful and good faith effort to develop and support the existing government. Some of the chiefs were induced with gifts and presents. Other chiefs suspecting mischief and bad-faith resisted the intrusion and invasion of the strangers into their communities. However, due to their limited access to superior firearms, the local chiefs could not withstand the more powerful invaders. Eventually, the resisting local chiefs surrendered to the invaders32. And in order to retain the remnants of their authority became agents of their new colonial masters.

It is pertinent to note that this era includes the convocation of the infamous Berlin Conference101 in Berlin, Germany. At the invitation of the German Chancellor, Bismarck, the major European powers – the United Kingdom, Germany, France, Belgium, Spain, Portugal, etc., met in Berlin and agreed to divide the African continent among themselves on the basis of who got where first. Consequently, Africa was partitioned according to the conquest area of the conquering European power, and as a result, historical and cultural

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chiefs who could seldom or never have understood the intention of their new 'protectors.' See also Okeke, C.N., Int'l Law in the Nigerian Legal System, supra.

101 The Berlin Conference of 1884-85 was convened by Germany with a view to having the European powers agree

boundaries were altered permanently.

After the local authorities surrendered to the overbearing force and influence of the colonial masters102, the latter began to engage in the smoke-screen exercise of signing the "treaties of protection" with the local authorities. The only justifiable reason for such exercise can be found in the need of the colonial masters to have some kind of semblance of validity conferred upon them for their subsequent game plan. If not, how else can it be justified that after intimidating and compelling the local chiefs to surrender their sovereignty, the same chiefs will willingly agree to sign a treaty of protection. In any case, most of the chiefs were illiterates who could neither read nor write and lacked the ability to fully appreciate the ramifications of the contents of the treaties.103 In light of the circumstances of the so-called treaties, some commentators have argued, and rightly so, that the treaties of

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on the modus of colonizing the newly discovered rich continent of Africa without confusion and conflict.

102 Such force and intimidation was manifested by colonial rulers in different forms and styles. For example, Sir Frederick Lugard, the former Governor of Northern Nigeria was reported to have "preceded negotiations with short military actions in order to place himself in a position of strength." Another colonial master, Consul Ralph Moor of the Niger Coast Protective was reported to have "moved up and down the Cross River with troops shelling and destroying villages before settling down to make 'treaties of friendship' with the frightened people."

103 Davidson, B., Africa in History: Themes and Outlines, 286, 1991.

cession lacked validity under international law.104

During the colonization era, the colonial powers embarked upon a double-pronged exploitation of the African continent. First, they mined the various rich mineral resources including gold, diamond, uranium, coal, tin, copper, etc., and exported them to their national countries and other parts of Europe and America to service their local industries and for profit. Second, in the process of acquiring the needed machinery for the exploitation as well as sourcing funds to run their Western style government with its expensive taste, they engaged in accumulating huge national debts on behalf of the colony. The result was that while Africa was deprived of its natural resources without adequate compensation in local infrastructure or foreign exchange, the colonial government was acquiring national debts for generations yet unborn.

104 See Okeke, C.N., International Law in the Nigerian Legal System, supra. Umozurike O. Umozurike, International Law and Colonialism in Africa, 3 E. Africa Law Rev. 47 (1970). Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 Mich J. Int'l L 6 (1995). Elias, T.O., NIGERIAN LAND LAW AND

By the time most former colonies became independent in late 1950s and 1960s, they had been exploited and marginalized for decades. By the time of political independence, most of the former colonies had accumulated huge national debts through their colonial governments. In most instances, the struggle for political independence completely overshadowed the issue of the national debt that the new independent countries must cope with. The colonial masters also succeeded in planting very fertile seeds of discord, distrust, and suspicion in the various groups that were in the vanguard to wrest political power from them. The colonial policy of divide-and-rule was very effective, and resulted in the different group's inability to close ranks as a united front. In the process, the new leaders missed the golden opportunity to request for formal handover and accounting from the colonial powers. Upon political independence, therefore, most of the former colonies were uncertain of what their national debts were, and in the circumstances where the amount was certain, neither could they ascertain the veracity of the amount.

CUSTOM (1962). Also, the landmark Nigerian case on the subject matter, Amodu Tijani v. Secretary, Southern

## POST-COLONIAL PHASE

Under the post-colonial phase, the developing countries fell into more debt as a result of the following practices105:

1. indebted industrialization
2. neglect of agricultural developments
3. failure to diversify exports
4. debt-inducing social reforms
5. cleptocracy
6. developmental gigantomania
7. indebted militarization

## INDEBTED INDUSTRIALIZATION:

According to Peter Korner, many developing countries started to engage in the practice of 'indebted industrialization'106 or forced industrialization as early as in the 1930s when the Latin American countries introduced it. The practice was later adopted by Asian and African countries after the Second World War when foreign

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Provinces (1915), (1921) 3 NLR 24 (1921) 2 A.C. 399.

105 See Korner Peter et al, The IMF and the Debt Crisis, supra, footnote 95.

106 See Korner et al, p. 32 which cited Friedman (1981) as the origin of the concept. I have, however, interpreted the concept as being synonymous with 'forced industrialization', because the developing countries were compelled to embark upon such industrialization under the exigencies of the moment. This position is supported by Canitrot (1980, p. 918) when the author stated that the practice 'was not the product of a sovereign decision derived from an industrial philosophy' but rather 'the only socially viable alternative, as a consequence of the international economic

exchange income from raw materials dropped drastically due to the international economic crisis. However, the practice is most prominent in the newly industrializing countries107 which have advanced substantially in the industrial production and manufacture of some products. The logic behind such a practice is that since the developing countries lack the ability to earn more foreign exchange from the economically distressed developed countries, the scarce foreign exchange available should be saved for importation of essential goods and machinery. Consequently, the developing countries implemented import substitution, which started with the substitution of imported consumer goods, and graduated to the substitution of investment goods by domestic production.

Such a practice was not planned for, but rather forced upon the developing countries in reaction to a sudden drop in their foreign exchange earning capabilities as a result of economic or political crisis in the developed countries. As a result of the forced industrialization or indebted industrialization, the developing countries were also compelled to borrow more loans from the international banks in order to

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crisis....' This passage was quoted by Korner et al, in p.32

107 The Newly Industrializing Countries (NICs) include the four Asian tigers (Taiwan, Hong Kong, Singapore, and South Korea), Brazil, Mexico, Malaysia, Thailand, and Chile. These countries are classified as the NICs by the World Bank because they possess the following characteristics: (1) fast-growing, middle-income or higher economies, (2) they possess a heavy concentration of foreign investment, and (3) they export large quantities of manufactured goods, including high-tech products. Recently, due to the fact that the economies of the four Asian tigers have out-paced the others in the group, the tigers have earned a distinct classification of the Newly Industrialized Economies (NIEs). See Donald Ball et al., International Business: The Challenge of Global Competition, 2006, p. 102-103.

finance the capital intensive industries. The anticipated savings in scarce foreign exchange did not materialize as more foreign exchange was needed and sought for in order to activate the new industries. Additionally, by concentrating almost all the scarce foreign exchange in the new industries meant that little or none was allocated to agriculture. The agricultural sector suffered neglect which inevitably resulted in shortage in food production, which in turn, compelled the government to begin to import food. The foreign corporations that were engaged to initiate and establish the new industries contributed their fair share in the depletion of the scarce foreign exchange by such practices as 'profit transfers and artificially high-priced imports.'108

With a view to amending the practice of import substitution and yet maintaining the goal of conserving scarce foreign exchange, some developing countries began to practice export industrialization by exporting manufactured goods. A good example is Brazil which has engaged in massive production of industrial goods for export. Unfortunately, neither the import substitution nor the export industrialization has successfully transformed Brazil and other developing countries into the high foreign exchange earning countries that they aspire to. Rather, the developing countries have ended up with more debts than they owed initially.

108 Korner, supra, p. 32

## NEGLECT OF THE AGRICULTURAL SECTOR:

As we highlighted in the preceding section, one of the fallouts of indebted or forced industrialization was the neglect of the agricultural sector with the attendant consequences for the economy. Such neglect usually creates food shortage which compels the government to embark upon food importation.

Although the government may not completely abandon the agricultural sector development, however, such development may be so narrowly tailored towards export. According to Korner et al, such practice tends to imitate 'the policies of their former colonial masters, who often confined the agricultural sector to the export of one product only – as a cheap raw material for use in the colonial centers.' The powerful influence of foreign corporations in the developing countries further ensures that the governments follow such narrow agricultural development paths.

The 'vicious circle'109 that results from the neglect of the agricultural sector becomes inevitable. As more people are forced to abandon the rural areas to the urban areas (cities) in search of better paying jobs, the cost of servicing the urban areas increase. Such cost is financed from the funds that could otherwise be invested in agricultural sector development. At the same rate,

the demand for more imported food increases which further drains the scarce foreign exchange. In order to finance the increased pressure on the scarce foreign exchange, the governments typically resort to increased external borrowing and increased export production for the limited agricultural investment.

FAILURE TO DIVERSIFY EXPORTS:

Another familiar cause of the debt crisis in developing countries is the failure of the countries to diversify their foreign exchange earning sources. By limiting their major source of foreign exchange to one or two raw materials, the countries end up loading all their proverbial eggs in one or two baskets with the attendant risks to the one or two baskets.

Typically, when there is a sudden drop in the demand of the raw material that forms the bulk of the foreign exchange source of a developing country, all the economic and financial planning that were tied to the source suffer negatively.110 In the wake of the economic shock from a drop in foreign exchange revenue, the import prices for essentials like oil, capital goods and

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109 Ibid, p. 34

110 This was the case of the countries that earned most of their foreign exchange from copper in 1974/75. After the price of copper rose steadily, it crashed to almost half. The countries could not survive from another source of

imported food become higher. While the government is not earning enough foreign exchange, at the same time; it is forced to pay more in imported goods, oil and machinery. Again, in order to finance the increased demand for foreign exchange, most developing countries resort to external borrowing or compensatory financing[111] with hopes that the situation will be temporary.

DEBT-INDUCING SOCIAL REFORMS:

Under this situation, the government of the developing country either came into power on the platform of social reforms[112] or suddenly transforms into a social reform government. In either case, however, the government begins to embark upon such expensive and foreign exchange draining practices like increase in real wages, subsidizing social services like education, health, public transportation, etc. With the sudden increase in real wages, the appetite for imported goods increase, this in turn drains scarce foreign exchange.

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reign exchange because their economies relied heavily on copper. The same situation occurred in Nigeria during oil slumps of the early 80s because the country relies on crude oil for most of its foreign exchange earnings.

Ibid, p. 35 This is the type of external borrowing targeted for the relief of the foreign exchange shortage which ults from a sudden drop in the country's foreign exchange earnings.

For example, the government of Allende in Chile from 1970-1973. Also, the government of Manley in Jamaica 1972-1976.

The subsidization of social services coupled with increase in real wages imply that the cost of running the government has increased exponentially while the government revenue remains stagnant or lower.113 In order to continue with such program of social reforms, the government must find new sources to fill the gaps created by the deficits. The situation becomes compounded by the reluctance of international creditors to continue to finance economically unviable social reform programs. Consequently, the government inevitably seeks recourse to the IFIs in order to remain credit-worthy and hopefully pull out of the debt crisis.114

CLEPTOCRACY:

According to Peter Korner et al, cleptocracy is the practice whereby the 'state-class under the repressive leadership of one clan pile up wealth in so uninhibitedly in foreign exchange accounts or squander such huge sums on luxury consumption that corruption and self-enrichment become the central cause of the debt crisis.115 Further, 'the direct access of these classes to the finance ministries, the central banks and the customs authorities enables them

113 Ibid
114 Ibid
115 Korner, supra, p. 36

to operate illegally'.116 Some of the common illegal activities of this rogue class involve 'the smuggling or raw materials, the diversion of scarce foreign exchange reserves for private use and the forging of import licenses'.117 As a result of these illegal activities, the affected country suffers massive capital flight from its economy.118 Unfortunately, the bulk of the capital that is illegally taken out of the economy eventually re-enters the same economy as foreign loans.119 The affected country thus finds itself in the situation where it is paying premium in fees and interest for money that originally belonged to it.120

DEVELOPMENTAL GIGANTOMANIA:

Developmental gigantomania121 differs from indebted (forced) industrialization122 because it is not a product of a government's reaction to a massive drop in foreign exchange earnings from raw materials. Rather, it is driven by the desire of the developing country 'to realize ambitious

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16 Ibid
17 Ibid
18 It is estimated that capital flight from Mexico in 1981 and 1982 totaled $12.3 and $13.15 thousand million. *Financial Times*, December 1, 1983). Also, it is estimated that between 1976 and 1983, capital flight from Argentina amounted to about $35 thousand million. (Information from the Central Bank of Argentina quoted in *HB*, November 3, 1983)
19 Ibid
20 Ibid
21 This classification was used by Korner et al, supra, p. 38.

infrastructural projects in the shortest possible time.'123 The idea behind such accelerated developmental projects is that the government hopes that the projects will in turn generate the much needed foreign exchange, and ultimately increase state revenue. But what the government fails to factor into the plan is the added cost of maintaining the projects as well as the expensive machineries needed to run them.124

In the process, the government invests huge amounts of scarce foreign exchange into the projects. In order to sustain the demands of machineries and maintenance, government is compelled to borrow from external creditors thereby adding to the debt crisis.125

INDEBTED MILITARIZATION:

This is the process whereby developing countries accumulate more debt by their desire to increase their military arsenals and ammunitions. Some of the developing countries have been driven into 'indebted militarization' by the

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122 Supra
123 Supra
124 A good example is the 'gigantic' infrastructural development of the Ajaokuta Steel industry by the Nigerian government. After many years of spending billions of dollars on the ambitious steel development project, the government eventually abandoned the project.
125 Ibid

desire to defend themselves from their neighboring enemies126 or political enemies127. Others have been driven by the desire to exert their political independence or military might.128 While others exploit the militarization policy as a clever means of enrichment and corruption.129

Regardless of the motive, most developing countries allocate and expend substantial portions of their national budget to the militarization policy.130 Since most developing countries lack the industrial base for the production of the arms and military equipments, they wind up buying from the industrialized countries. The already scarce foreign exchange is spent and borrowed in order to finance the ambitious militarization policy.

In light of the huge consequences of continued burden of national debt on developing economies, there have been divergent recommendations on how

126 Examples of the countries that spent much on their military in order to protect themselves from their neighbors include Israel, Pakistan, South Korea, all of them spending over 20% of their budget on military expenditure in 1980.
127 The Argentine government spent huge sums on arms acquisition immediately before and after their war with the UK over the disputed Falklands Island.
128 The Egyptian government spends a substantial percent of its national budget on arms acquisition, partly to prove its military might and partly to prevent internal and external aggressions.
129 The Nigerian government has lost substantial amounts of foreign exchange on the sharp practices associated with arms importation under the military governments. In order to cover one scandal, the then military headquarters building in Lagos was set ablaze.
130 According to the US ACDA report in 1983, the following developing countries spent over 20% of their budget in 1980 on military expenditure: South Yemen (45.7%), Ethiopia (42.6%), Syria (35.4%), Israel (34.2%), North Yemen (30.0%), Chad (29.0%), Mozambique (28.9%), South Korea (28.4%), Zimbabwe (25.9%), Mauritania

best to ameliorate the situation, or at best, resolve it. While some commentators have proffered suggestions for better and more humane servicing options, others have preferred ways to "relief"131 the debts by working out better payment mechanism, while writing-off a substantial part thereof. Lately, there has been a very concerted and vociferous clamor for total and unconditional "forgiveness"132 of the national debts.

From the divergent proposals for solving the debt issue, there appears to be a recent effort directed at what we consider to be *escaping or avoiding* the debt obligation.133 For our present purpose, we prefer to classify this approach as the *escape or avoidance approach.* This approach focuses primarily on how best to escape or avoid the obligation of current debt repayment. With so many convincing arguments rooted on moral and legal jurisprudence, the proponents of the escape or avoidance approach have attempted to persuade

(25.9%), Peru (24.4%), Jordan (23.4%), Pakistan (23.2%), Burundi (22.2%), Burma (22.1%), Uganda (20.6%), Singapore (20.6%), and Mali (20.5%)

131 The Group of 7 (G7), comprising the industrialized nations; United States of America, United Kingdom, Germany, France, Japan, Italy, and Canada, initiated this approach by agreeing to a two-thirds reduction of all bilateral debts owed by the HIPC countries to the individual members. See HIPC Debt Initiative, World Bank, 2000, at http://www.worldbank.org/hipc/about/hipcbr/hipcbr.htm

132 Current President of Nigeria, Olusegun Obasanjo, is in the forefront as one of the most consistent and courageous champions of total debt forgiveness. Nigeria, which is the largest black nation in the world, is burdened by a whopping national debt of $30 billion. According o Obasanjo, no country can make meaningful development

and cajole the creditor institutions to erase the entire national debts with more liberal conditions or without any conditions.

While this approach appears to be gathering momentum in the arena of public opinion, it is yet to translate into concrete results.[134] The debts still hang over the indebted countries like an albatross, while the weight continues to crush the daylight out of the poor segments of the citizenry. On the contrary, while the developing nations must seek ways to escape or avoid the burden of their current national debts, greater emphasis must be made at preventing additional debt or re-accumulation of debt after the current debt is forgiven. This approach is called the *preventive approach*.[135] This approach focuses primarily on a soul-searching journey of examining how these nations arrived at this embarrassing debt burden cross street. The idea is that unless a critical analysis of how these debts were

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der the weight of such huge national debt.

. See Okeke, C.N., supra, note 20. See also, Obasanjo, supra, note 22.

. Recently, in the face of mounting criticisms over his incessant overseas trips in search of debt forgiveness, geria's President Olusegun Obasanjo admitted embarrassingly that his trips have yielded little or no concrete ults.

These solution perspectives were developed by the author. The idea arose from what the author perceived as a certed effort to address the developing world debt burden from the limited perspective of 'how to escape' rather 'how to avoid.' In my humble view, escape is short- term remedy, while avoidance is long-term remedy, and ibly a permanent remedy.

accumulated and mis-applied, these nations may never find long-lasting solutions to the debt crises. I will elaborate on this further in the concluding paragraph of this thesis.

## VIII CONCLUSION

The developing countries are the products of the former colonies which the colonial powers pillaged for many decades. On the contrary, the developed countries136 are the products of the former colonial powers that exploited their former colonies. During the Second World War (1939-45), most of the developing countries served as political colonies of the developed countries. It was during this period that the colonial governments accumulated the initial national debts for the colonies through the international financial organizations that were established under the Marshall Plan and Bretton Woods system. As we have shown earlier, these financial institutions were specifically created to facilitate the re-habilitation of devastated Europe. However, the colonial governments borrowed from the financial organizations in order to sustain their limited social programs.

Further, upon political independence, the emerging states and their young and inexperienced leaders realized to their chagrin that they needed financial and technical support from the international financial organizations in order to maintain political credibility and respect. Lacking knowledge of how to create these resources locally, they resorted to the international financial organizations with their stringent conditions. Political expediency demanded that the new political leaders seek "quick fix" approaches through the international financial institutions. Thus began the journey to the present debt burden of the developing economies.

136 The United States of America is the only developed country that did not have political colonies during the colonial era.

# CHAPTER THREE

# INTERNATIONAL FINANCIAL INSTITUTIONS UNDER INTERNATIONAL LAW

## I INTRODUCTION

International financial institutions (IFIs)137 comprise of two major components: the international organizations138 and the international monetary system.139 The critical question for us to address at this point is the relationship between international law and the international financial institutions (IFIs). In other words, do these international financial institutions qualify to be classified as recognizable subjects of international law? By extension, do these institutions possess internationally recognizable personalities? Can they, assuming they possess international personalities,

137 International financial institutions (IFIs) are used in this work as the same as international financial organizations (IFOs). It is the author's preference to adopt the IFIs in the context of this work.
138 International organization in this context refers only to organizations which membership comprise of governments or governmental agencies.
139 The international monetary system is the legal regime that comprises a group of international organizations whose goals are aimed at monetary policy formulation and enforcement. It is dominated by the IMF and the Articles

engage in such critical functions like treaty making? The determination of the legal standing of these institutions under international law will go a long way to assist us in the determination of other pertinent questions that consequentially follow. For instance, do these international financial institutions have the legal capacity to claim an international right and be accountable for an international duty under international law? Can these institutions subject their beneficiaries to international obligations that are legally binding under international law? In a situation of dispute in the relationship between an international institution and a beneficiary partner, what legal recourse, under international law, is available to the aggrieved party? What enforcement tools are available, assuming one of the parties prevail? These and some other consequential questions follow from a determination of the legal standing of international financial institutions, indeed, any international institution, under international law.

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which gave rise to modern day international monetary law.

## II CLARIFICATION

Before we proceed further on our inquiry into the relationship between international law and international financial institutions,140 it is pertinent to pause and make a critical distinction or clarification. While the use of the words, "international monetary system,"141 may not create illusions in appreciation and understanding, the use of the words "international organizations," cause some conceptual confusion. Why? This confusion arise because a lot of people confuse international organizations with non-governmental organizations (NGOs). International organizations are those organizations whose membership consists of sovereign nations or governments. Non-governmental organizations or NGOs, as they are popularly called, are comprised of individual members who have joined together in pursuance of common public goals or objectives.

In order to better appreciate the place of international financial institutions within the context of international organizations in the sphere of international law, we shall apply the following four approaches:142

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Supra, note 134

Supra, note 136

These approaches are based on Dr. Manuel Rama-Montaldo's article entitled, 'International Legal Personality

## III MODES OF APPROACH

### 1. *THE INDUCTIVE APPROACH*

*Under the Inductive Approach, an international organization possesses some rights and duties, which are expressly conferred upon it. These rights and duties derive from the constituent instrument of the organization. And from the exercise of these rights and duties, the organization asserts its international personality in the arena of international law. It is worthy of note that these rights and duties may be expressly conferred or implied from the constituent instrument.143 The emphasis of this approach is the will of the States in forming the international organization.*

### 2. *THE OBJECTIVE APPROACH*

*Under the Objective Approach, the determining factor in analyzing the international personality of an international organization is the structural content. Such analysis demands a critical review of its composition, voting*

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Implied Powers of International Organizations,' *British Yearbook of International Law*, 1970. See also Okeke, *The expansion of new subjects of contemporary international law through their treaty-making capacity,* 1973 Bowett, *The Law of International Organizations* (1964), p. 275. Also, Brownlie, *Principles of International*

*procedure, functions, and the powers of the organization. According to the proponents of this approach, if an international organization lacks the requisite structural content, then it may lack the credibility to claim international personality. Contrary to the Inductive Approach, the Objective Approach de-emphasizes the will of the States that formed the international organization. Rather, if the international organization satisfies certain criteria, it will be conferred with international personality by the international legal order.144*

3. *THE FORMAL APPROACH*

*Under the Formal Approach, an international organization must enjoy international personality if the organization is endowed with such rights and duties. Such determination can be made by reviewing the provisions of the instrument setting up the organization. By implication, if the constituent instrument expresses the desire that the organization should enjoy international personality, then such privilege must be accorded the organization.*

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w, 1966, p. 520.

## 4. *THE MATERIAL APPROACH*

Under the Material Approach, it is acknowledged that general and customary international law determines the scope of the international personality of an international organization. Regardless of the international personality of an organization, it may still be limited by its constitution. For instance, the constitution of the organization may prevent the organization from performing certain legal acts or the acts that the organization wishes to perform may exceed the limit permitted by its constitution.*145*

The four approaches146 have shed some light on how best to determine the international legal personality of an international organization. While they seem to help us chart the course of determining the status of international organizations under international law, there appears to be some lingering questions on the subject. For example, under the Inductive Approach, what happens if the organization lacks the capacity to carry out the will of the States expressed in the constituent instrument? In other words, does the mere expression of the will (without more) by the States sufficient to confer full international

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Seyersted, *Objective International Personality of International Organizations,* 1963, p.46.
Seyersted, id

personality on an organization? What happens when the organization fails to assert its rights and acknowledge its obligations under international law?

While the Objective Approach appears, in my opinion, to be the most practical approach, it still calls into question the distinction between "structure" and "function". That an organization is properly structured does not necessarily imply that the organization is functional. But we must proceed on the assumption that structure under this approach is synonymous with functionality. And hopefully, that the organization will make effective use of the structures already put in place by the founders.

The Formal Approach also appears to emphasize the structure of the organization and the provisions of the instrument. It asserts that the critical determinant of the status of an international organization is the constituent instrument. Thus, if the constituent instrument expressly

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146 The four approaches are the Inductive, Objective, Formal, and Material Approaches.

endows the organization with international personality, then the organization need not do more.

The Material Approach focuses upon the role of the general and customary international law in determining the status of an international organization under international law. It also recognizes the limitations that could be placed by the constituent instrument of the organization.

Given the usefulness of the four approaches, I believe that an international organization may be properly structured and endowed with the general international personality. However, much depends on the functionality of the organization in the international arena.

## IV INTERNATIONAL LAW

International law is the law that confers rights and demands obligations from subjects in international relationships. Subjects of international law, indeed, like subjects of any given legal order, implies such entities that the norms of the legal order in question apply to, as well as the regulation of their conduct, by the imposition of duties and conferment of rights.147

International law has been broken into two main components as follows: International private law and International public law.

International private law involves international relationship between individuals. International public law, on the contrary, involves international relationship between agencies. For the purposes of our inquiry, we shall be limiting our focus on international public law because of the international agencies or organizations subject of our review.

147 Okeke, C.N., The Expansion of New Subjects of Contemporary International Law through Their Treaty-Making Capacity, Rotterdam University Press, 1973.

## V INTERNATIONAL LEGAL PERSONALITY

It is worthy of note that the earlier interpretation of international law and its subjects deprived all other entities, except sovereign states, of legal personality under international law. The assumption was that since nation-states have historically been recognized as subjects of international law, they automatically enjoy the status of "international personality." Consequently, nation-states are endowed with rights and duties directly supplied by international law.148 This position, according to Okeke, was a direct consequence of the basic premise of the classical view of international law, which denied almost all entities other than states personality in international law.149

Presently, a lot has changed since the classical view was the dominant theory in international law. International organizations have grown in number and influence,150 so have other players in the international arena, making enormous contributions to the world that the continued denial of their

148 Kirgis, Frederic, L, Jr., International Organizations in Their Legal Setting, 2nd Ed, West Publishing Co, 1993.
149 Okeke, supra, note 38.
150 A classical example is the United Nations, whose membership includes almost all the countries of the world and

influence will amount to ignorance.151

Given the rapid development of these organizations and their consequences in the global arena, other non-sovereign entities have been recognized and accorded legal personality under international law.152 Specifically, the International Law Commission noted in its commentary to the Draft Articles on the Law of Treaties of 1969, that entities other than States might possess international personality.153 These non-sovereign entities include, but are not limited to, organizations like the United Nations.154 Also, included in this non-state entities are colonies155, which are on their way to statehood, and 'communities' which have been customarily described as States because of their political cohesion, their internal autonomy and their historical status.156

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whose area of influence spans to all corners of the globe. At present, the UN membership stands at 192 member states.

151 Ibid

152 id

153 *Yearbook of International Law Commission* (1962-11), p.37. See also Okeke, C.N., The Expansion of New Subjects of Contemporary International Law Through Their Treaty-Making Capacity, 1973, p.182.

154 See Reparations for Injuries Suffered in the Service of the UN case, ICJ Reports, 1949, p.185. Also, Whiteman, *Digest*, 1963, Vol. 1, p. 548.

155 *Yearbook f International Law Commission* (1965-11),1,17.

Legal authorities157 and judicial decisions158 on the question of the legal personality of international organizations lend credence to the fact that international organizations, indeed, enjoy international legal personality. Beginning with an assessment of the League of Nations to the United Nations, there seems to exist credible evidence that international organizations are recognizable subjects of international law, with requisite legal personality.

Writing on the status of the League of Nations, Oppenheim-McNair159 asserted as follows:

"The League appears to be a subject of international law and an international person side by side with several States.....not being a State, and neither owning territories nor ruling over citizens, the League does not possess sovereignty in the sense of state sovereignty. However, being an international person *sui generis*, the League is the subject of many rights which as a rule can be exercised by sovereign States."

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156 *Yearbook of International Law Commission* (1953-11), p.95. The Holy See also falls under this category.
157 Okeke, supra note 150. See also, Oppenheim-McNair, *International Law,* Vol 1, 4th edition, 361
158 Reparations case, supra, note 151

With respect to the United Nations, and in furtherance of the proposition that international organizations possess international personality, the International Court of Justice, in its Advisory Opinion160 in the matter of the *Reparations for Injuries Suffered in the Service of the United Nations,161*held that the United Nations possessed international personality. Further, the court held that since the United Nations possessed the requisite international personality, it equally was entitled to bring suit for reparations under international law. The *Reparations* matter arose out of the assassination of the United Nations staff, named Count Bernadotte, while working in Palestine. The Court's opinion was sought by the United Nations with a view to bringing a claim of reparations against the Palestinians. In the Opinion, the court held that the United Nations possessed international personality, as well as the right and capacity to bring an international claim for reparations. Part of the Court's Opinion reads as follows:

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159 See Oppenheim-McNair, supra, note 154.
160 Although Article 34(1) of the ICJ Statute provides that " Only states may be parties in (contentious) cases before the Court," the United Nations and its specialized agencies are entitled to apply and obtain advisory opinions from the ICJ pursuant to Article 96 of the United Nations Charter. It was in exercise of Article 96 that the UN sought the advisory opinion of the ICJ in the subject matter.
161 ICJ Reports (1949), p.174.

"That it 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 the same thing as saying that it is a 'super state,' whatever that expression may mean.....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."162

## VI TREATY-MAKING CAPACITY

The capacity of an international organization to enter into a treaty constitutes an important aspect of the international personality of the international organization. Pursuant to this objective, the International Law Commission has codified two comprehensive laws on the law of treaties. The 1969 Vienna Convention on the Law of Treaties primarily deals with treaties entered into between nation-states163 On the contrary, the 1969 Vienna Convention on

162 Ibid. See also, Detter, *Law-Making by International Organizations,* Stockholm, 1965, pp 271-318, on the international personality of the European Economic Communities (ECC).
163 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; entered into force January 27,

the Law of Treaties between States and International Organizations or Between International Organizations,164 deals with treaties entered into between nation-states and international organizations on the one hand, or between international organizations, on the other hand.

Furthermore, Article 6 of the 1986 Vienna Convention states:

"The capacity of an international organization to conclude treaties is governed by the rules of that organization."

This provision of Article 6, we are told,165 was a product of a compromise between differing approaches espoused by blocs of states during the drafting process. One side argued that the capacity of an international organization to conclude treaties exists as a matter of customary international law, though the authority to conclude any given treaties could be denied by the rules of the particular organization. The other side argued that an organization's capacity depended solely on its own rules.

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1980.

164 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, March 21, 1986, U.N. Doc. A/CONF. 129/15 (1986), 25 Int'l Legal Materials 543 (1986), referenced in Kirgis, supra note 148.

165 See Hartman, The Capacity of International Organizations to Conclude Treaties, in Agreements of International Organizations and the Vienna Convention on the Law of Treaties, 127 (K. Zemanek ed 1971, referenced in Kirgis,

As a result of these disagreements, some commentators have argued that the capacity of an international organization to conclude treaties depended on the following factors; the international personality of the organization, the functional necessity for a given organization to conclude treaties if it is to perform its tasks, or the familiar constitutional doctrine of implied powers.166

## VII MEMBERSHIP

Each international organization has different conditions for membership. Some of the conditions can be time-consuming and cumbersome167, while others can be relatively smooth. Generally, the constituent instrument of the organization will stipulate the conditions for membership in the organization. While the conditions may seem straightforward and uncomplicated, due to the political implications of new membership, existing members may subject

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supra.

166 See Hartmann, supra note 162.

167 A good example was in the early years of the United Nations, as well as at the height of the Cold War. The situation was so bad during the height of the Cold War that candidates favored by the Soviet Union could not get enough of the Western votes to be admitted, and candidates favored by the West were vetoed in the Security Council by the Soviet Union.

potentially new members to undue scrutiny and opposition.

It is important to state that regardless of the characterization of an organization's constituent instrument168, the universally acceptable mode of becoming a member is by the process of accession. In other words, after a potential member-state applies to the membership of the organization, the onus will be on the new member-state to prove that it has satisfied all the conditions of membership. After the member-state proves satisfactorily that it has satisfied all the conditions, the member will then accede to the constituent instrument of the organization. The process of accession differs from one country to another, but the acceptability of membership depends on whether the member-state has complied with its laws on accession to international organizations.

## VIII INTERNATIONAL ORGANIZATIONS

International organizations are organizations whose membership consists of sovereign governments that come together in pursuance of mutual benefits based on multilateral cooperation.169

Modern 'universal' international organization can be traced to the Versailles Treaty170 at the end of World War I. The treaty gave birth to the League of Nations and the International Labor Organization.171 From the ashes of the League after World War II, came the United Nations.172 The importance of the United Nations, as well as other complementary institutions cannot be over-emphasized in the world of business and in the orderly relationship of the world. Given the tremendous changes that the world is constantly faced with, particularly, in the twenty-first (21st) century, the need for a more

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168 The constituent instrument of an international organization may be characterized as a Charter, a Protocol, an Agreement, , an Article, etc.

169 This classification distinguishes International Organizations from Non-Governmental Organizations (NGOs). The latter comprises of individuals as members with a common societal objective or goal.

170 The Versailles Treaty of 1920 gave birth to the League of Nations. The League is known as the first multilateral international political institution. It existed until the end of World War II, and was finally wound up on April 18, 1946 on a simple resolution of the Assembly of the League.

171 Ibid

172 See the UNO at www.un.org

orderly world becomes more paramount. The concept of globalization[173] has, indeed, reduced the world to the fabled global village. As the world continues to be more interconnected, the physical barriers that separated one part of the world from another are dismantled. As labor, goods, services, information, technology, etc. are transported from one part of the world to another, so are drugs, crimes, disease, terrorism, etc.[174]

Consequently, these institutions have grown to supplement some of the functions of the national governments.[175] They serve as sources of information[176] or sources of financing.[177] They also serve as a source of regulation[178] or a source of jobs.[179] Increasingly, they provide many services on behalf of the member states that mutually benefit the members as well as non-members.

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173 Although the term 'globalization' has been widely applied to include political, social, environmental, historical, geographical, and cultural implications of globalization, however; we will limit the application in this work to economic globalization. Thus, economic globalization is defined as the international integration of goods, technology, labor, and capital, whereby firms implement global strategies that link and coordinate their international activities on a worldwide basis. See Slaughter, M.J. and Swagel, P., *Does Globalization Lower Wages and Export Jobs?* (Washington, DC: IMF, 1997), p.1. Contrast with Lubbers, R.F.M., "General Introduction," *The Globalization of Economy and Society,* December 30, 1996; Riggs, F.W., "Globalization Is a Fuzzy Term but It May Convey Special Meanings," *The Theme of the IPSA World Congress 2000,* July 1999.

174 Ibid

175 Ball, D. A., et al, International Business: The Challenge of Global Competition, 10th ed, 2006, p. 120

176 See the UNO, supra, note 169

177 See the UNO subsidiaries like the IMF, the World Bank, etc.

The size and influence of these organizations differ as well as the areas of their operations. While some are better known due to their political and economic impact on the international arena, others are more confined to specific and limited geographical areas.180

Regardless, these organizations qualify to be called 'international,' because they meet the criteria of being comprised of two or more States in their membership. They also qualify to be called 'organizations,' because they meet the criteria of having specific and general goals and objectives.181 Some of the well-known ones include the United Nations and its predecessor, the League of Nations, the European Union (EU), the World Bank (International Bank for Reconstruction and Development), the International Monetary Fund (IMF), the International Labor Organization (ILO), the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the World Trade Organization (WTO).

178 Many agencies of the UN serve in the regulatory capacities.
179 The United Nations as well as its agencies is reputed to be the world's largest employer. See note 169, supra
180 Ball, supra, note 172.

# IX INTERNATIONAL MONETARY SYSTEM

The international monetary system is driven by the international monetary law. International monetary law was essentially created by the Articles of Agreement of the IMF. According to Sir Joseph Gold,182 *"before the Articles of Agreement of the Fund came into existence, international monetary law, whether customary or conventional, was negligible."183* Thus, the Articles of Agreement of the Fund and the interpretation and application of the Articles have principally shaped the development of modern day international monetary law.184 The reason lies in the practice of states prior to World War II. Before the war, *"monetary affairs were matters of domestic, not international concern"*, thus, *"the terms 'international monetary relations' and 'international monetary law' were essentially*

181 According to McNamara Carter, an organization is a group of people intentionally organized to accomplish an overall, common goal or set of goals.
182 Sir Joseph Gold is an internationally recognized authority on the development of modern day international monetary law. He served as a member of the Legal Department of the IMF from 1946 to 1960, as General Counsel and Director of the Legal Department from 1960 to 1979, and as Senior Consultant to the Fund thereafter. In those capacities, he played critical roles in the creation and development of international monetary law as a distinct branch of public international law.
183 Gold, J, THE RULE OF LAW IN THE INTERNATIONAL MONETARY FUND, 2 IMF Pamphlet Series, No. 32, 1980.
184 Ibid.

*unknown."185* This situation was confirmed by Sir Gold when he stated as follows: *"in the past, states exercised an almost unrestrained freedom to deal with their balances of payments, even though the policies of one state had an impact on the balances of payments of others."186* The Catholic Church's prohibition of usury through their Canon Law was the closest example of a rule of international monetary law before the creation of the Fund.187 The application of the law within the mainly European Catholic community as well as the violation of the law, limited the acceptability of the law internationally.188 Another significant attempt at creating an international monetary law was the Latin Monetary Union of 1865. The treaty creating the union was entered into by France, Italy, Belgium, Switzerland, and Greece, pursuant to which the states agreed to accept the gold and silver coins of the members in settlement of financial transactions.189 Again, the limited scope of the union as well as the

185 Zamora, Stephen, SIR JOSEPH GOLD AND THE DEVELOPMENT OF INTERNATIONAL MONETARY LAW, 23 Int'l Law 1009, 1989.
186 Gold, J, Law and Change in International Monetary Relations, 31 REC.A.B. CITY N.Y. 223, 1976.
187 Einzig, P., THE HISTORY OF FOREIGN EXCHANGE 109-10, 2nd ed, 1970; SHUSTER, M.R., THE PUBLIC INTERNATIONAL LAW OF MONEY 11-14, 1973; Schwarzenberger, The Principles and Standards f International Economic Law, 1966, 1 RECEUIL DES COURS 1, 63.
188 Einzig, supra note 163
189 Nussbaum, A., MONEY IN THE LAW: NATIONAL AND INTERNATIONAL, 1950. See also, Mann, F.A., THE LEGAL ASPECT OF MONEY 463, 4th ed., 1982

violations robbed it of an international stature.190

From the foregoing, one can appreciate the conclusions reached by Professor Stephen Zamora191 when he wrote:

*"In short, the IMF Agreement was preceded by a haphazard pattern of international (mostly bilateral) agreements adopted by political rulers, usually for the purpose of stabilizing foreign exchange markets. While international monetary law was not exactly nonexistent, it was, as Sir Joseph (Gold) has pointed, "negligible." The international agreements that were adopted were usually short-lived. They did not provide for mechanisms of international enforcement."*

The international monetary system, therefore, is a group of organizations dealing specifically with monetary policy formulation and enforcement. Some of these organizations, like typical international organizations, consist of member states. On the contrary, while some are not specifically comprised of member states, they, however, are financed and controlled by the governments behind their formation.192 The common characteristic

190 Ibid
191 Supra, footnote 161
192 See the Paris and London Clubs.

underlying the organizations in the international monetary system is the fact that they are limited to solely monetary policy formulation and enforcement in their respective environment.

For instance, the United Nations193 is the umbrella of all international organizations. It is comprised of member states. Its goals and objectives cover every conceivable human concern and activity. It is one of the world's largest employers, and it has offices and operations in virtually all parts of the world. The United Nations is also classified as one of the major players in theinternational monetary system, making rules and regulations that tremendously impact the world's economy, while providing critical enforcement tools and agencies.194 By contrast, the European Union195 has developed into another major player in the international monetary system. Unlike the United Nations, the EU is made up of sovereign nations in Europe that have come together to form a supra-national state or the United States of

193 See the United Nations website at www.un.org
194 Ibid
195 www.eu.org

Europe as it is jokingly described.196

With the creation of the European Monetary Union (EMU), and the introduction of the *euro* as a common currency in the Union197, the European Union has become a critical actor in the international monetary system. Some of the organizations under the international monetary system include the United Nations Organization (UNO), the European Union (EU), the World Bank (IBRD), the International Monetary Fund (IMF), the World Trade Organization (WTO), etc.

196 Ibid

197 It is noteworthy that while the *euro* is the official currency of the European Union, some member states have not yet replaced their national currencies with the *euro*. Among the member states, the United Kingdom, Sweden, and Denmark still retain their national currencies.

## X. CONCLUSION

International law serves as the critical regulatory tool of the activities of international organizations and international monetary systems as subjects of international law.198 Without the vibrant regulation and monitoring of international law, international organizations and international monetary systems would be confronted, on a daily basis, with issues that would make their operations sluggish.

As the activities of these institutions expand, so is the emergence of new and more challenging issues. Some of the issues were not anticipated by the founding fathers of these institutions probably as a result of the limitations of that era.

While appreciating the new and more challenging issues confronting these institutions, it must be borne in mind that not all institutions can legally claim to be called international organizations under international law. The reason lies in the fact that every international organization must

first pass the litmus test of international personality.199 If such an organization meets the criteria for recognition as an international organization, then it can assert itself on the international arena by claiming rights and observing duties in international law.200 Further, such an organization may avail itself of the capacity to enter into legally binding treaties with sovereign States or with other international organizations under the 1969 Vienna Convention on the Law of Treaties.201 But in order to exercise this right, the rules of the organization must empower the organization to enter into a treaty.202 However, as Kirgis203 reminded us, "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community." But such subjects must meet the minimum criteria under the community standard of membership.

198 Okeke, supra, note 144
199 Supra, notes 157, 158, 159, 160, 161 and 162.
200 Ibid
201 Supra, note 164.
202 Ibid
203 Kirgis, F.L., Jr., supra, note 148.

# CHAPTER FOUR

# BRETTON WOODS SYSTEM AND COMPANY UNDER INTERNATIONAL MONETARY SYSTEM

## I INTRODUCTION

During the end of the World War II (1939-1945)204, the major players205 sought to create an economic and financial system that would facilitate international trade on a multilateral and nondiscriminatory basis. The four-year war had taken great toll206 on all the major players in Europe207, America and Asia, as well as on the minor participants in Africa208.

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204 The term, "Second World War" is more commonplace in the United Kingdom and Canada, while the term "World War II" is preferred by American publishers. For example, the Oxford University Press uses *The Oxford Companion to the Second World War* in the United Kingdom, and *The Oxford Companion to World War II* in the United States. For further reading visit http://en.wikipedia.org/wiki/World_War_II, last visited on February 23, 2007

205 The World War II was fought between the Allied Powers and the Axis Powers. The conflict involved armed forces from over seventy nations and resulted in the death of over sixty million people. The major players on the Allied side included Soviet Union, United States of America, United Kingdom, and China, while the major players on the Axis side included Germany, Japan, and Italy. The Allied Powers emerged victorious.

206 The economies of Europe, China and Japan were completely destroyed by the war. Both sides in the conflict suffered enormous casualties, for example, it is estimated that the Allied Powers lost over seventeen million of their military and over thirty three million civilians. The Axis Powers lost an estimated eight million military personnel and over twelve million civilians. See http://en.wikipedia.org/wiki/World_War_II, last visited February 23, 2007.

207 Footnote 164, supra.

208 The minor participants of the war on the Allied side included Philippines, India, New Zealand, South Africa, Brazil, etc., while those on the Axis side included Hungary, Romania, Finland, Croatia, Slovakia, Thailand, etc.

A series of conferences209 were held to fashion these institutions210 and agreements. The most important was held in 1944 at Bretton Woods, New Hampshire, in the United States of America, where the institutions and agreements on the regulation of the financial and economic relations were developed211. The main achievement of the Bretton Woods Conference was the creation of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD-the World Bank).

As conceived by the Conference, the term "Bretton Woods System", comprise the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD-the World Bank), and the General Agreement on Tariffs and Trade (GATT). The General Agreement on Tariffs and Trade, however, was developed in another series of conferences, which

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209 Some of the international conferences that preceded the Bretton Woods conference include: The Atlantic Charter of 1941, The United Nations Declaration of 26 Nations on January 1, 1942 (It is noteworthy that the UNO was not formed until 1945); The Moscow Declaration of 1943; The Dumbarton Oaks Conference of 1944; The Yalta Conference of 1945; and The San Francisco Conference of 1945 which finally gave birth to the United Nations Organization (UNO).

210 These institutions include the 'original' Bretton Woods institutions like the IMF, The World Bank and the GATT. Although the WTO took over from the GATT, it was created later in 1994 but became operative on January 1, 1995. However, for the purposes of this work, we have grouped them all under the title of the international financial institutions (IFIs).

211 Although the preceding conferences to the Bretton Woods conference focused primarily on the developments from the Second World War, it is important to emphasize that the political leaders were also aiming not just on a strategy to win the war, but also on a strategy to maintain lasting peace after the war.

spanned from the fall of 1946 to mid-1948.212 The GATT was designed as a multilateral agreement that will succeed the originally conceived Havana Charter and the International Trade Organization (ITO)213, while embodying commercial policy provisions essentially similar to the Havana Charter chapter on commercial policy. The ITO failed to materialize because some of the governments failed to ratify the ITO charter, consequently; *the ITO was not ratified as a de jure organization, and GATT became a de facto international trade organization.214*

While the IMF was intended to repair the disintegration that had befallen the international monetary system prior to the War215, and the World Bank was designed to stimulate and support foreign investment which had declined to insignificant amounts,216 the GATT was intended to reverse the

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212 Horsefield, Keith J., The International Monetary Fund, 1945-1965, 3 vols, 1969; Mason, Edward S. & Asher, Robert E., IMF, The International Monetary Fund, 1966-1971 (1984).

213 The Havana Conference of 1948 succeeded in drawing up a charter for the formation of the International Trade Organization (ITO).

214 Curzon G, *Multilateral Commercial Diplomacy,* New York, Praeger, 1965.

215 As a result of the discriminatory and retaliatory trade practices that responded to the US enactment of the Smooth-Hawley Tariff Act of 1930, the international monetary system was adversely affected in the uncontrolled and unregulated trade war. Infact, the international monetary system as it was then known lost control of the system and eventually lost credibility.

216 The decline of foreign investment and trade was so drastic that world trade plummeted from $5.7 billion in 1929 to $1.9 billion in 1932 while unemployment increased sharply within the same period. For further reading see "The Fruits of Free Trade: Protection's Price," 2002 Annual Report – Federal Reserve Bank of Dallas,

protectionist and discriminatory trade practices that had multiplied during the pre-war depression years.217 The Fund and GATT were to collaborate on exchange policies and trade policies. In combination, the Fund, the World Bank, and GATT, were designed to help the advanced industrial countries achieve the multiple objectives of full employment, freer and expanding trade, and stable exchange rates.218 The framers of these institutions had hoped that GATT will serve "*the ideal of an international organization that would function in the trade areas much as it was hoped the UN would function in the political and peacekeeping areas.*"219 However, the GATT did not live up to the expectations of the framers. According to Jackson, J.H., et al, the "*birth defects*" that GATT had suffered from inception prevented it from fully living up to the ideal of the founding fathers.220 The framers of GATT never intended it to be an organization, but rather an agreement to

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www.dallasfed.org/fed/annual/2002/ar02f.html, (June 30, 2004). This data was cited by Ball, D et al, International Business: The Challenge of Global Competition, 10th ed, p.95, 2006.

217 Some commentators have traced the origin of the pre-war depression years to the enactment of the Smooth-Hawley Tariff Act, 1930, by the US Congress and the subsequent signing of the bill by President Herbert Hoover. According to the commentators, the bill was enacted as a result of the lobby of the US farmers who wanted to ensure some level of protection from foreign competition by the imposition of heavy tariffs on imported agricultural products. Consequently, the bill sparked a trade war "characterized by tit-for-tat tariffs and protectionism between trading nations, which soon engulfed most of the world's economies." Ibid

218 Meier, G.M., The Bretton Woods Agreement – 25 Years After, 39 Stanford Law Rev. 235, 237, 245-246 (1971); reprinted in J.H. Jackson, W.J. Davey, A.O. Sykes, Jr., Legal Problems of International Economic Relations, 3 ed., West Publishing Co., 279 (1995).

219 Donald Ball et al, International Business: The Challenge of Global Competition, 2006, McGraw-Hill, p.123.

embody the results of the tariff negotiations as well as some general protective clauses, which would prevent evasion of the tariff commitments. Whilst GATT was originally planed to embody the results of the tariff negotiations, the International Trade Organization (ITO), was planned to be the organizational framework for the implementation of the GATT provisions.221

Like the IMF and the World Bank, the initiatives for the formation of an ITO and a GATT came chiefly from the United States of America, during the end of World War II. The motivation for this initiative can be traced to two main sources in the American economic policy222 at the end of the war. The first source was the general "Reciprocal Trade Agreements" program that originated with the 1934 Act,223 which enabled the United States President

220 Jackson, J.H., Davey, W.J., Sykes, A.O., Jr., supra, note 41.
221 Ibid
222 Noting that the "tariff wars" that greeted the Smooth-Hawley Tariff Act of 1930 was one of the major economic causes of the World War II, the American economic policy after the war was aimed chiefly at preventing a re-occurrence of the events that gave rise to the war. Thus the government began the process of enacting the Reciprocal Trade Agreements program as well as the formation of the ITO and GATT as major regulators of the international economic affairs.
223 See the Reciprocal Trade Agreements Act (RTAA), 1934. The RTAA was an amendment to the 1930 Smooth-Hawley Tariff Act. The RTAA granted the president the power to make foreign trade agreements with other nations on the basis of a mutual reduction of duties, contrary to the prevailing practice whereby Congress set import duties, usually at high protectionist levels. It may be worthy of note that between 1934 and 1947 (GATT formation), U.S. tariffs were reduced from an average of 48 percent to an average of 25 percent. The RTAA was also regularly

to negotiate mutual reductions of tariffs. The second source was the realization by the United States224 of the important role played by international economic affairs in the genesis of World War II. The ITO and GATT were thus conceived to achieve the dual objective of providing a multilateral medium for negotiating mutual tariffs reduction and a viable regulator of international economic affairs.225

In addition to the core Bretton Woods institutions like the IMF, the World Bank and the ITO/GATT, other organizations were formed to facilitate the re-activation and coordination of international trade. Hence, at the inception of the United Nations in 1945, the Economic and Social Council (ECOSOC), was also established226. During the Council's first meeting in February 1946, the United States introduced a resolution calling for the convening of a "United Nations Conference on Trade and Employment." The resolution was adopted with the principal goal of drafting a charter for an international trade

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renewed by the Congress until it was replaced in 1962 by the Trade Expansion Act, which was granted to President John F. Kennedy to empower him to negotiate reciprocal trade agreements with the European Common Market which was formed in 1957.

224 Supra footnote 181 and 182

225 Ibid

226 The United Nations Charter was signed at San Francisco on June 26, 1945. It entered into force on October 24,

organization.227

In the fall of 1946, a committee met in London to consider a "Suggested Charter for an International Trade Organization", drafted by the United States government.228 In early 1947, a drafting subcommittee met at Lake Success, New York, while beginning in April to October of 1947, the full preparatory conference convened again in Geneva.229 It was at this Geneva conference that the General Agreement on Tariffs and Trade (GATT) was drafted, and some progress was made with the tariff negotiations and the ITO charter. It is worthy of note that the tariff agreements were being negotiated under the extended authority of the 1945 Reciprocal Trade Agreements Act.230 The United States Congress had hoped that the ITO Charter would be submitted to them for approval.231 Thus, when early drafts of the General Agreement included some provisional semblance of an organization, the provisions were

1945. The latest amendments can be found at 24 U.S.T. 2225, T.I.A.S. 7739.

227 U.S. State Dept. Press Release, Dec 16, 1945, reproduced in 13 Dept. State Bulletin 970 (1945); 1 U.N. ECOSOC Res. 13, U.N. Doc. E/22 (1946)

228 London Report, First Session of the Preparatory Committee (1946); U.N. Doc. EPCT/CII/1-66 (1946)

229 New York Report, U.N. Doc. EPCT/34 (1947); U.N. Doc. EPCT/C.6/W.58 (1947); Also U.N. Docs. EPCT/A/SR/1-43; EPCT/B/SR/1-33 (1947); U.N. Doc. EPCT/TAC/SR. 1-28 (1947).

230 Supra footnote 182. The RTAA 1945 was a product of the renewal of the original 1934 Act. President Harry Truman used the power of the 1945 Act to authorize the US to join the other countries engaged in tariff negotiations which later culminated in the formation of the GATT on October 30, 1947.

intensely criticized by the Congress on the grounds that the President lacked authority to accept international organization membership for the United States without congressional approval.232 Congress had expected that the GATT would be a subsidiary agreement under the ITO charter, depending upon the ITO secretariat for servicing and enforcement. This expectation was based upon the recognition by Congress that most of the general clauses in the GATT were drawn from comparable clauses drafted for the ITO.233

Due to the foregoing reasons and more234, neither the ITO Charter, nor the GATT was able to pass the litmus test of becoming effective before the expiration of the United States extended Trade Agreement Act in 1948. The GATT for instance, needed parliamentary approval by some of the other countries235 in order to accept many of its general clauses.236 However, in

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231 The ITO was a product of the RTAA 1945. The US Congress reasonably expected that the ITO will be presented to them for approval.

232 Hearings on the Trade Agreements Act and the Proposed ITO Before the House Ways and Means Comm., 80th Cong. 1st Sess. (1947); Hearings on Operation of the Trade Agreements Act and Proposed ITO Before the Senate Finance Comm., 80th Cong. 1st Sess. (1947)

233 Supra footnotes 189, 190 and 191.

234 The political enthusiasm for the ITO and GATT had waned by the expiration of the extended Trade Agreement Act 1948. The victory of the Republican Party in the 1946 mid-term elections for Congress frustrated all the political enthusiasm that the Democratic Party had brought in pushing for the ITO and GATT.

235 The other countries that were signatories to the GATT in 1947 include the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of

order to avert a complete loss of the entire effort, the 23 original members of GATT signed in late 1947, a "Protocol of Provisional Application" (PPA), which became effective on January 1, 1948.237 Since then, the GATT has been applied only through this protocol with hopes that at the inception of the ITO Charter, the Protocol of Provisional Application would give way to a definite application of the GATT.

Unfortunately, this expectation never came through. Although the Havana conference completed the draft charter of the ITO in early 1948, the United States Congress had by then gone through a lot of changes that prevented the President from convincing them to approve their hitherto wanted baby238, and thus the ITO became a still-born baby239. At the demise of the ITO,

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Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland.

236 Some of the GATT general clauses include Article I (General Most-Favoured-Nation Treatment), Article II (Schedules of Concessions), Article III (National Treatment on Internal Taxation and Regulation), Article V (Freedom of Transit), etc.

237 Protocol of Provisional Application to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. Pts. 5,6, TIAS No.1700, 55 UNTS 308. The Protocol was signed by the original 23 members of the GATT, including the United States of America.

238 Upon the death in 1945 of President Franklin D. Roosevelt, his Vice President, Harry Truman took over. In 1946, the Republican Party won the mid-term elections in the US Congress. Consequently, the new Democratic President, Harry Truman, had to deal with a rather uncooperative Congress from 1946 until 1948 when he was elected President with a Democratic Congress. Truman was so frustrated with the Republican Congress that he labeled them the "do nothing" Congress ostensibly in reference to their inability to pass the bills on his nationalized healthcare program, the ITO Charter, etc. See www.friesian.com/presiden.htm, last visited March 6, 2007.

239 Ibid

GATT therefore became by default, the central organization for coordinating national policies on international trade.240 With the addition of new members, it became apparent that GATT was not fashioned to undertake the onerous responsibility of coordinating the GATT trade policies, again re-igniting the search for a more effective coordinating organization.

At the ninth session of the Contracting Parties of GATT, held from October 1954 to May 1955, a number of amendments were proposed to GATT and a draft charter for the proposed Organization for Trade Cooperation (OTC) was completed.241 The United States Congress again rejected the OTC charter, like its predecessor the ITO charter. However, the amendments to the GATT were accepted under the authority of the then existing USTrade Agreements Act. The inability to form a coordinating organization for the GATT consequently gave rise to the situation whereby the nation participants in GATT are not called "members", but rather are called "contracting

240 Ibid
241 GATT, 3rd Supp. BISD (1955); Agreement on the Organization for Trade Cooperation, GATT Doc. Final Act, 9th Session.

parties.242

According to Jackson, J.H., et al, at the commencement of the Uruguay Round of Talks243 in 1986, the "*birth defects*" that hindered the efficiency of GATT can be summarized as follows:244

1) *GATT application was controversial, flawed and still "provisional," although the GATT rules did apply as binding international treaty obligations. Grandfather rights still existed, even though they were originally intended to be temporary. A number of other institutional problems stemmed from this basic treaty structure, including the difficulty of the amendment process, its uncertain relationship to*

242 GATT Article XXV(1) provides that "Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES." Article XXV (3) provides that each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES. Further, Article XXV (4) provides that decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast, except as otherwise provided for in this Agreement. See also Article XXVI on Acceptance, Entry into Force and Registration.

243 The GATT operated by organizing and coordinating a series of multilateral negotiations known as "trade rounds". Until the Kennedy Round in 1964, the previous GATT trade rounds concentrated on tariffs reduction. The Kennedy Round produced an agreement on anti-dumping and development. The Tokyo Round of 1973 followed suit by producing agreement on non-tariff barriers. A comprehensive list of the GATT Round of Talks is as follows: (1) Havana(Cuba) – 1947 (2) Annecy(France) – 1949 (3) Torquay(UK) – 1951 (4) Geneva – 1956 (5) Dillon Round – 1960/1965 (6) Kennedy Round – 1964/1967 (7) Tokyo Round – 1973/1979 (8) Uruguay Round – 1986/1994 (9) Doha Round – 2001/2005

*domestic laws, and the lack of a unified dispute settlement procedure, questions of membership, and the ill-defined powers of the contracting parties.*

2) *The amending provisions of the General Agreement were such that it was considered nearly impossible to amend it. The delay required by the treaty acceptance process, the difficulty of obtaining the required number of acceptances, the shift in bargaining power involved under the amending procedure in the context of a large membership and the fact that even when an amendment is effective it will not apply to countries which do not accept it, are all the reasons why the amending procedure had fallen into disuse. This caused a certain rigidity and inability to develop rules to accommodate the many new developments in international trade and other economic interdependence subjects. One result was the development of an elaborate system of "side agreements or codes," which created additional problems.*

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Jackson, J.H., Davey, W.J., Sykes, A.O., Jr, supra, 296.

3) *A key problem was the relationship to GATT of these many side agreements, which in most cases were stand-alone treaties, but which were intimately linked to the GATT treaty structure itself. It was unclear in some circumstances what this relationship was and whether an obligation contained in a side agreement would prevail over one contained in the General Agreement or vice versa. In any event, since the side agreements tended to have a series of separate procedures for various matters including dispute settlement, there was certain inefficiency in the potential "forum shopping." Side agreements bound only governments, which accepted them, and the opportunity for countries to pick and choose led to "GATT a la carte."*

4) *The relationship of the GATT treaty system to domestic law in a variety of GATT member countries was very murky. This might have existed in any event, regardless of the basic treaty structure, since national legal systems differ so widely. Nevertheless, it seemed that some more attention could be given to the possibility of certain international treaty obligations with respect to how the trade and economic rules should be*

*implemented domestically. More attention has been given to this question in recent years, sometimes under the rubric "transparency." It should be noted that the General Agreement itself has several clauses (e.g. Article X) that are related to transparency, dealing with publication and administration of trade regulations.*

5) *There were a number of troublesome problems with respect to membership, or "contracting party status," in the GATT system. There were various ways by which a nation could become a "member" of GATT or one of the side agreements. In some cases, a territory that did not have full independent international sovereignty could obtain membership. In certain cases, former colonies could be sponsored for membership and enter GATT with very little substantive commitment, reducing the "terrain of reciprocity," and leading to criticisms of unfairness. The General Agreement had an "opt out" clause (Article XXXV) by which individual GATT contracting parties could opt out of a GATT relationship with other parties, at one time only (when one of them originally enters GATT). Furthermore, there were a number of*

*instances where there was an effective "opt out" at a later time, with murky legal results. Article XXI with an exception for "national security" purposes is related to this issue.*

6) *The powers of the Contracting Parties defined in the General Agreement were very ambiguous. Indeed, they were so broad that they could be the subjects of abuse (although they have not been so abused). There were a number of unsettled and disquieting issues, such as the power of the contracting parties to interpret the General Agreement and the relationship of actions of the contracting parties to some of the side agreements. Furthermore, the decision making process left much to be desired. The so-called "consensus approach," which had evolved to ameliorate some of the problems of a one-nation, one-vote structure, had slowed the decision making process and made it hard to confront difficult issues. The GATT Council had been created out of whole cloth by resolution of the Contracting Parties, and had been delegated almost all of their powers, but had no treaty status.*

7) *The dispute settlement processes of GATT were one of the more intriguing institutional developments of the institution. The treaty language was very sparse indeed, but many decades of the practice had resulted in a considerable amount of exegesis. A Tokyo Round "understanding" elaborated and formalized many of the dispute settlement procedures that had developed in the early decades of GATT practice.*

8) *Finally, there was a long festering problem with respect to the relationship of GATT to the other Bretton Woods institutions, particularly, the International Monetary Fund and the World Bank.*

At the end of the eight-year Uruguay Round (1986-1994) of trade negotiations, there had emerged what had eluded all previous efforts – a new and better-defined international organization and treaty structure in the name of a World Trade Organization (WTO). The Uruguay Round did not only succeed in the formation of the WTO, but also made substantial

revisions in the dispute settlement procedures.245 Furthermore, while the GATT dealt almost entirely with trade in products, the Uruguay Round added a treaty for trade in services (GATS), and another for the protection of intellectual property (TRIPS). The WTO, is thus, charged with the responsibility of administering these three treaties with a view to a better regulation of international trade and services.246

It must be clarified that the formation of WTO during the Uruguay Round247 was not planned and was not anticipated. The agenda and negotiating structure prepared by the ministers at Punta del Este, Uruguay, in September 1986, did not include the drafting of any organizational charter. Moreover, the planners did not want to incur the opposition of the United States Congress, which had earlier struck down two attempts at forming such organization.248 However, a group was formed to consider

245 The Uruguay Round created the unique Dispute Settlement Understanding (DSU) as the main WTO agreement on settling disputes. Also, the Dispute Settlement Body (DSB) was created to handle all the cases arising under the DSU. The DSB is made up of all member governments, usually represented by an official at the level of an ambassador or its equivalent. The DSB also creates a permanent seven-member committee called the Appellate Body. The members of the AB serve four-year terms and are individuals that are not affiliated with any government. See www.wto.org/english/tratop_e/dispu_e/dispu_e.htm, last visited June 27, 2006

246 Ibid

247 See the Uruguay Round Agreements Act (1994), Pub. L. No 103-465, 108 Stat. 4809.

248 Supra, footnote 197

the "Future of the GATT system", conveniently called the FOGS group. The FOGS group focused on the GATT's relationship to the monetary part of the Bretton Woods system and on designing the new Trade Policy Review Mechanism (TPRM).

In May of 1990, the government of Canada was the first to formally propose the formation of a World Trade Organization. The European Union was in support of this proposal, but suggested a Multilateral Trade Organization (MTO). The Ministerial Meeting held in Brussels in December of 1990 ended in an impasse. Afterwards, the then GATT Director-General, Arthur Dunkel, intervened and encouraged the negotiators to go ahead and produce a complete rough draft of the negotiation results. The draft that was presented contained a draft charter for a new organization to be called MTO.

From that time until December of 1993, the negotiators worked out their differences and the oppositions of the draft charter, especially, the name – MTO. This lasted until December 1993, when the negotiators agreed to a

charter proposal with a change of name back to WTO. In April 1994, the proposal was finally formalized at the Morocco249 summit and ready to be submitted to the respective governments for ratification250.

Having reviewed the historical background of the Bretton Woods institutions which form the bulk of the IFIs, it is equally important that we review the institutional framework of these IFIs, starting with the IMF.

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The Uruguay Round Final Act was signed in Marrakesh, Morocco, on April 15, 1994. It subsequently came into ect on January 1, 1995, thus giving birth to the World Trade Organization (WTO).
As at December 11, 2005, the WTO has 149 members. See

## II INTERNATIONAL MONETARY FUND (IMF)

### INSTITUTIONAL FRAMEWORK

The Articles of Agreement251 of the International Monetary Fund (IMF), sets out the institutional framework of the Fund. The Articles provide for the following:

i) A Board of Governors,

ii) An Executive Board,

iii) A Managing Director, and

iv) A staff of international civil servants.

The highest authority of the IMF is the Board of Governors.252 The Board consists of one Governor and one Alternate Governor, appointed by each of the IMF's member countries. The Governors are usually ministers

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//www.wto.org/english/thewto_e/whatis_e/whatis_e.htm, last visited June 19, 2006.
The Articles of Agreement of the IMF which is the legal document that created and empowered the Fund, ed into force in December 1945. For a complete reading of the Articles, visit

of finance or heads of central banks in their own countries. The Articles also provide that the Board of Governors may establish a Council as a permanent body of the IMF at the ministerial or comparable level to supervise the management and functioning of the international monetary system and to consider any proposals to amend the Articles of Agreement. However, the Board has not established the Council. Rather, an Interim Committee was established at the 1974 Annual Meetings.

The Interim Committee is composed of 24 IMF Governors. The Committee meets twice a year to fashion out how best to provide ministerial guidance to the Executive Board. It reports to the IMF's Board of Governors on the management and functioning of the international monetary system and on proposals to amend the Articles of Agreement.

In 1974, there was also established a Joint Ministerial Committee of the Boards of Governors of the Bank and the IMF on the Transfer of Real Resources to Developing Countries (the Development Committee). The

//www.imf.org/external/pubs/ft/aa/index.htm, last visited August 15, 2005.

Development Committee, which has 24 members, also advises and reports to the two Boards of Governors on development issues.

The Board of Governors normally meets once a year,253 but it may meet or vote by mail. Over the years, the Board has delegated many of its powers to the Executive Board.254 Thus, while the Board of Governors is the highest authority of the IMF, the Executive Board, on the contrary, has developed into the permanent decision-making organ of the IMF.255 The latter has its headquarters in Washington, D.C. The Executive Board currently consists of 24 Executive Directors, who are appointed or elected by member countries.

The Executive Board deals with a wide variety of policy, operational, and administrative matters. These matters include surveillance of members' exchange rate policies, provision of IMF financial assistance to member

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Article XII (2) of the Articles of Agreement, 1945.
Footnote 90, supra.
Article XII (3) of the Articles of Agreement, 1945.
This delegation of permanent decision making authority arose by default. Since the Board of Governors which is the highest ranking authority meets once a year, the Executive Board consequently makes the daily decisions that are requisite for the effective management of the Fund.

countries, consultations with members, and comprehensive studies on issues of importance to the membership.

The Executive Board also selects the Managing Director of the IMF, who serves as Chairman of the Board and as the head of the IMF's staff. The Managing Director conducts the day-to-day business of the IMF.256

The next IFI to be reviewed, the IBRD, commonly called the World Bank, is another Bretton Woods creation.

## III INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT (WORLD BANK)

### INSTITUTIONAL FRAMEWORK

The institutional framework of the International Bank for Reconstruction and Development (World Bank), is contained in Article V of the Bank's constitution which is otherwise called the "Organization and Management Article."257 This Article V is very similar to the Fund's Articles XII and XIII.

The Board of Governor of the Bank, like that of the Fund, consists of one governor and one alternate, appointed by each member country. The two boards meet in joint session once a year. Also, like the Fund, the daily operation of the Bank is delegated to the executive directors.

The Board of Governor is, however, the highest authority of the Bank. The

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256 Article XII (4) of the Articles of Agreement, 1945.The current IMF Managing Director is Rodrigo de Rato, who was formerly the Minister of Finance of Spain. His five year term began on June 7, 2004.

257 The Articles of Agreement of the International Bank for Reconstruction and Development, 1944 (hereinafter

powers include the admission of new members, increase or decrease of the capital stock of the Bank, suspension of a member, determination of the remuneration of directors, and other reserved functions.258

The Articles of Agreement of the Bank provided for twelve executive directors of whom:

(i) Five shall be appointed, one by each of the five members having the largest number of shares;

(ii) Seven shall be elected.....by all the Governors other than those appointed by the five members.....259

In accord with the agreement at Bretton Woods, the member countries having the largest number of shares were, in order, the United States, the United Kingdom, the Soviet Union, China, and France. The Soviet Union, however, failed to ratify the Articles of Agreement, thus, India moved up to the fifth

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referred to as IBRD Articles of Agreement).
258 IBRD Articles of Agreement, Article V, section 2.
259 IBRD Articles of Agreement, Article V, section 4(b).

position.260

Executive directors and their alternates were to be appointed or elected for two-year terms. Article V, section 4(e) of the Articles of Agreement, provides that the Executive Directors shall function in continuous session at the principal office of the Bank and shall meet as often as the business of the Bank may require.

The president of the Bank is the chief executive officer, "responsible for the organization, appointment and dismissal of the officers and staff, subject to the general control of the Executive Directors."261 In the recruitment of staff, the president must be influenced primarily by the "paramount importance of securing the highest standards of efficiency and have technical

260 Mason, E.S. & Asher, R.E., The World Bank since Bretton Woods, (1973), 29. Several explanations have been offered for the failure of the Soviet Union to ratify the Articles of Agreement of the Bank and the Fund. By their failure to ratify the Articles, the Fund quota relegated the Soviet Union to third place in number of votes in both the Fund and the Bank, after the United States and the United Kingdom. No veto power was given to any member while Fund membership required making available a substantial amount of information hitherto undivulged, and borrowing from the Bank involved exacting investigations. Further, a general purpose of the Bank and the Fund to promote private trade within freer markets was of little interest to the Soviet Union. At a meeting of the General Assembly of the United Nations in 1947, the Soviet representative charged that the Bretton Woods institutions were merely "branches of the Wall Street" and that the Bank was "subordinated to political purposes which make it the instrument of one great power." See also, Knorr, K, "The Bretton Woods Institution in Transition," International Organization, Vol. 2, 1948, 35-36.

261 IBRD Articles of Agreement, Article V, section 5(b).

competence" and also "pay due regards to the importance of recruiting personnel on as wide a geographical basis as possible."262

Notwithstanding the similarity in the provisions of the Fund and the Bank with respect to organization and management, there exists, however, certain differences between the two. Article V, section 6, provides for an advisory council "selected by the Board of Governors, including representatives of banking, commercial, industrial, labor and agricultural interests...." The charter provides that "the Council shall meet annually and on such other occasions as the Bank may request." It is noteworthy that although a distinguished group was appointed initially, the Council quickly fell into disuse and has never been revived.

Article V, section 9, also authorizes the Bank to "establish agencies or branch offices in the territories of any member of the Bank." Section 10 of the same Article V, authorizes the establishment of regional offices, which "shall be advised by a regional council representative of the entire area and selected in

262 IBRD Articles of Agreement, Article V, section 5(d).

such manner as the Bank may decide." This ideal has also been abandoned and the Bank has developed as a highly centralized institution, with all fundamental decisions being made in Washington.

The GATT, we stated earlier, was designed to be the tripartite component of the other Bretton Woods institutions, namely; the IMF and the World Bank. However, due to some bureaucratic complications263, the GATT became formalized in another series of conferences, which spanned from the fall of 1946 to mid-1948. Consequently, although started at the Bretton Woods conference, the GATT was completed in the extended conference that ended in 1948.

# IV GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

## INSTITUTIONAL FRAMEWORK OF GATT

The "General Articles" of the General Agreement comprise the basic trade policy commitments of the contracting parties. The thirty-eight articles contain detailed rules and obligations designed generally to prevent nations from pursuing "beggar-thy neighbor" trade policies, which would be self-defeating if emulated, by other nations.

It is important to emphasize that GATT is not a single agreement, but is a series of over two hundred agreements, protocols, process-verbaux, etc.264 Some of these protocols are amendments to the text of the general articles, while many are corrections or revisions (in light of the re-negotiations) of the tariff schedules. Special "side agreements" have been completed in the context of GATT, which fill out details of the obligations on certain subjects,

263 See Meier, G.M., supra.
264 Jackson, Davey & Sykes, Jr., Legal Problems of International Economic Relations, 1995.

but these apply only to the signatories of the side agreements.265

The central core of the GATT system of international obligations is contained in Article II. This Article embodies the tariff schedules and expresses the detailed commitments by each country to limit tariffs on particular items by the amount negotiated and specified in its tariff schedule. Another important GATT obligation is contained in Article I, which deals with the "Most Favored Nation" (MFN) clause. This clause represents a central feature of the GATT obligation system, based on the non-discrimination principle. Under the MFN clause, each member of GATT is obligated to treat other GATT members at least as well as it treats any other country with regard to imports or exports. A third important GATT obligation is contained in Article III, which deals with the national treatment obligation. While the MFN clause provides a non-discriminatory principle for the treatment of imports from foreign nations, the national treatment obligation specifies that imports shall be treated no worse than domestically produced goods, under internal taxation or regulatory measures.

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265 Jackson, Davey & Sykes, Jr., supra, 298.

Although the General Agreement is central to international trade regulation, it has never itself been applied. It is rather applied by the "Protocol of Provisional Application" (PPA), which was signed on October 30, 1947.266 The birth of the World Trade Organization (WTO), during the eight-year Uruguay Round was, therefore, a welcome development in international trade267. More important, the WTO was charged with the administration of three treaties, namely; the GATT treaty on trade in products, the treaty on trade in services (GATS), and the treaty for the protection of intellectual property (TRIPS). It is equally pertinent to clarify that although the WTO was charged with the administration of the GATT treaty, it is not a creation of the Bretton Woods system. First, the WTO was created from the Uruguay Round of Talks and was endowed with the legal authority to administer not only the GATT treaty, but the other two treaties on trade in services and the protection of intellectual property.

266 Protocol of Provisional Application to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. Pts. 5,6, TIAS No. 1700, 55 UNTS 308. See also Jackson, etc, supra.
267 The Uruguay Round of Talks spanned from 1986 to 1994, and culminated in the formation of the WTO.

# V WORLD TRADE ORGANIZATION (WTO)

## INSTITUTIONAL FRAMEWORK OF WTO

Unlike the GATT Charter, the WTO Charter clearly established an international organization. The WTO Charter endows the WTO with legal personality, supports it with the traditional treaty organizational clauses regarding "privileges and immunities," secretariat, director-general, budgetary measures, and explicit authority to develop relations with other inter-government organizations and non-government organizations. The Charter prohibits staff of the Secretariat from seeking or accepting instructions from any government "or any other authority external to the WTO."268

As we indicated earlier, the WTO was formed as an effort to remedy most, if not all of the "birth defects" of the GATT, since inception. Thus, the WTO expressly provided for the continuity of the GATT. The WTO Charter

provided, among others, that except as otherwise provided, the WTO and the Multilateral Trade Agreements shall "be guided by the decisions, procedures and customary practices followed by (GATT 1947)." Also, the Charter provided that the secretariat of the GATT 1947 would become the WTO secretariat. The legal framework of the WTO is very similar to that of GATT 1947, with some major changes. At the apex of the authority is the "Ministerial Conference." The Conference is followed in hierarchy by the "General Council," which has overall supervisory authority, including responsibility for carrying out many of the functions of the Ministerial Conference between the conference sessions. Other Councils include the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Aspects of International Property Rights.

Also established by the Charter was a "Dispute Settlement Body" (DSB). The DSB is charged with the responsibility of supervising and implementing the dispute settlement rules in Annex 2. The General Council performs these functions. Further, the Charter created a "Trade Policy Review Mechanism".

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[268] Jackson, Davey & Sykes, Jr, supra, 303, 304

# VI CONCLUSION

We have so far traced the origin of the Bretton Woods System as well as the off-shoot institutions. The sole goal of establishing these institutions, from the perspective of the founders, was to collaborate to ameliorate and prevent the re-occurrence of the economic and financial conditions before World War II. The difficult economic and financial conditions that existed then, contributed immensely to the outbreak of that war. The Bretton Woods System269, as well as the off-shoot institutions270, were conceived as and remain the premiere institutions that greatly impact the economic, monetary, and financial forces of the twentieth and twenty-first century. Their importance and pre-eminence, therefore, can not be over-emphasized.

269 As we have explained earlier, the Bretton Woods system created the bulk of the international financial institutions (IFIs) which includes the IMF, the World Bank, and later the WTO.

270 These include all the complementary institutions to the IFIs like the other international organizations formed

However, these institutions were not created, we believe, to serve equally the economic, monetary, and financial needs of all the countries271. Certainly, the founders were the political leaders of the Allied Forces during the Second World War. Their goal, apparently, was to create the institutions that will in the general scheme of things, provide the tools to forestall a re-occurrence of pre-war economic and financial environment. But, particularly, they intended to establish institutions that will serve as catalysts and managers in the speedy reconstruction and rehabilitation of the devastated parts of the countries where the Allied Forces were drawn from, particularly, in Europe272.

To buttress this point, General George Marshall,273 then U.S. Secretary of State, and chief architect of the famous Marshall Plan, while delivering a speech at Harvard University, said:

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under the auspices of the United Nations as well as the regional organizations like the African Union, the European Union, the ASEAN, etc.

271 It appears that this anomaly was taken into consideration in the formation of the World Trade Organization (WTO). The second preamble to the WTO Agreement provides as follows: "*Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,*" (emphasis added), see The Uruguay Round Agreement Act (1994), ibid.

272 A good case in point is the careful and elaborate plans that went into the formulation and implementation of the Marshall Plan, otherwise known officially as the European Recovery Plan (ERP).

"It is already evident that, *before the United States Government can proceed much further in its efforts to alleviate the situation and help start the European world on its way to recovery*, there must be some agreement among the countries of Europe as to the requirements of the situation and the part those countries themselves will take in order to give proper effect to whatever action might be undertaken by this Government. It would be neither fitting nor efficacious for this Government to undertake to draw up unilaterally *a program designed to place Europe on its feet economically.* This is the business of the Europeans. The initiative, I think, must come from Europe. *The role of this country should consist of friendly aid in the drafting of a European program and of later support of such program so far as it may be practical for us to do so*. The program should be a joint one, agreed to by a number, if not all, European nations." (emphasis added) 274

The consequence, we shall later see, was that the founders created these institutions from their political, economic, and financial prisms. In the

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273 See the speech delivered by General George Marshall at Harvard University on June 5, 1947, at www.fordham.edu/HALSALL/MOD/1947 marshallplan.html (last visited on June 6, 2006).
274 Ibid

process, they allotted to themselves all the controlling powers and positions, and established goals and objectives that were so carefully tailored to serve their own interests. And the consequences are becoming more and more apparent as the world in the latter part of the twentieth century and the twenty-first century is completely different from the world in the early and mid-twentieth century when the IFIs were established. In view of the fact that the original purpose of the founding fathers of the BWS, was to ameliorate the harsh economic conditions that resulted in World War II, one would expect that in developing the legal framework for the operation of the BWS, that the poor economic conditions of the developing countries would be taken into consideration and accorded some measure of priority.

In order to better appreciate how much power the founders of the IFIs allocated to themselves as well as the goals and objectives established for the IFIs, we shall undertake a review of the organizational structures of the IFIs in the next chapter. Hopefully, the review will expose the discriminatory allocation of powers and privileges to the founders which has greatly influenced the goals and objectives of the IFIs and the allocation of the

resources of these institutions. In the exercise of their powers, particularly, in the allocation of the resources of the IFIs, the founders have over the years formulated terms and conditionalities for the allocation of the resources.

# CHAPTER FIVE

# LEGAL AND INSTITUTIONAL FRAMEWORK OFTHE BRETTON WOODS INSTITUTIONS

## I INTRODUCTION

In order to understand the current roles of the IFIs in the developing countries, it is pertinent, indeed essential, that we begin with a review of the "original"275 roles that these institutions set out to accomplish. I use the term, "original," to distinguish what was intended in the beginning, and what is currently the case in light of the challenges internally confronting these institutions as well as those spanning from the twentieth century into the twenty-first century. Consequently, our effort cannot be exhaustive until and

275 The "original" roles for the purposes of this work are those roles aimed at satisfying the primary objectives of these institutions which include a better regulated international monetary system, the expansion of foreign trade and investment and the prevention of the discriminatory trade practices that contributed towards the pre-war depression years...

unless we look at these "original" roles, as well as the "current"276 roles as spelt out in the constitutive instruments of the respective institution as well as the interpretative authorities on those provisions. This inquiry will attempt to cover the two major prongs of this research, beginning with the *law* 236 governing the Bretton Woods System whichforms the core of the group of IFIs, as well as the *practice* 277 of these institutions since creation. In this chapter, we shall focus primarily on the law governing these institutions, while saving their practice for the next chapter.

In order to determine the "original" roles established for these IFIs, we must begin the search from the constituent documents278 that established these institutions as well as their analysis by learned scholars and publicists. The approach I will undertake in this chapter, therefore, will be to critically review and analyze the constituent documents that gave rise to these

276 The "current" roles, on the contrary, are those that these institutions have developed and created in response to the ever-changing challenges of the 20th and 21st century, such as the three main strategies employed by the Fund as follows: Surveillance strategy, Technical assistance strategy, and the Lending strategy.
277 Such practice includes those exhibited by the institutions over the years and which have become widely accepted by member states.
278 By constituent documents, we mean the multilateral treaties that the founding member states signed and ratified which gave birth to these IFIs.

institutions279 in light of the authoritative interpretation of the learned scholars and publicists. Such a review will, hopefully, highlight my contention that these constituent documents were originally framed to reflect a Euro-American centric approach, contrary to a universal approach. By so doing, we can re-visit what the organizers intended to accomplish, as well as how the roles that these institutions were created to serve have been greatly impacted by the changes within the institutions280 as well as in the world.281 In the concluding chapters, we shall draw from some of our observations in this chapter to proffer some suggestions on how to tinker with the roles with a view to enhancing the performance of these institutions in the international community in general and the developing countries in particular.

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279 The constituent document of the International Bank for Reconstruction and Development (IBRD), otherwise known as the World Bank is the Articles of Agreement of the International Bank for Reconstruction and Development. (http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/O) last visited August 17, 2005. The constituent document of the IMF is the Articles of Agreement of the International Monetary Fund (http://www.imf.org/external/pubs/ft/aa/index.htm) last visited August 15, 2005; the constituent document of the GATT is the General Agreement on Tariffs and Trade (http://www.ciesin.org/TG/PI/TRADE/gatt.html) last visited August 17, 2005, while the constituent document of the WTO is the Agreement Establishing the World Trade Organization (http://www.wto.org) last visited June 9, 2006.

280 The expansion of the membership of these institutions from the few original member nations to almost all the nations, as well as the increased demand for fairness and equality from the developing countries have continued to challenge the viability of the institutional and legal framework of these institutions. Notable in this regard was the formation of such regional organizations like the OAU, the Non-aligned movement, UNCTAD, etc, and their insistent demands for fairness and equality in these institutions policies and practices.

281 The impact of globalization, diseases, terrorism, etc., has immensely changed the landscape of the world economically, politically and socially.

It is trite knowledge that the world after World War II is completely different in all shapes and forms from the world we currently live in. The consequences of the war on the economies of the international community were far-reaching and devastating.282 The need for the creation of the IFIs was apparent and urgent, not just to facilitate recovery, but to ensure that the pre-war discriminatory trade practices do not re-occur. The impact of globalization283 – economic, political, scientific, and technological – and the consequential development of a truly global village cannot be over-emphasized. All these factors justify the creation of the international financial institutions (IFIs). And since the IFIs were created to serve the international community, they must, in order to remain relevant, be subject to such changes as are necessary in the accomplishment of their goals and objectives.

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282 See the toll of the war on both the Allied and Axis Powers, supra. Footnotes 165 and 166.

283 Globalization has been used to imply economic, political, scientific, and technical liberalization of trade. Whilst the goals of all the Multilateral Financial Institutions are to "open" all the economies that were hitherto "closed", the resulting implications are becoming overwhelming for these institutions to contain. A closed economy encourages free flow of investments and trade, while a closed economy discourages or regulates the inflow of investments and trade. The argument in favor of open economy is that it is more conducive to the efficient allocation and use of resources, which in turn contributes to "an increase in production and incomes." See Stefan P. Schleicher, "Borders to Trade in a Borderless World", in OECD Proceedings, *Globalization and Environment: Preliminary Perspectives* (Paris: OECD, 1997), at 173.

## II INTERNATIONAL MONETARY FUND (IMF)

The IMF was created at the Bretton Woods Conference284 as an integral part of the reconstruction efforts after World War II285. Specifically, the Fund was created as a system that will facilitate the speedy repair of the international monetary system after the war. Most of the damage arising from the war occurred in Europe and certain parts of the world that actively participated in the war.286 Since most of the world's presently grouped developing countries did not play active roles in the prosecution of the war, a literal interpretation of the goal of the Fund appears to exclude them. In other words, the original goal of creating the IMF nd the sister institutions was far from the idea of facilitating the speedy repair of the economies of the developing countries287. Such roles, as will be discussed later; have evolved

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284 The Articles of Agreement of the International Monetary Fund was adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 22, 1944. Entered into force December 27, 1945. Amended effective July 28, 1969, by the modifications approved by the Board of Governors in Resolution No. 23-5, adopted May 31, 1968; amended effective April 1, 1978, by the modifications approved by the Board of Governors in Resolution No. 31-4, adopted April 30, 1976; and amended effective November 11, 1992, by the modifications approved by the Board of Governors in Resolution No. 45-3, adopted June 28, 1990.

285 The War was waged between the Axis Powers led by Nazi Germany and the Allied Powers led by Great Britain, and spanned from 1939 to 1945.

286 Supra, footnotes 165 and 166.

287 The "original" roles/purposes of the IMF can be seen from Article 1 of the Articles of Agreement which states as follows: promoting international monetary cooperation; facilitating the expansion and balanced growth of international trade; promoting exchange stability; assisting in the establishment of a multilateral system of payments;

over the years during the existence of the IMF. Although the roles established for the IMF can be glossed from Article 1 of its Articles of Agreement288, it is a different ball-game when those roles are subjected to authoritative interpretation by the staff and legal department of the institution, or indeed any other commentator.289

It is comforting to note that the Articles of the IMF "justify, indeed direct, observance of a teleological technique"290 to its interpretation when it stated thus:

*"The Fund shall be guided in all its policies and decisions by the purposes set forth in this Article."*291

The dilemma arises when those seemingly apparent purposes set forth in the Fund's Articles are subjected to varying interpretations and nuances that are

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and making its resources available (under adequate safeguards) to members experiencing balance of payments difficulties. See http://www.imf.org/external/np/exr/facts/glance.htm, last visited August 15, 2005.

288 Ibid

289 There is a persuasive opinion that the organs of the IMF and the World Bank are better fitted to apply the teleological technique than external entities. See Gold, Joseph, Interpretation: The IMF and International Law, 1996, p. 18 & 19. According to Mr. Gold, the organs are better fitted to apply the technique given their "effectiveness and expert knowledge, and in the analogy of U.S. administrative agencies." Sir Joseph Gold is an internationally recognized authority on the IMF and the development of international monetary law. He served as a member of the Legal Department of the IMF from 1946 to 1960, as General Counsel and Director of the Legal Department from 1960 to 1979, and as Senior Consultant to the Fund.

290 See Gold, Joseph, ibid.

291 The original Articles of the Fund referred only to the "decisions" of the Fund, however; the First Amendment of the Articles inserted "policies" to Article I. The First Amendment became effective on July 28, 1969, after the modifications were approved by the Board of Governors in Resolution No. 23-5, adopted May 31, 1968. See footnote 241, supra.

aimed at justifying the prevalent policies and decisions of the Fund.

According to Sir Joseph Gold292, the dilemma is understandable, because *"a teleological approach to interpretation in the adoption of policies and decisions calls for an expert knowledge of the history and development of the organization's purposes as expressed in its Articles and its subordinate law and as capable of response to changing circumstances."*

Unfortunately, the organs of the organizations that should be better fitted to apply the teleological interpretative technique to the Articles lack the requisite knowledge and expertise for a number of reasons. First, the Executive Directors and staff may lack the historical knowledge about the organization after sometime because most of the EDs serve for a limited time in the organization. Also, the rate of turnover in the staff pool may significantly affect the ability to retain the "institutional memory" of the organization.293 Consequently, the technique will imply *"that sometimes one and sometimes another purpose must be given ascendancy over other purposes without establishing a legal fixed hierarchy among them."294* It is

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292 See Gold, supra, p. 19
293 ibid
294 ibid

interesting to note that the main inspiration for the original Articles of IMF, H.D. White, forewarned this development in his memorandum for a stabilization fund dated July 10, 1943, when he stated as follows:

*"The various purposes enumerated in the outline are to a considerable extent interdependent and overlapping and in some instances may even represent apparently conflicting tendencies. Yet, progress in the attainment of almost any one of them facilitates progress toward the attainment of many of the others. Each of them represents a different phase of international monetary arrangements and calls in the main for different procedure, different powers, and in some cases, different kinds of resources. The fact that some of the objectives may be at times harmonious and at other times conflicting, indicates that the management of an international stabilization fund cannot be reduced to a matter of simple rules. The successful operation of the Fund calls for constant examination of a large variety of pertinent factors and the continual evaluation of various effects which might be expected to follow any particular action or failure to act."295*

It may be in reaction to the above constraints in strictly applying the teleological approach to interpretation that the IMF has creatively interpreted its Articles based on the different stages of its development.296

The earliest stages focused on the Fund's regulatory authority.297 Two main motives reinforced this approach. First, was the reinforcement of the international monetary system that had been created.298 Second, was the desire to protect the Fund's resources against misuse at a time when the major tasks were focused upon reconstruction and development after the devastation of war.299

The next stage was immediately after the Second Amendment which abrogated the par value system of the Fund. Consequently, the Fund's interpretation focused more on justifying growth and less on balance of payments.300

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295 Horsefield, *History 1945 – 1965,* Vol. 3, p. 46, cited in Gold, supra.
296 Gold, Joseph, supra, p. 564 & 565
297 ibid, p. 564
298 ibid
299 ibid
300 Ibid, p. 565

The interpretation and application of the law of the IMF falls squarely upon the IMF team consisting of the Board of Governors, the Executive Board, the Managing Director and the Staff. This team is also conveniently referred to as the organs of the Fund.

## GOVERNING STRUCTURE

In order of priority, the Articles of Agreement[301] provide for the following organs:

### 1) The Board of Governors

The Board of Governors[302] is the highest authority of the IMF. It consists of one Governor and one alternate Governor appointed by each of the IMF's member countries[303]. The Governors are usually Ministers of

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301 Article XII, section 1, of the IMF Articles of Agreement deals with the Organization and Management issues.
302 Article XII, section 2
303 Currently there are 184 member countries; consequently, there are 184 members of the Board of Governors. See http://www.imf.org/external/np/exr/facts/glance.htm, last visited August 15, 2005.

Finance or Heads of Central Banks in their own countries.304

The Articles also provide that each Governor and each Alternate shall serve until a new appointment is made. Further, that no Alternate may vote except in the absence of his principal. The Chairman of the Board shall be selected from one of the Governors.305

The Articles also empower the Board of Governors to delegate to the Executive Board authority to exercise any powers of the Board of Governors, except those powers conferred directly by this Agreement on the Board of Governors.306 Although all members have equal representation on the Board of Governors, yet, their respective votes vary according to the number of votes allotted to each member country. Consequently, the Articles make it explicitly clear that, "*Each Governor shall be entitled to cast the number of votes allotted under Section 5 of*

304 As of March 2007, the current Nigerian Minister of Finance, Mrs Nenadi Esther Usman serves as a member of the Board of Governors, while the current Central Bank Governor, Prof. Charles Soludo, serves as the alternate Governor. The current representatives of Ghana on the Board of Governors are Paul Acquah as Governor, and George Gyan-Baffuor as alternate Governor. The Brazilian representatives are Guido Mantega as Governor, and Henrique de Campos Meirelles as alternate. The representatives of Korea are Duck-Soo Han as Governor, and Seontae Lee as alternate.

305 Article XII, section 2 (a), supra.

306 Article XII, section 2 (b), supra.

*this Article to the member appointing him"* (emphasis mine)307. In this caveat lies the fundamental difference in the powers of the developed countries and those of the developing countries. Although each member country enjoys equal numerical representation on the Board of Governors, yet each member country's representative enjoy differential voting powers within the same Board. The obvious result, no doubt, is that by their superior voting powers, the developed countries dictate and enforce policies and practices within the Fund that ultimately serve their best interests.

The Articles provide that the Governors and Alternates shall serve on the Board without compensation from the Fund, but they are entitled to reasonable expenses incurred in attending meetings.308 The Articles also empower both the Board of Governors and the Executive Board to appoint such committees as they deem advisable for the more efficient administration of the Fund. Such committee membership should not be

307 Article XII, section 2 (e), supra. Section 5 (a) states as follows: "Each member shall have two hundred fifty votes plus one additional vote for each part of its quota equivalent to one hundred thousand special drawing rights."
308 Article XII, section 2 (h), supra.

limited to Governors or Executive Directors or their Alternates. 309 In line with the foregoing provision, the Board of Governors on July 26, 1972, adopted a resolution establishing a Committee on Reform of the International Monetary System,310 known as the Committee of 20. Further, an Interim Committee was established at the 1974 Annual Meetings.311 The Interim Committee is composed of 24 IMF Governors. The Committee meets twice a year to fashion out how best to provide ministerial guidance to the Executive Board. It reports to the IMF's Board of Governors on the management and functioning of the international monetary system and on proposals to amend the Articles of Agreement.312

In 1974, there was also established a Joint Ministerial Committee of the Boards of Governors of the Bank and the IMF on the Transfer of Real Resources to Developing Countries (the Development Committee). The

309 Article XII, section 2, (j), supra
310 The Committee of 20, as it was popularly called concluded their work on June 12-13, 1974.
311 Ibid
312 On June 12-13, 1974, the Committee of 20 concluded their work and recommended that there was need to establish an immediate program to help monetary system evolve. On January 7-8, 1976, the Interim Committee also recommended that there was need to embark upon "interim reform" of the monetary system, including the

Development Committee, which has 24 members, also advises and reports to the two Boards of Governors on development issues.

The Board of Governors normally meets once a year, but it may meet or vote by mail. Over the years, however, the Board has delegated many of its powers to the Executive Board and the Managing Director of the Fund.313

2) The Executive Board

Although the Board of Governors is the highest authority of the IMF, in practical terms, the Executive Board314 is the permanent decision-making organ of the Fund. The Executive Board consists of Executive Directors, who are appointed or elected by the member countries. The five members having the largest quotas are entitled to *appoint* five members of the Executive Board, while the remaining fifteen members of the Board shall

amendment of Article IV and other issues.
313 See IMF By-laws, section 15 which is similar to the World Bank's By-laws, section 15.
314 Article XII, section 3 (a), supra

be *elected* by the rest of the membership (emphasis mine)315. Here again, one can see how the composition of the EB is so arranged to be dominated by the five members with the largest quotas. In this case, the five members are entitled to appoint five members of the EB, while the rest of the membership of the Fund votes to elect the remaining fifteen members.

Unlike the Board of Governors, the Articles empower the Executive Directors to appoint their Alternates. Such Alternate enjoys the full power to act for the Executive Director when the Executive Director is absent. But when the Executive Director is present, Alternates are entitled to attend meetings, but may not vote. 316 An Executive Director shall continue in office until the successor is appointed or elected.317 Similar to the provision on the voting privileges of the Board of Governors, *each appointed Executive Director shall be entitled to cast the number of votes allotted under Section 5 to the member appointing him* (emphasis mine)

315 Article XII, section 3 (b) (i) (ii), supra.
316 Article XII, section 3 (e), supra.
317 Article XII, section 3 (f), supra.

318. On the contrary, *each elected Executive Director shall be entitled to cast the number of votes which counted towards his election* (emphasis mine) 319. The disparity within the EB becomes more apparent in the voting structure of the EB. Whilst the five members appointed can individually cast the number of votes allotted under Section 5 to the member appointing him/her, the remaining fifteen members are limited to cast the number of votes which aggregated to his/her election on the EB.320 By this arrangement, the votes of the fifteen members are marginalized into the number of votes that elected each of them, whilst the votes of the five members depend on the huge allocation of votes and quotas under Section 5.

The Executive Board deals with a wide variety of policy, operational, and administrative matters. These matters include surveillance of members' exchange rate policies, provision of IMF financial assistance to member countries, consultations with members, and comprehensive studies on

318 Article XII, section 3 (i) (i), supra.
319 Article XII, section 3 (i) (iii), supra.
320 Ibid

issues of importance to the membership.

3) The Managing Director

The Managing Director of the IMF is selected by the Executive Board.321 However, such selection shall be made of a person who is not a Governor or an Executive Director of the Fund322. The Managing Director, when selected323, serves as the Chairman of the Executive Board and as the head of the IMF's staff. In that capacity also, the Managing Director conducts the day-to-day business of the IMF.324

321 Given the dominance of the five members with the highest number of quotas and votes in the Executive Board, it is of no surprise that the appointment of the Managing Director of the Fund has been dictated by those powerful five.

322 Article XII, section 4 (a).

323 The first person to be appointed the Managing Director of the IMF was Camille Gutt, from Belgium, who served from May 6, 1946 to May 5, 1951. The current Managing Director of the Fund is Rodrigo de Rato, from

4) The Staff

The IMF staff typically comprises of international civil servants325. The pool is drawn from the member countries with a view to having widespread representation in the staff. The staff works under the direction and supervision of the Managing Director, who has the power (subject to the control of the Executive Board), for the organization, appointment, and dismissal of the staff of the Fund326. They implement the day-to-day decisions and policy directives of the Fund. The fact that most of them are international civil servants provides the Fund with a rich variety of expertise to harness within the system.327

Spain, whose five year term began on June 7, 2004.
324 Footnote 114 and 115, supra; IMF SURVEY, September, 1995, supra.
325 As of 2005, the IMF staff is comprised of approximately 2,700 members drawn from 141 countries.

## QUOTA SYSTEM

Central in the organizational structure of the Fund is the quota system. 328 Article III, section 1, of the IMF Articles of Agreement provides as follows:

> "Each member shall be assigned a quota expressed in special drawing rights. The quotas of the members represented at the United Nations Monetary and Financial Conference which accept membership before December 31, 1945, shall be those set forth in Schedule A. The quotas of other members shall be determined by the Board of Governors. The subscription of each member shall be equal to its quota and shall be paid in full to the Fund at the appropriate depository."

Under the system, each member of the IMF is assigned a quota, expressed in SDRs, which is equal to its subscription in the IMF. The quota is intended to reflect the size of the member's economy relative to the

326 Article XII, section 4 (b).
327 Article XII, section 4, © and (d).
328 On December 27, 1945, the Articles of Agreement of the Fund entered into force upon signature by 29

economy of other members. The quota is a good reflection of a member's maximum financial commitment to the Fund329, its voting power330, as well as its access to the Fund's resources.331 The voting strength is calculated based upon 1 vote for each SDR 100, 000 of its quota, plus the 250 basic votes to which each member is entitled. Further, the quota also determines a member's maximum access to the financial resources of the IMF, as well as its share in allocations of SDRs by the IMF. A member is generally required to pay up to 25 percent of its quota in SDRs or in currencies of other members specified by the IMF, with the concurrence of the issuers; it pays the remainder in its own currency.

Until the early 1960s, the initial quotas of the original members of the IMF were based upon what was generally termed the Bretton Woods formula.332 This formula was a combination of some basic variables as an average of

governments, representing 80 percent of original quotas.

329 As of June, 2006, Nigeria had a total quota of 1,753.2(Millions) SDRs corresponding to a total number of votes of 17,782; Brazil had a total quota of 3,036.1(Millions) SDRs corresponding to a total number of votes of 30,611; while Korea had a total quota of 1,633.6(Millions) SDRs corresponding to a total number of votes of 16,586. For more details on the quotas and voting powers, see http://www.imf.org/external/np/sec/memdir/members.htm, last visited June 12, 2006.

330 ibid

331 By the end of March 2006, the total quotas of the IMF were SDR 213 billion, which translates to about U.S. $308 billion.

annual import and export flows, gold holdings and dollar balances, and national income. In 1963, the Bretton Woods formula was revised and a number of other quota formulas were introduced.333 These formulas employed the economic data of the Bretton Woods formula, but included parallel calculations that employed current account transactions and the variability of current receipts in place of data on exports and imports.

In 1980, the quota formulas were further revised with hopes of simplifying the procedure for calculating quotas and improving the quality of the economic data used in the formulas. Consequently, GDP replaced national income; a broader measure of official reserves was employed; and calculations used data on current account transactions, rather than trade data on imports and exports.334

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332 Article III, section 1 of the IMF Articles of Agreement.
333 It is noteworthy to emphasize that the exercise of quota review is undertaken by the Executive Board after which they make their recommendations to the Board of Governors.
334 Ibid

Today, when a country applies for IMF membership,335 the IMF staff calculates a quota for the new member and compares it with the quotas of existing members of similar economic size and characteristics. The staff then suggests an initial quota or quota range in a paper prepared for the consideration of a committee of the Executive Board. If the country agrees to the terms and conditions of membership – including the amount of the initial quota – proposed by the committee, the full Executive Board considers the committee's recommendations. If the Board approves the recommendations, the Board forwards a proposed membership resolution to the IMF's Board of Governors. After the membership resolution is approved by the Board of Governors, and appropriate domestic legal and procedural steps are completed, a representative of the country signs the Articles of Agreement, at which time the country becomes a member.

From the foregoing, we can appreciate the vital role that the quota system plays in the Fund as both a determinant of the power structure as well as in

335 Article II of the Articles of Agreement covers membership status. While section 1 deals with the "original members", i.e. those members represented at the United Nations Monetary and Financial Conference and who accepted membership before December 31, 1945, section 2, deals with "other members." See also Article III, section

the accessibility to the resources of the Fund. The voting structure of the Fund is weighted by the quota system, and consequently, the voting power of the members, particularly, the developing countries, rests on their quota system in the Fund. Furthermore, the amount of resources a member can draw from the Fund is predicated upon the size of the member's quota. Consequently, the voting power as well as the amount of resources available to the members, particularly, the developing countries, are determined by their limited share of the quota system. Yet, the formula that the Fund applies in the creation and management of the quota system takes little recognition of theexport instability, structural imbalance or dependence on imported inputs which is the bane of many developing countries.

In light of the foregoing policies and practices, it is no wonder that the developing countries tend to blame the Fund, to a large extent, for aggravating their adjustment problems.336 In addition to the point earlier made that the Fund has treated the balance of payments objective as overriding and thus has shown insensitivity to other government objectives,

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1, which empowers the Board of Governors to allocate the quotas of other members in line with Article II, section 2.

336 This may explain the unpopularity of the Fund and the World Bank in the developing countries where they are both perceived as agents of oppression rather than partners in development.

thethrust of the Fund's adju stment programs has been to focus more on reducing demand than on stimulating supply.337

Developing countries, we have shown, lack the voting powers under the Fund's quota system. They also lack the accessibility to the resources of the Fund commensurate to their pressing economic and financial needs. In order to access additional financial resources within the Fund, they must agree to very burdensome terms and conditions which are imposed by the Executive Board. In light of the fact that developing countries have little or no alternatives in the face of pressing financial and economic difficulties, they reluctantly accept such burdensome terms and conditions. According to one commentator, in so doing, developing countries do not just borrow money from the Fund (and other IFIs); they effectively mortgage the future of their citizens.338

337 This practice, no doubt, contravenes one of the principal objectives of the Fund which is the facilitation of the *expansion* of international trade (italics mine). One wonders how the Fund intends to expand international trade by discouraging demand.

## QUOTA REVIEWS

On August 1, 1995, membership of the Fund comprised of 179 countries, with a total quota of SDR 144.9 billion. Currently,339 the Fund's membership stands at 184 countries, with total quotas of SDR 213 billion. Why the demand for a continuous review of the quota formula?

The importance of a continuous review of the quota formula is very critical for the following reasons:

1. A general quota review provides the opportunity for the Fund to assess the adequacy of the total quota package with regard to the members' balance of payments financing needs, as well as the Fund's ability to meet those needs.
2. A general review provides the Fund the opportunity to reflect any changes in a member's new position in the world economy. 340

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338 See Susan George, *A Fate Worse than Debt* (New York: Grove Press, 1988), at 155, where she posited that, "indebted countries have not just borrowed money – they have mortgaged the future. Nature puts up the collateral."
339 See http://www.imf.org/external/np/exr/facts/quotas.htm, last visited June 12, 2006

Although the Board of Governors approves the recommendations of the Executive Board on a quota review, such approval must receive the final approval of 85 percent majority of the membership. In the approval of a quota review by the Board of Governors, such approval must pass two litmus tests: the size of an overall increase and the distribution of the increase among the members.341 The Board has authorized thus far, Thirteen General Review of the quota formula.342 Such review exercise is carried out in regular intervals of five years, except the review that was carried out between 1958 and 1959. Not all the reviews have resulted in quota increases.343

The size of a member's quota within the Fund is very critical for a number of reasons. According to Sir Gold,344 "both the absolute and the relative size of a quota are of central importance in a member's relations with the IMF. For example, a member's subscription to the IMF's general resources is equal to its quota; voting power is based largely on quota; the rate of allocations of

340 Outside a general review, the Fund can embark upon ad-hoc quota review. In 2001, the Fund granted China a higher quota after it resumed sovereignty over Hong Kong.

341 The importance of these two criteria is ostensibly to first ensure that the increase meets the present financial needs of the members, and secondly, to ensure equitable distribution in line with pre-existing formula.

342 After the conclusion of the Twelfth General Review on January 30, 2003, the Board authorized the Thirteenth General Review which is expected to be completed by January 30, 2008.

343 Apart from the exceptional review of 1958/59, of all Twelve reviews already concluded, increases have been approved on seven occasions. Those increases occurred during the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh General Reviews.

SDRs is proportionate to quotas; and access to the general resources is usually defined in terms of quota."

## SPECIAL DRAWING RIGHTS (SDRs)

The Fund created the Special Drawing Right (SDR), to serve as an international reserve asset, as well as to supplement the existing official reserves of member countries.345 At the time of SDR creation, the two key reserve assets for international transactions were *gold* and the*U.S. dollar* . However, those two proved inadequate to meet the increasing needs arising from the expansion of world trade and financial developments. Consequently, the IMF intended to fulfill the need by creating another international reserve asset in the SDR. Upon creation, the Fund allocated SDRs to member countries in proportion to their already established IMF quotas. Each member's SDR corresponded to the member's quota ratio. Another important feature of the SDR was that it became the unit of account of the IMF and

344 See Gold, supra, note 289, p. xxviii
345 The IMF Board of Governors approved the plan to establish special drawing rights (SDRs), on September 29, 1967.

some other international organizations. From the creation of the SDR in 1967 until the early 1970s, the Fund applied the SDRs as its unit for calculating transactions.

Sometime in the early 1970s, the Bretton Woods system collapsed346, occasioning the ineffectiveness of the SDR. Although the Fund has been working hard to restore the viability of the SDR as a credible reserve asset, presently, the SDR maintains limited use as a reserve asset. What is left intact of the SDR is the use as the unit of account of the IMF and some other international organizations.

Under the IMF system, however, a member may be allocated SDRs in proportion to their IMF quotas. There are two kinds of allocations:

1. The General Allocations, which are based on a long-term global need to supplement existing reserve assets. Generally, such allocations are considered

346 As a result of the collapse, on August 15, 1971, the United States government informed the IMF that it will no longer freely buy and sell gold to settle international transactions, thus signaling the beginning of the floating exchange regime. For further reading see, Wilson E Schmidt, "The Night We Floated," International Institute for

every five years, but not automatically approved every five years.

2. The Special One-time Allocation, which is based on the need to correct or remedy an anomalous situation or emergency.347

## III CURRENT TELEOLOGICAL APPLICATION OF THE FUND'S ARTICLES

The Articles of the Fund, like other constitutive instruments, are products of constitutive treaties.348 Such treaties deserve special interpretative approach quite dissimilar to the constitutional interpretation applied to national constitutions.349 This position, which has gained currency, was articulated by Judge Spencer in his separate opinion in the advisory opinion of the International Court of Justice in *Certain expenses of the United Nations, 1962*. According to Judge Spencer,350

"In the interpretation of a multilateral treaty such as the Charter which

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Economic Research, Original Paper 9, October 1977.

347 The IMF's Board of Governors approved a special one-time allocation of SDRs in September 1997 to correct the fact that countries that joined the IMF subsequent to 1981, have not received an SDR allocation.

348 Gold, supra, note 337, p. 407

349 Ibid

350 See *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20*

establishes a permanent international mechanism or organization to accomplish certain stated purposes there are particular considerations to which regard should, I think, be had. Its provisions were of necessity expressed in broad and general terms. It attempts to provide against the unknown, the unforeseen and, indeed, the unforeseeable. Its text reveals that it was intended – subject to such amendments as might from time to time be made to it – to endure, at least it was hoped it would endure, for all time. It was intended to apply to varying conditions in a changing and evolving world community and to a multiplicity of unpredictable situations and events. Its provisions were intended to adjust themselves to the ever changing pattern of international existence. It established international machinery to accomplish its stated purposes.

It may with confidence be asserted that its particular provisions should receive a broad and liberal interpretation unless the context of any particular provision requires, or there is to be found elsewhere in the Charter, something to compel a narrower and restricted interpretation. The stated purposes of the Charter should be the prime considerations in interpreting its

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*July 1962*, ICJ Reports 1962, p. 151, at p. 185

text."

From the above statement, the learned Judge encourages the interpreters of any constitutive treaties to be solely guided in the process by the stated purposes of the Charter while applying "a broad and liberal interpretation" unless mandated to apply "a narrower and restricted interpretation."351 Earlier in this chapter,352 we noted that the Fund appears to be guided in the interpretation of its Articles according to its different stages of development. 353 Pursuant to that objective, the Fund employs three main strategies that serve it well both in terms of creativity as well as flexibility. The strategies are commonly characterized as follows:354

1. Regulatory/Surveillance

According to Sir Gold, regulatory powers are those exercised by the Fund to approve or disapprove certain measures applied or contemplated by member

351 Ibid
352 Supra, footnote 253.
353 Supra, footnotes 254 – 257.
354 The classification of the *modus operandi* of the Fund as strategies is my own creation and does not reflect the IMF terminology. Neither are these strategies listed in the order of importance. The Fund may apply one of the strategies at a time or a combination of the three pursuant to their goal. Infact, Sir Joseph Gold classified these strategies as the three main areas that the Fund exercises its jurisdiction. See Gold, supra

countries.355Under the regulatory/surveillance strategy, the Fund provides member-countries regular policy advice. In the same process, the Fund conducts, once a year, a comprehensive assessment of each country's economic situation.356 From these assessments, the Fund publishes twice a year the comprehensive report in the World Economic Outlook and the Global Financial Stability Report.

2. Technical/Advisory Assistance

Under the technical or advisory assistance and training strategy, the Fund offers these services to member countries free of charge. Such assistance and training are offered in a variety of fields like fiscal policy, monetary and exchange rate policies, banking and financial system supervision and regulation, statistics, etc.357

3. Financial/Lending

Under the lending or financial strategy, the Fund offers member-countries the financial lifeline to facilitate their recovery from adverse economic and financial situations. In the same process, the Fund imposes the terms and

355 Gold, supra.
356 Ibid.
357 IMF Articles, Article V section 2 (b), see also Gold, supra, pp 422-423.

conditions for such use.358A pre-condition for the Fund's loan is that the affected country will obligate itself to a specified policy program designed and monitored by the Fund.359 The IMF lending activities are generally conducted under two principal programs: (1) the Poverty Reduction and Growth Facility (PRGF) program, (2) and the Heavily Indebted Poor Countries Initiative (HIPC) program.360

Although a literal reading of the Fund's Articles of Agreement will indicate an emphasis on the promotion of international monetary cooperation, facilitation of the expansion of international trade, promotion of exchange stability, etc., through such operational strategies as surveillance, technical assistance, and lending; however, from the Fund's current teleological approach to the interpretation of its Articles, it would seem that the Fund is relegating these listed objectives to the background in preference to the restoration of payments equilibrium objective. In the opinion of one

358 The popular term in the context of the Fund's activities is the conditionalities.
359 Such policy programs may take a variety of forms including the austerity measures, structural adjustment programs, devaluation of currencies, severe compression of real wages, privatization, higher interest rates, etc.
360 There are currently 18 countries in this category of Heavily Indebted Poor Countries (HIPC), owing approximately US 50 billion dollars. Most of those countries are in Africa.

commentator,361 "the Fund would appear to have treated these objectives as secondary to the restoration of payments equilibrium and has tended to neglect the potentially negative impact of its programs on the "primary objective" set out in the Articles of Agreement." But given the current stage of the Fund's development as an institution, coupled with the increased and more demanding roles on its limited human and material resources, the Fund may be reacting to the more pressing global challenge of payments disequilibrium. And in so doing, the Fund may have unwittingly relegated the "original primary objectives" to the background and replaced them with the current and more pressing objective of restoration of payments equilibrium. In the same vein, the Fund has also relegated to the background another primary objective, which is, the provision of balance-of-payments finance for members experiencing temporary financial and budgetary constraints. Such finance was anticipated to reduce the risk that imports would be cut in circumstances where they need not and should not be cut, and would thus contribute to the maintenance of both domestic and global employment and income. However, the conditions stipulated by the Fund before members can

361 Sanusi, J.O., *"African Economic Disequilibria and the International Monetary System,"* papers presented at a

access the financing facility have negated the interventionist role that the Fund was intended to serve. Again, the Fund has attempted to justify its new attitude by pointing out that its financing resources are limited while the demand for them is in the increase.

## IV INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT (WORLD BANK)

The World Bank, we stated earlier, was one of the tripartite creations of the Bretton Woods Conference362. Article I of the Articles of Agreement, 363specifically states that the primary purpose for the creation of the Bank was to assist in the reconstruction and development of territories of members by *facilitating the investment of capital for productive purposes* as well as the *restoration of economies destroyed or disrupted by war.* 364(italics mine)

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symposium held in Nairobi, Kenya, May 13-15, 1985.

362 See the United Nations Monetary and Financial Conference, 1945, supra. Also, see Article II, section 1(a) which states as follows: "The original members of the Bank shall be those members of the International Monetary Fund which accept membership in the Bank before the date specified in Article XI, section 2(e)."

363 Articles of Agreement of the International Bank for Reconstruction and Development, December 27, 1945, 2 U.N.T.S. 134, hereinafter referred to as IBRD Articles of Agreement. It is noteworthy that of all 45 original member countries signatories to the Articles, only 4 were from Africa, namely, Egypt, Ethiopia, Liberia, and then Union of South Africa

364 IBRD Articles of Agreement, Article I (i).

Contrary to the position of Sir Joseph Gold that "the original Articles were drafted without express differentiation between developed and developing countries, and without acceptance of the idea that the promotion of development was a purpose of the IMF,"365 a careful reading of Article 1 of the Bank's Articles would suggest that the Article charges the Bank with the responsibility of accomplishing two major objectives. The first component of the responsibility consists of the *"facilitation of investment of capital for productive purposes"* in the territories of members. The second component, however, limits the Bank to the narrower pool of *"restoration of the economies destroyed or disrupted by war."* Thus, a literal interpretation of the mandate of the Article would imply that while the Bank is charged with the responsibility of serving the entire members under the first component of Article 1, the second component limits the Bank to the service of only member countries "destroyed or disrupted by war." Thus, from a literal interpretation and application of Article 1, one can argue that developing countries were included in the first component of the Article, while the

365 See Gold, supra. Although Sir Gold was writing specifically about the Articles of the Fund in this context, given the similarity of both the Articles of the Fund and the Bank, one can safely apply that comment in this context. Further, the similarity extends to membership, whereby a condition for membership in the World Bank is

second component excluded most of the developing countries. The justification for this assertion may be anchored on the fact that many developing countries were not principal actors in World War II, and consequently, were minimally impacted by the war.366 Since the second component of Article 1 specifically covers only member countries "destroyed or disrupted by war", it could be argued that developing countries lack any legal basis to claim for assistance under this component of the Article.367 Because they were not in the consideration of the framers of thatsecond component of the provision, they were thus excluded from the benefits of that purpose.368 But such a narrow interpretation will deprive, as it has been depriving developing countries, the opportunity to jump start their development with the active support and encouragement of the IFIs, particularly, the World Bank. Moreso, since the Bank and indeed the West created extra-ordinary interventionist policies and measures369 to jump start

membership in the IMF. (IBRD Article II, section 1).
366 See footnotes 165, 166 and 241, supra.
367 Ibid.
368 A good example of the extra efforts to boost private investment to the war-devastated Europe after World War II, the U.S. government included in the Economic Cooperation Act of 1948, ch.169, paragraph 111 (b) (3), 62 Stat. 144 (1948), a system for guaranteeing U.S. private investments in Western European countries against restrictions on the conversion of currencies. See Shihata Ibrahim, MIGA and Foreign Investment, 1988, p.55.
369 Ibid, refer also to the Marshall Plan and other extra-ordinary policies geared towards accelerating the economic recovery of Europe after the war.

the economies of the European countries destroyed by war, one would expect such treatment for the developing countries in light of their present situation which is as bad as any war situation.370

Furthermore, central to the Bank's mandate was for the Bank to stimulate and support foreign investment, which had declined significantly prior to and after World War II371. The idea of foreign investment from the narrow perspective of the founders of the World Bank covers primarily investment flowing from developed countries to developing countries for the sole purpose of profit maximization by the investing developed country firms. It may also include investment from the economies of former colonial masters to that of the former colonies.

On the contrary, the anticipated flow of investment did not envisage flow of investment from the developing country firms to the developed country firms. Neither did it envisage flow of investment from the economies of the former colonies to that of the former colonial masters. Indeed, the proposed

370 Unfortunately, the West has not responded enthusiastically to the calls for a formulation of an African Marshall Plan or developing countries recovery plan. Other related calls for total and unconditional debt relief or forgiveness have not yielded tangible results.

371 IBRD Articles of Agreement, Article I (ii).

flow of investment, based on the *classical theory372* on foreign investment, reflects the Euro-American centric view of foreign direct investment. The opposing view, however, based on the *dependency theory373*, highlights the concerns of this author as well as most developing countries that the central idea behind foreign direct investment is a system that creates permanent dependency on the part of the host country in a foreign direct investment relationship, notably, the developing countries.374 These objectives, no doubt, lend credence to my contention that the Bank was created, *ipso facto,* to serve the limited interests of the founding states, which were Euro-

372 The classical economic theory on foreign investment is premised on the assumption that it mostly benefits the host state, typically, the developing country. This assumption is based on the following factors: (a) the foreign capital brought into the host state guarantees that domestic capital that could otherwise be applied for that use is applied to other public use (b) foreign investment brings technology into the host state (c) employment is also created by the foreign investor (d) skills employed by the foreign investor will be transferred to the nationals employed in the enterprise (e) infrastructural facilities built either by the foreign investor or the host government benefits the general public. See Sornarajah, M, The International Law on Foreign Investment, 1994, pp 38 & 39.

373 The dependency theory, on the contrary, is totally opposed to the classical theory and asserts that foreign investment does not ensure sustained economic development in the host state. The argument is based on the contention that most foreign investments are driven by multinational corporations based in the developed countries. The multinationals, therefore, embark upon foreign investments driven by a global policy intended to primarily benefit the parent company and its shareholders in the home country. Consequently, the home countries become the central economies of the world, while the host states (developing countries) become subservient or peripheral economies serving the interests of the central economies of the home states of the multinationals. Under the circumstances, the host countries can not develop unless they break the link with the home countries that design the foreign investment agenda. For further reading, see Sornarajah, M, supra, p. 43. See also R. Peet, *Global Capitalism: Theories of Social Development* (1991) pp. 43-51; B. Hettne, *Development Theory and the Three Worlds* (1988) pp. 12-14; P. Evans, *Dependent Development: The Alliance of Multinational, State and Local Capital in Brazil* (1979); T.J. Biersteker, *Multinationals, the State and the Control of the Nigerian Economy* (1987). See also Samir Amin, *Unequal Development: An Essay on the Social Formation of Peripheral Capitalism* (1976) as well as D. Bennett and K. Sharpe, *Transnational Corporations versus the State* (1985). For a contrasting view on how communist states effectively control the activities of the multinationals, see M.M. Pearson, *Joint Ventures in the People's Republic of China: The Control of Foreign Direct Investment under Socialism,* 1991, pp 14-19.

374 ibid

American states. The Bank has over the years insisted that it serves equally both the developed and the developing member states by a strict application of the teleological approach to the interpretation of its Articles.

The Articles of the World Bank, just like that of the Fund, encourage a teleological technique in its interpretation.375 Accordingly, Article 1 of the Bank's charter376 provides as follows:

*"The Bank shall be guided in all its decisions by the purposes set forth above."*

However, the same dilemma faced by the interpreters of the Articles of the Fund confronts the interpreters of the Articles of the Bank.377 The reason lies in the major components of a teleological technique which includes the demand for expert knowledge of the history and development of the organization's purposes, its subordinate law, as well as the capability to respond to changing circumstances.378 We shall cover these challenges in more details later; however, in the meantime let us review the

375 See footnotes 246 & 248, supra.
376 See footnote 298, supra.
377 Footnote 301, supra

organizational/institutional framework of the World Bank.

## GOVERNING STRUCTURE

The institutional framework of the Bank is contained in Article V of the Bank's constitution, which is otherwise called the "Organization and Management Article." 379This Article V is similar to the Fund's Articles XII and XIII.380

In order of priority, the Articles provide for the following organs:

1) The Board of Governors

The Board of Governors,381 like that of the Fund, consists of one Governor and one alternate Governor appointed by each member country. The two Boards meet in joint session once a year.

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378 ibid
379 IBRD Articles of Agreement, Article V, section 1.
380 IMF Articles of Agreement, supra.

The Board of Governors is the highest authority of the Bank.382 Its powers include the admission of new members, increase or decrease of the capital stock of the Bank, suspension of a member, determination of the remuneration of directors, and other reserved functions.383

2) The Executive Directors

Like the Fund, the Board of Governors delegates the daily operation of the Bank to the Executive Directors. 384 However, the Board may not delegate to the Executive Directors the powers specifically enumerated in Article V Section 2 (b) (i) – (vii). 385The Articles of the Bank provided for twelve Executive Directors in the following categories:

381 IBRD Articles of Agreement, Article V, section 2 (a).
382 Ibid.
383 IBRD Articles of Agreement, Article V, section 2(b).
384 Supra, footnotes 154 and 155.
385 Such reserved powers of the Board include the power to admit new members and determine the conditions of their admission; increase or decrease the capital stock; suspend a member; decide appeals from interpretations of the Agreement given by the Executive Directors; arrangements to cooperate with other international organizations; permanent suspension of the operation of the Bank and the distribution of its assets; and determination of the distribution of the net income of the Bank.

i) five shall be appointed, one by each of the five members having the largest number of shares;

ii) seven shall be elected.....by all the Governors other than those appointed by the five members.....386

The Board of Governors may, by a four-fifths majority of the total voting power, increase the total number of directors by increasing the number of directors to be elected. 387The Executive Directors and their alternates are appointed or elected for two-year terms. Further, they shall function in continuous session at the principal office of the Bank and shall meet as often as the business of the Bank may require.388 They are also empowered to appoint such committees as they deem advisable. Such committee membership need not be limited to governors, directors or their alternates.389

386 IBRD Articles of Agreement, Article V, section 4(b).
387 IBRD Articles of Agreement, Article V, Section 4, (b) (i) and (ii), see particularly the interpretation paragraph at the end of sub section (b) (ii).

3) The President

The President of the Bank shall be the chief executive officer, "responsible for the organization, appointment and dismissal of the officers and staff, subject to the general control of the Executive Directors."390 In the recruitment of staff, the President must be influenced chiefly by the "paramount importance of securing the highest standards of efficiency and of technical competence" and also, "pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible."391

4) The Staff

The President is the "chief of the operating staff of the Bank and shall conduct, under the direction of the Executive Directors, the ordinary

388 IBRD Articles of Agreement, Article V, section 4(e).
389 IBRD Articles of Agreement, Article V, section 4 (i).
390 IBRD Articles of Agreement, Article V, section 5(b).
391 IBRD Articles of Agreement, Article V, section 5(d).

business of the Bank." 392This power extends to the organization, appointment and dismissal of the officers and staff of the Bank, subject to the general control of the Executive Directors. 393 In staff selection and recruitment, thePresident's goal is to "secure the highest standards of efficiency and of technical competence," while at the same time aiming to hire from a pool that covers "as wide a geographical basis as possible."394

Further, the President and the staff enjoy international duty status in the discharge of their official duties to the Bank. While they are expected to owe their duty entirely to the Bank and to no other authority, each member of the Bank is expected to "refrain from all attempts to influence any of them in the discharge of their duties."395

The World Bank Group is comprised of five organizations as follows: the International Bank for Reconstruction and Development (IBRD), the

392 Currently, the World Bank staff strength is around 9,300 working out of Washington and other country offices. See http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/O, last visited August 17, 2005.
393 IBRD Articles of Agreement, Article V, section 5 (b), supra

International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). The World Bank Group can be further classified into the implementation group and the service group. The implementation group consists of the IBRD and the IDA, while the service group consists of the IFC, the MIGA, and the ICSID. While the IBRD focuses on middle income and creditworthy poor countries, the IDA focuses primarily on the poorest countries in the world. Both organizations, however, are serviced by the combined efforts of the IFC, the MIGA, and the ICSID.396

394 IBRD Articles of Agreement, Article V, section 5 (d).
395 IBRD, Articles of Agreement, Article V, section 5(c).
396 For further reading on the World Bank Group and the relationship of each organization to one another, refer to

## V CURRENT TELEOLOGICAL APPLICATION OF THE BANK'S ARTICLES

Under the section covering the IMF above, we enumerated the generally accepted approach to a teleological interpretation of the Articles of any organization. Such approach, we stated, "calls for an expert knowledge of the history and development of the organization's purposes as expressed in its Articles and its subordinate law and as capable of response to changing circumstances."397 Indeed, the Articles of the Bank, just like that of the Fund, not only justify but direct observance of a teleological approach to the interpretation of the Articles.398

Consequently, Article 1 of the Bank's charter399 provides that:

"The Bank shall be guided in all its decisions by the purposes set forth above."

However, as in the analysis under the Fund above, the application of the teleological approach to interpretation within the Bank is hampered by such

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http: // web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0, last visited July 3, 2006.
397 See Gold, supra
398 Ibid.

challenges as the lack of expert knowledge in the history and development of the Bank. The high turnover rate of thestaff and the Executive Directors hinder the accumulation and preservation of institutional memory for easy access and application by other employees who may be relatively new in the Bank. Compounding this situation is the conflicting provisions of the Bank's Articles of Agreement400 in some respects. For instance, the Articles created an ambiguous situation by assigning to the Board the responsibility for "the general operations" of the Bank.401 In the same vein, the Articles mandate the President to conduct its "ordinary business" under the "general control" of the Board.402 The Bank has, however, attempted to clarify these roles in the First Annual Report of the Bank which was issued in September 1946. In that report, the Bank clarified the roles as follows:

"Matters of policy determination are the responsibility of the Executive Directors, while operational, administrative and organizational questions are

399 Footnote 311, supra. The Articles of the World Bank or IBRD is also referred to as the Bank's charter or constituent instrument.

400 See IBRD Articles of Agreement at arts. V (4) (a) and 5(b). See also IFC Articles of Agreement, May 25, 1955, 264 U.N.T.S. 117, at arts IV(4)(a) and 5(b); IDA Articles of Agreement, January 26, 1960, 439 U.N.T.S. 249, at arts. IV (4) (a) and 5(b).

401 Ibid

402 Ibid. Although Article V(5)(b) of the IBRD Articles of Agreement mandates the President to conduct the ordinary business of the Bank "under the general direction of the Executive Directors", it is important to note that both "direction" and "control" were used interchangeably in the section.

the responsibility of the President, subject to the general direction and control of the Executive Directors."403

According to Dr. Shihata, notwithstanding the effort of the Bank to clarify the ambiguity in roles, the Bank's first President resigned in December 1946 after six months in office.404 In another attempt to further clarify the roles, the Bank's Board in 1947 adopted a "Memorandum with Regard to Organization and Loan Procedure"405. By the time the Memorandum was last revised in 1956, the Board was specifically charged as being "responsible for the decision of all matters of policy" which is inclusive of loan approvals.406 On the contrary, the management was charged as being "responsible for developing recommendations on all matters of policy requiring decisions by the Executive Directors."407

From the foregoing, one can appreciate the difficulty within the Bank in its attempt to teleologically interpret the Articles of Agreement with respect to the roles designed for each office within the Bank. As a result, roles have

403 IBRD, *First Annual Report by the Executive Directors* (1946)
404 See Mason and Asher, *The World Bank since Bretton Woods,* p. 41-42, 46-48 (1973).
405 IBRD Doc. R-106, June 4, 1947.

clashed or overlapped as a result of mis-interpretation by the officers involved. This challenge becomes more apparent in the on-going efforts of the Bank to apply a teleological approach to the interpretation of the various provisions of its Articles. Notwithstanding these challenges, the Bank must continue to strive to interpret its Articles teleologically whether in respect to the different roles of the various offices or in respect to the various policies and practices that it embarks upon pursuant to its responsibilities.

## VI GENERAL AGREEMENT ON TARRIFS AND TRADE (GATT)

GATT is not a single agreement, but is comprised of over two hundred agreements, protocols, process-verbaux, etc.408 The protocols are products of amendments to the text of the general articles, as well as corrections or revisions of the tariff schedules. In addition, special "side agreements" were completed, dealing with obligations on certain subjects, but applicable only to the signatories of the side agreements.

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406 IBRD Doc. R-106/8, September 14, 1956.
407 Ibid
408 Jackson, J.H., Jean-Victor Louis & Mitsuo Matsushita, Implementing the Tokyo Round: National Constitutions

The basic trade policy commitments of the contracting parties of GATT are contained in the "General Articles" of the General Agreement. 409And the General Agreement, which includes the detailed commitments on tariffs that comprise the "Tariff Schedules," fills many volumes of treaty text. The General Articles, which is thirty-eight in number, also covers seventy pages of text. They contain a number of detailed rules and obligations, which admonish nations not to pursue "beggar-thy-neighbor", trade policies, which will be counter-productive if practiced by all the contracting nations.

From the previous chapters, we have shown that GATT was a product of badly compromised diplomacy. Consequently, GATT suffered what has been rightly characterized as "birth defects."410 The result was a cumbersome system that lacked the organizational structure to be efficient in the arena of international trade and commerce. 411 As a matter of fact, international law did not recognize GATT as an organization. The implication is reflected in the fact that signatories to GATT are not identified as "members" as is the

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and International Economic Rules 1-2, (1984).

409 See the General Agreement on Tariffs and Trade (GATT), 1947. The Agreement was signed on 30 October 1947 by 23 contracting parties. The tariff concessions, however, came into effect on 30 June 1948 through a "Protocol of Provisional Application".

410 Footnote 179, supra.

411 As we noted earlier, the ITO was designed to serve as the organizational structure that will implement the

case in other international organizations, but are called "contracting parties"412

## GOVERNING STRUCTURE

As a consequence of the demise of the ITO, 413 the GATT lacked the complementary institution for implementation. Further, since the GATT was never intended to serve as an organization, it also lacked the requisite institutional framework for its self implementation. But the GATT had made a provision for the convening of its first meeting. Under this provision, the Secretary-General of the United Nations is mandated to convene the first meeting of the CONTRACTING PARTIES, no later than March 1, 1948.414 Apart from the convening of the first meeting by the UN Secretary General, the GATT apparently created the office of an Executive Secretary. The

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GATT obligations. However, when in 1950 the United States government announced that it would not seek Congressional ratification of the Havana Charter (which created the ITO); it signaled the demise of the ITO.

412 See http://www.wto.org/english/thewto-e/whatis-e/whatis-e.htm, last visited June 19, 2006. For comparison, see the Agreement Establishing the World Trade Organization, 1994 at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm, last visited June 20, 2006.

413 Footnote 170

414 The General Agreement on Tariffs and Trade (GATT 1947), Article XXV (2). See also http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm, last visited June 20, 2006.

Executive Secretary was to serve as the head of the GATT secretariat. 415 Under Article XXVI, 416 each contracting party accepting the Agreement was expected to deposit an instrument of acceptance with the Executive Secretary. The Executive Secretary will, thereafter, inform all the parties of the date of deposit and of the day on which the Agreement enters into force under paragraph 6 of this Article. 417

## GATT OBLIGATIONS

At the heart of the GATT obligations is the Article II, dealing with tariff schedules. The Article comprises detailed commitments by each country to limit tariffs418 on particular items by the amount negotiated and specified in its tariff schedule. The other GATT obligations, however, are designed to act

415 Following the tradition of continuity from GATT to WTO, the secretariat still remains in Geneva, Switzerland.
416 The General Agreement on Tariffs and Trade (GATT 1947), Article XXVI, (4). See also, http:www.wto.org/English/docs_e/legal_e/gatt47_02_e.htm, last visited June 20, 2006.
417 It is important to note that by the decision of the 23 Contracting Parties on March 1965, the title of the head of the GATT secretariat was changed from "Executive Secretary" to "Director-General". The first GATT Director-General was Eric Wyndham-White (1948-1968) from UK, while the current Director-General is Pascal Lamy (2005-present), from France.
418 Tariffs are taxes on imported goods. The logic is that by the imposition of such taxes, the imported goods will become more expensive than the locally manufactured goods; consequently, it will serve as a deterrent to importers while protecting domestic producers. Such taxes can be applied *ad valorem,* specific, or by compound formula. A*d valorem* duty is levied as a percentage of the invoice value of imported goods. Specific duty is levied as a fixed sum on a physical unit of an imported good, while Compound duty is levied as a combination of specific and *ad valorem*

as a counter-balance to the basic tariff obligation by ensuring that nations do not evade tariff obligations by the use of other non-tariff barriers419 that would negatively affect imports. These obligations, nevertheless, provide an exception in Article I, which comprise the "Most Favored Nation" clause (MFN). The MFN clause is the principal clause, and it provides in part as follows: "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.420

Another important GATT obligation is the national treatment obligation, which is contained in Article III. Sub paragraph 2 of that Article states as follows: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or

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duties. See also Ball, McCulloch, Jr, Frantz, Geringer & Minor, International Business : The Challenge of Global Competition, 10th ed, 96.

419 Other non-tariff barriers may not involve monetary measures, but may include other bureaucratic bottlenecks that are classified as quantitative and nonquantitative barriers. Such quantitative barriers include quotas, voluntary export restraints (VERS), and orderly marketing arrangements. Nonquantitative barriers include direct government participation in trade, customs and other administrative procedures and standards. Again, the logic is that such

indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."421

It is worthy of note that in addition to the *obligations,* the General Agreement contains several exceptions.

## GATT EXCEPTIONS

Some of GATT exceptions include the following:

1. Article XII, which provides for Restrictions to Safeguard the Balance of Payments, creates an exception when a contracting party intends to safeguard its external financial position and balance of payments.422
2. XIII, which provides for Non-discriminatory Administration of Quantitative Restrictions, creates an exception in the application of prohibition or restriction on imports.423
3. XIV, which provides for Exceptions to the Rule of Non-discrimination,

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bottlenecks will discourage imports without imposing any monetary fines.

420 The General Agreement on Tariffs and Trade (GATT 1947), Article I (1).

421 The General Agreement on Tariffs and Trade (GATT 1947), Article III (2).

422 The General Agreement on Tariffs and Trade (GATT 1947), Article XII (1, 2, (a)).

creates many exceptions to the non-discrimination rule.424

4. Article XIX, which provides for Emergency Action on Imports of Particular Products, creates an exception where imports are causing or threatening serious injury to domestic producers.425
5. Article XX, which provides for General Exceptions, creates many exceptions ranging from the protection of the public morals to the acquisition or distribution of products in local supply.426
6. XXI, which provides for Security Exceptions, create exceptions for the protection of a contracting party's "essential security interests", as well as "its obligations under the United Nations Charter for the maintenance of international peace and security."427
7. Article XXIV, which provides for Territorial Application – Frontier Traffic – Customs Unions and Free-trade Areas, creates exceptions to the strict interpretation of the Article.428
8. Article XXV, which provides for Joint Action by the Contracting

423 The General Agreement on Tariffs and Trade (GATT 1947), Article XIII (1).
424 The General Agreement on Tariffs and Trade (GATT 1947), Article XIV (1 – 5).
425 The General Agreement on Tariffs and Trade (GATT 1947), Article XIX (1, a & b).
426 The General Agreement on Tariffs and Trade (GATT 1947), Article XX (a – j).
427 The General Agreement on Tariffs and Trade (GATT 1947), Article XXI (a – c).
428 The General Agreement on Tariffs and Trade (GATT 1947), Article XXIV (3 a & b).

Parties, creates an exception in exceptional circumstances.429

Ironically, the General Agreement, which is central to international trade regulation, has never itself been applied. It is, however, applied by the "Protocol of Provisional Application" (PPA), which was signed October 30, 1947.430

From the foregoing shortcomings of the GATT, it became imperative that a properly constituted organization must be formed in order to fully complement the functions of the Fund and the World Bank as originally envisioned at the Bretton Woods conference. Thus, when the World Trade Organization was formed, it completed the dreams of the founding fathers of the Bretton Woods conference.

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429 The General Agreement on Tariffs and Trade (GATT 1947), Article XXV (5). The sub-paragraph 5 reads as follows: "In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties."

430 Protocol of Provisional Application to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61

## VII WORLD TRADE ORGANIZATION (WTO)

As we stated earlier, the formation of the WTO was a result of mere happenstance.431 Although GATT suffered from many birth defects432 which inhibited its maximum performance, there was no indication that the Uruguay Round433 would produce an organization that will take over from GATT known as the World Trade Organization (WTO). The WTO, however, differs substantially from the ITO (the 1948 International Trade Organization). While the ITO Charter included five sizeable chapters filled with substantive rules regulating international economic behavior, plus a chapter with an elaborate set of institutional clauses, the WTO on the contrary is a "mini-charter," with no substantive rules or institutional measures. The WTO is a very flexible institution, which allows for texts to be added or subtracted with time and for the evolution of institutions necessary for implementation of the rules.434

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Stat.pts.5, 6, TIAS No. 1700, 55 UNTS 308.
431 Chapter 1, supra.
432 Footnote 179, supra
433 Uruguay Round negotiations, spanned from 1986-94. It was signed at the Marrakesh ministerial meeting in April 1994.
434 *Agreement Establishing the World Trade Organization in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (1994) 33 I.L.M. 1125. For further reading, see the Agreement Establishing the World Trade Organization at http://www.wto.org/english/docs_e/legal_e/legal_e.htm, last visited June 26, 2006.

The WTO Charter explicitly established an international organization. The Charter endowed the organization with legal personality, clauses on "privileges and immunities," secretariat, director general, budgetary measures, and explicit authority to develop relations with other inter-government organizations, as well as non-government organizations. Further, the Charter prohibits staff of the Secretariat from seeking or accepting instructions from any government "or any other authority external to the WTO."435 The World Trade Organization is essentially comprised of six major parts. The Agreement Establishing the World Trade Organization serves as the umbrella agreement, with other five major parts, identified as Annexes. The other five parts are the General Agreement on Tariffs and Trade (1994), the General Agreement on Trade in Services (GATS), the Trade-Related Aspects of Intellectual Property Rights (TRIPS), Dispute Settlement Understanding (DSU), and the Trade Policy Review Mechanism. 436

435 See Footnote 192.
436 In addition to the big six components of the WTO family, it is worthy to note that other components like the plurilateral agreements, schedules of commitments, etc, also form part of the WTO family.

*Annex 1* is broken into sub paragraphs covering different subject matters.437 The Annex 1 texts include the following:

*Annex 1A* consists of the Multilateral Agreement on Trade in Goods. The principal document in this Annex is the GATT 1994, which must be read with GATT 1947.

There are a number of "side agreements," some originating from the Tokyo Round results. 438 These include the following: Agriculture, Sanitary and Phytosanitary Measures, Textiles and Clothing, Technical Barriers to Trade, Trade-Related Investment Measures (TRIMs), Anti-dumping (Article VI of GATT 1994), Customs valuation (Article VII of GATT 1994), Preshipment Inspection, Rules of Origin, Import Licensing, Subsidies and Countervailing Measures, and Safeguards.

*Annex 1B* consists of the General Agreement on Trade in Services (GATS), which was aimed at specifically providing the rules for trade in services. This was in cognizance of the tremendous growth in trade in services since the end of World War II.439

The GATS aims to regulate a very wide spectrum of service sectors, including legal, medical, banking, insurance, transportation, tourism, communications, etc. The drafters' intention was apparently motivated by the recognition of the vital role that trade in services had acquired, as well as the desire to checkmate governments that may attempt to limit competition with restrictions and protectionist measures. Similar to GATT, there are exception clauses, as well as transparency clauses that obligate members to disclose trade information.

*Annex 1C* consists of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).440

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437 The WTO Agreement 1994, Annex 1 (1A).
438 The Tokyo Round spanned from 1973 – 1979.
439 The WTO Agreement 1994, Annex 1 (1B).
440 The WTO Agreement 1994, Annex 1 (1C).

The TRIPS comprises some of the major intellectual property treaties.441 The primary goal of TRIPS was to further trade by providing some measure of protection for those intangible, yet critical, components of trade identified as intellectual property rights. These rights include, but not limited to, copyrights, trademarks, industrial designs, patents, business secrets, etc. Similar to the GATT, the TRIPS also contains exception clauses.

*Annex 2* consists of the Dispute Settlement Understanding, whichobligates all members to explore the dispute settlement options provided under the Agreement.442

*Annex 3* consists of the Trade Policy Review Mechanism (TPRM), which empowers the WTO to conduct a periodic review of the overall trade policies of each member to ensure compliance with the spirit and letter of the

441 The Berne Convention on Copyrights 1886 is formally known as the Berne Convention for the Protection of Literary and Artistic Works. It was revised in Paris in 1896 and in Berlin in 1908, completed in Berne in 1914, revised in Rome in 1928, in Brussels in 1948, in Stockholm in 1967 and in Paris in 1971, and was amended in 1979. The Paris Convention on Patents 1883 was the fore-runner to the Berne Convention. Both the Berne and Paris Conventions set up separate bureaux to handle the administrative tasks. In 1893, both bureaux merged and became the United International Bureaux for the Protection of Intellectual Property (BIRPI). In 1967 BIRPI became WIPO, the World Intellectual Property Organization, currently a separate organization within the United Nations. See http://en.wikipedia.org/wiki/Berne_Convention_for_the_Protection_of_Literary_and_Artis, last visited June 27, 2006.

Agreement.443

*Annex 4* consists of the Plurilateral Trade Agreements. These Agreements are four and include the Agreement on Trade in Civil Aircraft,444 the Agreement on Government Procurement,445 the International Dairy Agreement,446 and the International Bovine Meat Agreement.447

There is a very conscious effort to harmonize the operations of WTO and GATT. The WTO Charter stipulated that the secretariat of GATT 1947 shall become the WTO secretariat. Further, the Charter stated that the WTO and the Multilateral Trade Agreements shall "be guided by the decisions, procedures and customary practices followed by (GATT 1947)."448

Having reviewed the general provisions of the WTO as well as its historical

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442 The WTO Agreement 1994, Annex 2.
443 The WTO Agreement 1994, Annex 3.
444 The WTO Agreement 1994, Annex 4 (a).
445 The WTO Agreement 1994, Annex 4 (b).
446 The WTO Agreement 1994, Annex 4 ©. This Agreement was terminated in 1997. For further reading, visit http://www.wto.org/english/docs_e/legal_e/legal_e.htm, last visited June 27, 2006.
447 The WTO Agreement 1994, Annex 4 (d). This Agreement was also terminated in 1997. For further reading refer to footnote 203.
448 The WTO Agreement 1994, supra.

background, let us now turn our attention to the governing or institutional structure of the WTO.

## GOVERNING STRUCTURE

### (1) The Ministerial Conference

The highest hierarchy in the WTO is the "Ministerial Conference," which meets every two years. The Ministerial Conference is comprised of Ministers from member nations. In their capacity as the supreme body of the WTO, they make decisions regarding any of the multilateral trade agreements. In addition to the General Council, the Ministerial Conference enjoys exclusive authority in the interpretation of GATT 1994 by the approval of three-quarters majority of the members.449 Unlike theother Bretton Woods institutions (the IMF and the World Bank), the ultimate decision-making power is not delegated to a board of directors or the institution's head, but

449 See Article IX: 2 and Article 19:2 of the WTO Agreement. See also Articles 3(2) of the DSU.

lies with the Ministerial Conference.450

Although the powers of the Ministerial Conference are not expressly delegated to the General Council, the latter meets more regularly and in the process acts in three capacities. According to one commentator, as the General Council strives to act in these different capacities, they adopt different sets of rules in each meeting all in an effort to make decisions by consensus.451 The process of decision-making in the WTO is generally by consensus.452 However, in situations where members can not reach consensus, voting is permitted. In voting, each member commands one vote and the outcome are determined by simple majority of the total votes cast.453

(2) The General Council

The next in hierarchy is the General Council which is charged with the

450 Ibid

451 Baldwin, Robert E., *"Pragmatism Versus Principle in GATT Decision-Making: A Brief Historical Perspective"* in WTO Secretariat, *From GATT to the WTO: The Multilateral Trading System in the New Millennium,* Kluwer Law International, 2000 at p. 38.

452 This is one of the major inheritances of the WTO from GATT. Decision making by consensus also drives the WTO's claim that it is 'member-driven'. Notwithstanding that practice, the WTO Agreement does recognize that there are occasions where consensus may not be practicable and voting may be applied, e.g. in the interpretation of any of the multilateral trade agreements, in a decision to amend the provisions of any of the multilateral trade agreements, in a decision to admit a new member, etc.

responsibility for carrying out the day-to-day work in between Ministerial Conference sessions. It is comprised of ambassador level representatives from all member governments. In addition to the Ministerial Conference, the Council enjoys exclusive authority in interpreting GATT 1994 which is the constituent authority of the WTO.454 The General Council also functions as the Dispute Settlement Body455 and the Trade Policy Review Body.456 Although the composition of the General Council is the same while functioning as the DSB and the TPRB, nonetheless, their terms of reference differ while functioning in their different capacities.

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453 Footnote 207

454 Footnote 393, supra

455 The WTO General Council is governed by different rules while acting as the Dispute Settlement Body (DSB). The current chairperson is H.E. Mr. Muhamad Noor Yacob from Malaysia. For further reading, see http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm, last visited June 28, 2006.

456 The WTO General Council functions under different rules while acting as the Trade Policy Review Body. As the TPRB, they conduct periodic reviews of trade policy of members in order to ensure compliance with the WTO Agreement. A Chairperson for the year is elected at the first meeting of the year. Currently, the chairperson is H.E. Ms. Claudia Uribe from Colombia. See http://www.wto.org/english/tratop_e/tpr_e/tprbdy_e.htm, last visited June 28,

(3) The Councils

The next hierarchy is the Councils. These are the Councils set up pursuant to the three annexes under the GATT Annex 1. The Councils are as follows: Council for Trade in Goods, Council for Trade in Services; and Council for Trade-Related Aspects of Intellectual Property Rights. These Councils are comprised of all member nations.

(4) The Subsidiary Groups

The fourth hierarchy is the Subsidiary Groups. These groups are created from the Councils to handle very specific areas of the general coverage of the Councils. There are many such subsidiary groups. For instance, the Goods Council has 11 committees dealing with specific subjects like agriculture, market access, subsidies, anti-dumping measures, etc.

2006.

(5) The Secretariat

Finally, the WTO is run by a secretariat located in Geneva. The head of the secretariat is the Director-General.457 The DG is assisted by four Deputy Director-Generals, in charge of specific areas of operation and management.

## VIII CURRENT TELEOLOGICAL APPLICATION OF THE WTO'S CHARTER

The World Trade Organization was the most recently created458 of the three organizations that were intended under the Bretton Woods conference. 459Although it was created at a different forum, yet the forum was a creation of one of the products of the Bretton Woods conference.460

Under the WTO, the GATT 1994 expressly confers the exclusive authority of interpretation of the charter on the Ministerial Conference and the General

457 The current Director-General is Pascal Lamy, assisted by the following Deputy Director-Generals: Alejandro Jara, Valentine Rugwabiza, Harsha Varhana Singh, and Rufus Yerxa. For further reading, visit http://www.wto.org/english/thewto_e/whatis_e/tif_e/org4_e.htm, last visited June 30, 2006.
458 The WTO came into force in 1995.
459 See the Bretton Woods conference of 1945, supra.
460 The Uruguay Round of Talks under the GATT 1947 was a creation of GATT which emerged from the Bretton

Council.461 Thus, only the Ministerial Conference and the General Council can adopt interpretations of the GATT 1994, after securing the majority decisions of three-quarters of the members.

Again, any attempt to apply the teleological approach to the interpretation of the charter of the WTO must take into cognizance the requirements of such an approach. Such considerations call "for an expert knowledge of the history and development of the organization's purposes as expressed in its Articles and its subordinate law and as capable of response to changing circumstances."462 Unfortunately, the WTO has only been in existence for twelve years463 and by comparison to both the IMF and the World Bank, lacks the lengthy history that the other two can draw upon.464 Further, due to its limited number of years, the WTO lacks the experience of organizational development with respect to its purposes as well as enough experience in responding to changing circumstances.465 Yet, the WTO, as a *bona fide* member of the Bretton Woods family, and indeed the international financial

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Woods conference.

461 Supra, footnotes 393 and 398.

462 See Gold, supra.

463 See the WTO, supra. It was created in 1995 after the Uruguay Round of Talks finalized the arrangements for its establishment.

464 Both the IMF and the World Bank were established at the Bretton Woods conference of 1945.

institutions must ensure that it applies the teleological approach in its interpretation of its charter with a view to achieving uniformity in the long run.

## IX CONCLUSION

In this chapter, we have focused primarily on the *law* governing the Bretton Woods institutions as well as the off-shoots like the GATT and the WTO, which form the core of the IFIs. In order to better understand the laws governing most IFIs, a good appreciation of the laws governing the Bretton Woods institutions will serve as a good appetizer. Whilst our search is to appraise the roles of the IFIs in the context of some select developing countries, such a search, in order to become meaningful, must begin from the constituent documents that established these institutions. However, a mere literal analysis of the constituent documents will not suffice. More is needed in order to comprehensively carry out the search. Consequently, we have not just looked at the constituent documents, but have gone deeper in search of

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[465] Ibid

the authoritative interpretation of the learned commentators, scholars and publicists.

Our thesis has been that the roles that the Bretton Woods System play, and indeed, all the complementary economic, monetary, and financial institutions, were roles that were carefully scripted for them by the founding powers. Such roles were the roles that the founding powers articulated in the aftermath of World War II. Thus, the roles were framed to reflect a Euro-American centric approach, contrary to a universal approach. The roles were limited to the political, economic and financial exigencies of the post-war era from the prism of the founding fathers. The area of service was also limited to the geographical map covering the key members of the Allied Forces during the war. With the benefit of hindsight, these institutions were able to serve those interests fairly successfully. A case in point was the Marshall Plan of 1947.466

466 The Marshall Plan was named after United States Secretary of State George Marshall. It is officially known as the European Recovery Program (ERP), a plan by the United States for rebuilding the allied countries of Europe after World War II. The plan was in operation for four fiscal years beginning in July 1947. During that period, an estimated $13 billion of economic and technical assistance, equivalent to around $130 billion in 2006, when adjusted for inflation, was given to help the recovery of the European countries which had joined in the Organization for Economic Co-operation and Development. For more details, visit http://en.wikipedia.org/wiki/Marshall_Plan (last

But when we look at the tremendous changes taking place in the international community as well as the ever-expanding roles expected of these institutions as a result of their internal expansion, there will be little doubt that these international financial institutions are not pulling their weight in the scheme of things. Admittedly, some of the challenges of the latter part of the twentieth century as well as the twenty-first century were not foreseeable in the twentieth century. But most of the economic and financial challenges were foreseeable and preventable. As a matter of fact, with regard to Africa and other developing parts of the world that were victims of colonialism, the economic and financial challenges were foreseen, but intentionally ignored.467

Consequently, with all the efforts of these institutions in those parts of the world called developing, the situation still looks bleak and hopeless. Why?

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visited June 6, 2006.)

467 It is reasonable to expect that during the period of colonialism, these developing countries presented first hand experiences to their colonial powers of the enormous challenges faced by these economies. Further, as the colonial rulers of these colonies, the former can not claim to be oblivious to the enormous challenges that they were daily confronted with during the period of their colonial rule. Thus, it is justifiable to assert, as I have done, that these challenges were known (or should have been anticipated), but were ignored for obvious reasons. This position was re-inforced by Dr. Kingsley Moghalu when he stated: 'Colonialism, of course, was a cardinal means of the expansion of Western-dominated international society for thoroughly self-interested reasons, mainly economic. And it was not infrequently accompanied by mass atrocities against the colonized peoples. The Belgian King Leopold, who ruled Belgian Congo (today's Democratic Republic of Congo) in the late 19th century as his private rubber plantation, ordered the massacres of nearly 10 million Congolese to quell resistance to forced labor in the colony.....' See *Is there an international community?* by Kingsley Moghalu in the Nigerian Guardian Newspapers, August 15, 2005.

Because, we venture to state, the problems have been left unattended for such a long period of time that "band- aid therapy" now appears ineffective. Take for instance the IMF, despite the amendment of the Articles, neither the structure nor the operational philosophy havebeen impacted to reflect and incorporate the contemporary realities of the situation in the developing world.468 In all the institutions that we reviewed under this chapter, there is a remarkable imbalance in the composition of the membership of the highest authorities. Same applies in the voting structures and arrangements, such that developing countries lack adequate voting powers to impact the policies and practices of these institutions. Flowing from these inequities is the inability of the developing countries to impact the terms and conditions for accessing the resources of these institutions. Developing countries thus bear the full weight of the policy decisions of these institutions through the various ways that these institutions exercise their jurisdiction. Yet, the developing countries constitute the numerical majority of the membership of these institutions.

468 Footnote 210, supra.

# CHAPTER SIX

# ROLES OF INTERNATIONAL FINANCIAL INSTITUTIONS IN NIGERIA, SOUTH KOREA AND BRAZIL

## I INTRODUCTION

### THE AFRICAN EXPERIENCE

The lack of concrete evidence to prove that the IFIs have had any positive impact on the economies of developing countries is troubling, to say the least. Among the group classified as developing countries, it appears that Africa's fate is worse. As one commentator vividly stated, "Africa's economic situation, already serious, is deteriorating. In fact, unless effective measures are taken now, the already fragile fabric of the economic, social, and political systems in many parts of Africa will break down."469

469 Ndegwa, P., The Economic Crisis in Africa, published by the IMF from papers presented at a symposium held in Nairobi, Kenya, May 13-15, 1985, edited by Helleiner, G.K., in 1986.

## II THE MACROECONOMIC ENVIRONMENT

It is pertinent at this juncture, to analyze the economic climate or macroeconomic environment in which this debate on the impact, if any, of the IFIs on the African economies is conducted. The statistics is alarming. According to the World Bank's "Berg Report," only few African states had fairly good rates of economic growth until 1979. Since then, there has not been any report of economic growth in the whole of sub-Saharan Africa.

Further, the available data indicates that 15 of the 45 sub-Saharan African countries experienced declining per capita income between 1970 and 1979. The other 19 countries experienced per capita income growth of less than 1 per cent per year during this period. According to the World Bank, per capita income in Africa declined by 0.4 per cent per year in the 1970s. Agricultural exports, which were then the major source of foreign exchange earnings, declined over the decade by 20 per cent. The situation was exacerbated by a combination of factors, which included governmental inefficiency, pervasive mismanagement, unstable political structures and wanton corrupt practices in both the public and private sectors. The resultant shock on the fragile

economies was so severe that most African economies could not and has not been able to recover economically. The second oil price shock (1979-80), no doubt dealt the "last straw" on the economies of African states.

In addition, the terms-of-trade shock, which has continued unabatedly in sub-Saharan Africa, has been aptly described by the IMF itself as "brutal." This deficit in terms-of-trade has been attributed mainly to the decline in prices of primary commodities which over a long period of time constituted the main source of foreign exchange earnings in sub-Saharan Africa. The cumulative impact was a continuous decline in the terms of trade of African countries exporting primary products. It has been canvassed that the decline is so unprecedented that it was even worse than it has ever been since independence, or since the Second World War, or even since the Great Depression."470

Unfortunately, African countries are already burdened by heavy surcharges imposed upon them for failure to pay back on capital borrowed from foreign

banks and suppliers, including the IMF and the World Bank. African countries also suffer from surcharges imposed on goods sold to them by foreign suppliers on credit. During the period in review, organizational development assistance was cut by the major donors. For instance in 1981 alone, development assistance to Africa fell by 4 per cent in real terms overall. The International Development Association, which directs about 30 per cent of its credit to Africa, was been forced by the United States cutbacks in contributions to reduce its activities significantly.

The cumulative effects of the scarcity, consequently, resulted in a massive cutback in the volume of imports by African countries. According to the IMF, import values over this period fell on average by 7 per cent in Africa. In Madagascar, for instance, they fell by 40 per cent, in Sierra Leone they fell by 36 per cent, in Ghana by 29 per cent, in Zambia by 20 per cent, and in Tanzania by 12 per cent.471 These figures continued to worsen as the 1980s progressed.

470 Helleiner, G.K., Essays in International Finance, No. 152, July, 1983.

Unfortunately, the governments were unable to cut expenditure as quickly as their revenues have fallen, leading inevitably, to unplanned and excessive monetary expansion. Monetary expansion in combination with scarcities, inevitably breeds, inflation. In an effort to curb inflation, African governments have adopted a number of economic and political measures. Among these measures, is an effort to deal with price increases by means of price controls, which is typically reinforced by severe consequences. The result is a spread of black markets and corruption, a retreat from legal activities, a concomitant depressing effect on morale. Further, the delays in required adjustments of exchange rates have led to further tightening of import and foreign exchange controls and to the growth of smuggling. According to the IMF report, real (inflation-adjusted) exchange rates in Africa have appreciated enormously in the past three years which amounted to the opposite of what was probably required for adjustment over the longer run.472

The longer the necessary exchange-rate changes are delayed, the greater the "shocks" eventually required to bring them back in line.

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471 IMF, 1982a, p.97.

In 1974, the IMF reported only 3 countries in arrears on external payments. However, by the end of 1981, the number had increased to 32, of which 20 were African.473 As more and more African countries fell behind in their debt repayment plans, the need to seek external credit became imperative. Unfortunately, when suppliers are forced to extend credit, they charge high interest rates. And the next time, they demand payment in cash.

In a desperate effort to keep afloat the ship of state, African countries resorted to debt rescheduling. Consequently, in the past few years, African countries have taken over as the most numerous customers of the "Paris Club" of official creditors. By 1979, African countries accounted for 3 out of 4 official reschedulings (Togo, Sudan, Zaire); in 1980, 2 out of 3 (Sierra Leone and Liberia); and in 1981, 6 out of 7 (Madagascar, Togo, Zaire, Uganda, Senegal, Liberia). Subsequently, there have been 6 more African meetings of the Club, rescheduling the official debts of Senegal, Uganda, Malawi, Sudan, Togo, and Zambia. The report further indicates that foreign-

472 IMF, supra, p.122; 1982b, p.54

exchange reserves in Africa fell in 1982 to unprecedented levels, averaging 7.4 per cent of annual imports, or twenty-seven days worth of imports. Reserves were less than half their 1973-74 levels and less than half the estimated 1982 average for all oil-importing developing countries.474

## III THE FEDERAL REPUBLIC OF NIGERIA'S EXPERIENCE

### INTRODUCTION

Modern day Nigeria has been an amalgamation of different peoples and culture that had been under the dominance of the British government, through their Royal Niger Company. In 1885, the British received international recognition for their formal claim of influence over Nigeria. In 1914, the separate areas were formally united as the "Colony and Protectorate of Nigeria." Under this unification, the area was still administered separately under the Northern province, the Southern province, and Lagos colony. After World War II, in response to increasing nationalism and demands for

473 IMF, 1982c, p. 28.

independence, the British granted Nigeria independence on October 1, 1960.475

Under independence, the country was designed to be governed as a Parliamentary government with three regions forming the federation states. The three regions were the northern region476, the western region477 and the eastern region478. Each region was endowed with substantial powers for self-governance, while the federal government had exclusive powers over defense and security, foreign relations, commercial and fiscal policies. Three years later on October 1963, the government changed its political structure and became a federal republic with a new constitution. At the same period, a new and the fourth regional government were created as the Midwestern region.

The newly established nation did not last long. On January 15, 1966, the military embarked upon a coup which ended the First republic under Prime

474 IMF, 1982a, p.169
475 Upon independence, Alhaji Tafawa Balewa became the first Prime Minister of Nigeria.
476 The capital city of the Northern region was located in Kaduna.
477 The capital city of the Western region was located in Ibadan.
478 The capital city of Eastern region was located in Enugu.

Minister Tafawa Balewa.479 In July of the same year, a segment of the military staged a counter-coup.480 The fall-out of the two coups and the total breakdown of law and order, as well as the massive killings of civilians, resulted in the civil war that lasted from 1967 to1970.481

Since then, the country has been ruled by one military government or another until 1979, when another civilian government was elected under Alhaji Shehu Shagari. President Shagari's government lasted from1979 to 1983, when the military overthrew the government. The military continued to rule the country from 1983 until 1999, when former military general Olusegun Obasanjo was elected civilian president for four years, and re-elected in 2003 for another four year term.

479 It is worthy of note that the Prime Minister, Alhaji Tafawa Balewa, the Premiers of Northern region and Western region, as well as other high ranking officials were killed in the bloody coup.
480 It is also worthy of note that the counter-coup culminated in the death of the Commander-in-Chief of the Military Government that succeeded the Tafawa Balewa region, General JTY Aguiyi Ironsi. Although Ironsi was not directly involved in the plot to overthrow the Balewa government, he assumed the position of C-in-C as the highest ranking military officer during the coup.
481 The Nigerian Civil War (1967-1970) was fought between the Nigerian military and the Biafran military. Then Governor of Eastern region, Colonel Odumegwu Emeka Ojukwu, declared the State of Biafra, in reaction to the genocide that was been perpetrated against the Ibos in the Northern region of the country. The war, essentially, was

Although generally known as Nigeria, the country is officially addressed as the federal republic of Nigeria. With an estimated population of 137 million people, Nigeria is the most populous country in Africa, and also accounts for 20 percent of the entire population of West African countries. A country with a rich diversity, there are approximately 250 ethnic groups that constitute the population segments. The dominant ethnic groups are the Hausa-Fulani in the north which are predominantly Muslims, the Yorubas in the west which are evenly divided between Christians and Muslims, and the Igbos in the east which are predominantly Christians.

The country enjoys a land area estimated at 923, 768 square kilometers or 356,700 square miles. The capital city is Abuja with an estimated population of 100,000. Other popular cities include Lagos with estimated population of 12 million, Ibadan with estimated population of 5 million, Kano with estimated population of 1 million, and Enugu with estimated population of 500,000 people.

an attempt by the Nigerian government to prevent the secession of Biafra (with its rich oil reserves) from Nigeria.

Nigeria currently runs a democratic government under a federal system of representation. The operational constitution is the 1999 constitution, which is based largely on the 1979 constitution that had been suspended by the military after the overthrow of the civilian government in 1983.[482] Currently, the country is administered as a federation with 36 states and a Federal Capital Territory (FCT), called Abuja. The federal government currently led by President Olusegun Obasanjo and his Cabinet constitute the Executive branch. The Legislative branch is comprised of the bicameral legislature. The National Assembly consists of the Senate (Upper House) with its 109 members. Each state is represented by three senators, while the FCT is represented by one senator. Also, the National Assembly consists of the House of Representatives (Lower House) with its 360 members. The tripartite component of the federal government is the Judicial branch, headed by the Chief Justice of the Federation. The states are governed by the Governors and their cabinet. The states are further sub-divided into a total of 774 local governments, headed by Local Council Chairpersons.

[482] The 1999 constitution which was based largely on the 1979 constitution was promulgated by decree on May 5,

With an estimated Gross Domestic Product of $90.9 billion and per capita Gross Domestic Product of $694, Nigeria has been a classical case study of missed opportunities and under-utilization of human and natural resources. The country is blessed with abundant natural resources like petroleum, natural gas, tin, columbite, iron ore, coal, limestone, lead, zinc. It has been a world leader in the production of agricultural products like cocoa, palm oil, yams, cassava, sorghum, millet, corn, rice, livestock, groundnuts, cotton, etc. The industrial products that are produced in the country include textiles, cement, food products, footwear, metal products, lumber, beer, detergents, car assembly, etc. Total export receipts in 2005 are estimated at $52.16 billion, while petroleum products aloneaccounts for 95% of the total revenue.

The discovery of oil in Nigeria and the sudden oil boom in the 1970s caused the government to focus all economic attention on the oil sector to the total neglect of the other sectors of the economy. The consequence is evident in the fact that in 2002, for instance, oil and gas exports accounted for more

1999. It came into force on May 29, 1999.

than 98% of export earnings and about 83% of the government revenue.[483]

The neglect of other areas of economic activities like agriculture has been most devastating. Nigeria used to be Africa's biggest poultry producer with an estimated 40 million birds annually. Currently, the number of birds produced annually is about 18 million birds. Same consequence applies to the cocoa production, groundnuts (peanuts), rubber, and palm oil, which all used to be major sources of revenue for the country pre- and post-independence. Cognizant of the dangers inherent in a 'one-product economy', the government of President Obasanjo has embarked upon a number of policy initiatives aimed at diversifying the economy and providing incentives for investment in other areas of the economy.

With the aggressive efforts directed at privatization of the government owned banks, cement plants, fuel distribution companies, the government is geared towards a more market-oriented economy. A huge success story in this effort was the introduction of the GSM telecommunications system, which has

[483] U.S. Department of State, Bureau of African Affairs, July 2006. See http://www.state.gov/r/pa/ei/bgn/2836.htm,

greatly increased private investment in the industry, as well as created new employment opportunities. Further, with the creation of the much dreaded Economic and Financial Crimes Commission (EFCC), the government has shown that it is committed to curbing the embarrassing stigma of public and private corruption in the system. But more needs to be done in order to reverse the downward trend in economic development under the many years of poor military rulership. The country's infrastructure is in urgent need of attention and repairs after many years of neglect and non-maintenance under the military.

Nigeria currently has oil reserves that are estimated to be 25 billion barrels. It also has gas reserves that are estimated to be 100 trillion cubic feet. It is also becoming a more respected member of the international community by the leadership roles it has been playing in West Africa, Africa, and as a member of the United Nations. Its national economic profile is equally on the rise which was evident in the IMF's approval of its first ever Policy Support Instrument for Nigeria in October 2005. Further, the Paris Club recently

last visited August 16, 2006.

signed debt reduction agreements with Nigeria under which the country was given an $18 billion debt reduction in exchange for the payment of the remaining $12 billion. The country did not only meet the Paris Club deadline, but is currently working to also exit the London Club as a debtor.

## NIGERIA AND THE INTERNATIONAL FINANCIAL INSTITUTIONS

First, I must concede that the scope of this work can not accommodate a most comprehensive review of the totality of the relationship between Nigeria and the major international financial institutions (IFIs). The underlying reason includes the fact that this exercise is not principally aimed at dissecting the entire relationship between Nigeria and the IFIs. Rather, the effort here is to highlight the major aspects of the relationship with a view to using it as a mirror of what constitutes the relationship. Consequently, although Nigeria has, from inception, been involved with the IFIs, I will locate the critical aspect of its relationship with the IFIs within the limited period from 1983-1993. This ten-year period is very illustrative because it covers the

administration of one civilian government and two military governments.484

## I. THE SHAGARI GOVERNMENT (1979-1983)

After thirteen years of military rule,485 Nigeria conducted another general election aimed at enshrining a multi-party democracy. The National Party of Nigeria (NPN) won the Presidency and a slim majority in the National Assembly. On October 1, 1979, Alhaji Shehu Shagari of NPN was sworn in as the President and C-in-C. The out-going military government had fashioned a new constitution modeled after the US Presidential system of government, otherwise known as the 1979 constitution. President Shagari also inherited a relatively stable economy from the out-going military government headed by General Olusegun Obasanjo. Although the country had some external debt, it was easily manageable at 1.5 percent debt service ratio.486 The oil revenue from crude oil was also significant since

484 The Shagari government was elected in 1979 and won re-election in 1983. Shortly thereafter, the government was overthrown by the military. In the wake of the coup d'etat, General Muhammadu Buhari became the C-in-C and Head of the Military government. Two years later, General Ibrahim Babangida, his Army Chief, overthrew the government in a palace coup.

485 Footnote 248, supra

486 See Yusufu Bangura, "The Politics of Nigeria's Debt Crisis" in Okello Oculi, ed. Nigerian Alternatives, Zaria,

a barrel sold for $44.4 in 1980/81.487 The out-going Obasanjo government had pursued what a commentator called "low profile" deflationary policies which were aimed at tackling the 1977/78 balance of payments challenges.488

However, in the first budget announced by the new civilian government in March 1980, the government reversed the out-going government's "low-profile" economic policy. Rather, the government adopted what I consider to be a "lavish and extravagant" economic policy. For instance, the government expanded the allocation for public expenditure from N13.291 billion in 1979 to N23.695 billion in 1980, resulting in almost 200 percent increase in its first year.489 Simultaneously, both the federal and state governments borrowed unrestrictedly in the international capital markets

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Nigeria, Dept. of Political Science, Ahmadu Bello University, p.99-100. Cited in M.O. Okome, "A Sapped Democracy", University Press of America, 1998.

487 See Adebayo Olukoshi, "The Management of Nigeria's External Debt: Issues & Problems" in Olukoshi, ed. The Nigerian External Debt Crisis: Its Management, Lagos, Nigeria, Malthouse, 1990, p.28. Also cited in M.O. Okome, supra.

488 M.O. Okome, supra, p. 88; see also Olukoshi, supra, pp 25-26.

489 Yusufu Bangura, Rauf Mustapha and Saidu Adamu, "The Deepening Economic Crisis and its Political Implications." In Siddique Mohammed and Tony Edoh, Nigeria: A Republic in Ruins, Ahmadu Bello University, Department of Political Science, 1983, p.59.

thereby draining the external reserve of the country.490 The import license scheme which was in place before the new government took power was used as a vehicle for party patronage, and consequently contributed to the huge drain on the foreign exchange. Cumulatively, by allowing massive capital flight in a short period of time, the over-invoicing of imports, under-invoicing of exports, and fraudulent accounting practices, the Shagari government caused a sudden economic crisis.491 By 1981, the country's foreign exchange reserves were depleted from over $10 billion in 1980 to $4.2 billion.

By early 1982, the international price for crude oil fell drastically, thus compounding Nigeria's economic problems. As a result, Nigeria's oil revenue fell from $10 billion in 1979 to $5.161 billion in 1982.492 At the same time, Nigeria's gross domestic product (GDP) fell by 2 percent and 4.4 percent in 1982 and 1983, respectively. Nigeria's current account

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490 Olukoshi & Herbst, "Nigeria: Economic and Political Reforms at Cross Purposes" in Stephen Haggard & Steven B. Webb, eds. Voting for Reform: Democracy, Political Liberalization, and Economic Adjustment, New York, Oxford University Press, 1994. (Published for the World Bank).
491 See Olukoshi, supra, footnote 256.
492 Olukoshi, "The Role of the IMF and World Bank in Nigeria's....." in The Nigerian External Debt Crisis: Its Management, supra, footnote 256

deficit grew to N4.9 billion in 1982 and was N2.9 billion in 1983.493 By the end of the administration's first term in office in 1983, the budget deficit of N6.231 billion was more than 50 percent of the total expenditure.494

By adopting the "lavish and extravagant" economic policy, the Shagari government effectively plunged the country into a serious economic crisis within the four-year period that it was in office. The consequences for both the country and the citizens were dire. The economy began to experience massive retrenchment, unemployment increased irregular payment of salaries became popular, while most employers froze employment. Basic food became scarce and expensive, while public services became more expensive. Crime and violence immediately increased as a result of higher numbers of the citizens without employment.495

493 Ibid
494 Ibid
495 See Yusufu Bala Usman, Nigeria Against the IMF: The Home Market Strategy, Kaduna, Nigeria, Vanguard,

In realization of the collateral consequences of its economic policy, the Shagari government began to introduce an austerity package in 1981. The goal of the package was for the government to cut public expenditure by $1.6 billion. The 1982 budget also targeted a further cut of $3 billion. But, apparently the damage had been irredeemably done. As we can see, the efforts by the government to stem the tide of economic erosion were too late and too little. In fact, the situation had become so critical that while the government was implementing the austerity package, it was compelled to draw upon the country's reserves with the IMF.496

Dr. Okome succinctly summarized the three strategies that were applied by the Shagari government as follows: 1) Stabilization of the economy strategy; 2) The appointment of a committee of experts to make recommendations on policy reforms strategyand 3) The solicitation of external assistance strategy.497

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1986.

496 Thomas Biersteker, "Reaching Agreement with the IMF: The Nigerian Negotiations, 1983-86." Pew Program in Case Teaching and Writing in International Affairs, Case #205. University of Southern California Press, 1988, pp.

A. The Economic Stabilization Strategy:

In recognition of the dire economic situation facing the administration, the Shagari government introduced the Economic Stabilization Act, 1982,498 while pledging to cut government expenditure by 40 percent.499 The provisions of the Act were aimed at increasing customs and excise duties, as well as comprehensive import regulation. Consequently, the government recalled all import licenses that were unused; suspended the issuance of import licenses for motor vehicle importation; suspended all capital projects not yet started; reducedbasic travel allowances 500 from N800 to N500 and from N3,000 to N2,000 for individuals and businesses, respectively; advance deposits were imposed on all imports while interest rates were increased by 2 percent. Further, the government imposed more stringent monetary and credit policy for industries, development finance institutions and general commerce.501

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497 M.O. Okome, supra, p.88

498 The Economic Stabilization Act was enacted on April 19, 1982, as an act of the legislature of Nigeria.

499 See Olukoshi, "Role of the IMF & World Bank in Nigeria's Foreign Debt", supra, footnotes 256 & 261.

500 These were amounts of money that the government authorized individuals and businesses to have while traveling overseas.

501 See Okome, "A Sapped Democracy", supra, p. 90. See also Yusufu Bangura et al "The Deepening Economic Crisis..." supra, and Olukoshi, "The Nigerian External Debt Crisis. Further, see Tom Forrest, Politics and Economic Development in Nigeria, Boulder, Westview, 1993, p.183.

As I indicated earlier, by the time the Shagari government introduced the Economic Stabilization Act, the proverbial horse had bolted out. The Act, unfortunately, failed to remedy the economic situation of the government. Compounded by the steady decline in crude oil export, the chief source of foreign exchange revenue, the Act could not control imports; regulate the monetary system and curtail government expenditure to a commensurate level with declining income. By the end of 1982, Nigeria's debt service ratio had skyrocketed to 19.2 percent, while the government's trade debt to foreign creditors was three months overdue.502 The government reacted by seeking the assistance of a team of economic and financial experts, thus the appointment of the Odama Committee.

B. The Committee Appointment Strategy:

The economic situation continued unabated into 1983. Thus, in January 1983, in order to curtail the drain on the scarce national resources, the government embarked upon a massive deportation exercise of over one million "illegal"

aliens resident in the country at the time.503 In the same January 1983, the government through its National Economic Council appointed a committee of experts under the chairmanship of Dr. J.S. Odama.504 Other members of the committee include the special advisers on economic affairs to the respective state governors, as well as a representative of the Central Bank of Nigeria.

To underscore the urgency of the situation, the committee submitted its report one month after its inauguration.505 The report, among other recommendations, called for "radical departures.....in a number of crucial sectors and policies if the economy is to survive the onslaught, particularly from exogenous outside factors."506 Further, the committee proposed a long-term solution that calls for "fundamental structural adjustments in all sectors of the economy."507

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502 For a fuller account of the economic situation of Nigeria under the Shagari government, see Biersteker, "Reaching Agreement...." supra.

503 Unregistered aliens are commonly referred to as illegal aliens. These aliens comprised mainly citizens of neighboring countries who had sought political and economic refuge in Nigeria.

504 At the time of his appointment, Dr. Odama was a special adviser to the President on economic affairs.

505 See the Report of the Odama Committee on the State of the Nigerian Economy by the National Economic Council (NEC) Experts Committee, (The Odama Report) Lagos, Nigeria, Federal Ministry of Planning, February, 1983. Cited in Okome, supra, p.91. The Odama Report was submitted on February, 1983.

506 The Odama Report, supra, footnote 274.

Again, the report was another effort by the government that fell short of the expected reaction to the increasingly worsening economic situation facing the country. I will like to argue that while the Odama report was aimed at long-term recommendations, the government was looking for short-term measures that will allow them to plan for the long-term. Thus, the goal of the experts in making the recommendations was divergent to the goal of the recipients and became impracticable. Evidence of this position was that in the same month that the report was submitted, the government negotiated and received a $1 billion Eurocredit loan for the payment of the country's debt arrears.

Although the National Economic Council made recommendations to the government from the Odama report,508 based upon which the government issued a white paper, the prevailing mood within the government circle was that external help must be sought. Without devoting further thought to the Odama report, the Shagari government sought a formal help from the international financial institutions, particularly, the IMF.

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507 The Odama Report, supra, footnotes 274 & 275.
508 See "The Green Paper on the State of the Nigerian Economy," Africa Development, Vol., 9, #3, 1984, p.136. This was a critique of the Odama report.

C. The External Assistance Strategy:

As I indicated earlier, after receiving the Odama report and without further thought on it, the government began formal negotiations with the IMF in April, 1983. Nigeria sought from the IMF a $2-3 billion loan in under to support its balance of payments deficits and an additional $500 million in order to support the deficit from oil sales. Both loans were made under the IMF's Extended Fund Facility (EFT) and the Compensatory Financing Facility (CFF) programs, respectively. Additionally, the government sought more help from the World Bank in the amount of $300 million under the Bank's Structural Adjustment Loan (SAL) program.

In order to approve the loan, the IMF demanded that Nigeria meet the following conditionalities:509

1. reduction in aggregate public expenditure, particularly in the size of the budget deficits;

2. introduction of greater budgetary discipline;

3. reduction of grants, subventions and loans to parastatals;

4. cessation of non-statutory transfers to state governments;

5. simplification and rationalization of the Customs Tariff Structure;

6. review of industrial incentives and policies;

7. strengthening of the operational efficiency of revenue collection agencies;

8. upward review of interest rates and a reduction in the sectoral allocation of credit;

9. strict external debt management;

10. export promotion to broaden the export base;

11. adjustment of producer prices of agricultural commodities;

12. review of on-going projects with a view to determining their priorities;

13. classification of parastatals into social and economic activities for the purpose of restructuring them to achieve cost effectiveness, accountability and, for economic parastatals, profitability;

14. phased removal of subsidies on fertilizer;

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509 These conditionalities were adapted from Okome, A Sapped Democracy, supra, pp.93 & 94.

15. trade liberalization;

16. removal of the subsidy on petroleum;

17. the devaluation of the Naira510

Notwithstanding the government's willingness to comply with most of the IMF imposed conditionalities, the government had great reservations regarding the implementation of those relating to devaluation of the Naira511, the removal subsidy and the liberalization of trade.512

The government believed that the three conditions were irrelevant to the context of the Nigerian economic situation and should be excluded from the negotiations. Some scholars, however, attribute the government's reluctance to comply to be based on the lack of administrative and political capacity.513 Some other scholars believe that while the government possessed sufficient administrative capacity, it lacked at the time, the political capacity to comply.514 Why? The reason was that the government was facing general elections and felt that the maintenance of the economic status quo will be

510 See the Nigerian NEWSWATCH magazine of October 14, 1985, p.14.
511 The Nigerian currency is denominated by Naira (paper denominations) and Kobo (coin denominations).
512 Footnote 279. supra

more beneficial to their prospects in the election. One major implication of the maintenance of the economic status quo was the continuation of the import license scheme which had been abused by the party officials, but which had served the ruling party well in oiling their patronage scheme.

The government was faced with a fundamental decision: comply with all the IMF conditionalities and risk losing the 1983 general elections, or refuse to comply and hopefully win the general elections.515 The decision of the government was facilitated by the mounting resistance to the IMF package coming from the organized labor unions, civil servants, students, professional organizations, etc. The Shagari government predictably chose to refuse to comply with the IMF conditionalities, particularly; those relating to

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513 See Olukoshi, supra

514 See Okome, supra p.96

515 An interesting development during the government's negotiations with the IMF was the dispute regarding the accurate amount of Nigeria's external indebtedness. According to Okome, "Throughout the negotiations, the Shagari administration was never sure of the exact amount of Nigeria's indebtedness. Consequently, between 1982 and 1987, the amount of Nigeria's external debt was a matter for debate, discussion and conjecture. Acrimonious disputes ensued between Nigeria and its creditors on the amount of the debt and the extent of state responsibility for repayment. The claim submitted by the London Club to the Nigerian government was $8.8 billion while Nigerian importers submitted a counter claim of $6.4 billion. A conference was held on the matter and a "guesstimate" of $23 billion was made. The Central Bank of Nigeria's estimate in 1983 was $17.758 billion. Further complications were caused by the discovery that many of the claims were fraudulent. Three financial advisers, S.G. Warburg and Co., Lehman Kuhn and Lazard Freres were hired to assist Nigeria in reconciling all the claims and in negotiating an agreement with Nigeria's private creditors to whom $2 billion was owed on unconfirmed letters of credit." See also Yusuf Bangura, "The Politics of Nigeria's Debt Crisis"; Olukoshi, The Management of Nigeria's External Debt, and "The Role of the IMF & World Bank....", supra

devaluation, subsidy removal and trade liberalization.

In the meantime, Nigeria sought and obtained an agreement from the London Club of creditors to roll over Nigeria's trade debts. The package demanded that the interest rolled over will be converted into a loan which will be repaid in three years, commencing from January 1984. Thereafter, the creditor banks insisted that Nigeria will not receive any new loans until they conclude an agreement with the IMF. Consequently, creditors like the US Eximbank and the U.K.'s Export Credit Guarantee Department (ECGD) refused to insure the country's imports without an IMF agreement.516

The Shagari party, the National Party of Nigeria (NPN), won the majority of the votes in the 1983 general elections. The victory was short-lived because in December 1983, the newly elected government was overthrown by the military government led by General Muhammadu Buhari who claimed that the coup d'etat became necessary in order to save the ship of state from the recklessness of the Shagari government.

## II. THE BUHARI GOVERNMENT (1983-1985)

As earlier stated, the Buhari government justified their overthrow of the Shagari government based on the latter's recklessness and indiscipline in handling the affairs of the country.517 Thus, the new government championed discipline in both thepublic and private sectors of the country.518 The economic situation of the country was fast deteriorating upon the seizure of power by the Buhari government. The main source of foreign exchange for the country, the crude oil earnings, had plummeted from $25 billion in 1980 to $11 billion in 1984. At the same time, the country's debt service ratio had skyrocketed to 28.3 percent of the GDP. Consequently, while the country was generating less than half of its 1980 earnings, its debt obligation had more than doubled. Compounding the situation was the high rate of domestic inflation, the low rate of industrial production, and the overall impact on the standard of life of the average citizen.519

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516 See Olukoshi, "Role of the IMF & World Bank....", supra
517 See Buhari: Middlemen, Party Agents Ruined Economy," FBIS-MEA, January 30, 1984, p. T3
518 Ibid

The Buhari government immediately introduced what they termed a War Against Indiscipline (WAI).520 The campaign was aimed at encouraging the citizens to live an orderly and discipline life in private and public relationships. It was also aimed at curbing the wanton recklessness in the public sector which had fueled the prevalent rate of corruption in the public sector. The campaign was carried out in the local and national print and broadcast media. A combined team of the newly established and recruited WAI Brigade officers and the military were empowered to strictly enforce any act of indiscipline.521

The Nigerian public welcomed the Buhari government as a relief from the corrupt and scandalous Shagari government. At the same time, they looked forward to a faster containment of the economic crisis. The Buhari government responded to the worsening economic crisis by adopting some austere fiscal and monetary policies. These included drastic reduction in public expenditure, increased interest rates and stricter tax laws enforcement.

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519 Biersteker, "Reaching Agreement....", supra
520 Ibid
521 Ibid

Although the new government did not immediately abolish the corrupt import license scheme of its predecessor, they, however, imposed stricter guidelines in its operation. Predictably, these measures worsened the economic conditions of the citizens and the industrial sector.

The high rate of unemployment implied the unavailability of jobs for the citizens, both skilled and unskilled. For the employed, there was a higher sense of job insecurity resulting from the daily retrenchments and layoffs prevalent in the country. Concomitant to job insecurity was the state of under-employment and irregular wage payments. Social services also became increasingly expensive for both the employed and unemployed.522

The production sector of the economy fared worse. The full weight of the austere fiscal and monetary policies, although necessary to combat the economic situation, fell upon the industrial sector.523 Consequently, many could not afford to continue producing on full capacity and had to lay off their non-essential workers. Cost of procuring raw materials and replacement equipment parts became exorbitant.524

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522 Bangura et al, "The Deepening Economic Crisis", supra
523 Ibid
524 Ibid

Buhari's Blue Book:

After initially imposing stricter fiscal and economic policies,525 the Buhari government developed and released The Blue Book in 1984.526 The Blue Book was a comprehensive report that included some of the provisions of the 1982 Stabilization Act, some of the provisions of the Odama report, as well as those recommendations of the IMF and the World Bank which were acceptable to the government.527

The Blue Book stated the justifications for the overthrow of the Shagari government as follows:

1. the mismanagement of the Nigerian economy;
2. lack of political accountability;
3. causing the deterioration in the quality of life of the average citizen;
4. insensitive political leadership;
5. preemptive intervention to prevent the drift towards economic collapse and

525 Okome, supra, classified these initial fiscal and economic responses by the Buhari government as domestic solutions. I concur, but must add that they were aimed to serve as very interim measures while searching for more effective measures. At the same time, the new government needed to buy time to undertake a more comprehensive study of the extent of the situation and proffer more effective solutions. This position became evident in the government's release of The Blue Book.

526 See Yusufu Bala Usman, Nigeria Against the IMF..., supra

527 Ibid

political chaos.528

The Blue Book also analyzed the consequences of the country's over-dependence on oil revenue and identified the following consequences:

1. a shift in the pattern of investment to the construction and service sectors;
2. an increase in the importation of goods;
3. neglect of the agricultural sector resulting in the shortage of food supplies;
4. loss of foreign exchange earnings from agricultural exports; and
5. the massive population shift from the rural to the urban areas.529

Another critical aspect of The Blue Book report was the mismanagement and indiscipline of the Shagari government which they attributed to their policy failures. Some of the consequences of the Shagari government's mismanagement and indiscipline include the following:

1. overspending on social programs;
2. inflation and non-execution of contracts;
3. increased numbers of political appointees;

528 Ibid

4. huge budget deficits; and

5. increased internal and external debts at all levels of government.530

Finally, The Blue Book made some recommendations for tackling the economic crisis as follows:

1. the repayment of federal and state governments' external and domestic debts as a matter of priority;
2. increased internal revenue through efficient collection of taxes and levies;
3. reduction in government expenditure, particularly on social services to combat budget deficits;
4. retrenchment of workers;
5. freeze on salaries and wages and the elimination of allowances;
6. freeze in hiring new government employees;
7. closer regulation and taxing of traders and artisans;
8. support of private capital in its industrial, agricultural and other investments;
9. commercialization and privatization of parastatals;

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529 Ibid

10. local sourcing of raw materials;

11. government spending to foster improvements in power and telecommunications;

12. increased government involvement in distributing goods at many different levels;

13. increased controls on expenditure and foreign exchange allocation.531

In February 1984, the Buhari government re-activated the negotiations between the Nigerian government and the IMF.532 The Fund insisted that the new government must devalue the naira, increase the cut in government subsidies, increase the cut in government expenditure, freeze any new loans to state governments, and divide the government parastatals into social and economic categories. The Fund also demanded that domestic interest rates be further reviewed, more trade liberalization, including review of the import restrictions and promotion of export. Again, the Fund demanded that the

530 Ibid
531 Ibid
532 The talks had been stalemated due in part to the Shagari government's refusal to comply with all the conditionalities imposed by the Fund prior to their full engagement in the crisis management or solution. The overthrow of the Shagari government further contributed to the cessation of talks between the government and the Fund.

Buhari government comply with *all* their demands before they can engage them in solving the increasing economic crisis. Like the Shagari government, the Buhari government through the Minister of Finance,533 countered that they were willing to implement the non-disputable conditionalities while engaging in further talks regarding the disputable conditionalities.

In order to prove their willingness to cooperate with the Fund, the government cut the budget deficit from N6.2 billion in 1983 to N3.3 billion in 1984.534 The government imposed a general wage freeze on all government employees, while on the other hand, 250,000 government employees were fired. The subsidies that had been extended to the education sector and the social services sector were also withdrawn, and replaced with levies and fees.535 The government further reduced grants and subventions to parastatals and public enterprises. The parastatals were categorized into economic enterprises and social services enterprises, with a view to

533 The Minister of Finance under the Buhari government was Dr. Onaolapo Soleye who led the team of Nigerian negotiators during the talks.
534 See Thomas Callghy, "Lost between State and Market: The Politics of Economic Adjustment in Ghana, Zambia and Nigeria," in Joan Nelson, ed. Economic Crisis and Policy Choice, Princeton University Press, 1990.
535 Ibid

commercializing the parastatals.536 The government resisted the demand to remove the petroleum subsidy, but rather intensified their efforts to curb crude oil bunkering and the smuggling of petroleum products.537

While the Buhari government was doing their very best to meet the expectations of the Fund, it was also engaged in another battle of credibility domestically.538 As part of their War Against Indiscipline (WAI) campaign, the government commenced a series of military tribunal prosecutions to try those charged with us crimes during the ousted Shagari government. Concurrently, the vibrant Nigerian press was handicapped by draconian decrees like the Decree number 2, which empowered the government to arrest and detain any person without trial; and Decree number 4 (The Public Officers Protection Against False Accusation Decree) which imposed prison term for the publication of any information found to be false.539 At the same time, government banned all public demonstrations and processions, subject to government approval and authorization. The government refused to

536 See the Nigerian Newswatch magazine of October 14, 1985, p.14.
537 Ibid
307 For a good perspective on the Buhari government's policies, see, " Buhari Delivers Independence Day Speech,"

engage the public in any discussions relating to a possible return to democratic rule.540 At this point, the government was beginning to feel threatened in both directions: one from the Fund and its uncompromising conditionalities, and the other from the citizens who were beginning to lose their patience with the draconian rule of the government and the slow pace of economic recovery.

The Buhari government refused to comply with all of the Fund's conditionalities on the same argument advanced by the Shagari government. The government was convinced that the devaluation of the naira, privatization of the parastatals and the removal of the petroleum subsidy would have worse implications for the Nigerian economy. While the government reserved the right to agree to devalue the currency as a last resort, it advocated a gradual devaluation contrary to the wholesome 50 percent devaluation advocated by the Fund. Again, the Buhari government responded that the currency devaluation conditionality was "irrelevant"

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FBIS-MEA, 1 October, 1984, pp. T1-T3

539 See "Idiagbon Cautions Press on Writings of Ex-Politicos", FBIS-MEA, 28 March, 1984 p. T4

540 See the West Africa magazine, 7 April, 1984, p.968; Shehu Othman, "Nigeria: Power for Profit: Class,

because the country's petroleum exports were denominated in US dollars and the local industries were import dependent. Moreover, the government feared that such devaluation will cause sudden and unmanageable inflation in the economy.541

While the negotiation with the Fund was in progress, the government engaged the Paris and London Clubs for shorter term financial assistance. In their negotiations with the Clubs, the issue of the exact amount of Nigeria's debt as well as the interest amount owed on uninsured trade debts became disputed. The government reacted by appointing the Chase Manhattan Bank of New York to represent the government with a view to resolving the issues. In the interim, the government succeeded in obtaining a loan of $1 billion from a syndicate headed by the Barclay's Bank of London to facilitate payment of trade debts owed to exporters insured by the British Export Credits Guarantee Department (ECGD).542 Thereafter, Nigeria was pressurized to reach complete agreement with the Fund before any further

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Corporatism and Factionalism in the Military" in Doanl Cruise O'Brien, ed. Contemporary West African States, New York, Cambridge University Press, 1979, p.137; cited in Okome, supra.

541 See, Biersteker, "Reaching Agreement....", supra

financial assistance will be approved.543 The World Bank, for instance, refused to approve the government's pending application for a SAL unless it fully complies with the IMF's conditionalities. The country's lines of credit were blocked, while the foreign creditors mounted increasing pressure on the government to honor their debts.544 Some of the country's creditors agreed to reschedule the debts owed in the amount of $2.5 billion in uninsured trade arrears when the country's foreign exchange reserves fell to less than $1 billion. The deal allowed the country a grace period of two and a half years and an interest rate of 1 percent above the London Inter-Bank Rate (LIBOR)545

After the negotiation deadlock, the government and the Fund resumed a fresh round of negotiations in May 1984. However, this round of talks did not last. Although the Fund had lowered the bar on the naira devaluation from 50 percent to 30-35 percent, the government refused to comply with the conditionality, insisting on a gradual devaluation process. In frustration, the

542 Olukoshi, "The Role of the IMF & World Bank...." supra
543 See, Government, U.K. Yet to Agree on Trade Payments" FBIS-MEA, 25 June, 1984, p. T2
544 Ibid

Fund formally declined Nigeria's loan application in July 1984.546 The government reacted by designing its own indigenous stabilization program in 1985. One of the goals of the program was to increase the debt service ratio from 30.3 percent in 1984 to 44 percent in 1985.547 Also, the program sought to increase the country's foreign exchange earnings by introducing counter-trade schemes with trading partners like Brazil, lobbying OPEC to increase production quota,548 cutting the price of Nigeria's crude oil and overproduction of crude oil. In the meantime, Nigeria sought a short term loan from Saudi Arabia in the amount of N1.6 billion. The US government blocked the loan by advising the Saudi government to insist that Nigeria make a deal with IMF.549

The Buhari government notwithstanding the deadlock in formal negotiations with the Fund, nevertheless, maintained informal negotiations with the Fund. In October 1984, there appeared to be a breakthrough when the government announced that the Fund was willing to conclude negotiations without

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545 Biersteker, "Reaching Agreement....." supra
546 Ibid
547 Ibid

insisting on two of the three disputed conditionalities.550 The Fund, through its representative, confirmed the possibility of a deal in November 1984, if the government will agree to a major devaluation of the naira. By January 1985 the Fund proposed that the naira be devalued by 25 percent immediately and by another 25 percent later. Such a drastic devaluation was again rejected by the government which on its own had devalued the naira from N1 = $1.33 in January 1984 to N1 = $1.12 in March 1985.551 The Fund insisted that the rate of devaluation was still insignificant and unacceptable.

In the final analysis, the Buhari government continued to implement its independently designed and indigenous stabilization program without the Fund's approval and agreement.552 At the same time, it continued to wage its self-proclaimed war against indiscipline domestically. The combined effect of both "wars" on the government policies and the citizens contributed immensely in fertilizing the conducive environment for the palace coup of

548 See "Oil Seen as Way To Achieve Self-Sufficiency," FBIS-MEA, 23 October, 1984, p. T5.
549 Biersteker, supra
550 The announcement was made by the Minister of Finance, Dr. Soleye. For further details, see, "Finance Minister on Economy, IMF Loan," FBIS-MEA, 22 October, 1984.
551 See West Africa, 9 September, 1985.
552 See Olukoshi & Herbst, Nigeria, supra. See also Biersteker, "Reaching Agreement....." supra

August 27, 1985.

## III. THE BABANGIDA GOVERNMENT (1985-1993)

On August 27, 1985, the Army Chief under the Buhari government, Major General Ibrahim B. Babangida, popularly known as "IBB", overthrew the government of Buhari in a palace coup. Immediately upon usurpation of power, Babangida promised that his government would *"break the deadlock in the negotiations with a view to evaluating more objectively, both the negative and positive implications of reaching a mutual agreement with the IMF" (italics mine).*553 At the same time, Nigerians, particularly; the organized labor unions, professional groups, as well as student groups were united in their opposition of IMF prescribed conditionalities.554 Cognizant of the strong public opposition to the IMF and its conditionalities, and yet willing to appear to be conciliatory, the Babangida government appointed a

553 See West Africa, September 9, 1985

554 See Financial Times of September 20, 1985, article captioned, "Nigerians reluctant to take IMF's bitter remedy." Compounding the economic situation of the country at the same time was the unprecedented drop in crude oil revenue from $28 per barrel to $10 per barrel.

panel to study the desirability or otherwise of accepting the IMF deal.555 Some commentators argue that the establishment of the panel was primarily aimed at accomplishing two objectives:556

1. to estimate the magnitude of anti-IMF sentiment, and
2. to demonstrate the regime's commitment to human rights to the Nigerian public.

Others argue, however, that it was ploy by the new government to buy time "until the regime had devised a strategy for taking a decision that it had intended all along."557 This author concurs with the latter analysis given the government's final position on the recommendations of the panel.

The new government also announced a couple of policy decisions aimed at seeking public approval and cooperation.558 The notorious Decree number 4 was repealed, however; the sister Decree number 2 was continued. Some journalists and politicians not yet charged and tried by the Buhari

555 The Nigerian Newswatch magazine article of October 14, 1985, entitled, "The Great IMF Debate: Nigerians argue the merits and demerits of an IMF loan."
556 Olukoshi & Herbst, supra
557 Okome, A Sapped Democracy, supra, p. 107
558 See Callaghy "Lost between State and Market...." supra. See also, "Newspapers Assess Babangida's Performance, Regime," FBIS-MEA, December 6, 1985, p. T3.

government were released. The National Security Organization which had carried out most of the arrest and prosecution under the previous government was disbanded and publicly ridiculed. The new government also signaled its intention to begin the process to return the country to multi-party democracy.559

The IMF Debate: Whether to accept or reject the IMF loan

The nine-member panel that was set up by the Babangida government to conduct the IMF debate was chaired by Abubakar Abdulkadir.560 The committee was charged with the task of organizing the debate to determine whether the Nigerian government should accept or reject a loan of $2.5 billion from the IMF. The debate was intended to be carried out by public speeches, pronouncements, street demonstrations, discussions, seminars and special reports and interviews in the mass media.561

559 Ibid, see also Olukoshi & Herbst, supra, p. 26
560 At the time, Mr. Abdulkadir was the Managing Director of the Nigerian Industrial Development Bank (NIDB). Other members of the panel were drawn from the business community, the academia, bankers and civil service.

Although the debate was meant as an opportunity for the government to gather public opinion on the best policy choice to make, it was evident from the beginning of the exercise that the government desired the choice to accept the loan. Signaling the government's preference in the matter, Babangida had stated in his maiden speech to the nation that: *"Austerity without structural adjustment is not the solution to our economic predicament."(italics mine)*562 Leading the government's team in support of the acceptance of the loan was the newly appointed Minister of Finance, Dr. Kalu Idika Kalu, who was a former World Bank economist. Also, in support of the team was the resident representative of the World Bank, Ishrat Hussain, as well as the commercial sector, some indigenous entrepreneurs, and representatives of foreign capital.563 The supporters of the loan claimed that the loan and the concomitant conditionalities were precisely the best prescription for the ailing Nigerian economy. The position of this group could be summarized by the remarks of the then Minister of Finance, Dr. Kalu Idika Kalu, when he said, *"in fact, you are getting yourself a new lease of life with the*

561 See Biersteker, "Reaching Agreement....." supra, p. 24.
562 See Financial Times, Friday, September 20, 1985.
563 See Newswatch, The Great Debate, supra. See also Remi Akano, ed., Nigeria and the IMF, supra.

*loan."(italics mine)564* Other supporters of taking the loan included the US deputy assistant secretary of commerce, David Diebold, who promised that the Reagan administration will greatly assist the new government if it reached an agreement with the Fund.565

In opposition of the loan was a formidable coalition comprised of organized labor, bankers, intellectuals, local manufacturers, students, professionals, journalists, market women, etc.566 According to this group, the rejection of the IMF loan was critical in order to assert and maintain the economic independence of the country. Whilst the group appreciated the influx of additional capital from the loan, they nevertheless questioned the social and economic implications of the loan. They were, no doubt, afraid of accepting the loan which may turn out to be the proverbial "white elephant" gift. Some within the group questioned the difference between the IMF's loan and conditionalities and the Buhari's austerity policy which was currently in

564 Ibid
565 See the Report of the Conference: Nigeria's Economic Recovery, Lagos, Nigeria, September 24-25, 1985. This conference was con-sponsored by the Nigerian-American Chamber of Commerce and the African American Institute. See also the Africa Economic Digest, Vol. 6, No 35, 7-13 September, 1986.
566 Ibid

place.567 The opposition group also feared that the combined effects of the naira devaluation and subsidy removal will signal a huge increase in food prices and basic social amenities.

While the debate progressed, the economic situation of the country worsened. Some of the Western banks refused to confirm the letters of credit emanating from Nigerian banks. Others went as far as withdrawing the lines of credit that they had opened for some Nigerian banks.568 Time was running out for the Babangida government and a choice had to be made.

Babangida's Final Choice:

We had concurred with the proposition that the Babangida government wanted to buy time in order to implement the economic policy that they had in mind. The establishment of the panel to conduct the IMF debate was simply a ploy to appear to be sensitive to the wishes of the Nigerian public. From inception, the government had maintained their neutrality in the whole

567 See West Africa, "Nigeria and the IMF", 9 September, 1985
568 See the New Nigerian newspapers, Friday, September 27, 1985. Article entitled, "Nigerians Must Belt up President Babangida."

process, but in practice, the government had canvassed for the acceptance of the loan. In his interview with the New Nigerian newspaper, Babangida maintained that:

*"I did emphasize that we wanted to break the deadlock as far as the negotiation on IMF was concerned because we went into it as far back as 1983.....but in doing so, all our decisions must be governed by the yearnings and aspirations of the Nigerian people and we threw it out for debate.... It is the decision of the people that we will carry along to the negotiation table."569*

Contrary to his assurances to abide "by the yearnings and aspirations of the Nigerian people" in the outcome of the debate, Babangida ultimately made a choice that was totally contrary to the yearnings and aspirations of the Nigerian people. In December 1985, the Abdulkadir-led panel submitted their report from the debate to the Babangida government. The panel, in consonance with the overwhelming wishes of the Nigerian public, recommended that the government reject the IMF loan and the concomitant IMF's structural adjustment program (SAP). The government responded by

accepting the recommendation to reject the Fund's loan but announced that it would design a "home-grown" adjustment program.570

The government immediately developed a structural adjustment program that was only "home-grown" in name, but essentially a prototype IMF/World Bank structural adjustment program. It has been stated on good authority that, indeed, the World Bank resident representative in Nigeria, Dr. Ishrat Husain, who was actively involved in the debate also collaborated with the government officials in designing the program.571

One commentator described the program as follows:

*"A comprehensive reform program, one certainly unprecedented in the Nigerian context. It was, in effect, the equivalent of an IMF stabilization and structural change package. In fact, in some areas, it probably went further*

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569 See the New Nigerian , September 27, 1985

570 The term "home-grown" was used by Okome, supra. For greater details on the government's decision, see "Babangida Announces Rejection of IMF Loan" FBIS-MEA, 13 December, 1985 pp. T3-T4. See also, "Babangida Discusses Economic Measures, Aims," FBIS-MEA, 27 December, 1985 p.T7. Also, West Africa, 13 January, 1986, p.51.

571 See Paul Beckett, "Structural Adjustment and Democracy: Reflections on the Nigerian Experience" in Lual Deng, Markus Kostner & Crawford Young eds, Democratization and Structural Adjustment in Africa in the 1990s, Madison, Wisconsin, University of Wisconsin Press, 1991, p. 159. See also Callaghy, "Lost between State and Market....", supra

*than the IMF would have."572*

On December 31, 1985, President Babangida573 presented the budget for the 1996 fiscal year. The budget essentially unveiled all the details of the new economic reform program.574 It contained provisions regarding the devaluation of the naira, subsidy removal and privatization. It also proposed a cut of 3 percent and 19 percent for government spending and defense spending, respectively. The country's debt servicing was reduced from 44 percent to 30 percent, while the government also re-iterated its commitment to return the country to civil rule timely.575 Babangida praised the budget provisions as "the beginning of a new path, and the inauguration of a new era; the era of economic reconstruction, social justice and self-reliance."576 The budget practically ratified all the contentious aspects of the IMF conditionalities which had served as the bottleneck in reaching an agreement

572 See Callaghy, "Lost between State and Market..." supra. See also, "Nigeria's Economy Under the Knife: The Depth of Nigeria's Crisis is Spelled Out in the Government's own Confidential Assessment which AB has obtained," an article that appeared in the African Business of August 1986, pp. 42-43

573 Upon seizure of power, General Babangida adopted the title of "President," contrary to the practice of former military rulers who were addressed as "Head of State." Thus, he became the first military president of the country.

574 See "The Babangida Charter" in the West Africa of 13 January, 1986, p. 51. See also the "Budget Speech" in FBIS-MEA.

575 See the Africa Economic Digest, "Nigeria takes tough line on debt payments," 4 January 1986, p.2

576 Ibid

between the previous Nigerian governments and the IMF. The government acceded to the conditionality regarding subsidy removal in the oil sector by proposing an 80 percent increase in the price of petroleum products.577 The devaluation condition was met by the proposal to establish a two-tier foreign exchange market. The first tier will be used for debt servicing and will operate on the existing exchange rate of the naira. The second tier foreign exchange market (SFEM) will service all other commercial transactions. Under this latter tier, the value of the naira will be determined in a foreign exchange auction mechanism that will be conducted by the Central Bank of Nigeria (CBN).578 Privatization will be conducted with regard to the government's parastatals. The only contentious conditionality that the government refused to accede to was the demand for trade liberalization.579

Interestingly, although the Babangida's government had almost acceded to all the previously contentious conditionalities, the IMF did not immediately give its blessings to the reform program. This is notwithstanding the fact that the

577 Ibid
578 Ibid
579 Ibid

World Bank had played a very critical role in the design and formulation of the program. It may be that the IMF felt that the government had, like its predecessors, cherry-picked the conditionalities to implement. It may also be that the Fund was displeased with the government for the clever way it manipulated the outcome of the debate. It is pertinent to note that the government had cleverly manipulated the outcome of the debate by taking the following courses of action:

1. It appealed to the popular yearnings of the Nigerian public by appearing to reject the IMF loan and conditionalities; yet
2. It jettisoned the Fund and accepted the World Bank loan through the Structural Adjustment Loan (SAL) of the Bank. As we stated earlier, Mr. Husain Ishrat, World Bank representative in Nigeria, was not only involved in the debate, but collaborated in fashioning the program.

Apparently, the IMF wanted the government to implement the whole contentious conditionalities even though the only one left out was the trade liberalization condition. In fact, it has been said that the World Bank refused to openly endorse the program due to pressure from the Fund and the US

Treasury Department.580

In the meantime, the London Club of creditors granted Nigeria a 90 day moratorium on the outstanding debt of $7.5 billion. The Paris Club, under pressure from the Fund, refused to grant the country any moratorium. On October 16, 1986, the World Bank approved a loan of $452 million for the implementation of the SFEM. The London Club later extended the moratorium by an additional three months period.581 The IMF continued to withhold its blessing for the economic program until September 5, 1986, when the government and the Fund signed a letter of intent. That letter was subsequently ratified by the Executive Board of the Fund on December 12, 1986. The agreement provided the country the long-awaited life-line in the form of SDR 650 million from the Fund, effective January 30, 1987.582 Simultaneously, the London Club and the Paris Club agreed to re-schedule the country's debts of $3.8 million and $6.5 million, respectively.583

At the same time that the government announced this economic reform program, the government was also aggressively embarking upon a political

580 Olukoshi and Herbst, supra
581 See "World Bank Approves $452 Million Loan,"FBIS-MEA, 20 October, 1986, p. T2.
582 Olukoshi & Herbst, supra

reform program. Thus, the Babangida government set out to accomplish the unprecedented feat of embarking upon two major reforms at the same time.584

## IV THE REPUBLIC OF KOREA'S EXPERIENCE

### INTRODUCTION

From 1910 to the end of World War II, Japan colonized what is currently known as North and South Korea. However, after the war, the Soviet and the United States embarked upon the division at the 38th Parallel, which created the trusteeship rights over the North and South Korea, respectively.

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583 Ibid

584 Okome, supra. The author also credits the adoption of SAP by the Babangida government to the influence exerted by the IMF, the World Bank and other external creditors, who insist that the fulfillment of conditionalities was a prerequisite for access to debt relief.

Although the country is generally known as South Korea, it is officially addressed as the Republic of Korea (R.O.K.). A product of the end of World War II, with the surrender of Japan to the Allied Powers in 1945, the R.O.K. was established on August 15, 1948.585 The Democratic People's Republic of Korea (D.P.R.K.) or North Korea, on the contrary, was established on September 9, 1948.586

Since the division of Korea into North and South, and establishment of the trusteeship arrangement, there has been no love lost between the sister-nations. Less than a year after their establishments, 587North Korean forces invaded South Korea, sparking off another major international crisis which pitched the R.O.K and the U.S.-led United Nations Command (UNC) on the one side and the D.P.R.K. and China on the other side. Eventually, the crisis was brought to an end when the Armistice Agreement was signed by the representatives of the Korean People's Army, the Chinese People's Volunteers, and the U.S. – led United Nations Command (UNC). The R.O.K.

585 The first President of the R.O.K. was Syngman Rhee.
586 The first leader of the D.P.R.K. was Kim II Sung.
587 North Korean forces invaded South Korea on June 25, 1950.

refused to sign the Agreement.588

With a population of 48.42 million people inhabiting a total land area of 98,477 square kilometers (38,022 square miles), the R.O.K has one of the world's highest population densities. Also, given the fact that almost all Koreans share the same cultural and linguistic heritage, the population is said to be one of the most ethnically and linguistically homogenous in the world.589

Although ethnically and linguistically homogenous, only fifty percent of the population actively practices religion. Amongst the religious group, Christians comprise 49 percent, while Buddhists comprise 47 percent. Confucianists comprise 3 percent, while the remaining 1 percent is comprised of a combination of Shamanism (traditional spirit worship) and Chondogyo (Heavenly Way).

588 By the end of the war, almost three million Koreans were estimated dead or wounded, while another estimated millions were left homeless and separated from their families.

589 The exception to the population mix is the very insignificant 20,000 people that comprise the Chinese

The R.O.K. is governed by a republican form of government consisting of the Executive branch, the Legislative branch and the Judiciary. The Executive branch is comprised of the President, who acts as the head of state, and the Prime Minister, who acts as the head of government. The Legislative branch is comprised of a unicameral National Assembly, while the Judiciary is comprised of the Supreme Court, the Appellate Courts, and the Constitutional Court. The country is administratively divided into Nine provinces and seven cities.590

Although the R.O.K has been governed mostly by the military, the economy has performed impressively. For instance, in 1963, the per capita Gross National Income (GNI) was estimated at $100. By 2004, the same GNI stood at over $14,000. At thesame time, the country's Gross Domestic Product (GDP), stood at $680.1 billion. The country's gross exports in 2004 was estimated at $257.7 billion which was derived mainly from electronic products, (semiconductors, cellular phones, computers), automobiles, machinery and equipment, steel, ships, textiles, etc. The major markets for

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community.

these exports include China (and Hong Kong), which accounts for 19.6% of the total exports, the United States, which accounts for 16.9% of the total exports, the European Union which accounts for 12.8%, and Japan which accounts for 8.5%. On the contrary, the country's gross imports in the same year was estimated at $219.6 billion, which comprised crude oil, food, machinery and transportation equipment, chemicals and chemical products, base metals and articles. These imports were supplied by Japan which accounts for 20.6%, China which accounts for 13.1%, the U.S. which accounts for 12.8%, and the European Union which accounts for 10.8%.

The R.O.K's economy has performed tremendously well that in 2004, it ranked as the 11th largest economy in the world. However, the economy has been showing signs of slowing down in recent years, particularly, since the 1997-98 economic crises.591 Some of the factors attributable for the weak economic performance include the rigid relationship between the employers and employees, the underdeveloped financial markets, the aging working

590 The seven cities are Seoul, Pusan, Incheon, Daegu, Gwangju, Daejeon, and Ulsan.
591 The R.O.K survived the 1997-98 economic crises due to a combination of the huge IMF assistance and the extensive financial reforms that restored market stability and confidence.

population, and the lack of efficient regulation of the sector.

## THE R.O.K AND THE INTERNATIONAL FINANCIAL INSTITUTIONS

The scope of this research limits any attempt to cover all conceivable impacts of the IFIs on the R.O.K. However, I will use the single most devastating financial and economic crisis that beset the R.O.K. to illustrate the role of the IFIs before, during and after the crisis. By so doing, hopefully, we can fully appreciate the tremendous impact of the IFIs on the current shape, form and direction of the R.O.K's economy, politics, society, etc.

The R.O.K. became a member of the IMF on August 26, 1955. But membership of the IMF, or indeed, any other IFIs did not contribute to the spectacular transformation of the one time poor country into what became the model for many developing countries. The transformation can be appreciated from the statistics that indicate that in 1965, for example, the country had a per capita GDP that was less than that of the Philippines. However, by 1995, the country's per capita income (GNP) was $13,269, compared with the

$2,475 of the Philippines. Statistically, this accounted for a 770% increase in 30 years,592 while the economy grew averagely 7% per annum, making the economy the 11th largest in the world at the time. As a beautiful bride, the R.O.K. was invited by many elite economic clubs, and consequently, joined the Organization for Economic Cooperation and Development (OECD) on September 30, 1996.593

Further, the R.O.K. was described in the 1996 report of the United Nations Conference on Trade and Development (UNCTAD) as the outstanding example of an "emerging donor". The report also described the R.O.K. as a "country that has successfully broken out of aid dependence"; having received aids totaling $4.8 billion since independence in 1945.594

Less than a year later, the economic tide turned against the R.O.K. The economy took a turn for the worse. The R.O.K's balance of trade with Japan

592 Vinod Ahuja, et al, *Everyone's Miracle? Revisiting Poverty and Inequality in East Asia,* Washington, World Bank, 1997, cited by Walden, et al, *TAMING THE TIGERS: THE IMF AND THE ASIAN CRISIS* , Third World Quarterly, 01436597, Sept 98, Vol. 19, Issue 3

593 See 'South Korea leaves developing world', Inter Press Service, 30 September 1997. In fact, the admission of the R.O.K into the OECD was referred to as joining the elite 'rich man's club'.

594 id

and the USA was worsening. For instance, in 1987, the R.O.K enjoyed a trade surplus of $9.6 billion with the USA. But by 1996, the trade surplus had turned into a trade deficit of over $10 billion, while its total trade deficit was approximately $21 billion.

By October 1997, the situation had become very critical. In fact, by that time, the total loan amount that was in default by the R.O.K's businesses was estimated at over $50 billion. In the light of this situation, the foreign banks which had provided the needed financial life-line froze all new loans to the R.O.K.595 Not only the businesses were in default of their loan obligations; the government also, was in financial dire straits faced with the repayment of $66 billion in foreign debt. The R.O.K. had no alternative than to join Thailand and Indonesia to apply for the IMF life-line.

595 The foreign banks at the time already had about $200 billion worth of investments and loans in the R.O.K. In reaction to the general economic and financial situation in the country, they apparently wanted to mitigate their potential losses by freezing the approval of new loans. Note 257, supra.

## THE IMF PACKAGE

Given the extreme situation that the R.O.K. was facing, the IMF had to devise a means to circumvent its lending policy that no financial package shall exceed five times the recipient country's IMF quota. Consequently, the IMF invented a new kind of loan called the 'Supplemental Reserve Facility', that allowed it to contribute $21 billion of the total $57 billion package to the R.O.K. 596

The total loan package of $57 billion was contributed by the IMF ($21 billion), the World Bank ($10 billion), the Asian Development Bank ($4 billion), Japan ($10 billion), the USA ($5 billion), Australia and Brunei ($1 billion each), while Canada, France, Germany, and the UK contributed ($1.25 billion each). The conditions attached to the package included a long list of economic, institutional, labor and industrial reforms by the government.

596 It is noteworthy to point out that the $57 billion financial package extended to the R.O.K. exceeded the previous record loan of $17.8 billion to Mexico in 1995. It also represents more than 20 times the quota available to the R.O.K. in 1997.

The key fiscal and monetary conditions of the package included tightening monetary policy, raising interest rates from 12.5% to 21% to curtail liquidity, controlling money supply to contain inflation at or below 5%, floating the exchange rate, maintaining a balanced or slight surplus budget, increasing the value added tax (VAT) and expanding corporate and income tax bases.

The key institutional conditions of the package included establishing an independent central bank, closing ailing financial institutions, imposing the debt-to-equity ratio of the Bank for International Settlement (BIS) on the local banks as well as opening the local market for foreign banks to establish their subsidiaries. Further, the package calls for more trade liberalization, capital account liberalization, corporate governance and structure review, and labor market reform.

Some commentators have suggested that the IMF as well as other donors to the package used the opportunity to extract from the R.O.K. concessions that they had long sought but could not get. Others posit that some of the concessions or conditions of the package covered areas that were unrelated to

the economic crisis.597 For instance, an editorial in the Financial Times cautioned as follows598:

"both the government and the IMF must exercise care. Korea faces a private sector financial crisis, not the sort of government-inspired payments problem to which the IMF is traditionally used. Its current account deficit is low and falling, and there is a history of balanced budgets. Stringent fiscal restraint would compound the impact of private sector adjustment. The government can afford to borrow to finance its banks rescue. Insisting on tax increases and spending cuts to meet the cost would smack of overkill."

Unfortunately, the IMF package caused a bad situation to become worse by their insistence on fiscal restraint, tax increases, spending cuts, monetary tightening and more financial liberalization. To buttress these contradictions, Professor Sachs stated:

'The won has depreciated by about 80% in the past 12 months, from around 840 to the dollar to a (then) record low of 1565 yesterday (10 December,

597 Jeffrey D. Sachs, the Harvard's Institute for International Development director, in the wake of the deal, accused the IMF of secrecy and attempting to compel all the country's presidential candidates to endorse the agreement which they had no part in drafting and no time to understand. For further reading, see, Jeffrey D. Sachs,

1997). This currency depreciation will force up the price of traded goods. Yet, despite that the IMF insists that Korea aim for essentially unchanged inflation rates....to achieve unchanged low inflation in the face of huge currency depreciation Korea will need a monetary squeeze. And this is indeed what the Fund has ordered. Short term interest rates jumped from 12.5. to 21 per cent on the signing of the agreement, and have since risen further.'599

The consequences of the IMF prescriptions were predictable: money is in short supply, credit is expensive, companies can't afford credit, companies collapse, and people lose their jobs, consumer demand declines, and so on. In order to meet the new BIS debt-to-equity standards, the local banks closed their lending services and refused to roll over existing loans. The situation immediately got so bad that it has been correctly attributed to an equivalent of 'fanning the flames'600, as well as'overkill'.601

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'IMF is a power unto itself', Financial Times, 11 December, 1997. Cited in Note 257, supra.
598 See the Financial Times of 27 November, 1997.
599 Note 263, supra

The general criticisms of the IMF in the handling of the R.O.K's crisis in 1997 can be summarized as follows:

1. Faulty advice

The Fund failed to distinguish between private sector debt crisis as was faced by the R.O.K., and public sector crisis. Consequently, the measures imposed by the Fund in dealing with the R.O.K's crisis like budget cuts, hiking interest rates and taxes were in the domain of public sector debt crisis management, and not private sector situation as was faced by the R.O.K.602

2. Moral hazard

By bailing out countries in dire financial situations, the Fund has been accused of creating a morally hazardous situation which saves creditors and debtors who engage in unwise financial transactions.

3. Inequitable distribution of adjustment pain

The Fund has also been criticized for their inequitable distribution of the adjustment pain between 'domestic' and 'foreign' interests. According to

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600 Note 257, supra
601 Note 262, supra
602 In another scathing piece on the same subject matter, Professor Sachs noted 'the currency crisis is not the result

the critics, domestic firms are expected to deal with the market forces, while foreign firms are protected in the reforms that form part of the rescue package.

4. Extra-jurisdictional coverage

The Fund has been accused, and rightly so, of exploiting the opportunity afforded it to intervene in distressed countries to act as the 'global economic policeman.'603 Professor Martin Feldstein hit the point on the head when he cautioned as follows: "a nation's desperate need for short-term financial help does not give the IMF the moral right to substitute its technical judgments for the outcomes of the nation's political process."604

5. Same-size-fits-all approach

The generic prescription that has become the hallmark of most IMF reform packages has been attributed to the intellectual arrogance of the Fund. The perception is that the policy makers in the Fund arrogantly

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of Asian government profligacy. This is a crisis mate mainly in the private, albeit under-regulated, financial markets'. See Jeffrey D. Sachs, 'The wrong medicine for Asia', New York Times, 3 November, 1997.

603 See Note 258, supra

604 See Martin Feldstein, 'Refocusing the IMF', Foreign Affairs, March/April 1998, cited in Note 258. Professor Feldstein is of faculty at Harvard University and also the President of the National Bureau of Economic Research, as well as a former adviser to US President Ronald Reagan.

believe that they have all the answers to the variety of financial problems that challenge different countries. Their prescription, therefore, of the same-size-fits-all reform package has been anything but the magical solution that is needed in the variety of the situations.605

6. Agent of neoliberalism

Finally the Fund has been labeled an agent of neoliberalism and free market policies of its major shareholders, particularly, the United States. This point was highlighted by Charlene Barshefsky in her testimony before the US House Ways and Means Subcommittee, when she declared as follows: 'Many of the structural reform components of the IMF packages will contribute directly to improvements in the trade regimes in those countries. If effectively implemented, these programs will complement and reinforce our trade policy goals'. (Emphasis mine)606

605 This scenario was illustrated by Joseph Stiglitz, when he wondered how effective the Fund's solutions can be when those solutions were products of a system where 'economists would fly into a country, look at and attempt to verify these data, and make macroeconomic recommendations for policy reforms, all in the space of a couple of weeks'. Cited in Note258.

606 This formed part of the testimony of Charlene Barshefsky, then US Trade Representative, before the US House Ways and Means Trade Sub-committee in 1998. This was cited in Note 258.

# V THE FEDERATIVE REPUBLIC OF BRAZIL'S EXPERIENCE

## INTRODUCTION

Generally known as Brazil, the country is officially known as the Federative Republic of Brazil. The country of 186 million people came into existence in 1500 when Pedro Alvares Cabral claimed the region called Brazil as a colony of Portugal. From 1500 to 1808, the colony was ruled from Lisbon, Portugal. When Napoleon's army invaded Lisbon, King Dom Joao VI and the entire royal family fled and settled in Rio de Janeiro, where they set up the new government. In 1821, however, King Dom Joao VI returned to Portugal. A year later, his son, Dom Pedro I, declared Brazil's independence on September 7, 1822, and became the first Emperor. After the reign of Dom Pedro I, his son, Dom Pedro II took over and ruled Brazil from 1831 to 1889.

In 1889, Deodoro da Fonseca, Marshal of the Army, led a military coup and thereafter established a federal republic. Under the republic form of government, the presidency rotated between the dominant states of Sao Paulo

and Minas Gerais from 1889 to 1930. In 1930, there was another military coup which brought Getulio Vargas into the presidency. Vargas ruled Brazil as a dictator until 1945. From 1945 to 1961, Brazil was ruled by Jose Linhares, Gasper Dutra, Vargas (again), Café Filho, Carlos Luz, Nereu Ramos, Juscelino Kubitschek, and Janio Quadros who was forced to resign in 1961. After the resignation of Quadros, his Vice President, Joao Goulart, continued the presidency until 1964, when the military staged a coup. Thereafter, the military began a long period of military rule that spanned from 1964 to 1985.

By then, there had been established a transitional electoral college consisting of all members of congress and six delegates chosen from each state to choose the president. The electoral college, pursuant to its mandate, elected Tancredo Neves as President on January 1, 1985. Shortly after his election, President Neves took ill and died in April 1985 and was succeeded by his Vice President, Jose Sarney.

In 1989, Brazil completed the electoral transition when Fernando Collor de Mello was elected president in the first direct presidential election in over 20 years. Three years later, Mello's government was tarnished by a major corruption scandal which culminated in his impeachment and resignation. Consequently, Vice President Itamar Franco, succeeded him and completed their term in 1994, when Fernando Henrique Cardoso was elected President. President Cardoso was re-elected in 1998 for another four-year term due in part to his aggressive economic reforms. In 2002, Luiz Inacio da Silva, popularly known as Lula, was elected president for a four-year term.

In 2005, the population of Brazil was estimated to have reached 186 million people, ranking the country the fifth in the world, as well as the most populated country in Latin America. The population is comprised of six major groups: the Portuguese, the Africans, other descents from Europe, Middle East, Asia, as well as indigenous peoples of Tupi and Guarani. However, it is worthy of note that Brazil remains the only Portuguese-speaking nation in the Americas with three quarters belonging to the Roman Catholic Church, while the remainder belongs to the Protestant or indigenous

African religions.

The country has a geographical land area of 8,511, 965 square kilometer (or 3,290,000 square miles). The major cities include the capital city, Brasilia, with a population of 2.3 million residents; Sao Paulo, with a population of 10.8 million residents; Rio de Janeiro, with a population of 6.1 million residents; Belo Horizonte with a population of 2.4 million residents. The other cities include Salvador with a population of 2.6 million residents; Fortaleza, with a population of 2.3 million residents; Recife with a population of 1.5 million residents; Porto Alegre with a population of 1.4 million residents; and Curitiba with a population of 1.7 million residents.

The federative republic of Brazil is comprised of 26 states and a federal district. The federal government is made up of the executive branch, the legislative branch, and the judicial branch. The 1988 constitution provides that the president is the chief of state and head of government. The president is elected to a four-year term of no more than two 4-year terms.607 The legislature consists of the Senate and the Chamber of Deputies. The Senators

serve for eight years, however; two-thirds of the chamber undergoes election at the same time, while the remaining one-third is up for election four years later.608 On the contrary, the Chamber of Deputies serves for four years.609 The Judiciary consists of the Supreme Federal Tribunal. The 11 lifetime members are appointed by the president.

Recently, the economy of Brazil has recorded steady growth in a variety of the sectors. By 2005, the Gross Domestic Product (GDP) stood at $619.7 billion by official exchange rate, which was equivalent to $1.579 trillion in purchasing power. The per capita Gross Domestic Product at the same period was $8,400, while the annual real economic growth was approximately 2.4%. Brazil's economic activities are based primarily on their huge natural resources which included iron ore, manganese, bauxite, nickel, uranium, gemstones, oil, wood, and aluminum. Given the fact that Brazil commands 14% of the world's renewable fresh water, agriculture plays a vital role in the general economic activities of the country. Their agricultural products

607 President Luiz Inacio da Silva (Lula) was elected president in 2002 for a four year term.
608 The 81 member Senate have three representations for each state and the Federal District. They serve for 8 years.
609 The Chamber of Deputies has 513 members. They serve for 4 years.

include coffee, soybeans, sugarcane, cocoa, rice, livestock, corn, oranges, cotton, wheat, and tobacco. Another vital component of the economy are the industrial products which include steel, commercial aircraft, chemicals, petrochemicals, footwear, machinery, motors, vehicles, auto parts, consumer durables, cement, and lumber. The services sector, another huge component of the economy, includes mail, telecommunications, banking, energy, commerce, and computing.

In 2005, Brazil recorded a $44 billion trade balance surplus. The total export receipts amounted to $118 billion, while the exports were shipped to the European Union which accounted for 25.0%, United States which accounted for 21.1%, and Mercosur which accounted for 20.4%. Total imports under the same period amounted to $62.8 billion, and the major suppliers were European Union which accounted for 25.4%, United States which accounted for 21.2%, Argentina which accounted for 7.6%, and China which accounted for 5.6. %.

Despite the modest growth recorded by the economy, there are still some critical economic and fiscal reforms that must be undertaken in order to

guarantee a more vibrant and steady economic growth. The Lula administration appears to be cognizant of these challenges and is poised to remedy them. For instance, the government has passed key tax and pension reforms to improve the fiscal accounts of the country. Part of the tax reform was aimed at creating incentives for long-term savings and investments. Also, judicial reform and the bankruptcy law reforms were embarked upon to improve the credit market system. In an effort to attract private investment, legislation has been passed aimed at promoting public private partnerships.

## BRAZIL AND THE INTERNATIONAL FINANCIAL INSTITUTIONS

Again, the scope of this research limits any attempt to fully review the impact of the international financial institutions (IFIs) on Brazil. Suffice it to say that our effort will be selective, yet covering the high points of the relationship between the country and the IFIs. It is also worthy of mention that unlike the R.O.K., Brazil has had a longer lasting interaction with the IFIs due to her

endemic financial and economic challenges.610

Brazil joined the IMF on January 14, 1946. However, Brazil has become a regular patron of the Fund undergoing a variety of Fund-mandated economic and financial recovery programs.611 The genesis of the economic and financial crises of Brazil have been attributed to a number of factors, yet, no other set of factors is more dominant than the fiscal deficits incurred by the Brazilian government from the late 70s to the early 80s.612 This point can be highlighted by the fact that in four years613, Brazil, and indeed the other two largest economies in the region (Mexico and Argentina), "more than doubled the size of their nonfinancial public sector deficits, which rose from the already high levels of around 6 percent of GDP to well over 15 percent."614 Fueling the increasing fiscal deficits were political pressures aimed at forcing the government to continue to spend regardless of the negative economic and

610 See Brazil: Financial Position in the Fund As of July 31, 2006, at http://www.imf.org/external/np/tre/tad/exfin2.cfm?memberKey1=90, last visited August 22, 2006

611 *id*

612 The same case is applicable to most countries in Latin America under the same period. This position is supported and indeed advanced by Eduardo Wiesner in his paper, *Latin American Debt: Lessons and Pending Issues*, American Economic Review, May 1985, Vol. 75, Issue 2, 191. Infact, the author acknowledged that although world recession and high real rates of interest in international markets aggravated the crisis, he doubts if they created the crisis as did the fiscal deficits.

613 The four year period is from 1979 to 1982.

financial implications. Consequently, the external debt of Brazil, and indeed other key countries in the region, more than doubled between the four year periods.

These countries accumulated the huge debts principally from the external financing facilities that were flowing from private international banks. The attraction for the private international banks to continue to make the funds available was the erroneous impression that these debts will be guaranteed by the government of the respective countries.615 On the contrary, some commentators attribute the attraction for the governments to continue to seek more funds to the illusionary belief that such funds were actually causing real appreciation of the exchange rate.616 The concomitant erroneous implication was that the economy was experiencing low inflation, high growth, and exchange rate stability.617 Unfortunately, after the initial appreciation of the exchange rate, the situation turned into a drastic depreciation of the real

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614 *id*

615 See Swoboda, A., "Debt and the Efficiency and Stability of the International Financial System," in J.T. Cuddington and G.W. Smith, eds., *International Debt and the Developing Countries,* Washington: World Bank, 1985.

616 See Kavalsky, B. and Squire, L, et al., "Debt and Adjustment in Selected Developing Countries," unpublished paper, World Bank, July 1984. The authors acknowledge that in countries like Peru, Argentina, and Mexico, real

exchange rate.618 The reality, however, was that these countries realized in the words of Rudiger Dornbusch and Stanley Fischer, that debt accumulation was not a "financing investment that was productive by the test of net dollar earnings."619

It is important to underscore two fundamental developments that manifested in Brazil during the era of unregulated inflow of external financing. The first was the negative implication on domestic savings, which resulted in a derease in domestic savings as a proportion of GDP. In the same vein, gross domestic investment was on the decline as a percentage of the GDP. The reason had been that Brazil was amassing external resources primarily for consumption and not for increased investment.620 Consequently, the country was accumulating external debt faster than it was accumulating productive investment, which made a debt crisis very imminent. The second was the absence of oversight mechanism between the external finance and the

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exchange rates actually appreciated during that era.

617 *id*

618 See Harberger, A.C., "Lessons for Debtor Country Managers and Policymakers," in J.T. Cuddington, and G.W. Smith, eds., *International Debt and the Developing Countries*, Washington: World Bank, 1985.

619 See Dornbusch, R. and Fischer, S., "The World Debt Problem," Report to the Group of Twenty-Four, UNDP/UNCTAD, September 1984.

projects that the funds were intended to finance. This was a consequence of the character of the two principal parties involved: the private international banks and the public sectors of the Brazilian government. In the process, the private international banks ignored the fundamentals that should have been insisted upon in such financing, and in the words of a commentator, "the importance of the economic feasibility of investment projects was diluted."621 Again, as we stated earlier, the banks are willing to take this kind of blind risk if there is a guarantee, particularly, a sovereign guarantee.622

620 Ffrench-Davis, R., "Que Paso con la Economia Chilena?" *Estudios Publicos,* Santiago, Chile, No 11, 1983.
621 Note 277, supra
622 Note 280, supra. The commentator, Alexander Swoboda, confirmed that banks are "willing to acquire assets at

## THE CONTAGION EFFECT

In addition to the fiscal deficits effect which we have covered thus far, another major effect on the Brazilian economic and financial crises is the contagion effect. By contagion effect, we imply the spill over effect on Brazil from the economic and financial turbulences from other countries that have fundamental economic and financial relationship with Brazil. As Professor Charles W. Calomiris stated623, contagion effect may arise under one or more of the following links:624

1. *Export and Import links*, either through competition among exporters, as in the fallout for Indonesia and Malaysia after the Thai collapse, or import market linkages, as in the case of Uruguay's reaction to Argentina's crisis.
2. *Direct financial links,* between the crisis country and other countries (which were of some importance for explaining the transmission of the

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rates of return lower than the riskiness of these assets" if there is a sovereign guarantee.

623 Professor Charles W. Calomiris is the Henry Kaufman Professor in the Division of Finance and Economics at the Columbia University Graduate School of Business. He is also the codirector of the Project on Financial Deregulation at the American Enterprise Institute.

624 See Calomiris, C.W., "LESSONS FROM ARGENTINA AND BRAZIL", Cato Journal, Vol. 23, No 1 (Spring/Summer 2003).

Russian crisis to Brazil, the Argentine crisis to Uruguay, and the Asian crisis to Korea).

3. *Indirect, general-equilibrium financial links associated with global portfolio rebalancing,* which explains the problems experienced by Brazil and Argentina in the wake of the Mexican crisis, and of Brazil in the wake of the Russian crisis.

It must be cautioned, however, that contagion effect is not automatic, and is more likely selective in nature.625 The lesson, therefore, is that countries like Brazil can safeguard their economy from the contagion effects if the policy makers are willing to regulate the domestic banking sector, limit the expansion of government debt while pursuing programs aimed at export market growth and diversification.

## THE IMF PACKAGE

The IMF has been intervening in Brazil since the country became a regular patron of the Fund's 'rescue prescriptions.' The Fund, predictably, has been

offering Brazil its garden variety rescue prescriptions ranging from the reform of the banking sector to a whole array of other economic and political reforms aimed at stabilizing the economy and ensuring growth.

Apparently, the Fund's reform packages are not very effective in Brazil, or they may be taking a rather longer period of time to translate into concrete results. And the question remains, "Is the Fund not doing a good job at diagnosing the Brazilian economic and financial crisis or alternatively, is the Fund failing to prescribe the correct reform pills for the country?" Some commentators have attempted to answer the question by placing the substantial portion of the blame on the Fund and its allies,626 while some others have suggestedhat the problem is twofold. 627 First, politicians do not have long-time horizons. Consequently, they lack the political patience to wait until after economic growth before increasing government expenditures. Second, local bureaucratic interests can be impervious to change even when politicians try to cut spending. This explains why huge spending policies are

625 This point can be buttressed by the fact that Chile was not fundamentally affected by the Mexican crisis of 1994 -95, neither was Singapore affected by the Asian crisis of 1997.

626 See Lerrick, A., and Meltzer, A., "Beyond IMF Bailouts: Default without Disruption." *Quarterly International*

often decided at the local level but paid for at the national level.

## VI CONCLUSION

In this chapter, we selected one sample country from Africa, Asia and Latin America, respectively, to illustrate the roles played by the IFIs, particularly the IMF, in the developing countries. Our analysis of the experience of each of our selected country leads us to virtually the same conclusion: the Fund has become in the words of a critic a 'modern day Trojan horse'.628 In this ever-expanding role, the IFIs introduce a wide variety of trade, security and commercial interests under the cover of rescue mission. The case of the R.O.K. is very illustrative of how the IFIs used the opportunity of intervention to practically impact the totality of the composition of the country. As we indicated earlier, some of the reforms that formed part of the package were way beyond the economic and financial crisis that the country

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*Economics Report,* Carnegie Mellon Gailliot Center for Public Policy, May 2001.

627 Note 289, supra.

628 See Note 258. The authors contend that for more than 30 years, the R.O.K had creatively developed their economy by keeping the doors closed to outsiders like the US. Consequently, when the opportunity presented itself through the invitation of the IMF, the US and other interested parties used the Fund to prise open the closed market doors.

was confronted with. Yet, the IFIs insisted on those extraneous conditions as part of the rescue package presented to the R.O.K. And given the desperate situation that the R.O.K. government found itself in, it lacked the political or financial muscle to reject all or some of those extraneous components of the package, rather, they literally swallowed all hook, line, and sinker.

Under the same cover of rescue mission, the IMF, and indeed the IFIs, has assumed the new and more powerful role of 'global economic policeman' under their surveillance jurisdiction or strategy.629 In this role, the IFIs have arrogated to themselves the role of monitoring directly and indirectly the performance of the economic performance of each country, particularly, the developing ones. However, experience has shown, and disappointedly so, that the IFIs' surveillance mechanism is faulty and ineffective since they fail to avert the crisis before maturation. Rather, they are apt to respond with their predictable one-size-fits-all prescription when disaster strikes.

# CHAPTER SEVEN

# PROPOSALS, RECOMMENDATIONS AND SUGGESTIONS

## I INTRODUCTION

As we stated in the introductory part of this work, the fundamental goal of a doctoral dissertation must not be limited to the formulation of an academic thesis. It must ensure that the academic thesis is strongly supported by a variety of academic sources. Such sources must include among others, concrete, practical and reasonable proposals, recommendations, and suggestions on how best to deal with the enumerated challenges. Consequently, our goal in this concluding chapter will be to attempt to proffer some familiar as well as some unfamiliar recommendations.

629 See Roberto Mangabeira Unger, 'The really new Bretton Woods', cited in Marc Uzan (ed) The Financial

## II STRUCTURAL REFORMS

Under this category, we propose a comprehensive review of the organizational structure of the key international financial institutions with a view to making them more representative of, and more responsive to the challenges of the twenty-first century. Granted that almost all of them were products of the post World War II era, and consequently, are of the twentieth century regime, it is imperative that they be re-organized to adequately meet the new and more complex challenges of the new century.

Take for instance, the United Nations, which is the umbrella organization of all the international financial institutions (IFIs), although it is made up of 192 member states,630 it still retains its original structure which created among others the Security Council with the concomitant powers of the permanent

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System Under Stress: An Architecture for the New World Economy (New York: Routledge, 1996).

630 Montenegro became the 192nd member of the United Nations when it was admitted on 28 June 2006 by the General Assembly upon the approval of the Security Council. The countries that form the basis of this work became members of the UN in this order: Brazil (24 October 1945), Nigeria (7 October 1960), and the Republic of Korea (17 September 1991). For further reading on the UN membership, visit http://www.un.org/News/Press/docs/2006/org1469.doc.htm, last visited on April 3, 2007.

five and their veto631. One wonders how truly representative such a body can claim when all their deliberations and resolutions can be overridden by the veto of one of the five permanent members on the Security Council.632 Unfortunately, this situation contradicts, in my humble opinion, the noble objectives enshrined in the preamble of the Charter which reads in part: *"to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small"633 (italics mine).*

One wonders how the United Nations, the pre-eminent international organization, is living up to its ideals when only five members hold the ultimate veto power in the Security Council. Although the composition of the Security Council has been expanded to 15 members, yet, the other members with numerical majority on the Council lack the power to issue a resolution if one of the big fives decides otherwise. The same trend was replicated in the

631 Although the amendment to Article 23 enlarges the membership of the Security Council from eleven to fifteen, it did not change the pre-eminence of the permanent five members. Amendment of Article 23 of the UN Charter was adopted (inclusive of Articles 27 and 61) by the General Assembly on 17 December 1963 and came into force on 31 August 1965. In order to read the current membership of the Council as well as their term on the Council, visit http://www.un.org/sc/presidency.html, last visited April 3, 2007.

632 The five permanent members are the United States of America, the Russian Federation, China, France and the

organizational structure and the power structure of the international financial institutions to the end that the poorer, weaker, member nations lack the ability to make meaningful contributions to the critical decisions that most affect them.

A case in point is Africa, which is the beneficiary of almost fifty percent of combined IMF/World Bank loans to developing countries, yet, its combined votes in both institutions is less than three percent, respectively. The current imbalance in the power structures of both institutions has given rise to the natural clamor by the affected developing countries for an immediate review of the situation.634

Ironically, the combined votes of African nations in the Bretton Woods institutions635, which are already low, have been targeted for further

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United Kingdom.

633 Preamble to the Charter of the United Nations and Statute of the International Court of Justice.

634 At a recent meeting held in Maputo, Mozambique, African Ministers of Finance resolved to push for more roles and representations in the organs of the IMF and World Bank. Their strategy includes enlisting the support of their Heads of State, through the African Union, to help them lobby their counterparts in the developed countries. One doubts if the leaders of the developed countries will pay anything more than lip service to the request in light of the fact that they are currently enjoying the privileges that Africans want a piece of. See http://www.ngrguardiannews.com/news/article01, last visited August 7, 2006.

635 The Bretton Woods institutions are those institutions that were products of the Bretton Woods, New Hampshire,

reduction in order to give the Asian developing countries more prominence in the institutions. According to the Special Assistant to the Nigerian President on NEPAD-External636, Ambassador Aluko-Olokun, the Bretton Woods institutions plan to make the recommendations for a further reduction of the combined votes of African nations at their coming meeting in Singapore. In the words of the Ambassador, who also served as a former Nigerian Minister of National Planning, "Truly, we are not saying that the new Asian Tigers should not be given some leverage. But we are saying Africa should not lose its own relative position: 48 per cent of all the facilities given out by the Bretton Woods institutions come to Africa and that in itself is about an index that should show that we need to have a voice there. We are losing our voice in the Bretton Woods institutions. This is not a good development for Africa. This is the essence of NEPAD: to intervene in specific areas like this on behalf of Africa....."637

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USA, conferences, e.g. the IMF and the World Bank. It is important to clarify that although the International Trade Organization (ITO) was conceived at the conferences, it failed to materialize. Consequently, the General Agreement on Tariffs and Trade (GATT) became the default organization. The GATT later gave birth to the WTO.

636 NEPAD stands for the New Partnership for African Development.

637 See, *Why Africa should protest reduced power in IMF, World Bank, by Aluko-Olokun,* THE NIGERIAN GUARDIAN NEWSPAPERS, at http://www.ngrguardiannews.com/news/article02, last visited August 14, 2006.

## III DISTINCT APPROACH

It would appear that two principal factors influence the international financial institutions' (IFIs) design of a one-size-fits-all policy in most developing countries. The first could be the lack of resources and manpower to develop country-specific programs, while the second could be the economics of applying a single policy across many countries as the case may be.638 Experience, however, has proven that the one-size-fits-all approach that is currently been applied by the institutions, and indeed, the business world, is anything but effective. Interestingly, Coca-Cola, the world's exemplar of the success of standardization has realized the shortcomings of blind insistence on standardization in the face of tremendous changes going on in the new century. Douglas Daft, Coca-Cola's chair recently confessed as follows: "As the century was drawing to a close, the world had changed course, and we had not. The world was demanding greater flexibility, responsiveness and local sensitivity, while we were further consolidating decision-making and

638 The business parlance for the application of a single marketing mix across different markets is called Standardization. The benefits inherent in the standardization of a marketing mix include (1) lower costs, (2) easier control and coordination from headquarters, and (3) reduction of the time spent preparing the marketing plan...

standardizing our practices.....The next big evolutionary step of 'going global' now has to be 'going local.' "639

It is common knowledge that differences exist between one nation and another within the same continent.640 It is equally common knowledge that differences abound from one part of a country to another.641 Consequently, the international financial institutions must resist the temptation of treating all African countries, for instance, as if they are comprised of the same human and environmental characteristics. Rather, great care must be taken to develop country-specific policies that may involve the adaptation of existing policies or the development of a completely new policy that will meet the peculiar needs of the recipient country.642 It will also be more productive if the developers of such programs are persons with sufficient knowledge of the

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639 Cited in Donald A. Ball..., et al, INTERNATIONAL BUSINESS: The Challenge of Global Competition, 9th ed., p. 525, 2004.

640 A classical example will be found in the extreme cultural, geographical and political characteristics of a country in the northern part of Africa, and another in the southern part. Many people in the US still confuse the fact that a country like Egypt lies in Africa, rather than in the Middle East.

641 Take, for instance, Nigeria, with 36 states and three major ethnic groups, namely; Ibo, Hausa, and Yoruba. The other components of the country include a wide variety of groups that have peculiarly different customs, traditions, languages, etc.

642 Adaptation or the development of completely different policies is the two alternatives to the blind implementation of the standardized policies across board. Adaptation simply requires the tinkering of the existing policy in order to meet the present needs. Development of completely new policy, however, calls for the abandonment of the existing policy. It demands a completely new design taking into account the peculiar needs of

recipient nation. Such persons will, no doubt, ensure that the programs are consistent with the cultural, political, and economic peculiarities of the nation.

## IV GUARANTEEING HUMAN RIGHTS AND UNIVERSAL FREEDOM

Following from the call for a distinct approach in program formulation, is the need for the international financial institutions (IFIs) to ensure that their programs and policies are aimed at guaranteeing human rights and the facilitation of universal freedom in the recipient nations.

The current situation which tends to ignore the incalculable burden of sovereign debt on the citizenry, as well as the high corruption of the officials which results in the national funds siphoned overseas, is unjustifiable. Such a situation which denies the recipient nations and their citizens the right to enjoy and benefit from their national resources is unproductive, and indeed,

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the moment.

contrary to the laudable goals of these institutions.643 It is common knowledge that most citizens of developing countries view international financial institutions (IFIs) suspiciously and have on occasions labeled them as agents of neocolonialists. This can be understood given their perception of the roles of the international financial institutions, and the harsh consequences of the IFIs'economic policies on their daily lives. As Africans poignantly put it: "People go to the doctor to get well. If, therefore, you visit the doctor and your conditions keep getting worse, it is either that the doctor lacks the knowledge to cure the sickness or the doctor is prescribing the wrong drugs for the cure."644 A situation where many of the recipient nations are faring worse after many years of taking the IFIs' 'prescription drugs' is not helpful to the image of the IFIs. Such a situation has re-inforced the perception, particularly among developing countries, that many of the recipient nations have indeed found themselves in worse economic and social conditions than they were before they sought the intervention of the IFIs.

643 The right of the citizens to enjoy and benefit from the wealth of their nation has been classified as their fundamental economic rights which must be protected and preserved. See Ndiva Kofele-Kale, International Law of Responsibility for Economic Crimes: Holding Heads of State and Other High Ranking State Officials Individually Liable for Acts of Fraudulent Enrichment, Kluwer Law Int'l, p.2, 1995. The latest edition of the work is titled, The International Law of Responsibility for Economic Crimes, 2nd ed, Ashgate Publishing Company, 2006.

644 This is a common way that Africans express their frustration when a problem defies all known solutions.

The diversion of public funds by government officials for private use has been likened to a violation of the people's fundamental human right.645 The contention is that when the government officials divert national funds for their private use, the consequence is the deprivation of the basic rights of the citizens.646 According to Professor Kofele-Kale:

"The right of a people not to be disposed of their wealth and natural resources is not just any ordinary human right but *the*fundamental human right. This right transcends all the other rights and gives some semblance of form and shape to, and in a very real sense qualifies the other rights."647

The validity of the learned professor's position can be further justified by the application of the needs theories like Maslow's648 and Adelfer's649. It is

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645 Id, Ndiva, Kofele-Kale, p. 359, supra.

646 *Id.,* Ndiva Kofele-Kale, p. 359. Note 256, supra

647 According to Professor Kofele-Kale, the act of depriving the citizens of the national funds and resources is the act of indigenous spoliation. The act of indigenous spoliation, according to Professor Kofele-Kale, is defined as the illegal act of depredation which is committed for private ends by constitutionally responsible rulers, public officials or private individuals. This view is contrary to the prevailing view in the international legal community that the act is merely a property dispute. The human rights view is emerging and was amplified by Peter Weiss as one of the lawyers who represented the Philippines Government in the *Marcos* cases, cited in the 81st ANNUAL CONFERENCE OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW.

648 The two major need theories include Maslow's hierarchy of needs and Alderfer's existence-relatedness-growth (ERG) theory. These two theories assume all people share a common set of basic needs. Maslow posited that people are motivated to satisfy five basic needs as follows: physiological needs, security needs, and belonging needs, esteem needs, self-actualization needs. The five basic needs are organized hierarchically, beginning from the physiological level and graduating at the self-actualization level. Thus, they are called the hierarchy of needs. Accordingly, lower level needs must be satisfied before the next higher level need would motivate further action on the part of a person.

trite, and indeed, noticeable that citizens typically assert their rights to "finer aspirations"650 (speech, association, and pursuit of higher goals), after satisfying the basic needs of food, clothing, and shelter.651 The assertion of any right or the degree of the assertion, nevertheless, depends largely on the motivation of the people.652

Further, such "violation of a human right anywhere is also a violation against the state as well as against the conscience of mankind as represented by the *international community*, both as an integral whole and in its regional fragmentations."653 (italics mine) In the same vein, Professor Sucharitkul asserts that, "human rights, .....are legal rights." He goes further to

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See Maslow, A.H., *Motivation and Personality,* New York, Harper & Row, 1954.

649 Aderfer's existence-relatedness-growth (ERG) theory resembles Maslow's needs theory. For instance, the existence needs correspond to Maslow's physiological and security needs; the relatedness needs correspond to the social and esteem needs; while the growth needs correspond to the self-actualization need. Apart from those similarities, Aderfer makes two fundamental distinctions in the ERG theory. First, is that people sometimes attempt to satisfy more than one need at the same time. Second, is that the frustration in attempting to satisfy a higher-level need can lead to the satisfaction of a lower-level need. See Aderfer, C.P., "An Empirical Test of a New Theory of Human Needs," *Organizational Behavior and Human Performance* 4 (1969), pp. 142-75

650 *Id* footnote 645

651 Id footnote 646 with reference to the physiological needs.

652 Kanfer, R., "Motivation Theory in Industrial and Organizational Psychology" cited in *Handbook of Industrial and Organizational Psychology*, ed. M.D. Dunnette and L.M. Hough, Vol. 1, Palo Alto, California, Consulting Psychologists Press, 1990, pp. 75-170. In Kanfer's opinion, motivation is anything that provides *direction, intensity,* and *persistence* to behavior. See also Campbell, J.P., and R.D. Pritchard, "Motivation Theory in Industrial and Organizational Psychology," in *Handbook of Industrial and Organizational Psychology,* ed. M.D. Dunnette, Chicago, Rand McNally, 1976, pp.60-130. On the same subject of motivation, the authors as a manifestation of choosing an activity or task to engage in, establishing the level of effort to put forth on it, and determining the degree of persistence in it over time. Thus, motivation is not directly observable, rather it must be inferred from the behavior of the person involved.

653 Sucharitkul, Sompong, A Multi-Dimensional Concept of Human Rights in International Law, Notre Dame Law Review, Vol. 62:305, 1987, p. 312

contend as follows:654

"They are legal as opposed to moral or ethical rights, and as such a given legal system should enforce them and give them full effect, at any level or in any dimension. Legal rights are meaningful only if they can be correlated to the corresponding legal duties."

Professor Sucharitkul goes further to place the obligation to protect human rights or to prevent the violations of them upon three identifiable and separate levels of enforcement or dimensions. The primary or first systemic dimension falls upon the state (including its administrative and police authorities). The intermediate dimension covers the regional agencies or commissions, while the ultimate dimension falls upon the *international community* (italics mine).655

Given the apparent inability of the first and second dimensions of enforcement to prevent the violations of human rights with regard to

654 Ibid, footnote 640, p. 311. See also the reference made to the work of Professor Hohfeld in Hohfeld, W, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1923) wherein the distinguished professor provided a practical test to measure the effectiveness and scope of a human right in relation to its "correlative," i.e. the duty or obligation and the duty bearers. See also J. Stone, THE PROVINCE AND FUNCTION OF LAW 115-34 (1950), as well as Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141 (1938).

655 Sucharitkul, ibid, footnote 641, p. 312

economic spoliation, the last vestige of hope lies in the international community, represented by the IFIs. In light of the clout that the IFIs currently enjoy in developing countries where they have expanded their traditional role as lending institutions to the new role of law-making institutions, they can contribute immensely to the guarantee of the human rights and universal freedom of the citizens. The World Bank, particularly, in its new law-making role can do more by leveraging its financial resources in developing countries.656

## V FUNDS REPATRIATION/SURRENDER

A common characteristic of the governments of developing nations is the high level of corruption of the officials.657 It is, unfortunately, these same corrupt government officials that seek and receive the funds meant to develop

656 Paul Mosley, et al, AID AND POWER: THE WORLD BANK AND POLICY-BASED LENDING: ANALYSIS AND POLICY PROPOSALS 66-77 (1979). The new law-making role of the World Bank evolved from the shifting perspective of conditionality from the probability of repayment of the loan to the removal of fundamental obstacles to economic growth.

657 Classical examples abound in Nigeria under Generals Babangida and Abacha, in Zaire under Mobutu Sese Seko, in Philippines under Ferdinand Marcos, in Haiti under Jean-Claude Duvalier (Baby Doc), in Panama under Noriega, etc.

their respective countries.658 Again, it is common knowledge that most of these funds do not make it to the country's treasury, neither are they applied to the benefit of the citizens.659 In the few cases where the funds actually make it to the government's treasury, the same officials find creative ways to siphon the funds into their private bank accounts located mostly in developed countries.660 Consequently, the same developed nation party to the creditor bank will eventually get to keep the funds in their country for more economic and social development. On the contrary, the poor recipient country is deprived of the benefits of the loan, but at the same time is burdened by the overwhelming weight of the debt. In fact, this practice of massively looting the national wealth and resources have been attributed, and correctly so, as

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658 Most governments designate the officials that can seek and obtain financial and other technical assistance on behalf of the country. Either as the Head of the central government or head of the component units, like states, or the Ministers of Finance, etc., these officials have the responsibility to negotiate and obtain sovereign loans and other assistance packages on behalf of the government. It becomes understandable, therefore, to imagine what these officials can do in their positions if they decide, (as many are wont to do), to line their own pockets from such transactions.

659 A good example can be found in the case of Sierra Leone's former diplomat and government minister, Aiah M'bayo, who received on behalf of his government, $4 million, 500 tons of fuel and a ship load of provisions from Algeria as assistance to Sierra Leone in their hosting of the OAU summit. For negotiating the aid package, Mr. M'bayo received $25,000 from the proceeds, while the rest of the package was distributed among some of the country's ambassadors. A similar example can be found in the case of a former Foreign Minister of Sierra Leone, Alhaji Abdul Karim Koroma, who sold food aid from Italy that was meant for starving Sierra Leone citizens and converted the proceeds into his personal account. These were some of the revelations that emerged from the three Commissions of Inquiry set up by the military government after the overthrow of the Momoh government in Sierra Leone. The Commissions were the Beccles-Davis Commission of Inquiry, the Lynton Nylander Commission and the Marcus-Jones Commission.

660 Some of the creative ways that the government funds are siphoned include fake contracts, upfront kickbacks of designated contract amount percentage, outright conversion of public funds, the demand of huge monetary payments

the single most important obstacle to economic development.661 Unfortunately, in the light of the massive looting of the treasury, the local law enforcement apparatus as well as the national judiciary, lack the resources and political will to prosecute the culprits who are high ranking public officials.662

Another dimension to the issue of indigenous spoliation is the attempt by the sympathizers of the practice of indigenous spoliation to apportion greater blame for economic exploitation on multinational corporations. The tendency has been to focus primarily on the exploitative practices of the multinational corporations and consequently place all the blames on them. Granted that the multinational corporations have been less than ethical in their business practices in developing countries, the consequences of indigenous spoliation

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for the exercise of their official duties, etc.

661 *Id,* Note 256, supra. See also Joseph Nye, *Corruption and Political Development: a cost-benefit analysis,* in POLITICAL CORRUPTION: A HANDBOOK 966 (Arnold J. Heidenheimer, Michael Johnson & Victor T. Levine eds. 1989); Robert Williams, POLITICAL CORRUPTION IN AFRICA (1987).

662 It is heart-warming to note that some developing countries are creating specialized anti-corruption agencies that will solely focus on the investigation and prosecution of corrupt government and non-government officials. A good example is the establishment by the Nigerian government of the much dreaded Economic and Financial Crimes Commission (EFCC). In the same light of fighting corruption, a former Attorney General of the Nigerian government, Prince Bola Ajibola, advocated the expansion of the fight against corruption by empowering the government to issue a writ of restitution against public officials who are alleged to have looted the public treasury. Such a writ, the Attorney General asserted, carries a lower burden of proof as the government needs prove their case by a preponderance of evidence. See *Ajibola seeks law on restitution to recover ill-gotten wealth*, THE

can not be minimized either. This position was amplified by Michael Reisman when he argued that the "ritual of condemnation of foreign corporations" and their exploitative practices in developing countries as well as the elevation of the issue internationally has obscured the equally important and damaging consequences of indigenous spoliation by government officials. He asserted that it was time to apply all necessary tools in international law to "restrain and recapture" looted national wealth from wherever they are hidden.663

The international financial institutions (IFIs) should lead efforts to correct this ugly situation for two main reasons – it minimizes their efforts in assisting the developing countries and it will help launder their current image of willing benefactors of this crime. When the corrupt government officials are faced with a situation where they can no longer find a safe haven for their ill-gotten wealth, they will be somewhat discouraged from looting their government's treasury. But so long as they know that one of the developed

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VANGUARD NEWSPAPERS, http://odili.net/news/source/2006/aug/10/322.html, last visited August 10, 2006.

663 W. Michael Reisman, *Harnessing International Law to Restrain and Recapture Indigenous Spoliations,* 83 AM.J.INT'L L. 56-57 (1989). See also Abram Chayes, *Pursuing the Assets of Former Dictators,* PROCEEDINGS

countries will willingly accept their looted wealth, they will continue to deprive their fellow citizens of the funds needed for development, while in the same process increasing the sovereign debt.

## VI INTERNATIONAL CRIMINAL COURT (ICC)

Commentators of international law acknowledge that one of the most important developments in the field was the establishment of a permanent International Criminal Court (ICC).664 The significance of the development lies in the fact that efforts to establish such a court have failed since the end of World War I. According to Dr. Cherif Bassiouni who also served as Chair of the Drafting Committee at the ICC Conference, "since the end of World War I (1919), the world community has sought to establish a permanent international criminal court."665

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OF THE 81ST ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 394 (1987) (Michael P. Malloy ed. 1990).

664 *The Rome Statute of the International Criminal Court,* U.N. Doc. A/CONF. 183/9 (July 17, 1998) *reprinted* in 37 I.L.M. 999 (1998).

665 Cherif Bassiouni, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 3 (1998)., cited in Remigius Chibueze, United States Objection to the International Criminal Court: A

At the Diplomatic Conference of Plenipotentiaries666 which was convened by the United Nations to finalize and adopt a statute to establish an international criminal court, were delegates from 160 countries and representatives from nongovernmental organizations.667 Upon the conclusion of the conference, the conferees voted overwhelmingly in favor of adopting the statute and the establishment of the International Criminal Court (ICC).668 Since then, there has been tremendous support for the ICC which is evidenced by the number of countries that have signed the statute and ratified it.669 Consequently, on July 1, 2002, the ICC statute became effective after it was ratified by more than 66 countries.670

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Paradox of "Operation Enduring Freedom", Golden Gate University School of Law, Annual Survey of Int'l & Comparative Law, Vol. IX, 2003.

666 The United Nations convened the conference in Rome, Italy, from June 15 to July 17, 1998.

667 See the *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,* July 17, 1998, U.N. Doc. A/CONF. 183/10, Annex II, III (1998).

668 The conferees voted 120 in favor of adopting the statute, while 7 conferees voted against the adoption of the statute. The countries that voted against adoption are the United States of America, China, Iran, Iraq, Israel, and Libya. See also the *Final Act, supra,* note 253.

669 As at February 18, 2003, 139 countries have signed the statute, while 89 countries have ratified the statute. For further reading, see the Multilateral Treaties Deposited with the Secretary-General, available at *http://untreaty.un.org/English/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp*

670 Article 126 of the ICC Statute provides that the statute shall become effective after it has been ratified by 60

The ICC Statute empowers the Court to exercise complementary jurisdiction with the national courts in cases involving international crimes that fall under three main categories: genocide, war crimes and crimes against humanity.671 The court's jurisdiction over other areas including the crime of aggression, terrorism and drug-related crimes were suspended until acceptable definitions of the words are agreed upon in the future.672

## ICC JURISDICTION

As we stated earlier, the original jurisdiction of the ICC covers three main areas as follows:

1. Genocide

The drafters of the ICC Statute adopted the provisions of the Geneva

countries.

671 Art, 1, *Id.*

672 Articles 5(1), (2), *Id.*

Convention of 1948 on the definition of 'genocide'.673 In so doing, the ICC Statute clearly limits the jurisdiction of the court to cases where an accused is charged with the crime of genocide if s/he intentionally planned to destroy, in whole or in part, national, ethnical, racial or religious groups.674 This definition excludes acts of genocide intentionally directed against members of an opposing political group as well as other social groups that may not conveniently fall under the Geneva classifications.675

2. Crimes Against Humanity

Article 7 of the ICC Statute states that crimes against humanity must have been committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Further, Article 7(2) elaborates that 'attack directed against any civilian population' includes a course of conduct involving the multiple commission of acts referred to in paragraph one pursuant to or in

673 Article 6, *Id*

674 *Id*

675 It has been argued that the ICC Statute's definition of genocide will not cover crimes of genocide against members of an opposing political group and other social groups, e.g. as is the case involving the former Chilean dictator Augusto Pinochet. See Diane F. Orentlicher, *Putting Limits on Lawlessness: From Nuremberg to Pinochet,* Washington Post, Oct 25, 1998, cited in Chibueze, et al.

furtherance of a State or organizational policy to commit such attack.676

3. War Crimes

The Court's jurisdiction over war crimes is triggered when the crimes are committed as part of a plan or policy or as part of a large-scale commission of such crimes.677 This jurisdictional area appeared to have generated most controversy and opposition. In response to the controversy led by the United States government, Article 124 was approved under the transitional provision which permits a member to "opt out" of this provision for a non renewable period of seven years.678

## INVOCATION OF ICC'S JURISDICTION

Under Article 13, the ICC's jurisdiction may be invoked by any of the following procedures:

676 *Id*
677 Article 8, ICC Statute, supra
678 Article 124, *Id*

1. State Referral

The ICC Statute provides for two principal ways that states may refer a breach of the provisions of the statute to the Court. The first instance may be from a State that is party to the Statute. Under this provision679, the State may refer the breach to the ICC prosecutor, who in turn, is required to investigate the complaint to determine its merits or otherwise.

The second instance may be from a State that is not a party to the Statute. Under this provision680, a non party State may refer the case to the ICC prosecutor if either the crime was committed in its territory, or the accused person is a national of the non party State.

2. Independent Prosecutor

The ICC's Independent Prosecutor may initiate investigations based on complaints from victims of crimes covered under the statute, non-governmental organizations, or any other credible source. However, the Independent Prosecutor must first seek and obtain the

approval of the court's pretrial judges who must determine the merits or otherwise of the complaints.681 Consequently, if in the view of the judges the complaint warrants investigation and prosecution, they will approve of the investigation. If, on the contrary, they are of the opinion that the complaint lacks merit, they will disapprove of the investigation. Disapproval by the judges does not bar the prosecutor from subsequently representing the complaint if new facts and evidence arise in the future.682

In order to check potential abuse of discretion by the Independent Prosecutor, the Statute also empowers the UN Security Council by resolution to stop a prosecution for an initial period of twelve months if the Security Council believes that such prosecution will negatively impact the Council's work. After the expiration of the initial twelve months period, the Security Council may renew its request indefinitely, in twelve month intervals.683

679 Article 13(a), *Id*
680 Article 12(3), *Id*
681 Article 15(2), *Id*

3. Security Council

The UN Security Council can, *suo motu,* refer a breach under the ICC Statute to the Court pursuant to the exercise of their functions under Chapter VII of the UN Charter.

Such a referral by the Security Council, acting under the powers of the UN Charter, has given rise to the suggestion that the ICC acting under the direction of the UN Security Council, can exercise jurisdiction over nationals of States that are both parties and non-parties to the Statute. Such jurisdiction, it has been argued, may include both territorial as well as personal jurisdiction. Further, the logic is that the UN Security Council can lend its enforcement tools to the ICC if the State in question fails to cooperate with the ICC.684

682 Article 15(5), *Id*
683 Article 16, *Id*
684 See Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and*

## INCLUSION OF THE CRIME OF EMBEZZLING PUBLIC FUNDS UNDER THE ICC STATUTE

When high ranking public officials embezzle the public funds, like they do in most developing countries, the consequences are disastrous for the citizens. Such a criminal conduct deprives the country of the necessary funds to allocate to education, health, social infrastructure, as well as add to the sovereign debt of the country. The impact of such a conduct on the fragile economy is dangerous, while the moral implications on the citizens are far more dangerous.

It is, therefore, my opinion that such a crime should be included under Article 7 of the ICC Statute, which covers the crimes against humanity. Such inclusion will serve as a deterrent to the heinous crime of embezzling public funds with impunity which is currently the case in most developing countries.

The crimes enumerated under Article 7 of the ICC Statute should be

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*Effectiveness,* 29 Columbia Human Rights Law Review 291, 297 (1998).

enlarged to include such a crime. Moreover, since the law enforcement agencies of the affected country lacks the courage to initiate prosecution under the country's legal system, the ICC must rise up to the occasion and be, "a new institution that gives hope to the entire world that we can hope to bring to justice those who transgress the most basic human principles."685

## VII CONCLUSION

We must first acknowledge that the recommendations and suggestions so far proposed are in no way exhaustive. However, we believe that they will add to the pool of other suggestions and recommendations that have been proposed in other materials. While some of them will be fairly simple to implement in the short term, others will require tremendous diplomatic and leadership skills and determination to implement in the long term.

685 A quote by Adriaan Bos, cited in John Hooper, *U.S. Plan to Thwart War Crimes Court,* Guardian Weekly, July

Our belief is grounded on the conviction that the organizational structure of the international financial institutions (IFIs) as presently composed is grossly inadequate to realistically meet the challenges of the twenty-first century. Again, as we acknowledged earlier, these institutions have done fairly well in serving the needs of the twentieth century during which time they were formed. However, in light of the tremendous political, economic, and social challenges brought about by the twenty-first century, there is an urgent need to re-position these institutions for the present realities.

Secondly, more adaptation and sensitivity is needed in the formulation of recovery programs formulated by the international financial institutions (IFIs). The one-size-fits-all strategy in program development is no longer working. Although it may be more cost effective for the institutions, it is not as effective as it should be given the negative outcomes.

Thirdly, successful relief programs must do more than apply a band-aid therapy to the recipient country's economic, political and social development.

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26, 1998.

Developing countries deserve sustainable development programs that will facilitate their immediate recovery as well as chart the course to a permanent healthy condition.

Fourth, every effort must be put in place to discourage corrupt government officials from looting their national treasury and transferring their loot to their private accounts in banks located in developed countries. Also, efforts must be intensified to repatriate the already looted funds back to the government's treasury. Such a situation will greatly discourage such corrupt government officials from engaging in such criminal conduct.

Fifth, the International Criminal Court (ICC), deserves the support and encouragement of all countries, particularly, the developed countries. 686Experience has shown that municipal courts lack the jurisdiction and political will to try cases involving high ranking government officials who abuse their positions. It appears that the only hope left to bring such officials

686 The opposition of the United States government to the ICC is unfortunate, given their pre-eminent leadership position in the world. Some of the actions it has taken in opposition to the ICC includes the withdrawal of their signature from the treaty, the enactment of the American Service-Members' Protection Act 2002, and the signing of

to justice will be the ICC. Again, the fear of prosecution after losing their political immunity will checkmate corrupt government officials while in office.

Bilateral ICC Immunity Agreements with some countries, under Article 98 of the ICC Statute.

# CHAPTER EIGHT

# GENERAL CONCLUSION

## I INTRODUCTION

The roles of the international financial institutions (IFIs) in the world economy have drastically changed. As the world expands in population, commerce, industry, technology, etc., the challenges that face the IFIs increase daily. These global developments have drastically changed the original goals, functions and roles of these IFIs.687 Consequently, the IFIs must develop new capacities in order to meet these evolving roles and challenges. The institutions that house the IFIs must also become more flexible and responsive to these evolving global challenges in order to remain effective.688 No doubt, the world in the 20th century when the major components of the IFIs were created is completely different from the world in this 21st century that we currently live in.

687 Refer to the Articles of the IMF, the IBRD, and the World Trade Organization, supra.
688 The key institutions include the IMF, the World Bank, the World Trade Organization, as well as the Paris Club and the London Club.

In order to establish a good basis to appreciate the evolving roles and challenges of the IFIs in developing countries, we chose to understudy three countries in different parts of the world. From Africa, we chose Nigeria.689 In addition to the fact that this writer is a citizen of Nigeria, the country is the most populated country in Africa.690 A richly endowed country, with abundant human and material resources,691 Nigeria still fails to translate its abundant resources into a commensurate level of development since independence in 1960.692 From Asia, we chose the Republic of Korea (R.O.K.) The R.O.K. presents an interesting case in the league of developing countries.693 From a very poor and humble beginning, the R.O.K. successfully transformed its economy into an enviable one in a relatively short period of time. At the height of its glory, it became the beautiful bride of all the IFIs.694 However, when the economy began to suffer from the consequences of over-expansion, the same IFIs and its financiers treated

689 See Nigeria under Chapter 5, supra.
690 The population of Nigeria is estimated to be over 120 million people. Infact, the result of the recently concluded census exercise puts the population at over 140 million. Ibid.
691 Nigeria has produced many excellent professionals in almost all fields of human endeavors, who are equally spread all over the world as a result of the massive brain drain that the country experienced in the early 1990s. Nigeria also ranks as one of the major producers of crude oil in the world. Ibid.
692 Unfortunately, inspite of all its natural and human resources, the country is still ranked as one of the poorest countries in the world. Principally, because the majority of the citizens lack the most basic necessities of life like affordable housing, decent food, clean drinking water, good and affordable social infrastructure, jobs, etc.

them the same way that they treat other less successful countries.695 From Latin America, we chose Brazil.696 Again, one of the most populated countries in Latin America; Brazil has become a regular patron of the IFIs. With huge industrial and commercial base, the country, however, fails to elevate its status from one of the developing countries to a developed country.697 Which forces us to question: *Why have these countries failed to become developed given the enormous influence and policy directives of the IFIs in these countries?*

Many scholars have pondered this question in various forms and come up with equally varied responses.698 Although the responses vary from one scholar to another, there is a consensus that the underlying factors that attract the IFIs include decline in foreign exchange revenue, high level of national indebtedness, balance of payment crisis, corruption, etc. These factors cause the economies of developing countries to suffer serious economic imbalance

693 Refer to the Republic of Korea under Chapter 5, supra.
694 Ibid.
695 Ibid. The economy of the R.O.K took a down turn in the late 1990s.
696 Refer to Brazil in Chapter 5, supra.
697 Ibid.
698 See Okome, supra.

which consequently compel the government to seek help from the IFIs.699 When the IFIs respond, they recommend corrective actions that involve the adoption of an adjustment program with very strict conditionalities. 700Typically, the adjustment program imposes heavy costs on the affected society. Such costs, in turn, *sets in motion, forces which are destabilizing to both economic and political transformation.701* The garden variety of these costs include stabilization measures, inflation, unemployment and under-employment, decline in social services, which in turn breeds violence and distrust for the government in power.702

We have argued earlier that the IFIs were created after World War II principally to facilitate the speedy repair of the economies of the European countries that had suffered enormous destruction during the war.703 We also argued that the developing countries were not in the consideration of the founders of the IFIs since most of them did not actively participate in the

699 These conditions were present in the economies of Nigeria, the Republic of Korea, and Brazil when they were compelled to invite the IFIs. Refer to Chapter 5, supra.
700 Ibid.
701 Okome, supra, p. 268
702 Ibid.
703 Refer to Chapter 4, supra.

war, and consequently, did not suffer much destruction.704 Further, the leadership of the developing countries did not participate in the creation and formulation of the goals and objectives of the IFIs.705 After all the countries that presently constitute the developing countries did not play active or critical roles in the propagation of the war. The implications of the non-involvement of the developing countries in the formation and formulation of the goals and objectives of the IFIs are enormous. For example, the IMF was created to specifically facilitate the speedy repair of the international monetary system after the war.706 But the international monetary system that was in shambles was that of the European countries, *not the system of the developing countries* (emphasis mine). For example, the Fund's organizational structure as well as the power structure was created in a manner that gave the European countries the dominant control of the decision making apparatus of the Fund.707

704 Ibid
705 Ibid.
706 See the IMF Articles, supra.

Another major component of the IFIs, the World Bank, was also created from the prism of the dominant European powers. The Bank was created principally to stimulate and support foreign investment.708 We have argued that the goal of the Bank is to stimulate and support foreign investment which implies *investment flowing from developed countries of Europe to developing countries like Nigeria, the Republic of Korea, and Brazil* (emphasis mine). This anticipated flow of investment did not envisage investment flow from developing countries to developed countries. Again, the Bank's organizational structure as well as the dominant powers of control was allocated to the countries that played critical roles in the formation of the Bank.709 The same applies to all the other members of the IFIs.

By implication, since the IFIs were created by the leaders of the mainly European countries that won the war,710 with the mandate to serve the principal needs of the affected European countries, it is no wonder that the original roles of the IFIs were tailored for the European countries. It is,

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707 See the Fund's Quota System and the Special Drawing Rights system, supra Chapter 4.
708 See the IBRD Articles, supra.
709 Ibid.
710 Although the US was a principal player in the World War II, and played a vital role in the formation of the World Bank, it did not suffer much destruction as a consequence of the war. The only part of the US that was affected by the war was the Pearl Harbor.

therefore, my position that upon creation, the original roles created for the IFIs were to serve the European countries principally, and the developing countries by extension.711

However, the current roles of the IFIs appear to have shifted and focused principally upon the developing countries. As the economies of the European countries have become more stabilized, the IFIs have paid more attention to the economies of the developing countries. Further, as the economies of the developing countries continue to suffer from chronic distress, the leaders have been compelled to seek financial and technical assistance from the IFIs. 712

It is important to re-iterate that one of the primary purposes for the creation of the Fund is the provision of balance-of-payments finance for members experiencing temporary difficulties.713 Inclusive in the primary purposes was the mandate for the Fund to maintain high levels of employment,

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711 See the Articles of the IMF and the World Bank, supra. See also the Marshal Plan, supra.
712 Refer to Chapter 5, supra, where we understudied the three sample developing countries of Nigeria, The Republic of Korea, and Brazil. Further, underlying the circumstances that compelled all three of them to seek the

income, and economic development through balance of payments support.714 The Fund has attempted to serve these current roles, particularly, in the developing countries by the prescription of economic reforms that impose strict conditionalities.715 Some of the garden variety conditionalities of the Fund include the prescription of privatization of public parastatals, devaluation of the currency, trade liberalization, removal of subsidy on critical components of the economy, etc.716

It is worthy of note that the IFIs have strenuously emphasized their preference of market-oriented economy to the post-colonial state-led economy in almost all the developing countries.717 At the same time, they have attempted to convince the developing countries of Africa, Asia and Latin America that not only are the market-oriented economy the only solution, but one that can be attained in a relatively short period of time.718 Thus, they succeeded in creating the illusion of a quick-fix policy in the

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assistance of the IFIs was their unmanageable economic imbalance.
713 See the IMF Articles, supra.
714 Ibid.
715 Refer to the case studies undertaken of Nigeria, the Republic of Korea, and Brazil under Chapter 5, supra. In all those countries, economic reforms were prescribed which called for strict conditionalities.
716 Ibid.

minds of the leaders and people of the developing countries. However, experience has proven that the market-oriented economic policy does not impact the economy in a short period of time; rather, it requires a consistent application over a relatively long period of time.719 This may have contributed to the often expressed frustration of the government and peoples of the developing countries on the effectiveness of the market-oriented economic policy.720

Compounding the failure of the market-oriented economic policy in the developing countries is the enormous toll that such policy takes on the sovereignty of the affected state. According to Dr. Okome, in the case of Nigeria, state sovereignty was eroded in four ways. First, the Nigerian state

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717 See Okome, supra, p. 120

718 Ibid

719 Again, in Nigeria under the Babangida administration, both the government and the citizens began to lose faith in the SAP when the gains failed to materialize in the short period of implementation. Rather, the pains of the SAP became so unbearable that the citizens began to oppose its implementation.

720 Such expression of frustration on the failure of SAP in Nigeria can be seen in the conclusions of Professor A. H. Ekpo, a professor of Economics and Dean, Faculty of Management Science, University of Abuja. According to Professor Ekpo, the World Bank's SAP in Nigeria in the early 1990 failed to achieve its objectives. First, production was not stimulated; rather, speculation and commerce were encouraged. Foreign direct investment was not attracted to Nigeria as projected. Secondly, state involvement in the economy was reduced in some respects and increased in others. Third, the private sector failed to become the driving force in economic growth, contrary to the claim of the Bank. Fourth, privatization and commercialization led to increased prices for public utilities but no improvements in services, consequently, workers suffered from reduced real wages. Fifth, devaluation and the operation of the foreign exchange market led to economic distortions such as increased uncertainty and inflation. See A.H. Ekpo, Nigeria: Giant in the Tropics: A Compendium, Lagos, Nigeria, Gabumo Publishing Company, 1993.

lost its autonomy in the economic policymaking to the IFIs which dictated the state goals and objectives. Second, was the active involvement of World Bank and the Fund's staff in the policy implementation process by ensuring that the government kept to the terms of the policy. Third was the subordination of the domestic social contract to the payment and servicing of external debts. Fourth was the lack of a consciously and independently determined and articulated national interest.721

Like in Nigeria, the IFIs have succeeded in exercising their leverage in the developing countries when some common variables are present. Stallings identified these variables as inclusive of resource scarcity, combined with creditor unity, as well as credible sanctions from the multilaterals.722 No doubt, these variables were present in Nigeria when the country embarked upon the World Bank's prescribed Structural Adjustment Program. Same as in the Republic of Korea in the late 1990s, as well as in Brazil when they

721 Okome, supra, p. 180
722 See Frieden in Stallings & Kaufman, ed. See also Jeffrey Frieden in Debt, Development and Democracy: Modern Political Economy and Latin America, 1965-1985.

were heavily under the Fund's policy.723 Although such leverage succeeds in forcing the hands of the leaders to adopt the IFIs' economic policy, it nevertheless fails to guarantee the successful implementation of the policy in the face of stiff domestic opposition.724 Again, according to Okome, the reasons for such failure lie in the following premises. First, the policy is perceived by the citizens as a foreign imposition.725 Second, the government is torn between a tough choice of striving to salvage the economy at the expense of economic hardship for the people. Third, in order to compel compliance, the government resorts to draconian laws and decrees, thereby further alienating the people from the policy.726 Such alienation provides a recipe for failure of the program, because "programmes of adjustment cannot be effective unless they command the support of government and of public opinion."727 According to M. de Larosiere in the same address to the ECOSOC, he argued further that:

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723 Ibid

724 A classical example is the case of Nigeria under General Ibrahim Babangida which was covered under the case study of Nigeria in Chapter 5. In the face of stiff domestic opposition to the SAP, Babangida resorted to draconian measures and decrees in order to contain the growing opposition to the SAP. At the end, Babangida was forced out of power, having failed in his dual political and economic reforms.

725 Okome, supra, p. 122, where the author identified the one reason why the SAP policy failed in Nigeria as a result of lack of domestic commitment.

726 Ibid.

727 See M. de Larosiere; address to the Economic and Social Council (ECOSOC), July 4, 1986., quoted in

*"...this support will be progressively harder to maintain the longer adjustment continues without some pay-off in terms of growth and while human conditions are deteriorating. Likewise, it is hard to visualize how a viable external position can be achieved if large segments of the work force lack the vocational skills – or even worse, the basic nutritional and health standards – to produce goods that are competitive in world markets. Human capital is after all the most important factor of production in developing and industrial countries alike."728*

Consequently, we have seen that from the perspective of the developing countries, the IFIs have played not such a successful role. The leaders of the developing countries have suffered great political loss as a result of their invitation and subsequent adoption of the economic policy of the IFIs.729 Infact, some of them have lost their political mandate when the citizens fail to

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Ihonvbere, J.O., Economic Crisis, Structural Adjustment and Social Crisis in Nigeria, supra.

728 Ibid.

729 In Nigeria, for example, the Shagari government, although democratically elected, was overthrown by a military government due to its minimal adoption of IMF-imposed austerity measures. The military government of General Buhari which overthrew Shagari's government was also overthrown in a palace coup by General Babangida who preferred a full-blown Structural Adjustment Program. General Babangida himself was equally forced to 'step aside' after his government failed to succeed in the implementation of the dual economic and political reforms of the country.

see the gains from the adoption of such economic policy.730 On the other hand, the citizens of the affected developing countries have resisted the imposition of such 'foreign' economic policy with the resultant loss of economic and political sovereignty.731 Further, Professor Ihonvbere argues that "the further impoverishment of already disadvantaged groups has only encouraged political opposition to the process of adjustment thus creating major problems, tension, waste and the diversion or abandonment of the adjustment process."732 The fallout of such sense of failure from the leaders and the led in the developing countries is that the IFIs have become so distrusted and very unpopular in the larger segment of the developing countries.733

Further, such sense of failure has provided the conducive political environment for some commentators to label the IFIs as the veritable organs

730 Ibid. See also Ihonvbere, J.O., "Economic Crisis, Structural Adjustment and Social Crisis in Nigeria," *World Development*, Vol. 21, No. 1, pp. 141-153, 1993, which reported that the Babangida's government suffered two attempted *coups d'etat*, six major religious riots, three serious nationwide protests and several riots and demonstrations by workers, farmers, the unemployed, students, traders and other disadvantaged groups as a result of the fallout of the SAP implementation in Nigeria.
731 Ibid.
732 Ibid.
733 Ibid.

for modern day economic and political imperialism.734 In other words, that the IFIs were created and funded bythe former European colonial rulers and although the developing countries have gained political independence from their former colonial rulers, the modern day colonialism continues through the instrumentality of the IFIs and their economic policies. 735

The prevalent situation forces us to raise a very familiar question from the citizens and governments of most developing countries: *Why did the IFIs succeed in repairing the devastated economies of the European countries, while the economies of the developing countries remain chronically poor? Or put differently, why have the developed countries failed to formulate and implement a massive economic recovery plan for the developing countries in the size and speed of the Marshall Plan?*

While we are still pondering that question, it may be comforting to take into consideration the impact of the global challenges not just on developing

734 See Ihonvbere, supra, p. 145, wherein Professor Aluko was quoted as saying that government officials "don't understand what SAP is all about. They swallow hook, line and sinker the economic policies from Europe and America which is second line of slavery..." See also "Interview with Sam Aluko," *Quality* (Lagos), September 27, 1990, p.28.

735 It is important to distinguish the fact that although the United States of America is one of the founders of the IFIs, it nevertheless did not have colonies in the developing countries as did Europe.

countries, but also on the IFIs themselves. These global challenges that began in the late twentieth century and continued into the 21st century have tremendously impacted the IFIs. The extent of the impact can not be fully analyzed in the context of this research; however, suffice it to say that it is sufficient to have changed the original goals and roles of the IFIs.

We have seen that the economies of the developing countries have struggled all the way into the 21st century. These economies are fragile and operate in a very precarious condition. It behooves the IFIs to be cognizant of the peculiar nature of these developing economies in their formulation of policies that impact these economies, particularly, the impact of the policies on the most vulnerable segment of the population.736 It is against this backdrop that we have argued with other learned scholars that a blanket or one-size-fits-all policy will not meet the challenges of these economies737, instead, "*adjustment packages must be designed to take due cognizance of the specificities of these countries, the character of regimes, the content and context of national political discourses and the degree of governmental*

*credibility and accountability.*"738 We also argue that failure on the part of these IFIs to be sensitive to the consequences of their policies, particularly, in the developing economies, will result in catastrophic consequences for the affected economies in particular, and the rest of the world in general.739

While the formulation and implementation of recovery economic policy is aimed at correcting the economic imbalance of an economy, effort must also be made to prevent some of the factors that give rise to such economic imbalance. Again, as we have argued earlier740, developed countries and their leaders have much to do to discourage the leaders of the developing countries from finding safe havens in their countries where they can deposit looted public funds. At the same time, the IFIs must insist on strict accounting of the funds that the leaders of the developing countries borrow as sovereign debts. Since such debts are borrowed on behalf of the country, the leaders must be held accountable if the funds fail to make it back to the government's treasury or be applied to the specific projects for which they

736 Refer to Chapter 6, supra. Refer also to Ihonvbere, J.O., supra.
737 Ibid.
738 See Ihonvbere, ibid.

were borrowed.741 The IFIs also have to work better at monitoring the economic performance of the developing countries with a view to minimizing the consequences of a sudden collapse of the economy.742 Although this raises the familiar dilemma of how much involvement the IFIs should have in the economy of a sovereign country, it nevertheless provides us the present basis and need for a research such as this.

In the final analysis, we hope we have reasonably articulated the 'original' and the 'current' roles played by the IFIs in the developing countries in general, with particular emphasis on Nigeria, the Republic of Korea and Brazil. The articulation of the roles of the IFIs does not translate into a rectification of the negative consequences of the roles, however; we feel comforted by the words of Charles F. Kethering that "a problem well stated is a problem half solved."

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739 Ibid.
740 Refer to Chapter 6, supra.
741 Ibid.
742 Ibid.

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