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The World Bank Legal Instruments Appraisal and El Salvador's Adoption of Bitcoin as Legal Tender

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Abstract

In June 2021, the entire world woke up to the news that El Salvador, a country in Central America, adopted bitcoin as legal tender, alongside the United States Dollar. With the adoption of bitcoin, the country operates two currencies as legal tender. The World Bank affirms that it could not assist El Salvador's bitcoin implementation given the environmental and transparency drawbacks. The International Monetary Fund said it has economic and legal concerns regarding the move by El Salvador to make the bitcoin a parallel legal tender. The issue that arises from El Salvador's decision is whether the World Bank has any justification for rejecting bitcoin as legal tender. In finding answers to this issue, this article examines the nature of cryptocurrency and bitcoin. It examines the nature and attributes of money as legal tender. It also examines the provisions of the International Bank for Reconstruction and Development (IBRD) Articles of Agreement 1944 (As amended effective June 27, 2012). The article concluded by identifying the ground upon which the World Bank can refuse to recognise El Salvador's adoption of bitcoin.

Keywords: El Salvador, Adoption, Bitcoin, Legal Tender, World Bank.



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1.0 Introduction

El Salvador, officially the Republic of El Salvador in Central America, is bordered on the Northeast by Honduras, on the northwest by Guatemala, and on the south by the Pacific Ocean. El Salvador's capital and largest city are San Salvador. It is in the continent of North America. Its official language is Spanish, and the currency is the American Dollar and the latest addition of bitcoin.⁵⁹⁶ El Salvador became the first country to adopt bitcoin as legal tender officially. The El Salvadoran Congress approved President Nayib Bukele's proposal to embrace the cryptocurrency in June 2021 with 62 out of 84 votes.⁵⁹⁷ The president said the government had made history and would make it easier for Salvadorans living abroad to send money home.⁵⁹⁸ Bitcoin will become legal tender, alongside the United States Dollar, in three months⁵⁹⁹. It means that every business must accept Bitcoin as legal tender for goods or services, except it cannot provide the technology needed to do the transaction.⁶⁰⁰ President Nayib Bukele ordered the optimal conditions to be created so that the mining of the cryptocurrency⁶⁰¹ Bitcoin can be carried out with one of the most valuable energy resources in the country: geothermal energy.⁶⁰² He said:

I have instructed the president of LaGeo⁶⁰³ (our public geothermal energy company) to put in place a plan that offers facilities for mining Bitcoin with energy from our volcanoes: Cheap, 100% clean, and with zero emissions. This will evolve fast!

The Salvadoran government is of the view that bitcoin mining requires a strong injection of energy because specialised high-performance computing equipment is needed. This proposal by President Bukele will possibly develop work without causing serious implications for the environment, and this will possibly attract investors, create jobs, and incorporate bitcoin as a

⁵⁹⁶ <<https://worldpopulationreview.com/country-locations/where-is-el-salvador>> accessed 8 July 2021.

⁵⁹⁷ BBC News, 'Bitcoin: El Salvador Makes Cryptocurrency Legal Tender', available at <<https://www.bbc.com/news/world-latin-america-57398274>> accessed 8 July 2021.

⁵⁹⁸ Ibid.

⁵⁹⁹ From June 2021, it means the adoption will be effective in September 2021.

⁶⁰⁰ Bitcoin: El Salvador makes cryptocurrency legal tender available at <<https://www.bbc.com/news/world-latin-america-57398274>> accessed 27 October 2021.

⁶⁰¹ Bitcoin mining is performed by high-powered computers that solve complex computational math problems; these problems are so complex that they cannot be solved by hand and are complicated enough to tax even incredibly powerful computers.

⁶⁰² 'Salvadoran government to promote geothermal for Bitcoin mining' <<https://www.presidencia.gob.sv/gobierno-salvadoreno-promovera-la-geotermia-para-la-mineria-de-bitcoin/>> accessed on July 8 2021.

⁶⁰³ LaGeo is one of the public companies that make up the CEL Group. It works with steam and heat related to the national volcanic system. This type of energy generation has a low impact on the environment, but at the same time, it has a high potential. Over the course of the year, it has contributed 26% of the energy supply and is the second most important source.

legal tender, and could further promote economic recovery by stimulating private investors, foreign investment, and accelerating the process of financial inclusion.⁶⁰⁴

However, the World Bank has rejected the government of El Salvador's request to help implement bitcoin as legal tender in the country. The World Bank said that it could not assist El Salvador's bitcoin implementation considering the environmental and transparency drawbacks.⁶⁰⁵

The International Monetary Fund said it has economic and legal concerns regarding the move by El Salvador to make bitcoin a parallel legal tender, further clouding the outlook for an IMF-backed programme and widening spreads on the country's bonds.⁶⁰⁶ According to a Reuter's report in March, El Salvador is seeking more than \$1 billion in loans from the IMF as part of a proposed three-year credit facility⁶⁰⁷. The effort followed legislative victories by Bukele's political party that gave it majority control over the country's legislature.

On September 7, 2021, El Salvador became the first sovereign nation to adopt bitcoin as legal tender despite widespread domestic scepticism and international warnings of risks for consumers. The "Bitcoin Law" was widely and vocally promoted by President Nayib Bukele, who first announced the concept at a Cryptocurrency Conference in Miami in June 2021. President Bukele also declared that El Salvador would create its own commission-free "wallet" to receive, store, and transmit bitcoin to generate interest. The "Chivo" – and that the government would "airdrop" (*that is*, load) the wallet with the equivalent of \$30 of bitcoin for each Salvadorian citizen who downloads the wallet and registers as a user.⁶⁰⁸

In addition to adopting bitcoin as legal tender, the "Bitcoin law" generally requires "every economic agent" to "accept bitcoin as payment when offered to him by whoever acquires goods and services." But an exception to this requirement for those who "do not have access

⁶⁰⁴ 'Salvadoran Government to Promote Geothermal for Bitcoin Mining' opcit.

⁶⁰⁵ R., Campos, 'World Bank rejects El Salvador request for help on bitcoin implementation' available at <<https://www.reuters.com/business/el-salvador-keep-dollar-legal-tender-seeks-world-bank-help-with-bitcoin-2021-06-16/>> accessed on July 8 2021.

⁶⁰⁶ R., Campos & K., Strohecker, 'IMF Sees Legal, Economic Issues with El Salvador's Bitcoin Move' <<https://www.reuters.com/business/finance/imf-sees-legal-economic-issues-with-el-salvador-bitcoin-move-2021-06-10/>> accessed on July 8 2021.

⁶⁰⁷ A., Esposito and N Renteria, 'Exclusive: El Salvador Seeks IMF Funding, Sees 'Golden Opportunity' for Economy, Says Finance Minister' available at <<https://www.reuters.com/article/us-el-salvador-economy-exclusive/exclusive-el-salvador-seeks-imf-funding-sees-golden-opportunity-for-economy-says-finance-minister-idUSKBN2AW1GV>> March 4 2021, accessed on July 8 2021.

⁶⁰⁸ D. Stabile, K., Prior, 'El Salvador's "Bitcoin Law" Forces Governments and Businesses to Contend with Digital Assets', Global Banking and Finance Review available at <<https://www.globalbankingandfinance.com/el-salvadors-bitcoin-law-forces-governments-and-businesses-to-contend-with-digital-assets/>> accessed on September 21 2021.

to the technologies that allow them to carry out transactions in bitcoin,” along with conflicting statements made during the contentious enactment of the law, have created ambiguity as to whether businesses, as a practical matter, are required to accept bitcoin as payment.⁶⁰⁹ This article considers the action of this country regarding the provisions of the World Bank enabling statutes. The paper is structured as follows:

The first section is the introduction; section two examines the nature of cryptocurrency in general and bitcoin in particular; section three considers the nature and meaning of money; section four traces the development of the World Bank; section five discusses the relationship between the World Bank and El Salvador with the analysis of the provisions of IBRD Articles of Agreement; section six discusses the position of the World Bank, and section seven is the conclusion and recommendations.

2.0 Cryptocurrency and Bitcoin

Cryptocurrencies are digital assets recorded on decentralized public ledgers. The ledger known as a blockchain serves as a record of asset ownership and transfers, much like a land registry. Owning cryptocurrency involves having a private key. When matched with the public blockchain, this private key allows owners to access their cryptocurrency and transfer it to another person. A transfer occurs when it is recorded on the blockchain. Because the blockchain is maintained through a decentralised process, it is virtually impossible to reverse once a transaction is recorded on the blockchain.⁶¹⁰

The rapid advancement in encryption and network computing gave birth to new tools and products that have influenced the local and global economies alike. One recent and notable example is the emergence of virtual currencies, also known as cryptocurrencies or digital currencies. Virtual or digital money, such as bitcoin, introduced a fundamental transformation that affected exchanging goods, services, and assets.

Virtual currencies are experiencing increasing popularity in the financial markets and in portfolio management. They can be classified as financial assets or commodities on a scale from the pure medium of exchange advantages to the pure store of value advantages. As a result of its distributed ledgers based on blockchain, cryptocurrencies offer unique benefits to

⁶⁰⁹ *Ibid.*

⁶¹⁰ D., Chu, ‘Broker-Dealers for Virtual Currency’ (2018) (118)(8), Columbia Law Review; 2326.

the economy, investors, and consumers. They pose considerable risks to users and challenges for regulators when fitting the new technology into the old legal framework.⁶¹¹

Bitcoin is one of the better-known virtual currencies globally; it recently became a product for investment, making headlines in the financial media. Bitcoin was first introduced in 2008 by Satoshi Nakamoto,⁶¹² who proposed a new conceptualisation of virtual currency based on an algorithm involving a process of “minting.” It is estimated that the total number of Bitcoins will amount to 21 million units.⁶¹³ Bitcoin is the world’s first peer-to-peer digital currency, or cryptocurrency. Its core value proposition is that it allows individuals to directly transfer value to an intended recipient online without the need to rely on a trusted third party to reconcile balances and manage the currency supply.⁶¹⁴

The regulatory approach to virtual currencies across the world has varied widely. Governments have not only embraced different definitions of what constitutes a “virtual currency”, they have also tackled other legal and policy questions raised by these technologies, including their tax treatment, anti-money laundering/countering the financing of terrorism (AML/CFT) implications, reporting requirements, and conduct rules for financial institutions dealing with them. There is no global consensus about the definition or treatment of virtual currencies.⁶¹⁵

Many governments have attempted to fold virtual currencies into existing regulatory systems, explicitly or implicitly extending the reach of existing laws. Others have identified the potential advantage of being a first-mover. For this reason, some have created wholesale

⁶¹¹ S., Goutte and K., Guesmi and S., Saadi (eds) *Cryptofinance and Mechanisms of Exchange: The Making of Virtual Currency*, (Springer Nature Switzerland AG 2019) p.v.

⁶¹² In January 2009, Bitcoin entered the world to relatively little fanfare outside of computer programming circles. The white paper proposing Bitcoin had first circulated on a cryptography listserv in the fall of 2008, and the Bitcoin blockchain launched officially on January 3, 2009. The author’s name in the white paper, Satoshi Nakamoto, is thought to be a pseudonym for a person or a group of people. Nakamoto is aptly described as “a kind of crypto-libertarian mashup of Spartacus, Keyser Söze, and Jay Gatsby.” Although generally evoking white male heroic tropes in that phrasing, most authors go out of their way to adhere to plural pronouns to avoid gendering Satoshi (who is often referred to by first name in the manner of Madonna) and to nod to the possibility that Satoshi is more than one person. The Bitcoin blockchain is generally observed to have the kind of concerted, kaleidoscopically thoughtful presentation less likely to be the work of one individual’s thought process.

⁶¹³ ICT Cyber Desk, International Institute for Counter-Terrorism, *Cyber-Terrorism Activities Report No. 4* available at : <http://www.jstor.com/stable/resrep09471> accessed on March 19, 2021.

⁶¹⁴ Andrea O’Sullivan, ‘Ungoverned or Anti-Governance?: How Bitcoin Threatens The Future Of Western Institutions’ (2018) (71)(2) *Journal of International Affairs*; 91.

⁶¹⁵ C., Groden and E., Saravalle, and Julia Solomon-Strauss, *Uncharted Waters: A Primer on Virtual Currency Regulation Around the World*, (Center on Law and Security NYU School of Law 2018) p.2 available at <<https://s3.us-east-1.amazonaws.com/files.cnas.org/documents/CNASReportWEB-Bitcoin.pdf?mtime=20181002093347&focal=none>> accessed October 20, 2021.

virtual currency-friendly frameworks. Others are actively considering new regulatory regimes to encourage controlled growth of Initial Coin offerings (ICOs) and cryptocurrency. By contrast, a handful of countries have banned cryptocurrency altogether. Even within nations, the consensus is elusive: different agencies of the same government may adopt conflicting approaches; lack of clarity about cryptocurrency's legal status may result in the application of unexpected laws, and a sudden crackdown might inexplicably retreat months later.⁶¹⁶ However, El Salvador took the world by surprise when it adopted bitcoin as a parallel legal tender and American Dollar.

3.0 The Meaning of Money

Money has been around for millennia, although its origin has been the subject of academic debate for centuries.⁶¹⁷ There are two main theories of how money emerged. The dominant theory states that money creates the market, arising out of swaps and serving fundamentally to facilitate commodity exchange.⁶¹⁸ States only embraced money because of the power it gave them, such as the monopoly to issue legal tender.⁶¹⁹

The alternative theory argues that money is the deliberate and positive creation of the state and that barter succeeded money and was not the precursor.⁶²⁰ Proponents of this theory, such as Graeber, assert that the essential nature of money is credit or debit.⁶²¹ There are two common strands of thought within this theory: the idea that money originated as a unit of account for debt and the proposition that money creation involves the simultaneous creation of money and debt. This theory posits that debt is real money. Under this theory, therefore, the regulation of debt becomes crucial since an unregulated debt market can lead to inflation and other unforeseen contingencies.

Money has changed form, and although it may have been a different commodity in different societies, it has always maintained the same primary function, facilitating exchange and trade. As communities developed and civilisations flourished, money also evolved with time.

⁶¹⁶ Ibid.

⁶¹⁷ C. Menger, *On the Origins of Money*, (Ludwig von Mises Institute, Auburn, Alabama 2009), 45.

⁶¹⁸ M. Hudson, 'The Archaeology of Money: Debt Versus Barter Theories of Money's Origins' in Randal L. Wray (ed) *Credit and State Theories of Money* (Edward Elgar, Cheltenham 2004), p. 99.

⁶¹⁹ D. Graeber, *Debt: The First 5,000 Years* (Melville House, Brooklyn, New York 2011) p. 49.

⁶²⁰ M. Hudson, *op. cit.*

⁶²¹ D. Graeber, *op. cit.*

Montesquieu wrote in 1748 that money is a sign which represents the value of all merchandise.⁶²²

Since the dawn of civilisation and trade, money has been a characteristic of most transactions. Various commodities and precious metals have been used as the medium of exchange. Still, the warrior monks were the ancestors of modern banking and the creation of paper money, which has evolved into a digital format on computer platforms, underpinned by legal tender. It shows the crucial part that money plays in the evolutionary development of the modern economy and that it is the lifeblood of the monetary system.⁶²³ Households as entrepreneurs use the money to form firms and purchase the factor endowments of raw materials, capital, and labor to produce goods and services and generate income, including rent, interest, wages, and profit.⁶²⁴

Money and the financial system are intertwined and cannot be separated. They influence and affect the whole economy, including the inflation rate, business cycles, and interest rates. Consequently, consumers, investors, savers, and government officials would make better-informed decisions if they understood how the economy's financial markets and money supply.⁶²⁵

Anything can be used as money as long as it has these three characteristics. Firstly, it can serve as a medium of exchange; that is, people are willing to exchange their goods and services for this thing. Secondly, it can serve as a unit of account or a yardstick; that is, goods and services can be evaluated. Thirdly, something that can serve as money is a store of value. People can store the purchasing power of what they have to offer from now to a future date.⁶²⁶ It can then be summarised that an object must be a medium of exchange, a unit of account, and a store of value for an object to qualify as money. However, it is essential to note that the thing being used as money must be limited in quantity and cannot be easily replicated.

⁶²² Charles de Secondat Montesquieu, Baron de, 'Of Laws in Relation to the Use of Money' in *The Spirit of Laws* (Batoche Books, Ontario 2001), p. 407.

⁶²³ D. G Thomas and D.S. Bywaters, *The Creators of Inside Money: A New Monetary Theory*, (Palgrave Macmillan, 2nd edn, 2021) p.1

⁶²⁴ *Ibid.* p.11

⁶²⁵ K.R. Szulczyk, *Money, Banking, and International Finance*, (CreateSpace Independent Publishing Platform 2010),10

⁶²⁶ M. Ashraf, *Money, Understandings and Misunderstandings*, (Palgrave Macmillan 2020),.35

Money may be divided into two main categories; commodity money and non-commodity money. Commodity money is the oldest form of money. It has some intrinsic value: It can be used for something other than just money—for instance, food grain. Food grain can be used to sustain life. It may also be used to evaluate other goods and services.

Non-commodity money, on the other hand, does not have any intrinsic value. Its sole purpose is to serve as a medium of exchange, a unit of account, and a store of value. Fiat money⁶²⁷ is among these forms of money.

The term “legal tender” is used for the form of money that has been recognised by the legal system, usually a government. Legal tender means that the legal authority of the land has accepted this payment method, and government dues paid in this form will be accepted. Furthermore, private parties legally cannot refuse to get this in exchange for goods and services.⁶²⁸

In describing money and its dynamics, Nektarios Michai⁶²⁹ opined that:

What is money? Despite our daily use of it, we often ponder what makes something money, especially in the modern era where we take the prevalence of paper or digital money for granted. Throughout history, there have been different uses of various forms of money. In each step in money’s advance, people have reshaped how they do their commercial transactions and have introduced new distinctions.

He mentioned that for something to be considered money, it needs to serve four functions: a medium of exchange, an overall standard, a measure of value, and a store of wealth.⁶³⁰

On how bank creates money, Hanke and Sekerke⁶³¹ opine that:

Bank money is created by the banking system when banks make loans. Upon credit approval, a borrower receives a deposit balance created out of nothing more than a book entry by the bank to balance the new loan asset. The borrower thus obtains purchasing power in the form of a deposit. He is

⁶²⁷ Fiat money is a form of money that has been made money by fiat, that is, by the authority, in almost all cases, of the government.

⁶²⁸ M. Ashraf, Money, Understandings and Misunderstandings, opcit p.43.

⁶²⁹ N. Michai, Money, Credit and Crises, Understanding the Modern Banking System. (Palgrave Macmillan 2021),3.

⁶³⁰ Ibid.

⁶³¹ S. H Hanke and M. Sekerke, ‘Bank Regulation As Monetary Policy: Lessons From Great Recession’ (2017) (37)(2) *CATO Journal*; 385-405.at 388.

free to withdraw that purchasing power in the form of currency, but it is more often the case that the purchasing power remains within the banking system, transferred from bank to bank within the clearing system. Deposits thus circulate as money in their own right, and such transfers of deposits far exceed the volume of transactions in currency.

In all, the attributes of money are constant; money in the classical sense must perform three core functions. As a medium of exchange, it must facilitate the payments. It must also be able to reduce the transfer of property by having purchasing power, and it does this through storing value. Money must also serve as a unit of account and the standard measure of value. Maintaining its purchasing power over time is an attribute of good money.⁶³² It is also important to note that money as legal tender in the modern economy is issued by the central bank of each sovereign nation.

4.0 The World Bank

The conference, formally known as the United Nations Monetary and Financial Conference, convened on July 1, 1944, and was attended by 730 delegates. United States Treasury Secretary Henry Morgenthau Jr. served as conference president. Lord John Maynard Keynes of the United Kingdom delegation led Commission that dealt with a bank for reconstruction and development. The commission's committees were tasked with studying the preliminary draft presented at the conference and gathering additional suggestions and proposals. Mexico, Chile, Brazil, Russia, Belgium, the Netherlands, Czechoslovakia, Poland, Canada, China, and India were active participants. Much of the discussions centred on the proposed bank's dual purposes of reconstruction and development and its capital structure.⁶³³

By July 22, 1944, the Final Act of the United Nations Monetary and Financial Conference, which included charters outlining the goals and mechanisms of both the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD) was signed by the delegates. However, many decisions were yet to be made. The IBRD

⁶³² S. Madise, *The Regulation of Mobile Money, Law and Practice in Sub-Saharan Africa*, (Palgrave Macmillan 2019), 20.

⁶³³ Bretton Woods and the Birth of the World Bank available at <<https://www.worldbank.org/en/archive/history/exhibits/Bretton-Woods-and-the-Birth-of-the-World-Bank>>. accessed October 25, 2021.

Articles of Agreement were ratified on December 27, 1945, when representatives from twenty-one countries convened in Washington DC to become the Bank's first members.⁶³⁴

According to the statute⁶³⁵ establishing the Bank, the purposes of installing it are provided for under Article I as follows:

The purposes of the Bank are:

To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of adequate facilities to peacetime needs and the encouragement of the development of good facilities and resources in less developed countries.

To promote private foreign investment utilising guarantees or participation in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its capital, funds raised by it and its other resources.

To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging global investment to develop the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories.

To arrange the loans made or guaranteed by it international loans through other channels so that the more practical and urgent projects, large and small alike, will be dealt with first. To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate post-war years, to assist in a smooth transition from a wartime to a peacetime economy. The Bank shall be guided in all its decisions by the purposes mentioned above.

The World Bank Group is one of the world's largest sources of funding and knowledge for developing countries. Its five institutions share a commitment to reducing poverty, increasing shared prosperity, and promoting sustainable development. The five institutions of the World Bank are:

⁶³⁴ Article II, section 1 of the International Monetary Fund Articles of Agreement provides that the original members of the Fund shall be those of the countries represented at the United Nations Monetary and Financial Conference whose governments accept membership before December 31, 1945.

Also, Article II, section 1(a) of the IBRD Articles of Agreement provides that 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).

The date specified under IBRD Articles of Agreement, Article XI, Section 2(e) states that: This Agreement shall remain open for signature at Washington on behalf of the governments of the countries whose names are set forth in Schedule A until December 31, 1945.

⁶³⁵ International Bank for Reconstruction and Development Articles of Agreement (As amended effective June 27, 2012)

- (i) International Bank for Reconstruction and Development (IBRD),⁶³⁶
- (ii) International Development Association (IDA),⁶³⁷
- (iii) International Finance Corporation (IFC),⁶³⁸
- (iv) Multilateral Investment Guarantee Agency (MIGA),⁶³⁹
- (v) International Centre for Settlement of Investment Disputes (ICSID)⁶⁴⁰

Together, IBRD and IDA form the World Bank, which provides financing, policy advice, and technical assistance to governments of developing countries. IDA focuses on the world's poorest countries, while IBRD assists middle-income and creditworthy poorer countries. IFC, MIGA, and ICSID focus on strengthening the private sector in developing countries. Through these institutions, the World Bank Group provides financing, technical assistance, political risk insurance, and settlement of disputes to private enterprises, including financial institutions.⁶⁴¹

The International Monetary Fund (IMF)⁶⁴² fosters global monetary cooperation, secures financial stability, facilitates international trade, promotes high employment and sustainable

⁶³⁶ The origin of the International Bank for Reconstruction and Development had been discussed in the body of this article.

⁶³⁷ In the early 1950's, reports from the United Nations and the U.S. government supported the establishment of a program to lend to poor countries on concessional terms with the backing of multilateral donors. After initial deliberations, the idea to create the International Development Association (IDA), an agency to provide 'soft-loans' to developing countries, was floated within the Bank.

⁶³⁸ In **1956 IFC opens** under Robert L. Garner's leadership with \$100 million in capital, 12 staff and an ambitious goal: "Encouraging the growth of productive private enterprise" in three broad ways—investing, advising, and mobilising capital from others.

⁶³⁹ On April 12, 1988 an international convention established MIGA as the newest member of the World Bank Group. The agency opened for business as a legally separate and financially independent entity. MIGA was created to complement public and private sources of investment insurance against non-commercial risks in developing countries. MIGA's multilateral character and joint sponsorship by developed and developing countries were seen as significantly enhancing confidence among cross-border investors.

⁶⁴⁰ ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment. ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process. It is also available for state-state disputes under investment treaties and free trade agreements, and as an administrative registry.

⁶⁴¹ The World Bank Group and the International Monetary Fund (IMF), available at <https://www.worldbank.org/en/about/history/the-world-bank-group-and-the-imf> accessed on 24 October 2021.

⁶⁴² The Articles of Agreement of the International Monetary Fund were adopted at the United Nations Monetary and Financial Conference (Bretton Woods, New Hampshire) on July 22, 1944. They were originally accepted by 29 countries and since then have been signed and ratified by a total of 190 Member countries. As the charter of the organisation, the Articles lay out the Fund's purposes, which include the promotion of 'international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems'. The Articles also establish the mandate of the Organization and its members' rights and obligations, its governance structure and roles of its organs, and lays out various rules of operations including those related to the conduct of its operations and transactions regarding the Special

economic growth, and reduces poverty worldwide. The IMF's primary purpose is to ensure the strength of the international monetary system, the system of exchange rates, and international payments that enables countries and their citizens to transact with each other. It does so by keeping track of the global economy and the economies of member countries, lending to countries with balance of payments difficulties, and giving practical help to members.⁶⁴³

The organisations that make up the World Bank Group are owned by the governments of member nations, which have the ultimate decision-making power within the organisations on all matters, including policy, financial, or membership issues. Member countries govern the World Bank Group through the Boards of Governors and the Boards of Executive Directors. These bodies make all significant decisions for the organisations.⁶⁴⁴

To become a member of the Bank, under the IBRD Articles of Agreement, a country must first join the International Monetary Fund (IMF).⁶⁴⁵ Membership in IDA, IFC, and MIGA are conditional on membership in IBRD. Article VII of the Agreement provides for the status, immunities, and privileges of the IBRD.

El Salvador is a member of the World Bank; the next section discusses the relationship between the two analysing relevant provisions in the IBRD Articles of Agreement.

Drawing Rights. The key functions of the IMF are the surveillance of the international monetary system and the monitoring of members' economic and financial policies, the provision of Fund resources to member countries in need, and the delivery of technical assistance and financial services. Since their adoption in 1944, the Articles of Agreement have been amended seven times, with the latest amendment adopted on December 15, 2010 (effective January 26, 2016). The Articles are complemented by the By-laws of the Fund adopted by the Board of Governors, themselves being supplemented by the Rules and Regulations adopted by the Executive Board.

⁶⁴³ See Article I of the International Monetary Fund Articles of Agreement adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 22, 1944, amended, effective January 26, 2016 by the modifications approved by the Board of Governors in Resolution No. 66–2, adopted December 15, 2010.

⁶⁴⁴ See Article V generally.

⁶⁴⁵ Article VI section 3 provides that:

Any member which ceases to be a member of the International Monetary Fund shall automatically cease after three months to be a member of the Bank unless the Bank by three-fourths of the total voting power has agreed to allow it to remain a member.

See Article II, section 1 (a) and (b) of the IBRD Articles of Agreement (As amended effective June 27, 2012).

a) 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).

(b) Membership shall be open to other members of the Fund, at such times and in accordance with such terms as may be prescribed by the Bank.

5.0 The World Bank and El Salvador (An Analysis of the IBRD Articles of Agreement)

The World Bank had made it clear that it cannot support El Salvador's adoption of bitcoin as legal tender due to "environment and transparency" concerns.⁶⁴⁶

However, the International Bank for Reconstruction and Development Articles of Agreement states the procedures and principles the World Bank pledges to engage with sovereign governments. The core provision in the document is its commitment to accept payments from member states in local currencies.

Section 12 of Article V defines an acceptable "Form of Holdings of Currency" as follows:

The Bank shall accept from any member, in place of any part of the member's currency, paid in to the Bank under Article II, Section 7 (i),⁶⁴⁷ or to meet amortization payments on loans made with such currency, and not needed by the Bank in its operations, notes or similar obligations issued by the Government of the member or the depository designated by such member, which shall be non-negotiable, non-interest-bearing and payable at their par value on-demand by credit to the account of the Bank in the designated depository.

Also, section 9 of Article II provides for the maintenance of the value of specific currency holdings of the Bank as follows:

(a) Whenever (i) the par value of a member's currency is reduced, or (ii) the foreign exchange value of a member's currency has, in the opinion of the Bank, depreciated to a significant extent within that member's territories, the member shall pay to the Bank within a reasonable time an additional amount of its currency sufficient to maintain the value, as of the time of initial subscription, of the amount of the currency of such member which is held by the Bank and derived from currency originally paid in to the Bank by the member under Article II, Section 7 (i), from currency referred to in Article IV, Section 2 (b),⁶⁴⁸ or from any

⁶⁴⁶Martin Leo Rivers, 'Bitcoin Must Be Accepted by World Bank, According to Charter', available at <https://www.forbes.com/sites/martinrivers/2021/06/17/el-salvador-can-pay-world-bank-in-bitcoin-according-to-charter/?sh=116b94ff3d87>> accessed on 21 September 2021.

⁶⁴⁷ Article II, Section 7 (i)-(iii) provides on "methods of payment of subscription for shares" that:

Payment of subscriptions for shares shall be made in gold or United States dollars and in the currencies of the members as follows:

(i) under Section 5 (i) of this Article two percent of the price of each share shall be payable in gold or United States dollars, and, when calls are made, the remaining eighteen percent shall be paid in the currency of the member;

(ii) when a call is made under Section 5 of this Article, payment may be made at the option of the member either in gold, in United States dollars or in the currency required to discharge the obligations of the Bank for the purpose for which the call is made;

(iii) when a member makes payments in any currency under (i) and (ii) above, such payments shall be made in amounts equal in value to the member's liability under the call. This liability shall be a proportionate part of the subscribed capital stock of the Bank as authorized and defined in Section 2 of this Article.

⁶⁴⁸ The Article IV, section 2 on availability and transferability of currencies provides as follows:

additional currency furnished under the provisions of the present paragraph, and which has not been repurchased by the member for gold or for the currency of any member which is acceptable to the Bank.

(b) Whenever the par value of a member's currency is increased, the Bank shall return to such member within a reasonable time an amount of that member's currency equal to the increase in the value of the amount of such currency described in (a) above.

(c) The provisions of the preceding paragraphs may be waived by the Bank when a uniform proportionate change in the par values of the currencies of all its members is made by the International Monetary Fund.

The section above clarifies that members' holdings paid into the bank should be continually re-valued (against an accurate benchmark like United States of America dollars). The World Bank should hand over the gains back if the local currency appreciates. However, if the local currency depreciates, the member is called upon to pay to the Bank within a reasonable time an amount of that member's money equal to the increase in the value of such currency.

With the above provisions, the question that comes to mind is: what determines the appreciation and depreciation of the bitcoin, considering that it is not a central bank-issued digital currency? The following section discusses the position of the World Bank.

a) Currencies paid into the Bank under Article II, Section 7 (i), shall be loaned only with the approval in each case of the member whose currency is involved; provided, however, that if necessary, after the Bank's subscribed capital has been entirely called, such currencies shall, without restriction by the members whose currencies are offered, be used or exchanged for the currencies required to meet contractual payments of interest, other charges or amortization on the Bank's own borrowings, or to meet the Bank's liabilities with respect to such contractual payments on loans guaranteed by the Bank.

(b) Currencies received by the Bank from borrowers or guarantors in payment on account of principal of direct loans made with currencies referred to in (a) above shall be exchanged for the currencies of other members or reloaned only with the approval in each case of the members whose currencies are involved; provided, however, that if necessary, after the Bank's subscribed capital has been entirely called, such currencies shall, without restriction by the members whose currencies are offered, be used or exchanged for the currencies required to meet contractual payments of interest, other charges or amortization on the Bank's own borrowings, or to meet the Bank's liabilities with respect to such contractual payments on loans guaranteed by the Bank.

(c) Currencies received by the Bank from borrowers or guarantors in payment on account of principal of direct loans made by the Bank under Section 1 (a) (ii) of this Article, shall be held and used, without restriction by the members, to make amortization payments, or to anticipate payment of or repurchase part or all of the Bank's own obligations.

(d) All other currencies available to the Bank, including those raised in the market or otherwise borrowed under Section 1 (a) (ii) of this Article, those obtained by the sale of gold, those received as payments of interest and other charges for direct loans made under Sections 1 (a) (i) and (ii), and those received as payments of commissions and other charges under Section 1 (a) (iii), shall be used or exchanged for other currencies or gold required in the operations of the Bank without restriction by the members whose currencies are offered. (e)

Currencies raised in the markets of members by borrowers on loans guaranteed by the Bank under Section 1 (a) (iii) of this Article, shall also be used or exchanged for other currencies without restriction by such members.

6.0 The Position of the World Bank

From the IBRD Articles of Agreement provisions, the World Bank is at a crossroads on whether to recognise El Salvador's adoption of bitcoin as legal tender. However, the concern of the World Bank on the issue of transparency is a genuine one considering the volatility of the bitcoin and the fact that it is not an e-currency issued by the central bank of El Salvador.

In one of the publications of the World Bank Group, the nature of cryptocurrencies was stated as follows:

Cryptocurrencies are the first and, therefore, most developed application of blockchain technologies. They create money without central banks and facilitate payments without financial institutions. The success of several cryptocurrencies puts competitive pressure on transaction methods by existing financial institutions. However, severe limitations have become apparent. Decentralised organisations of markets without trusted intermediaries can be very costly. The volatility of the value of crypto currencies is a significant obstacle to their becoming an alternative to legal tender.⁶⁴⁹

The Central Bank of Nigeria⁶⁵⁰ in banning cryptocurrency from the Nigerian banking industry gave two reasons. The first reason it gave:

First, because unregulated and unlicensed entities issue them, their use in Nigeria goes against the CBN's key mandates as the issuer of the CBN Act (2007) legal tender in Nigeria. The use of cryptocurrencies in Nigeria is a direct contravention of existing law. It is also important to highlight a critical difference between Central Bank issued Digital Currencies and cryptocurrencies. As the names imply, while Central Banks can issue Digital Currencies, cryptocurrencies are issued by unknown and unregulated entities.

It went further to state the second reason thus:

Second, the very name and nature of "cryptocurrencies" suggests that its patrons and users value anonymity, obscurity, and concealment. Therefore, one may need to ask why any entity would disguise its transactions if they were legal. It is based on this opacity cryptocurrencies have become well-suited for conducting many illegal activities, including money laundering, terrorism financing, purchase of small arms and light weapons, and tax evasion. Indeed, many banks and investors who place a high value on reputation have been turned off from cryptocurrencies because of the damaging effects of the widespread use of cryptocurrencies for illegal

⁶⁴⁹Office of the Chief Economist, 'Cryptocurrencies and Blockchain World Bank ECA Economic Update May 2018' p.21 available at <<https://documents1.worldbank.org/curated/pt/293821525702130886/pdf/Cryptocurrencies-and-blockchain.pdf>> accessed 25 October 2021.

⁶⁵⁰ "Response to Regulatory Directive on Cryptocurrencies" dated February 7, 2021 available at <<https://www.cbn.gov.ng/Out/2021/CCD/CBN%20Press%20Release%20Crypto%2007022021.pdf>> accessed on 21 March 2021.

activities. In fact, the role of cryptocurrencies in the purchase of hard and illegal drugs on the darknet website called “Silk Road” is well known. They have also been recent reports that cryptocurrencies have been used to finance terror plots, further damaging its image as a legitimate means of exchange.

D.G Thomas and D.S Bywaters⁶⁵¹ did not envisage that a country would adopt a cryptocurrency like bitcoin as its legal tender when they opined that:

Different forms of money are evolving as virtual currencies like Bitcoin, although this format has limitations because it is not legal tender in any economy. States and monetary authorities have no control over the supply, which is costly to generate by private agents in terms of computer power, which means high transaction costs. The technology of transactions is not transparent, so it is liked by agents who operate in the criminal sector. It is the monetary monitoring and recording of the deposit base of retail banks as a medium of exchange and a store of value that is usually efficient and not too expensive to administer. Therefore, the credit creation-destruction technology of bank liabilities sustains production and trade at low transaction costs and provides a memory of records.⁶⁵²

On October 25, 2021, the Federal Government of Nigeria launched the first central bank digital currency in Africa, known as “e naira.”⁶⁵³ This is a giant stride in developing central bank-issued digital currency. This is the kind of development El Salvador should have strived to achieve.

7.0 Conclusion

While different countries are working on developing and issuing their central bank digital currencies, El Salvador adopted a cryptocurrency that has no control over its supply and transparency. To address the issue created by El Salvador, the following recommendations will be of importance.

⁶⁵¹ D. Gareth Thomas and David S. Bywaters, *The Creators of Inside Money: A New Monetary Theory*, (2nd edn. Palgrave Macmillan 2021) p.16.

⁶⁵² *Ibid.*

⁶⁵³ The eNaira is the digital equivalent of the cash Naira. Put simply, ‘same Naira, more possibilities. The eNaira, like the physical Naira is the official tender of Nigeria and is a liability of the CBN. The eNaira and Naira will always be exchanged one for one. While most Central Banks are on their Central Bank Digital Currency (CBDC) journey, different jurisdictions have different priorities, and a range of design choices can address individual country preferences and have implications for interoperability and cross-border payments. For example, the United States (US) have articulated their intent to evaluate CBDC on its ability to improve the payment system. The European Central Bank (ECB) has emphasised the potential for a digital Euro to further enhance the digital economy and support European sovereignty and stability. The ECB, Bank of Japan, Bank of Canada and Sveriges Riksbank highlight the prospect of declining cash use and the need for low-cost, low-risk, and efficient cashlike CBDC design. Japan also emphasises the stability and efficiency of payment and settlement systems, along with universal access, instant payment capability, and interoperability, as requirements of the CBDC.

Firstly, section 12 of Article V of the IBRD Articles of Agreement states that “...notes or similar obligations issued by the Government of the member or the depository designated by such member, ...” From the interpretation of the provision above, it is clear that El Salvador did not issue the bitcoin but adopted it as its legal tender. The World Bank will not be contravening its statutes by refusing to recognise such.

Secondly, the World Bank will not be obligated to recognise El Salvador’s adoption of bitcoin as legal tender since the US dollar has not ceased being its legal tender. Therefore, the World Bank should continue recognising US dollar as El Salvador’s legal tender.

Lastly, the World Bank should approach this issue with caution as its integrity as the world financial institution is at stake. A meeting of the World Bank should be called, and the president of El Salvador should be informed in clear terms reasons why the world financial institution will not recognise or accept bitcoin from the nation.

The above recommendations will go a long way in addressing the dilemma created by El Salvador for the World Bank.