Pace International Law Review

Volume 6
Issue 2 *Spring 1994*

Article 4

April 1994

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Recommended Citation

Anthony Galano III, *International Monetary Fund Response to the Brazilian Debt Crisis: Whether the Effects of Conditionality Have Undermined Brazil's National Sovereignty?*, 6 Pace Int'l L. Rev. 323 (1994)

DOI: https://doi.org/10.58948/2331-3536.1142

Available at: https://digitalcommons.pace.edu/pilr/vol6/iss2/4

COMMENTS

INTERNATIONAL MONETARY FUND RESPONSE TO THE BRAZILIAN DEBT CRISIS: WHETHER THE EFFECTS OF CONDITIONALITY HAVE UNDERMINED BRAZIL'S NATIONAL SOVEREIGNTY?

INTRODUCTION

The Third World Debt Crisis[1] of the 1980's has adversely affected the economies of the developing and developed nation-states. It has become a permanent fixture of the present day international political economy rather than just a passing crisis. International political economists now speak in terms of debt management and long term debt restructuring. The international financial system must now attempt to manage a Third World debt that had reached 1.15 trillion dollars in 1988 and has not diminished significantly since then.[2] Brazil is the largest indebted Third World country with approximately 111 billion dollars of foreign debt.[3] Such a massive amount of foreign debt places inordinate strains on Brazilian socio-economic development. The International Monetary Fund (IMF) is the principal multinational organization that has played, and will play for decades to come, a substantial role in managing the international and intranational conflicts caused by the Third

1 JOHN CHARLES POOLE & STEVE STAMOS, THE ABCs OF INTERNATIONAL FINANCE 85 (1987). See Chapter six that specifically analyzes the Third World Debt Crisis.

2 Eul-Soo Pang, *Debt Adjustment, and Democratic Cacophony in Brazil, in* DEBT AND DEMOCRACY IN LATIN AMERICA 128 (Barbara Stallings and Robert Kaufman eds., 1989).

3 WORLD BANK, WORLD BANK DEVELOPMENT REPORT 245 (1991).

World Debt Crisis.[4] As a result, the IMF has instituted various austerity and debt restructuring programs for Brazil throughout the 1980's.[5] However, these austerity programs have rigid conditionality requirements that nation-states must adopt before the IMF will extend financial assistance to a particular country.[6] Consequently, the IMF's political-economic influence over the domestic policy implementations of Brazil has increased substantially during the 1980's.

This comment examines whether or not it is an ultra vires[7] act of international law for the IMF to exercise financial, economic, and ultimately social policy leverage over Brazil's domestic affairs. The comment will primarily discuss the IMF's conditionality requirements and if they have undermined Brazil's national sovereignty, thus violating a basic principle of international law and nation-state identity. Part I briefly discusses why and how Brazil accumulated a 118 billion dollar foreign debt. This is necessary to fully understand why and how the IMF became so integrally involved with Brazil. Part II examines the institutional framework of the IMF and its conditionality policies. Part III addresses IMF conditionality and Brazil's national sovereignty. An extensive definition of sovereignty is also discussed in Part III. Part IV specifically examines the IMF conditionality policies and if they have undermined Brazil's sovereignty. Part V offers possible solutions to Brazil's foreign debt problems and Part VI offers some concluding thoughts.

4 Manuel Pastor, Jr., *Latin America, the Debt Crisis, and the International Monetary Fund, in* INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES GLOBAL POWER AND WEALTH 320 (Jeffry A. Frieden & David A. Lake eds., 2d ed. 1991).

5 Pang, *supra* note 2, at 128.

6 Samual Lichtensztejn, *IMF-Developing Countries: Conditionality and Strategy, in* IMF CONDITIONALITY 209-210 (John Williamson ed., 1984).

7 Ultra vires is defined as "an act performed without any authority to act on [the] subject." BLACKS LAW DICTIONARY 1522 (6th ed. 1990).

I. The Domestic and Exogenous Factors Of Brazil's Foreign Debt Accumulation In The 1970's And Early 1980's

A. *The Domestic Factors*

Although the international community often refers to the exogenous causes of the Third World Debt Crisis, Brazil had a number of domestic factors that fostered its foreign indebtedness. In part, Brazil's foreign debt can be linked to the political-economic policies of Brazil's authoritarian-military governments.[8] The authoritarian-military governments controlled Brazil from 1964 to 1985. These authoritarian-military governments were headed by several Brazilian Presidents who were not democratically elected by the Brazilian people, but were placed into power through the force of the Brazilian military.[9] One question the new military regimes faced was what type of economic development did they want Brazil to pursue.

The main thrust of the military regimes' economic policy was to rely less on the exportation of primary goods and to pursue economic growth by facilitating the production of more manufactured goods, such as consumer durable goods, for the domestic and foreign markets.[10] In order to have export led growth, Brazil had to modernize its industrial base and build a comprehensive infrastructure which could support this industrialization. The military regimes invested billions of dollars in

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[8] Thomas E. Skidmore & Peter H. Smith, Modern Latin America 175(2d ed. 1989). These authoritarian regimes were made up of coalitions of military officers, technocratic administrators, and old-line politicians. This alliance was formed in the early 1960's as a response to the populist government of President Goulart. The origins of the alliance are found in the concerns of the wealthy elite class and the right wing military establishment that saw the populist government of President Goulart as moving Brazil toward a socialist or communist political and economic structure. Goulart mobilized peasants as well as workers in what seemed to be a worker-peasant movement against the socioeconomic establishment. As a result, General Castelo Branco successfully staged a military coup in 1964 with the backing of the alliance. *Id.* at 173-176. See chapter five of Modern Latin America for an in depth analysis of Brazil's political, economic, and social development since it gained independence from Portugal in 1822.

[9] Thomas E. Skidmore, The Politics of Military Rule In Brazil 1964-1985 6 (1988). Specifically, under the military rule, the Brazilian President would come into power by being designated by the Brazilian Army Officer Corps for "election" by Brazil's Congress. *Id.*

[10] Chris C. Carvounis, The Debt Dilemma of Developing Nations 119 (1984).

state owned industrial corporations-parastatals[11] in energy, steel, telecommunications, transportation, mining, and agriculture.[12] But this type of industrialization process required immense amounts of capital and sophisticated technologies that Brazil did not have.[13] Indeed, "[g]rowth in developing economies often requires the import of capital equipment and materials necessary for new and ongoing industries."[14] Unfortunately, much of the parastatals' growth was financed with billions of dollars of capital borrowed from the foreign banking institutions of the developed countries.[15] By 1981 Brazil's parastatals accounted for 32.2 billion dollars in foreign debt which was 46% of Brazil's total foreign debt in 1981.[16] Brazil relied on borrowed foreign capital from the commercial banking institutions of the developed countries of the North because Brazilians have historically associated direct foreign investment with the process of "denationalization or foreign control of their economy.[17]

Second, the authoritarian-military governments also reorganized Brazil's financial institutions in order to finance Brazil's debt financed industrialization.[18] In the years following the 1964 military coup, the authoritarian governments revamped Brazil's financial sector so as to "institutionalize the role of the financial sector in the investment process."[19] In other

11 Jeffry Frieden, *The Brazilian Borrowing Experience*, LATIN AMERICAN RESEARCH REVIEW 99 (1988). Brazil's state owned and state managed industries are often referred to as "parastatals." *See* Aldo C. Vacs, *Politics Of The Foreign Debt: Argentina, Brazil: The International Debt Crisis* (1986) (unpublished Ph.D dissertation, University of Pittsburgh). Currently, Aldo C. Vacs is a tenured Professor of Government at Skidmore College in Saratoga Springs, New York. Specifically, he specializes in the teaching of and the writing on the political, economic, and social history and current state of developing countries, especially those of Latin America.

12 *Id.* at 99-108. When the military took over in 1964 there were a total of 180 public firms. However, their number grew to 646 by 1985. Consequently, of the Fortune 500 international corporations, seven are Brazilian. Five of these are the Brazilian state owned firms of Petrobras (oil), Companhia Vale do Rio Doce (iron ore), and Siderbras, Usiminas, and Cosipa (all steel manufacturers). Pang, *supra* note 2, at 129.

13 ECONOMIC REPORT OF THE PEOPLE, LONG SHADOW OF GLOBAL DEBT 185, 189 (1986).

14 *Id.*

15 Frieden, *supra* note 11, at 104.

16 Frieden, *supra* note 11, at 104.

17 Pang, *supra* note 2, at 128.

18 Frieden, *supra* note 11, at 98-99.

19 Frieden, *supra* note 11, at 98.

words, the Brazilian financial system was reorganized so as to resemble and operate just as the banking institutions of the United States. Moreover, the authoritarian governments also passed new banking laws, such as statute 4131[20] and Resolution 63,[21] that allowed Brazilian state and private firms to borrow directly from foreign banks. Additionally, the authoritarian governments enacted Aviso GB-588[22] which provided state guarantees for public and private companies that borrowed money from foreign banking institutions. In brief, this reorganization of the Brazilian financial sector made foreign borrowed capital more accessible for Brazil's parastatals and private industries, and integrated the Brazilian banking system into the international banking network of the developed countries.[23]

B. *The External Factors*

Brazil's 111 billion dollar foreign debt can also be attributed to factors outside the domestic sphere of influences. The origins of Brazil's Debt Crisis also stem from autonomous exogenous factors. The oil shocks of 1973 and 1979 were two significant external factors that facilitated Brazil's foreign indebtedness.[24] Both oil shocks resulted from the Organization of Petroleum Exporting Countries (OPEC) constriction of their oil production levels.[25] By cutting their oil production and thus world wide oil supplies, crude oil prices rose as demand remained at pre-shock levels in the developed and developing

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[20] Pang, *supra* note 2, at 128.

[21] Pang, *supra* note 2, at 128.

[22] Pang, *supra* note 2, at 128. Aviso GB-588 empowered Bank of Brazil to meet all the obligations of private and public industries with the guarantee from the national treasury or from any other official-state backed financial institution.

[23] Frieden, *supra* note 11, at 102. Generally, the authoritarian military governments also provided for incentives to borrow capital from abroad. Incentives ranged from exemptions from certain financial taxes or quantitative credit controls, to an exchange-rate policy that rewarded foreign borrowers, to an increase in domestic interest rates to push Brazilian industries to borrow abroad at lower real interest rates. Frieden, *supra* note 9 at 102. *See* Jeffry A. Frieden, *The Brazilian Borrowing Experience*, LATIN AMERICAN RESEARCH REVIEW 102-104 (1988) for a more extensive analysis of the reorganization of the Brazilian financial sector under the auspices of the military regimes in the late 1960's and early 1970's.

[24] POOLE & STAMOS, *supra* note 1, at 87-89.

[25] JOAN EDELMAN SPERO, THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS 265-277 (4th ed. 1990).

countries.[26] Since Brazil is classified as a non-oil-exporting developing country, Brazil has to import a substantial portion of its oil from the Middle East.[27] The oil shock of 1973 raised the price of oil from two dollars a barrel to more than eleven dollars per barrel.[28] Thus, Brazil's oil bill doubled and Brazil borrowed billions of dollars to import the same amount of oil they had bought before 1973.[29] The second oil shock of 1979 raised the price of oil from thirteen dollars a barrel in 1978 to approximately forty one dollars by mid 1980.[30] As a result, Brazil had to make 38.27 billion dollars in oil payments between 1974 and 1981.[31]

Further, since OPEC had hundreds of billions of dollars in new oil revenue, OPEC "began salting [investing] away a large percentage of their dollar holdings in the safe haven of European and U.S. banks."[32] Consequently, in the 1970's, capital became readily available for loan to the Third World at low interest rates and with none of the IMF conditionality requirements. It follows that Brazil eagerly took advantage of this situation and only borrowed capital from the newly-endowed banks in the United States and Western Europe.[33]

Equally important, was the shift in U.S. Federal Reserve policy in the latter half of 1979. The new policy was to combat inflation with a tight monetary policy, and thus the Federal Reserve raised the U.S. prime lending rate to 18.8% by the end of 1981.[34] Since Brazil contracted nearly two-thirds of its foreign

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26 PETER NUNNENKAMP, THE INTERNATIONAL DEBT CRISIS OF THE THIRD WORLD 60 (1986).

27 NUNNENKAMP, *supra* note 26, at 51-59.

28 SPERO, *supra* note 25, at 266-277.

29 SPERO, *supra* note 25, at 275-76.

30 SPERO, *supra* note 25, at 275-76.

31 NUNNENKAMP, *supra* note 26, at 60.

32 ECONOMIC REPORT OF THE PEOPLE, *supra* note 13, at 189.

33 ECONOMIC REPORT OF THE PEOPLE, *supra* note 13, at 189. What occurred in the 1970's with the OPEC nation-states investing hundreds of billions of dollar holdings in U.S. and Western European banks is often referred to as "recycling of petrodollars." Since there was a severe recession in the Western countries, loan demand from the developed countries was insufficient to absorb or recycle the OPEC petrodollars that were deposited in U.S. and Western European banks. As a result, international bankers turned to the Third World borrowers who needed capital to finance industrialization, massive infrastructure projects, and to pay for rising oil bills. *Id.* at 189-190.

34 ECONOMIC REPORT OF THE PRESIDENT, U.S. ECONOMIC DATA (1973-1985). The notion behind restricting the money supply was to slow the amount of cur-

borrowing with variable interest rates[35] that fluctuated with the change in the U.S. prime lending rate, Brazil's interest payments on its foreign debt substantially increased. Indeed, because these high interest rates came at a time when inflation was starting to abate, one result was higher real interest rates for Third World borrowers such as Brazil.[36] In 1981, the interest alone accounted for 9.6 billion dollars of Brazil's foreign debt.[37]

By late 1982, Brazil could no longer keep up with its mounting principle and variable interest rate obligations. The real trigger of the Third World Debt Crisis was Mexico's announcement in August 1982 of its inability to service (make installment payments) its 85 billion dollar foreign debt.[38] Consequently, bank lending to developing countries abruptly halted after Mexico's 1982 suspension of its debt servicing.[39] Mexico's shock to the confidence of the international banking community thus precipitated a drying up of new lending to Brazil.[40] Without new lending, Brazil was forced to turn to the IMF for capital lending that was essential to Brazil's continued ability to pay its foreign creditors and to maintain a source of financing for its economic development.[41] As a result, Brazil and the IMF negotiated a settlement where Brazil was to adopt IMF "austerity programs," which were implemented under the auspices of the traditional IMF conditionality requirements.[42] The

rency that was being injected into the United States economy. With a decreased money supply, the velocity of money would gradually decrease and thus inflationary pressures would slow.

35 WORLD BANK, WORLD DEVELOPMENT REPORT 253 (1991).

36 POOLE & STAMOS, *supra* note 1, at 91. Throughout much of the 1970's the cost of borrowing capital from the banking system of the industrialized countries proved to be quite inexpensive. With inflation running at extremely high levels, the real cost of borrowing capital from foreign banks was lowered. A foreign loan contracted at an eight percent interest rate would only cost a borrower two percent in real terms if there was a six percent inflation rate for that particular year. In many instances, the inflation rate far exceeded the interest rate that Brazilian industries were charged. As a result, many industries were able to borrow money at no cost.

37 CARVOUNIS, *supra* note 10, at 124.

38 SPERO, *supra* note 25, at 180.

39 SPERO, *supra* note 25, at 181.

40 WILLIAM CLINE, INTERNATIONAL DEBT: SYSTEMIC RISK AND POLICY RESPONSE 264 (1984).

41 *Id.*

42 Pang, *supra* note 2, at 130-132.

comment of former Minister of Finance and later chief economic advisor for President Joao Baptista Figueirdo (1979-1985), Delfim Neto, that "debts are not paid, debts are rolled," became a distant memory.[43]

II. THE INSTITUTIONAL FRAMEWORK OF THE IMF AND CONDITIONALITY

A. *What Is An International Organization?*

Multilateral cooperation among nation-states has fostered the creation of many international organizations to serve both political and economic purposes.[44] Although these international organizations usually do not have explicit supranational powers, "they may gain institutional strength over time that enables them to influence the behavior of individual [nation] states to a significant degree."[45] As a consequence, international organizations[46] can assume an autonomous international role that makes them "actors" in the international political-economic system along with nation-states.[47] Under international law, the term "international organization" is predominantly used to refer to entities that are comprised exclusively or mainly of nation-states and are established by a treaty.[48] Moreover, the treaty that created the international organization is the "constitutive instrument" that is the governing body of law for the organization.[49] What gives international organizations

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[43] ELIANA CARDOSO, BRAZILIAN DEBT CRISIS: PAST AND PRESENT 127 (1989).

[44] FRANKLIN R. ROOT, INTERNATIONAL TRADE AND INVESTMENT 5 (6th ed. 1990).

[45] *Id.*

[46] The Restatement (Third) of Foreign Relations Part II, Chapter 2, Introductory Note, states: International organizations are created by international agreements and are governed by the law pertaining to such agreements. The law of international organizations has become a separate subdivision of international law, much as in national legal systems the law of corporations developed, independently of the law of contracts even while retaining links to it. Particularly when organs of an international organization are authorized by its constitutive agreement to make decisions, allocate funds, admit and expel members and interpret or even amend the constitutive agreement, the organization can be said to have a law of its own, a kind of "international constitutional law."

[47] *Id.*

[48] LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 344 (3d. ed. 1993) [hereinafter HENKIN].

[49] *Id.*

an "international legal personality" is their capacity to effectuate legal acts "on the international plane rather than within a municipal law system."[50] Additionally, international organizations must be able to exercise their legal capacity and assume international responsibility for their acts in order to "draw a distinction in terms of legal powers and obligations between the organization and its member states."[51] As a result, this distinction requires an international organization to have a governing set of rules that can exercise such legal capacity and responsibilities in the international political-economic system.[52] The IMF is such an organization that operates under its own body of law called the Articles of Agreement.[53]

B. *The IMF As An International Organization*

During the closing months of the Second World War, the United States, Great Britain and the original members of the United Nations, met at Bretton Woods, New Hampshire to consider the institutional framework needed for international economic cooperation during the post-war period.[54] The delegates at Bretton Woods were convinced that an unprecedented degree of monetary cooperation was the only avenue which would forestall a repetition of the monetary crisis of the 1930's.[55] Conse-

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50 *Id.* at 347.

51 *Id.*

52 *Id.*

53 THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39; 20 U.S.T. 2775; 29 U.S.T. 2203, as amended through 1992 [hereinafter ARTICLES OF AGREEMENT]. The Articles of Agreement are the governing rules for the IMF. The Articles of Agreement were adopted at the United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire, July 22, 1944. They were entered into force on 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, and amended effective April 1, 1978, by the modifications approved by the Board of Governors in Resolution No 31-4, adopted April 30, 1976.

54 Milan Bulajic, *Indebtedness Of The Developing Countries And The New International Economic Order, in* FOREIGN DEBTS IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 43 (Detlev Chr. Dicke ed., 1986).

55 ROOT, *supra* note 44, at 459. The Great Depression of the 1930's, coupled with massive flows of speculative capital, promulgated the collapse of the international monetary system that was based on a modified form of the gold standard. The modified gold system was a system whereby central banks held some or all of their reserves in sterling, dollars, or francs rather than in gold. In 1931, Great Britain halted the gold convertibility of the pound and the United States devalued

quently, the Bretton Woods convention created the IMF to effectively manage international economic problems such as unstable exchange rates, competitive currency depreciations, and substantial restrictions on capital movement.[56]

Specifically, the Articles of Agreement, which consist of Article I through Article XXXI,[57] form the substantive law of the IMF. Underlying the stated purposes of the Articles of Agreement are the broad provisions of Article I.[58] Most important are the fundamental objectives of Article I (ii) and (v).[59] Section (ii) states in pertinent part: "[that] the promotion and maintenance of high levels of employment and real income and . . . the development of the productive resources of all members [are the] pri-

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the dollar by raising the price of gold from $20.67 to $35.00 an ounce in 1933. As a result, each country instituted unfair currency depreciations, exchange controls, currency blocs, and protectionist trade agreements. ROOT, *supra* note 44, at 459-60.

[56] Bulajic, *supra* note 54, at 44.

[57] ARTICLES OF AGREEMENT, *supra* note 53.

[58] The broad purposes of Article I are:

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

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

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

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

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

(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members. ARTICLES OF AGREEMENT, *supra* note 53, art. I.

[59] Sidney Dell, *Stabilization: The Political Economy of Overkill in* THE POLITICAL ECONOMY OF DEVELOPMENT AND UNDERDEVELOPMENT 222 (Charles K. Wilber ed., 4th ed. 1988). This article was originally presented to a Conference on IMF Conditionality held by the Institute for International Economics in March 1982. It has been published in IMF CONDITIONALITY 343 (John Williamson ed., 1983).

mary objectives of [the IMF's] economic policy."[60] Equally important, is the fundamental objective of section (v)[61] that provides member nation-states with the "opportunity to correct maladjustments in balance of payments *without resorting to measures destructive of national or international prosperity.*" [emphasis added].[62] In addition, the IMF shall exercise all its policies and decisions under the auspices of the purposes and objectives set forth in Article I.[63]

Equally important, according to Article XXIX,[64] the IMF itself has the power and authority to make a binding interpretation of the Articles of Agreement.[65] Any question of interpretation arising between members of the IMF or between the IMF and a member country is submitted to the Executive Board for a decision.[66] Moreover, members are only allowed to appeal the Executive Board's decision to the Board of Governors "whose decision shall be final."[67] Finally, the IMF is not part of the United Nations family of organizations and is not subject to the compulsory jurisdiction of the International Court of Justice.[68] Accordingly, the legal limits of the IMF's decision and policy making discretion are only enforceable by the IMF's governing body.

The IMF is governed and managed by its own internal structural framework.[69] Specifically, the IMF's organization

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[60] ARTICLES OF AGREEMENT, *supra* note 53, art. I(ii).

[61] Dell, *supra* note 59, at 223.

[62] ARTICLES OF AGREEMENT, *supra* note 53, art. I(v).

[63] ARTICLES OF AGREEMENT, *supra* note 53, art. I.

[64] ARTICLES OF AGREEMENT, *supra* note 53, art. XXIX(a).

[65] ARTICLES OF AGREEMENT, *supra* note 53, art. XXIX(a).

[66] ARTICLES OF AGREEMENT, *supra* note 53, art. XXIX(a).

[67] ARTICLES OF AGREEMENT, *supra* note 53, art. XXIX sec. (b). Under section (c), when a disagreement arises between the IMF and a member while the IMF is undergoing a process of liquidation or when a member has withdrawn, the "disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Fund, another appointed by the member or withdrawing member, and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the International Court of Justice or such other authority as may have been prescribed by regulation adopted by the Fund. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto." ARTICLES OF AGREEMENT, *supra* note 53, art. XXIX(c).

[68] *See* Agreement between the UN and the IMF, Apr. 15, 1948, art. I(2) 16 U.N.T.S. 325.

[69] HENKIN, *supra* note 43, at 1421.

and management structure is composed of a Board of Governors, an Executive Board, a Managing Director, and a staff.[70] Although Article XII section 2(a) provides that "all [the] powers under this Agreement [Articles of Agreement] not conferred directly on the Board of Governors, the Executive Board, or the Managing Director shall be vested in the Board of Governors,"[71] the vast majority of the powers originally conferred on the Board of Governors "has been delegated to the Executive Directors."[72] The IMF's Board of Governors meets only once a year with each member nation-state represented by a Governor who is either the member countries' Minister of Finance or Chairperson of the Central Bank.[73]

The day to day operations of the IMF are managed by the Executive Board, which consists of Executive Directors and a Managing director who acts as the chairperson.[74] According to Article XII section 3(b)(i)(ii),[75] the Executive Board consists of twenty Directors, of which five shall be appointed by the five members that have the largest quotas[76] and the remaining fifteen are elected every two years by the remaining members.[77] Article XII section (3)(b),[78] stipulates that the Board of Governors may increase the number of Executive Directors elected by the general fund members, by one or two, if eighty-five percent or more of the IMF's member countries agree. As a result, sixteen Executive Directors have been consistently elected by the IMF's general member countries. The number of Executive Directors may also be augmented by one or two, if during the two years before an election the five member countries with the largest quotas do not include the two members that have pro-

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70 Articles of Agreement, *supra* note 53, art. XII sec. (1).

71 Articles of Agreement, *supra* note 53, art. XII.

72 Henkin, *supra* note 48, at 1421.

73 Henkin, *supra* note 48, at 1421.

74 Henkin, *supra* note 48, at 1421.

75 Articles of Agreement, *supra* note 53, art. XII sec. (b)(i)(ii).

76 Upon entering the IMF, each country was allotted a quota in accordance with its relative economic size. Twenty-five percent of a country's quota was paid to the IMF in gold and the remainder in the country's currency. Since quotas were calculated in the 1944 U.S. dollar, the dollar equivalents of nondollar currencies were determined by their respective par values. The IMF started operations in 1947 with aggregate quotas of $8 billion, but successive quota increases had raised the total to 28.5 billion by 1971. Root, *supra* note 44, at 461.

77 Articles of Agreement, *supra* note 53, art. XII sec. 3 (b)(i)(ii).

78 Articles of Agreement, *supra* note 53, art. XII sec. (3)(b).

vided the IMF with largest amount of convertible currency for its overall operations.[79] Since the early 1980's, Saudi Arabia has been allowed to appoint one Executive Director because of Saudi Arabia's increased funding to the IMF.[80] Currently, the Executive Board consists of 22 Executive Directors.

Presently, the countries possessing the six largest quotas are, in descending order: the United States, the United Kingdom, Germany, France, Japan, and Saudi Arabia.[81] Under Article XII(3) section (b)(iv),[82] the American Republics have been allowed to appoint three Executive Directors. The remaining member nation states "with homogenous interests have [voluntarily] combined to form fairly stable combinations in order to muster the prescribed minimum number of votes necessary to elect [the remaining twelve] Executive Director[s]."[83] The fifteen persons receiving the greatest number of votes shall be Executive Directors, provided that no person receive less than four percent of the total number of eligible votes.[84] Each Governor of the "remaining countries" eligible to vote must cast for one person all of the votes to which he or she is entitled to under Article XII section (5)(a).[85] Under article XII section (5)(a)[86] each member has two hundred fifty votes "plus one additional vote for each part of its quota equivalent to one hundred thousand special voting rights."[87] In other words, the "remaining members" elect Executive Directors by forming constituencies or voting blocs where they combine their voting strength.

The size of a member nation-state's quota is also significant in two other respects. First, it determines the voting power of a member's Executive Director.[88] For example, the Executive Director of the United States has the largest percentage of voting power and the United Kingdom has the second largest. This gives the U.S. and U.K. a dominant voice in the management of

[79] ARTICLES OF AGREEMENT, *supra* note 53, art. XII sec. (3)(c).
[80] HENKIN, *supra* note 48, at 1422.
[81] HENKIN, *supra* note 48, at 1422.
[82] ARTICLES OF AGREEMENT, *supra* note 53, art. XII sec. (3)(b)(iv).
[83] HENKIN, *supra* note 48, at 1421-1422.
[84] ARTICLES OF AGREEMENT, *supra* note 53, schedule E(1)(2).
[85] ARTICLES OF AGREEMENT, *supra* note 53, art. XII sec. (5)(a).
[86] ARTICLES OF AGREEMENT, *supra* note 53, art. XII sec. (5)(a).
[87] ARTICLES OF AGREEMENT, *supra* note 53, art. XII sec. (5)(a).
[88] ROOT, supra note 44, at 463.

the IMF. Second, the size of a country's quota determines the amount of resources that it can draw from the IMF.[89] The IMF does not award loans to its members. Instead, the IMF allows member countries to use their currency to purchase the currencies of other members.[90] A member country will draw on IMF currency resources in "tranches" which represent twenty five percent of a members quota.[91] Because twenty five percent of a member's quota was contributed by the country in gold or now possibly in currency-reserve assets,[92] when a member asks for a drawing on the first tranche it is really borrowing from its own assets. There is no requirement that member countries use their tranche first, rather they are allowed to use the other three tranches (hereinafter the credit tranches) first.[93]

However, when a member country attempts to draw beyond 25% of its quota, thus seeking the use of the three credit tranches, a member is subject to certain conditions.[94] It is these credit tranches that provide the IMF with the ability to extend assistance to member countries that face a temporary deficit in their balance of payments. As a result, the three upper credit tranches are increasingly difficult to gain access to. A member country must prove by extrinsic evidence that there is a "sub-

89 ARTICLES OF AGREEMENT, *supra* note 53, art. III sec. (3)(a).

90 ARTICLES OF AGREEMENT, *supra* note 53, art. V sec. (3).

91 ARTICLES OF AGREEMENT, *supra* note 53, art. V sec. (3)(b)(c).

92 ARTICLES OF AGREEMENT, *supra* note 53, art III, sec. 3(a). After 1979, member nation-states were allowed to replace gold payments with payments in the currencies of other members.

93 ARTICLES OF AGREEMENT, *supra* note 53, art. V sec. (3)(b).

94 ARTICLES OF AGREEMENT, *supra* note 53, art. V sec. (3)(a)(b) provides for the following conditions:

(b) A member shall be entitled to purchase the currencies of other members from the Fund in exchange for an equivalent amount of its own currency subject to the following conditions:

(i) The member's use of the general resources of the Fund would be in accordance with the provisions of this Agreement and the policies adopted under them;

(ii) The member represents that it has a need to make the purchase because its balance of payments or its reserve position or developments in its reserves;

(iii) The proposed purchase would be a reserve tranche purchase or would not cause the Fund's holdings of the purchasing member's currency to exceed two hundred percent of its basic quota.

(iv) The Fund has not previously declared under Section 5 of this Article, Article VI, Section 1, or Article XXVI, Section 2(a) that the member desiring to purchase is ineligible to use the general resources of the Fund.

stantial justification" for the use of the upper three credit tranches.[95] This is where the purchase of foreign currency (capital lending) from the IMF begins to resemble a loan. A member is a given a specific time in which it must "pay back" the IMF for the foreign currency it has "borrowed," and must show the IMF that the member will pursue economic reforms that will enable it to repay the IMF. Use of the upper credit tranches is always contingent upon a member country adopting an IMF austerity program that is implemented under the auspices of the IMF conditionality requirements.[96] In reality, freely convertible funds, such as U.S. dollars, are sold to the member state "subject to the member's agreement to repurchase the convertible funds within a stated period."[97]

Up until the mid 1970's the IMF implemented its stated policies of Article I with great success through short term currency sales and economic policy requirements, which were readily accepted by the developing countries.[98] However, by the middle of the 1970's, international political-economic problems "became increasingly complicated, larger in magnitude, and more interrelated."[99] Indeed, by the early 1980's commercial lending to the developed countries ended because of Mexico's announcement that it could no longer service its foreign debt. As a result, the IMF became a "lender of last resort" for the indebted Third World countries.[100] Specifically, the IMF was the only source of foreign capital for many of the indebted developing countries. Thus, the IMF's political-economic power over the domestic policy implementations of the indebted developing nation-states' governments substantially increased.

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95 ARTICLES OF AGREEMENT, *supra* note 53, art. V sec. (3) (b)(c)(d)(e).

96 ARTICLES OF AGREEMENT, *supra* note 53, CONDITIONS GOVERNING USE OF THE FUND'S GENERAL RESOURCES, art. V sec. (3)(a). "The Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special polices for special balance of payments problems, that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund." ARTICLES OF AGREEMENT, *supra* note 53, art. V sec. (3)(a).

97 HENKIN, *supra* note 48, at 1425.

98 POOLE & STAMOS, *supra* note 1, at 56-57.

99 POOLE & STAMOS, *supra* note 1, at 55.

100 POOLE & STAMOS, *supra* note 1, at 57.

C. *Brazil And IMF Conditionality Requirements*

Presently, Brazil holds approximately 111 billion dollars in foreign debt,[101] which constitutes 9.6 percent of the entire 1.15 trillion dollar Third World debt.[102] Brazil was forced to turn to the IMF for capital lending when commercial banking institutions from Western Europe and the United States discontinued their lending to Brazil in early 1983.[103] Moreover, the inability of the indebted developing countries [i.e. Brazil] to make decreasing export revenues meet rising debt obligations led to balance of payments deficits for the indebted Third World nation-states.[104] Consequently, the IMF took hold of the pivotal role as "short term capital lender" and coordinator of debt renegotiations with commercial banks on behalf of the indebted countries.[105] Above all, in return for capital funding and facilitating debt restructuring negotiations with the private banking institutions of the North, the IMF demanded the indebted Third World countries to adopt stringent "austerity programs" which were governed by the IMF's traditional conditionality requirements.[106] Consequently, Brazil received financial assistance from the IMF in early 1983, and the IMF instituted rigid austerity programs for Brazil.[107]

When a country requests a "loan" from the IMF, the IMF sends a team of economic advisors into the particular country to analyze the nation-state's economy and balance of payments problems.[108] But before the IMF approves the "loan," the IMF requires that the member nation-state adopt rigid and comprehensive economic policies in order to be allowed to purchase one of the three upper credit tranches.[109] This is what the IMF traditionally refers to as its conditionality requirements. "Conditionality [is] understood as being the policies the Fund expects a

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[101] WORLD BANK, *supra* note 3.

[102] Pang, *supra* note 2, at 129.

[103] CLINE, *supra* note 40, at 264-265.

[104] ECONOMIC REPORT OF THE PEOPLE, LONG SHADOW OF GLOBAL DEBT 195 (1988).

[105] *Id.*

[106] *Id.*

[107] Pang, *supra* note 2, at 128.

[108] POOLE & STAMOS, *supra* note 2, at 57.

[109] ARTICLES OF AGREEMENT, *supra* note 53, CONDITIONS GOVERNING USE OF FUND'S GENERAL RESOURCES, art. V sec. (3).

member country to follow in order to be able to use the Fund's general resources."[110] Except for a short period of time directly after the adoption of the IMF treaty in 1945, the IMF member countries have agreed that the IMF's financial assistance should be conditional on the adoption of IMF austerity programs.[111] Specifically, the conditionality requirement is felt to be necessary to ensure that a certain nation-state "will get its own economic house in order, which also signals the commercial banking community that the country is taking the kind of measures deemed necessary to enable it to make good on its [foreign] debt obligations."[112] As a result, IMF approval also became a prerequisite for an indebted developing country to obtain more loans from the commercial banks of the developed countries.[113] The IMF "seal of approval" improves the debtor nation-state's status as a reasonable credit risk for a commercial bank to loan capital to once again.[114]

There are varying degrees of IMF conditionality. The degree of conditionality depends on how much a member country is requesting to "borrow." As a result, IMF conditionality is "low" regarding the first tranche. However, conditionality is "high" when a member requests a currency purchase in excess of the first tranche. Those purchases beyond the first tranche are referred to as the three credit tranches.[115] High conditionality implies substantial socioeconomic preconditioning, setting specific economic targets, establishing performance criteria and describing policy proposals, with each step constituting endless negotiating, planning, drafting, monitoring, and adjusting.[116]

Specifically, Brazil and the IMF agreed to several credit tranche purchases between 1983 and 1985.[117] The IMF agreed to these credit tranche purchases only when the Brazilian government agreed to: (1) continue to devalue their currency, the

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110 Samual Lichtensztejn, *supra* note 6, at 209-210 (quoting Joseph Gold "Conditionality," *Pamphlet Series* no. 31 (1979)).

111 MANUEL GUITAN, ECONOMIC MANAGEMENT AND CONDITIONALITY 75 (1982).

112 POOLE & STAMOS, *supra* note 1, at 57-58.

113 POOLE & STAMOS, *supra* note 1, at 57.

114 POOLE & STAMOS, *supra* note 1, at 57.

115 Karl M. Meessen, *IMF Conditionality and State Sovereignty, in* FOREIGN DEBTS IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 117 (Detlev Chr. Dicke ed., 1986).

116 *Id.* at 119.

117 Pang, *supra* note 2, at 128.

Cruzeiro; (2) initiate massive cuts in domestic spending; (3) freeze all wages; (4) reduce most of government subsidized credit; and (5) curb state industries' voracious appetite for foreign borrowing.[118] Since Brazil is the Third World's largest indebted nation-state, the IMF conditionality requirements have had a more pronounced effect on Brazil than on any other indebted developing country.[119] Moreover, because Brazil purchased currency from the upper three credit tranches, the IMF instituted high conditionality requirements for Brazil's austerity programs.

As a result of the IMF conditionality policies, Brazil experienced a four percent drop in its Gross Domestic Product (GDP), a 211 percent rise in inflation, and a twelve percent decline in employment by the end of 1983.[120] Consequently, an economic recession arose which provoked urban food riots by the unemployed and impoverished.[121] In 1984, Brazilians directed over 900 riots in Rio de Janeiro, Sao Paulo, and other urban centers against the IMF as the alleged source of their socioeconomic problems.[122] Brazil's Gross Domestic Product declined from $296 billion in 1982 to only $226 billion in 1985.[123] As of 1988, almost half of Brazil's population lived in households where income was less than one hundred twenty dollars a month.[124]

III. IMF CONDITIONALITY AND BRAZIL'S NATIONAL SOVEREIGNTY

Because the IMF's terms of conditionality perpetuate a situation where the IMF is "running the financial and economic policies of a great number of debtor States," the IMF may have undermined the international law principle of nation-state sovereignty.[125] IMF conditionality requirements have far reaching implications for a basic principle of nation-state identity, that of

118 Pang, *supra* note 2, at 130.

119 *See* Pastor, *supra* note 4, at 327.

120 Pang, *supra* note 2, at 130.

121 Pang, *supra* note 2, at 130.

122 Pang, *supra* note 2, at 130.

123 INTER-AMERICAN DEVELOPMENT BANK, ANNUAL REPORT (1986).

124 Juan de Onis, *Brazil On The Tightrope Toward Democracy*, FOREIGN AFFAIRS, Fall 1989, at 157.

125 Meessen, *supra* note 115, at 117.

national sovereignty.[126] Sovereignty reserves to each sovereign nation-state the exclusive right to "take any action it thinks fit provided only that the action does not interfere with the rights [and obligations] of other States, and is not prohibited by international law on that or any ground."[127]

The notion of sovereignty[128] was developed in the early stages of the Middle Ages as a reaction to the claims of the Emperors of the Holy Roman Empire, who contended they were the temporal rulers of the globe.[129] Although the claims of the Holy Roman Emperors did not fully correspond to reality, this claim was resented by all other leaders in Europe who saw these claims of global-imperial authority as an impediment to their longing to be the master of their own destinies.[130] "A sovereign ruler, master of his own destiny, cannot be subjected to rules made and enforced by others, hence he must be freed from the observance of the law - PRINCEPS LEGIBUS SOLUTUS."[131] This is known as absolute sovereignty. It was the very purpose of the notion of absolute sovereignty to allow leaders, other than the Holy Roman Emperor, to be masters of their own destinies so that they could lead their own sovereign countries.[132] As a result, a basic principle of international law, that of nation-state sovereignty, began to emerge.

However, the notion of absolute sovereignty did not remain the accepted definition of nation-state sovereignty. As soon as various sovereign nation-states began to enter into relations with one another, interdependency grew and absolute sovereignty eventually became an obsolete principle. As a consequence, states adopted the notion of relative sovereignty which

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126 SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 11-12 (1983).

127 *Id* at 11.

128 BLACK'S LAW DICTIONARY 1396 (6th ed. 1990). Black's Law Dictionary defines sovereignty as: "The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined *with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.*" [emphasis added]. *Id.*

129 IGNAZ SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW 21 (1989).

130 *Id.* at 21.

131 *Id.*

132 *Id.*

provides that any state is said to be sovereign, if its acts are not subject to any rules other than those of customary international law and treaties.[133]

According to the *Corfu Channel Case*,[134] sovereignty is the entire body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also in its relations with other states.[135] Judge Alvarez held that sovereignty is a notion that "has its foundation in national sentiment and in the psychology of the peoples, in fact it is deeply rooted."[136] Additionally, the court reasoned that since there is a greater interdependence among the world's nation-states, the international community can no longer define sovereignty as an absolute and rigid-individual right of every State where nation-states are only subject to international rules they accepted.[137] As a result, the court defined sovereignty of States as "an institution, an international social function of a psychological character, which has to be in accordance with the new international law.[138]

Therefore, sovereignty can no longer be defined in terms of the absolute power of a nation-state since states are increasingly interdependent. However, according to Louis Henkin,[139] nation state sovereignty still essentially includes: "independence, equality, autonomy, territorial authority, integrity and inviolability, impermeability and privacy."[140] Specifically, Henkin suggests that a nation-state should not be subject to any external decision making power unless it has "voluntarily consented to such authority."[141] Henkin states further that:

> By their ability to consent, to have relations and conclude agreements, States have in effect created the International political system, by a kind of "social contract." By their ability to consent

[133] *Id.* at 22.

[134] *United Kingdom v. Albania*, (Individual Opinion By Judge Alvarez), 1949 I.C.J. 39, 43.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] Louis Henkin is a world renowned international legal scholar and is University Professor Emeritus at Columbia University, School of Law. HENKIN, *supra* note 48.

[140] HENKIN, *supra* note 48, at 15-16.

[141] HENKIN, *supra* note 48, at 15-16.

to external authority and to conclude agreements, they have created norms and institutions to govern these relations, the international law of the system. Only States can make law for themselves. *States can make law for entities they create (e.g. international organizations), for entities created by individual States (i.e. companies) and for human individuals.* (emphasis added).[142]

Therefore, the question is: has the IMF undermined Brazil's national sovereignty by usurping Brazil's ability to implement its own monetary and fiscal policies without interference from the IMF conditionality requirements? Indeed, the answer to this question may lie in analyzing whether Brazil has consented to an infringement of its national sovereignty by simply being a member of the IMF and having consented to the IMF austerity programs. Moreover, has the IMF violated the fundamental objectives stated in Article I (i)-(vi)?[143]

A. *The Capitalist/Free Market View of IMF Conditionality*

In the view of political-economist Robert Z. Aliber,[144] the Third World Debt Crisis of the 1980's was substantially rooted "in international market forces as, first, lenders increased the availability of foreign finance with "petrodollar recycling" in the 1970's and second, borrowers used the net capital flows to pay for increased consumption and imports."[145] Aliber explicitly exempts the IMF from any responsibility for the austerity programs currently imposed in Latin America, namely Brazil. He states that the IMF conditionality requirements became inevitable once the indebted developing countries could no longer repay their foreign debts.[146] Specifically, he argues that even without the IMF austerity programs and their high conditionality requirements, Brazil would still have had to adopt the same policies on its own in order to repay its foreign debt and to gain

142 HENKIN, *supra* note 48, at 16.

143 ARTICLES OF AGREEMENT, *supra* note 53, art. I (i)-(vi).

144 Robert Z. Aliber, *The Debt Cycle in Latin America*, *in* INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES GLOBAL POWER AND WEALTH 313 (Jeffry A. Frieden & David A. Lake eds., 2d ed. 1991). Robert Z. Aliber is a political-economist who has specialized in the study of Latin America's economic development. His views of the IMF's role on the indebted countries of Latin America also appear in the Winter 1985-86 issue of the *Journal of Interamerican Studies and World Affairs*, Vol. 27, No. 4.

145 *Id.* at 313.

146 *Id.*

access to new commercial lending from the banking institutions of Western Europe and the United States.[147]

In essence, Aliber contends that Brazil would have had to experience a decline in real income, a drastic rise in unemployment, substantially reduced public spending, and a reduction of consumption of foreign imports even without the IMF conditionality requirements. Aliber further argues that the "IMF [austerity] programs may have lessened the squeeze on the private sector because of the Fund's efforts to reduce fiscal deficits as a share of national income."[148]

B. *The Marxist Interpretation of the IMF*

According to political-economist Manual Pastor, Jr.,[149] the IMF has become an enforcer of domestic discipline in Latin America on behalf of the capitalists of the developed countries.[150] In Pastor's view, the IMF austerity programs have been beneficial only to foreign and Latin American capitalists, have depressed Latin American growth, and have harmed the Latin American lower classes. "In the years of the debt crisis, the IMF's power and command over Latin America has risen dramatically. It is a performance that has hurt the vast majority of Latin Americans while delivering benefits to a thin strand of the industrial and banking elite in the developed and developing countries."[151]

Further, Pastor contends, it may be difficult to distinguish the IMF's effect on Latin America's indebted countries from the effects of the generalized debt crisis. However, "the IMF cannot escape blame for the disaster of the last five years (1984-1989), particularly since the IMF has been unwilling and unable to deal with key pressing issues: the need for both Northern

[147] *Id.* at 319.

[148] *Id.*

[149] Pastor, *supra* note 4, at 320. Manuel Pastor, Jr. is also an economist that has specialized in the study of Latin America's economic development. However, his interpretation comes from the Marxist perspective and believes that the indebted Latin American countries are subject to an unprecedented degree of supranational authority from the IMF. His views appear in *Latin America, the Debt Crisis, and the International Monetary Fund*, 16 LATIN AMERICAN PERSPECTIVES 790-110 (1989).

[150] Pastor, *supra* note 4, at 328.

[151] Pastor, *supra* note 4, at 332.

[Western industrialized countries] adjustment and a new development alternative for Latin America."[152] As a result, Pastor argues that the IMF has irrevocably become associated in Latin America with austerity, stagnation, regressive redistribution [of income], and often popular protest.[153]

Pastor additionally contends that the IMF and its policies are also benefiting various factions of local economic elites within Latin American nation-states by maintaining their position of social and economic domination.[154] It seems as though Pastor is implying that the IMF has usurped the national sovereignty of Latin American countries by actively promoting a particular social class within these countries.

IV. CONDITIONALITY V. STATE SOVEREIGNTY

International law recognizes that a requirement of Statehood is to have national sovereignty.[155] It is a nation-state's national government that has exclusive jurisdiction over the territory of the State and is the only recognized *legal representative of the State vis-a-vis other States* (emphasis added).[156] "It is the very essence of sovereignty that no State claiming to be sovereign can recognize another State as having legal authority over it."[157] Historically, the principle of nation-state sovereignty was usually only infringed by an actual military invasion by another state. However, in the 20th Century, the notion of economic sovereignty, where a sovereign nation-state "ought to be the master of its own destiny in the economic field,"[158] has become one of the defining factors of a country's sovereignty. As economic interdependency has grown, the actual sovereignty of nation-states has decreased. Presently, the international political system now encompasses approximately one hundred sixty sovereign nation-states and their mutual power relations, "which may be characterized as cooperative, competitive, or antagonistic."[159]

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[152] Pastor, *supra* note 4, at 333.
[153] Pastor, *supra* note 4, at 333.
[154] Pastor, *supra* note 4, at 334.
[155] ROOT, *supra* note 44, at 2.
[156] ROOT, *supra* note 44, at 2.
[157] IGNAZ SEIDI-HOHENVELDERN, supra note 126, at 24.
[158] IGNAZ SEIDI-HOHENVELDERN, *supra* note 126, at 24.
[159] ROOT, *supra* note 44.

Nation-states, however, are no longer the only "actors"[160] in the international political economy that have affected the national sovereignties of states. Public international organizations, created by treaties between States,[161] have become non-state "actors" in international political-economic and geopolitical relations. Since 1945, one of the most significant public international organizations for international economic relations has been the IMF. As a result, the IMF has become the focus of much debate since it has quite possibly undermined nation-states' national sovereignties.

A prime example of this possible infraction of a basic principle of international law is the IMF's past and present relations with the indebted developing countries, namely Brazil. Since the IMF terms of conditionality have imposed several austerity programs on the Brazilian economy, the IMF may have undermined Brazil's national sovereignty. Many international economists, such as Manuel Pastor, Jr.,[162] have held the IMF strictly liable for Latin America's "lost decade of growth" that occurred in the 1980's.[163] This implies that the IMF has undermined the Latin American countries' ability and inherent right to maintain economic growth without having the IMF infringing upon their respective national sovereignties. Therefore, the IMF may have violated international law by undermining Brazil's ability to implement its own economic and ultimately its own social policies.

Although the IMF has "forced" Brazil to accept several austerity programs under the auspices of the conditionality requirements, Brazil is a member of the IMF. As a consequence, Brazil may have, in fact, authorized the IMF to infringe upon their domestic policies with the IMF conditionality requirements. The Articles of Agreement[164] imply that a member nation-state's national sovereignty is not infringed upon by the IMF conditionality unless, the IMF violates the rules of its Articles of Agreement[165] or the Guidelines on Conditionality[166] interpreting them. Specifically, section nine of the Guidelines on

[160] HENKIN, *supra* note 48.
[161] HENKIN, *supra* note 48.
[162] Pastor, *supra* note 4.
[163] Pastor, *supra* note 4, at 320.
[164] ARTICLES OF AGREEMENT, *supra* note 53.
[165] ARTICLES OF AGREEMENT, *supra* note 53.

Conditionality provides that the IMF *must impose performance criteria for any credit tranche purchase*, but this "criteria will be limited to those that are necessary to evaluate implementation of the program with a view to ensuring the achievement of its objectives"(emphasis added).[167] Such "criteria will normally be confined to (i) macroeconomic variables, and (ii) those necessary to implement specific provisions of the Articles [Of Agreement] or policies adopted under them."[168] In addition, section four of the Guidelines On Conditionality imposes a duty on the IMF to "pay due regard to the domestic social and political objectives, the economic priorities, and the circumstances of members, including the causes of their balance of payments problems."[169] The IMF is not only authorized to, but it must impose specific macroeconomic targets, through its austerity programs and resulting conditionality policies, for member countries who purchase currency from the three credit tranches. Accordingly, with regards to Brazil, the IMF did not violate the Guidelines On Conditionality since the IMF is authorized to impose appropriate austerity programs for member countries that purchase from the three credit tranches.

The IMF may have violated the Articles of Agreement by imposing conditionality requirements that have led to negative growth rates for Brazil. Therefore, the conditionality requirements may have violated article I section (ii) of the Articles of Agreement that provides that the IMF implement policies for economic growth. Section (ii) states in part: "[that] the promotion and maintenance of high levels of employment and real income and . . . the development of the productive resources of all members [are the] primary objectives of economic policy." Arguably, the IMF may have violated article I (ii)[170] since the IMF conditionality requirements have fostered negative growth and increased impoverishment in Brazil since 1983. However, the

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166 GUIDELINES ON CONDITIONALITY, Decision No. 6056-(79/38), Sections 1-12 (March 2, 1979), in SELECTED DECISIONS OF THE INTERNATIONAL MONETARY FUND AND SELECTED DOCUMENTS 20 (1983). The Guidelines On Conditionality were adopted by the IMF's Executive Board in order to clearly set out the IMF's requirements for the use of the IMF's general resources and for stand-by arrangements.

167 *Id.* at 22, sec. 9.

168 *Id.* at 22, sec. 9.

169 *Id.* at 21, sec. 4.

170 ARTICLES OF AGREEMENT, *supra* note 53, art. I(ii).

IMF is only to use the principles of article I as guidelines.[171] Article I (ii)[172] also states that the IMF must only contribute to the economic growth and stability.

Although Brazil did experience a "lost decade of growth" in the 1980's, current economic data points out that the past economic hardships, caused by the IMF's conditionality, have led to economic growth and a decreasing debt burden for Brazil over the past two years. Specifically, Brazil's foreign debt was thirty-five percent of its GDP in 1985,[173] where as at the end of 1992 its foreign debt was only twenty-four percent of its GDP.[174] Equally important, in 1993: (1) Brazil's GDP has grown 4.6 percent; (2) its industrial production has increased 8.1 percent; and (3) its current account had a positive balance of 2.5 billion to the third quarter of 1993.[175] Despite negative economic growth during the 1980's, the IMF conditionality requirements have actually fostered Brazil's economic growth and reduced a portion of its debt burden. Therefore, the IMF has not violated article I sections (i) through (vi)[176].

Since Brazil has specifically consented to the terms of IMF conditionality, no violation of the prescribed rules of the IMF has occurred. As a result, the IMF has not violated international law since it has strictly abided by the explicit rules found in its Articles of Agreement and the Guidelines On Conditionality.

Even though the IMF has not violated the international law principle of national sovereignty, tens of millions of Brazilians still have fervent nationalistic objections to the IMF conditionality requirements and explicitly blame the IMF for Brazil's "lost decade of growth."[177] In 1987, former democratically elected President Sarney, announced that Brazil would place a moratorium on Brazilian debt repayment to all foreign banks.[178] Former President Sarney concluded:

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171 ARTICLES OF AGREEMENT, *supra* note 53.

172 ARTICLES OF AGREEMENT, *supra* note 53, art. I(ii).

173 *Emerging Market Indicators,* ECONOMIST, Jan. 22nd-28th, 1994, at 114. The ECONOMIST's figures are based on the World Bank and IMF statistical reports.

174 *Id.*

175 *Emerging Market Indicators,* ECONOMIST, March 12th, 1994, at 126.

176 ARTICLES OF AGREEMENT, *supra* note 53, art. I(i)-(vi).

177 Pastor, *supra* note 4, at 320.

178 U.S. Govt. Doc. BRAZILIAN DEBT CRISIS, (1988).

"Brazil will not pay its foreign debt with recession, not with unemployment, not with hunger. We believe that in settling this account at such high social and economic costs we would then have to surrender our freedom (i.e. our national sovereignty), for a debt paid with poverty is an account paid for with democracy. I thus wish to reaffirm with all seriousness and firmness that there is no solution possible without reformulation of international economic structures (i.e. the IMF)."[179]

Brazil perceives the IMF as a creation of the United States and Great Britain, managed substantially by the industrialized countries of the North. Indeed, the United States, which has less than one percent of the total population of the IMF member countries, had 18.86 percent of the IMF's total voting power as of April 1992.[180] As a result, Brazil sees the IMF as a policy tool of the United States and the other five majority voting members. Thus, although the IMF has not violated international law, its ultimate legitimacy is at stake. The ability of the IMF to implement its austerity programs will affect the future growth and stability of the Brazilian political-economy, as well as the future of Brazil's social development.

V. SUGGESTED SOLUTIONS

The Third World Debt Crisis has now moved into its second decade. It is no longer a process of emergency loan bail-outs, but rather a situation in which the IMF must effectively manage a 1.15 trillion dollar Third World Debt.[181] With the recent democratization of Brazil, the ruling government must now listen more carefully and sincerely respond to the voting masses.[182] Any solution the IMF creates should involve economic growth for Brazil. The socio-economic inequalities in Brazil are still at extremely high levels with approximately

[179] UN Doc. A/40/PV.4 p. 22. Address By His Excellency Jose Sarney to the XL Session of the General Assembly of the United Nations on September 23, 1985.

[180] HENKIN, *supra* note 48, at 1422.

[181] Pang, *supra* note 2.

[182] Pang, *supra* note 2, at 138-139. For a more detailed analysis of Brazil's redemocratization *See* STEPHAN ALFRED, DEMOCRATIZING BRAZIL (1989). Also, for am extensive view of military rule in Brazil *see* THOMAS E. SKIDMORE, THE POLITICS OF MILITARY RULE IN BRAZIL 1964-1985 (1988).

thirty two million Brazilians who live in poverty.[183] If there is not continued economic growth as there has been for the past two years, Brazil's new democracy will falter and the military could step in once again. An IMF plan that encompasses gradual economic recovery and growth with reasonable long term debt restructuring is a viable weapon against Brazil's continued indebtedness. Presently, the IMF and Brazil are still negotiating the next round of debt restructuring and conditionality policies. Such an agreement will probably not be finalized until after the Fall 1994 elections in Brazil since the lower middle class and poverty line voters still react with great distaste toward Brazilian politicians who negotiate with the IMF.

VI. CONCLUSION

In sum, the IMF did not violate international law by undermining Brazil's sovereignty since the IMF abided by the Articles of Agreement.[184] and the Guidelines On Conditionality.[185] Brazil's consent to the IMF austerity programs exhibits a cognitive recognition on the part of Brazil that they accepted the consequences of IMF conditionality. As a result, political-economist Manuel Pastor, Jr., was incorrect about his assertions that the IMF was violating international law. The IMF should adopt a more balanced approach to its conditionality measures. In order for the IMF to be an effective and legitimate facilitator of Brazilian socio-economic growth, it must work with the Brazilian government on a more equal basis than it has since the 1980's.

Since the IMF is not unlike many other multilateral institutions, such as the World Bank and the United Nations, the ability of the IMF to effectively find an equitable solution to Brazil's foreign debt will affect all multilateral institutions' legitimacy among the developing countries. Such pressing matters as the current IMF standby agreement negotiations with Russia and the sub-Saharan African countries[186] could be derailed by the continued disgruntlement with the stringent IMF

[183] *Latin American Survey: Onwards and Downwards in Brazil,* ECONOMIST, Nov. 13th, 1993 at 21.

[184] ARTICLES OF AGREEMENT, *supra* note 53.

[185] GUIDELINES ON CONDITIONALITY, *supra* note 166.

[186] *The Banker's Beanfeast,* ECONOMIST, Oct. 2, 1993, at 83-84.

conditionality policies. This would be a significant loss for both the developing and developed countries, since continued socio-economic underdevelopment in Russia and in the sub-Saharan African countries will lead to more political instability and ultimately more civil discord. Indeed, continued political, economic, and social unrest in Russia and sub-Saharan Africa is a concern for the security of the entire world. If Brazil and other indebted Third World countries continue to view themselves as subordinates to the IMF, they will be less willing to work within the framework of other multilateral institutions that are primarily funded and managed by the industrialized nation-states to promote world socio-economic growth and to settle international disputes.

Anthony Galano III