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UNITED NATIONS CONFERENCE ON  
THE LAW OF TREATIES

WRITTEN STATEMENTS SUBMITTED BY SPECIALIZED AGENCIES AND  
INTERGOVERNMENTAL BODIES INVITED TO SEND OBSERVERS TO THE  
CONFERENCE

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7. SECOND STATEMENT SUBMITTED BY THE INTERNATIONAL BANK  
FOR RECONSTRUCTION AND DEVELOPMENT

Transmitted by a letter of 18 March 1969 from the General Counsel

I. Introductory note

1. The International Bank for Reconstruction and Development (the World Bank) appreciates this renewed opportunity to comment on the draft Convention on the Law of Treaties. The following observations by the General Counsel of the Bank are intended to supplement those he had made at the beginning of the first session of the Conference.<sup>1/</sup>

2. The Bank has noted with satisfaction the tentative decisions taken by the Committee of the Whole with respect to the scope of the Convention in relation to the several types of treaties of principal concern to international organizations:

(a) Through articles 1, 2 (a) (1) and 3, to exclude treaties to which international organizations are parties, but at the same time to recommend "to the General Assembly of the United Nations that it refer to the International Law Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations".<sup>2/</sup>

(b) Through article 4, to qualify the application of the Convention to treaties that are constituent instruments of international organizations or that are adopted within such organizations.

These decisions are welcomed not because it is considered that treaties relating to international organizations should not be subject to any regulation, but because of the concern that any such regulation should only be consequent on an extensive and intensive study of the existing and developing practices - a study which the International Law Commission deliberately excluded in formulating the articles now

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1/ A/CONF.39/7/Add.1 and Corr.1.

2/ Draft resolution adopted by the Committee of the Whole in connexion with its consideration of article 1.

under consideration by the Conference and which that body could not have undertaken in the limited time available to it.

3. The above-mentioned decisions have not, however, diminished the interest of the Bank in the work of this Conference. In the first place, it is recognized that the international organization treaties excluded from the draft Convention are likely to become the subject of another instrument, which, as the Bank has previously pointed out, should not deviate more than absolutely necessary from that relating to inter-State agreements; it would be most undesirable to create wholly different regimes for separate types of treaties that differ from each other only in whether or not international organizations are parties to them.<sup>3/</sup> Secondly, under proposed article 3 (c), the provisions of the draft Convention will in effect govern the inter-State aspects of multilateral treaties to which international organizations are also parties, and thus that instrument would at least indirectly affect the interests of such organizations. Finally, the important agreements that are the constituent instruments of or that are adopted within international organizations are not to be excluded from the draft Convention, but are to be governed by its terms, subject to any relevant rules of the organization concerned - if and to the extent such rules exist.<sup>4/</sup>

## II. Observations relating to particular provisions or proposals

4. Article 2 (1) (c). In an amendment referred by the Committee of the Whole to the Drafting Committee, France proposed to add a definition of the term "adoption of the text of a treaty" as meaning "all the acts establishing the definitive wording of the text with respect to which the negotiating States will have to express their consent".<sup>5/</sup> In his intervention at the sixth meeting of the Committee of the Whole, the General Counsel of the Bank pointed out that the wording of that definition assumed that the texts of all treaties would invariably be formulated by the States that are to become parties to them, either in direct negotiation, or at an international conference, or at least in the plenary organ

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<sup>3/</sup> A/CONF.39/7/Add.1, para. 3.

<sup>4/</sup> In this connexion, see the statement by the Chairman of the Drafting Committee (A/CONF.39/11, Committee of the Whole, 28th meeting, para. 15).

<sup>5/</sup> A/CONF.39/C.1/L.24, para. 1.

of an organization.<sup>6/</sup> In fact, in recent years different techniques have increasingly come into use, as illustrated by the "adoption", by the Executive Directors of the World Bank, of the Articles of Agreement of the International Finance Corporation (IFC)<sup>7/</sup> and of the International Development Association (IDA)<sup>8/</sup> as well as of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the SID-Convention),<sup>9/</sup> or by the approval and promulgation by the Board of Governors of the International Atomic Energy Agency of the Agreement on the Privileges and Immunities of the Agency;<sup>10/</sup> neither of these two organs represents directly more than a fraction of the potential parties to these instruments. While it is recognized that article 4 permits the establishment of a special regime for treaties adopted within an international organization, such treaties are explicitly not excluded from the draft Convention, and the definitions in article 2 (1) will thus presumably apply to them and in particular will also apply to and therefore qualify article 4 itself. It is therefore suggested that, if the proposed definition is adopted, the words "the negotiating" be omitted.

5. Article 2 (2). In its initial comments, the Bank suggested that article 2 (2) be expanded by adding the following underlined words:

"2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State, in the practice of international organizations or in any treaty." <sup>11/</sup>

Ceylon subsequently introduced a corresponding amendment,<sup>12/</sup> which was referred by the Committee of the Whole to the Drafting Committee. As the Bank had pointed out, some of the terms proposed to be defined in article 2 (1) for the purposes of

<sup>6/</sup> A/CONF.39/11, Committee of the Whole, sixth meeting, para. 24.

<sup>7/</sup> United Nations, Treaty Series, vol. 264, p. 117.

<sup>8/</sup> Ibid., vol. 439, p. 249.

<sup>9/</sup> Ibid., vol. 575, p. 159.

<sup>10/</sup> Ibid., vol. 374, p. 147.

<sup>11/</sup> A/CONF.39/7/Add.1, para. 10.

<sup>12/</sup> A/CONF.39/C.1/L.17.

the Convention are already in current, extensive use in somewhat different senses in the practice of international organizations or in certain treaties. For example, in the SID-Convention the term "Contracting State" means a State for which that instrument is in force; under article 2 (1) (g) of the draft Convention such a State would be a "party", whereas a "Contracting State" would mean one which has consented to be bound by a treaty, whether or not the latter had entered into force (article 2 (1) (f)). The Bank, therefore, hopes that the Ceylonese amendment will be adopted.

6. Article 8 (3). Both the Bank and Ceylon have pointed out that article 8, while in substance dealing only with the majorities required to adopt the text of a treaty, is expressed in a form that suggests that it constitutes a complete catalogue of the methods by which the text of a treaty may be adopted; as such, however, it is defective in not referring to the increasingly frequent adoption of treaties within an international organization.<sup>13/</sup> Since article 4 would explicitly include treaties so adopted within the coverage of the draft Convention, it appears appropriate to supplement article 8 by a new paragraph along the lines of the following amendment:

"3. The adoption of the text of a treaty by an international organization takes place by action of a competent organ of such organization according to its rules." <sup>14/</sup>

Alternatively, the words "by States" might be added in existing article 8 (1), after the words "the text of a treaty".

7. Article 17 (3) would recognize the important principle that with respect to a treaty that is the constituent instrument of an international organization, it should generally be for a competent organ of that organization to decide whether a proposed reservation is acceptable. Since it may not be possible to cover that point through a "rule" of the organization as permitted by article 4, the Bank considers it most important that article 17 (3) be maintained and consequently

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<sup>13/</sup> A/CONF.39/7/Add.1, paras. 15 and 16, and A/CONF.39/5 (vol. I), pp. 106-108.

<sup>14/</sup> A/CONF.39/C.1/L.43.

regrets that at least two proposals for the merger of articles 16 and 17 would result in its omission.<sup>15/</sup>

8. However, as originally formulated, article 17 (3) is, necessarily, limited to reservations that are offered after the treaty in question has entered into force and the organs established by it are functioning. In practice, however, reservations may be offered at an earlier time, and the very question of the entry into force of the instrument may depend on whether or not these are to be accepted and the States proposing them are to be considered among the initial parties. In its comments the Bank had suggested that if the treaty had been adopted within another international organization (for example, the Articles of Agreement of IFC and IDA, and the SID-Convention which created the International Centre for Settlement of Investment Disputes), the latter might play a useful role in deciding on the acceptability of such an early reservation.<sup>16/</sup> This might be accomplished by the reformulation and expansion of article 17 (3) along the following lines:

"3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides:

"(a) If the treaty has entered into force, a reservation requires the acceptance of the competent organ of that organization;

"(b) If the treaty has not yet entered into force and is one that had been adopted within another international organization, a reservation requires the acceptance of the competent organ of the latter organization;

"(c) In cases not falling under either of the preceding sub-paragraphs, the expression of the consent of the State which formulated the reservation takes effect only when the competent organ of the organization of which the treaty is the constituent instrument has been constituted and has accepted the reservation."

The final paragraph of the above proposal is based on an Austrian amendment relating to this provision.<sup>17/</sup> If the formulation suggested above should not prove to be acceptable, then the Bank hopes that at least that amendment, or the

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<sup>15/</sup> Amendments by the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115) and France (A/CONF.39/C.1/L.169).

<sup>16/</sup> A/CONF.39/7/Add.1, para. 18.

<sup>17/</sup> A/CONF.39/C.1/L.3.

similar one proposed by China<sup>18/</sup> (both of which have been referred to the Drafting Committee) will be approved.

9. Article 17 (4) and (5). As the Bank had pointed out previously, while the rules stated in this article might be satisfactory in relation to many treaties, they are likely to be inappropriate for others.<sup>19/</sup> Therefore it has been noted with satisfaction that the Drafting Committee has provisionally added the words "unless the treaty otherwise provides" to both paragraphs.<sup>20/</sup> Consideration might, however, still be given to the expansion of these clauses to read: "unless the treaty otherwise provides or it is otherwise agreed or specified", to cover the not infrequent practice of stipulating in the Final Act of a treaty-drafting Conference that certain reservations are to be admissible, and as to these there is, of course, no right to object.

10. Article 20 (1). Since article 17 (3) already provides that under certain contingencies a proposed reservation would be accepted by the competent organ of an international organization, it seems appropriate to add the words "or organization" following the words "of a State" in article 20 (1). As article 17 is now formulated, the organization to be referred to in article 20 (1) would be the one of which the treaty in question is the constituent instrument; if the Bank's proposal in paragraph 8 should be approved, that organization might also be the one within which the treaty in question had been adopted.

11. Article 27 (2). As the Bank recalled in its earlier comments, in connexion with each of the three multilateral international agreements adopted by its Executive Directors these also adopted an "Explanatory Memorandum" or "Report", which accompanied the text of these treaties when they were submitted to the member States of the Bank for signature and acceptance, ratification or approval and indeed still are normally published together with those instruments. It was thus clearly intended that these documents constitute part of the "context for the purpose of the interpretation" of these treaties.<sup>21/</sup> However, they do not fall

<sup>18/</sup> A/CONF.39/C.1/L.162.

<sup>19/</sup> A/CONF.39/7/Add.1, para. 19.

<sup>20/</sup> A/CONF.39/C.1/L.344.

<sup>21/</sup> A/CONF.39/7/Add.1, para. 21.

within any of the categories now listed in article 27, since they are not agreements or instruments made by the parties, as required by that provision. The Bank therefore proposed to add a new sub-paragraph to article 27 (2) along the following lines:

"(c) any other instrument, if it was intended to constitute part of the context for the interpretation of the treaty."

The Bank is aware that the Committee of the Whole subsequently rejected an amendment which was formulated along similar lines.<sup>22/</sup> That proposal was, however, restricted to treaties adopted within international organizations, and might thus be considered as falling within the special regime of article 4. The paragraph proposed by the Bank was deliberately cast in more general terms, and as such it is hoped that it might prove acceptable to the Conference.

12. Articles 62 (4), 62 bis and 76. In its original submission the Bank catalogued over a dozen provisions of the draft articles that used terms which, because of their subjective or controversial nature or merely because of their novelty, made it highly desirable that the parties to the proposed Convention be able to submit any differences that might arise with regard to these terms to impartial, if possible judicial, determination.<sup>23/</sup> The Bank hopes that the Convention will itself include an adequate mechanism for the settlement of disputes, as has been urged by several States, inter alia, in the form of a new article 62 bis or 76.

13. Article 71 (1). The Bank welcomes the tentatively approved addition to article 71 (1) of a reference to the depository functions of international organizations or of their chief administrative officers, since these are tasks that are with increasing frequency being assigned to organizations.

14. Article 72 (1). Experience has shown that the depository of a treaty which is the constituent instrument of an international organization sometimes fails to inform that organization promptly of acts, communications and notifications

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<sup>22/</sup> A/CONF.39/C.1/L.212.

<sup>23/</sup> A/CONF.39/7/Add.1, para. 8.



relating to the treaty. It would therefore be desirable to insert after article 72 (1) (e) (which requires depositaries to inform States parties or entitled to become parties) a new sub-paragraph along the following lines:

"(e) informing an international organization of acts, communications and notifications relating to the treaty which is its constituent instrument;"

15. Article 74 (2). For reasons similar to those indicated in paragraph 14 with respect to article 72, it would also be desirable to add to article 74 (2) (which deals with correction of errors) a new sub-paragraph along the following lines:

"(d) if the treaty is the constituent instrument of an international organization and is in force, the notifications required by the previous sub-paragraphs shall also be addressed to it."

16. Article 75 (2). The Bank welcomes the tentatively approved adoption of this new paragraph, which would, inter alia, clarify the powers of international organizations to register or to file and record treaties of which they are depositaries, even if this function is not specified in these instruments.

17. Final Clauses. As it is not clear from any of the provisions that have so far been proposed for the draft Convention what effect that instrument is to have on existing treaty relationships, it is desirable that this question be clearly settled in the final clauses.

### III. Draft resolution relating to article 1

18. As indicated above, the Bank has noted with satisfaction the proposed resolution which is to recommend to the General Assembly that it refer to the International Law Commission the study of the questions of treaties concluded between States and international organizations or among such organizations.

19. In connexion with this proposal the Bank urges that special consideration be given to the procedure by which such a study is to be conducted and especially by which its results might be incorporated into an international instrument paralleling the Convention at present under consideration. In particular it would appear desirable that those organizations, such as the Bank and IDA (which together have in the past twenty years concluded over 800 international agreements),

having extensive experience with and operations requiring the frequent conclusion of treaties, be allowed to participate fully at every stage of the formulation of and any follow-up on the proposed study; such participation is indeed necessary if adequate account is to be taken of the diverse practices of these organizations. The Conference might therefore consider whether a reference to this matter should not be included in the proposed resolution itself or at least be mentioned in any report that the Conference might make to the General Assembly.

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