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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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WRITTEN STATEMENTS (continued)

6. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

Transmitted by a letter of 26 March 1968 from the General Counsel

I. Introductory Note

1. The International Bank for Reconstruction and Development (the Bank) appreciates the opportunity offered to it to present comments on the "Draft Articles on the Law of Treaties". The following comments by its General Counsel include certain general observations, as well as specific comments on Parts I, II and III of the Draft Articles. The Bank intends to submit additional comments on the remaining Parts, and to clarify or supplement its comments as may prove to be appropriate.

II. Procedural Comments

2. In examining the Draft Articles on the Law of Treaties to be considered at the Vienna Conferences of 1968 and 1969, the Bank has been conscious that the current draft expressly excludes (see Articles 1, 2 and 3) from its scope agreements concluded by international organizations, such as the Bank and its affiliates, and that it relates only conditionally (see Article 4) to treaties "which are constituent instruments of an international organization or are adopted within an international organization", a description which fits its own Articles of Agreement<sup>1/</sup>, as well as the several multilateral treaties that the Bank has sponsored and for which it is acting as depositary<sup>2/</sup>.

3. In view of the growing number and importance of the agreements falling into the categories excluded from the present draft, the Bank anticipates that if a Convention on the law of treaties is adopted, it will be followed in the not-too-distant future by another similar instrument dealing with

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<sup>1/</sup> UN Treaty Series, Vol. 2, page 134.

<sup>2/</sup> Articles of Agreement of the International Finance Corporation (UN Treaty Series, Vol. 264, page 117);  
Articles of Agreement of the International Development Association (UN Treaty Series, Vol. 439, page 249);  
Convention on the Settlement of Investment Disputes between States and Nationals of Other States (UN Treaty Series, Vol. 575, page 159).

treaties to which international organizations are parties. It seems clear that in formulating such an instrument, care will have to be taken that, whatever special rules may be required with respect to procedural aspects, the substantive provisions governing such treaties do not deviate more than necessary from those established in relation to treaties among States. It would be undesirable to create wholly different regimes for inter-State agreements and for those whose parties include both States and international organizations, and perhaps still another for the growing number of agreements to which only organizations are parties<sup>3/</sup>.

4. Though the undesirability of creating multiple treaty regimes suggests that all these instruments be dealt with in a single Convention, the Bank shares the concern expressed by the International Law Commission that extensive and intensive studies will be necessary before the rules applicable to the agreements of international organizations can be codified. One evident difficulty is that the entire body of law relating to international organizations is new and developing at a much more rapid rate than the older and better established treaty practices of States. Without attempting to catalogue here all the special devices used by international organizations in this field, any instrument dealing with international organization treaties will have to take account, inter alia, of the following practices, which are naturally not reflected in the current draft:

- (a) The entry into force of an agreement occurring directly as a consequence of the separate actions of the legislative organs of the organizations concerned, without the exchange of any signatures or ratifications. This procedure is customarily used in concluding relationship agreements between organizations.<sup>4/</sup>
- (b) The custom whereby international organizations frequently accept by implication (rather than expressly as foreseen in Draft

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<sup>3/</sup> For example, the Relationship Agreement between the United Nations and the Bank (UN Treaty Series, Vol. 16, page 346).

<sup>4/</sup> See the Agreement cited in footnote 3 as well as the others reproduced in: Agreements between the United Nations and the Specialized Agencies and the International Atomic Energy Agency (ST/SG/14).

- Article 31) obligations or functions with respect to treaties to which they are not parties (but which they may have sponsored)<sup>5/</sup>.
- (c) The explicit or implicit delegation by an organization to another of the power to sign agreements in its name. Examples of explicit delegation (to the Bank) appear in the Articles of Agreement of the International Finance Corporation (I.F.C.) (Article IV, Section 7)<sup>6/</sup> and of the International Development Association (I.D.A.) (Article VI, Section 7)<sup>6/</sup>. Implicit delegation is customary in concluding standard technical assistance agreements between a State and all the organizations participating in the UN Development Programme<sup>7/</sup>.
- (d) The dual mechanism whereby organizations on the one hand and States on the other may become parties to a particular agreement, such as the Convention on the Privileges and Immunities of the Specialized Agencies<sup>8/</sup> (for which the participation of organizations is governed by Article X and that of States by Article XI).
- (e) The general absence of any ratification procedure by organizations, even in concluding agreements with States whose representatives are only authorized to sign subject to ratification.

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<sup>5/</sup> Sometimes the sponsoring organization assumes such functions explicitly by signing the treaty (without, however, becoming a party to it), as the Bank did, for example, with respect to the three Agreements cited in footnote 2: more frequently this is not done - for example, the International Atomic Energy Agency assumed several functions under or in connexion with the Vienna Convention on Civil Liability for Nuclear Damage, without signing it or the Final Act of the Conference at which it was formulated (see IAEA Legal Series No.2).

<sup>6/</sup> See citations in footnote 2.

<sup>7/</sup> See, for example, the Agreement on Operational Assistance with Malawi, UN Treaty Series, Vol. 541, page 12.

<sup>8/</sup> UN Treaty Series, Vol. 33, page 261.

In addition to these "procedural" points, due consideration should be given to the application of many of the even more important "substantive" provisions of the Draft Articles to the agreements of international organizations. While in the event it may be determined that no more than an adaptation of the text of the Articles as they relate to States will be required, no such determination can be made until a careful examination of the character and subjects of the agreements of international organizations has been undertaken.

5. Whether or not the regime of treaties to which international organizations are parties is to be incorporated into an instrument relating primarily to agreements concluded among States, or is to be expressed in a subsequent, parallel instrument, special consideration should be given to the procedure whereby the provisions relevant to organizations are to be formulated. The Bank, which in just over twenty years of operation has concluded over 600 international agreements (for the most part Loan and Guarantee Agreements, but also including Relationship Agreements, Technical Assistance Agreements, etc. - not counting the over 100 Credit and other Agreements of its affiliate, the International Development Association), suggests that the participation of the major international organizations in the process of developing the text of any such instrument should be arranged on a more extensive basis than mere observer status at the final drafting conference. While there may be objection to international organizations becoming full or associated parties to such an instrument, provision ought to be made for their full participation (without vote) at all stages of its formulation.

### III. Substantive Comments

6. The Bank would like to indicate briefly certain concerns it has about the Draft Articles, even assuming there will be no substantial change in their present scope. These observations are prompted by the following considerations:

- (a) Though treaties to which international organizations are parties are excluded from the Draft Articles, these necessarily deal with agreements sponsored or administered by organizations, or which constitute their constitutional charters or for which they act as depositaries.
- (b) As already stated, it is both likely and desirable that if any separate instrument relating to international organization treaties is formulated, its substantive provisions will closely follow those relating solely to inter-State treaties.
- (c) As a major international financial institution having obligations and investments throughout the world, the Bank is naturally interested in the maintenance and improvement of legal relationships among States, and particularly in the stability and certainty of treaty relations.

#### A. General Observations

7. It is not clear from the Draft Articles what effect they are to have on existing treaty relationships. This question should be clearly settled in the Convention itself.

8. A number of provisions of the present draft are such that for their effective administration it will be necessary that the parties to the proposed Convention (or to the treaties to which it is to relate) be able to submit any differences that may arise to impartial, if possible judicial, determination. These include both provisions using terms requiring an essentially subjective interpretation, or those that introduce terms not yet adequately defined by international practice. For example:

- (a) Article 16(c): What reservations are "incompatible with the object and purpose" of a treaty?

- (b) Article 28: When does an interpretation leave the meaning of a treaty "ambiguous or obscure or ... lead(s) to results which are manifestly absurd or unreasonable"?
- (c) Article 37(1)(b)(ii): From what provisions would derogation be "incompatible with the effective execution of the object and purpose of the treaty as a whole"?
- (d) Article 41(3)(a): What clauses are "separable from the remainder of the treaty with regard to their application"?
- (e) Article 41(3)(b): What clauses constitute "an essential basis of the consent of the other party or parties to the treaty as a whole"?
- (f) Article 43: When is the violation of the internal law of a State "manifest" so as to enable it to invoke this fact to invalidate a treaty?
- (g) Article 45(1): What facts or situations form "an essential basis of (the States') consent to be bound by the treaty"?
- (h) Article 50: What are the "peremptory norm(s) of general international law from which no derogation is permitted"?
- (i) Article 57(2)(b): What party is "specially affected by the breach" of a treaty so as to be able to invoke such breach as a ground for suspending the operation of the treaty in whole or in part?
- (j) Article 57(2)(c): What treaty is "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty"?
- (k) Article 59(1)(a): What circumstances "constituted an essential basis of the consent of the parties to be bound by the treaty"?
- (l) Article 59(1)(b): What changes have the effect of "radically" transforming "the scope of obligations still to be performed under the treaty"?
- (m) Article 61: How is the emergence of "a new peremptory norm of general international law" to be established?

In making this comment the Bank recognizes that the seriousness of this problem is mitigated in the case of most of its own (and IDA's) international agreements by the inclusion therein of procedures for the impartial settlement, through binding arbitration, of differences arising out of or in connexion with these agreements<sup>9/</sup>; the constituent instruments of the Bank, IFC and IDA provide that questions of interpretation of these instruments are to be finally decided by the governing organs of each institution, while certain disputes are to be settled by binding arbitration<sup>10/</sup>; finally, Article 64 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States brings disputes regarding the interpretation or application of that instrument within the compulsory jurisdiction of the International Court of Justice. Nevertheless, the Bank considers that its own interests, as well as those of the States and organizations with which it deals, would be best protected if the Convention, whether or not it expressly relates to agreements concluded by international organizations, would itself contain effective provisions for the settlement of disputes relating to the application of its provisions to other treaties; this is so since (i) not all of the Bank's agreements can be provided with dispute provisions adequate to cover all contingencies; (ii) treaties have been and will be concluded under which the Bank derives rights and obligations or which concern its functions but to which it is not a party; and (iii) finally, because the Bank is convinced that the tasks entrusted to it by States can best be carried out in a community of nations in which the requirements of justice, good faith, stability and certainty are all adequately safeguarded.

9. In a number of provisions, the Draft Articles show concern lest the conduct of certain parties to a treaty derogate from the rights of other "parties" thereto. However, an increasing number of modern agreements,

<sup>9/</sup> See e.g., Section 7.04 of Loan Regulations No. 4 of the Bank, UN Treaty Series, Vol.400, page 212, at 232.

<sup>10/</sup> See e.g. Article IX of the Articles of Agreement of the Bank.



such as those relating to human rights, accord rights and sometimes assign corresponding obligations to persons (e.g., individuals) other than parties or potential parties. The Bank's own Articles of Agreement provide substantial protection to lenders to the Bank or to those who accept its guarantee, through the device of reserving 80 per cent of the capital subscription of each member for the sole purpose of meeting such obligations <sup>11/</sup> - which is a security from which the States parties to the Articles of Agreement should not be allowed to derogate even by an arrangement inter se. Similarly, under the Convention on the Settlement of Investment Disputes that certain irrevocable procedural rights can be established for both governments and for investors who are nationals of Contracting States, and it is even provided that these rights may not be derogated from by amending or denouncing the Convention <sup>12/</sup>. The Bank therefore, while aware of the Commission's decision to exclude from the Draft Articles the application of treaties to individuals <sup>13/</sup>, and recognizing the formidable procedural and substantive difficulties in fully preserving the rights of non-parties (in particular if they are not States), wonders whether it would not be possible at least to negate the implication, (in provisions such as Articles 37, 54, 55, 56 and 66 (1)(b)) that the possible existence and the need to protect such rights can be entirely disregarded.

B. Observations relating to particular Articles

Article 2

10. Paragraph 2 of Article 2 of the Draft Articles provides that the definitions given in paragraph 1 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". The Bank suggests the addition to the end of paragraph 2 of the words ", in the practice of international organizations

<sup>11/</sup> Article II, Section 5(ii)

<sup>12/</sup> Articles 66(2) and 72.

<sup>13/</sup> Paragraph 33 of the ILC's Introductory Comments to the Draft Articles (A/6309/Rev.1, page 7, at 10).

or in any treaty". The first part of the proposed addition is self-explanatory if one considers the important functions and consequently extensive practice of international organizations under and in respect of treaties, and this amendment would seem desirable regardless of the final formulation of Article 4. The reason for the (second part of the) suggested addition is that at least some of the defined terms, such as "Negotiating State", "Contracting State" and "Party" may be used in particular treaties in a sense different from the definitions. For example, in the Convention on the Settlement of Investment Disputes, the term "Contracting State" means a State which has consented to be bound by the treaty and for which the treaty is in force; for the purposes of the Draft Articles such a State would be a "Party" (Article 2(1)(g)) - whereas a "Contracting State" means any State which has consented to be bound by the treaty, whether or not the treaty has entered into force (Article 2(1)(f)).

#### Article 4

11. The Bank has studied with particular interest Article 4 of the Draft Articles and the comments made thereon by the Secretary-General of the United Nations and by certain of the specialized agencies as well as by certain governments. It feels that considering the draft as it now stands there is a clear need for special treatment of the constituent instruments of international organizations and for treaties adopted within an international organization.

12. With respect to the first category, "constituent instruments", the Secretary-General has rightly pointed out that without Article 4 the Draft Articles would be in conflict with the UN Charter and rules adopted under it <sup>14/</sup>. Similarly, the acquisition of membership in the Bank, IFC and IDA takes place in accordance with their respective Articles of Agreement, with the applicable Rules of Procedure of the Boards of Governors and Executive Directors and with particular resolutions passed by these bodies with respect to each candidate, rather than in accordance

with Articles 10-12 of the Draft Articles. In addition, further international agreements relating to such constituent instruments may be concluded in manners different from those described in the Draft Articles. To mention just one recent example, the replenishment of the resources of IDA is being undertaken through a resolution of the Board of Governors of the Association (its plenary organ) authorizing supplementary contributions to be made by certain members, which is to be followed by notifications to the Association on the part of these members constituting their agreement with the Association and each other to make the contributions authorized under the resolution.

13. The Bank believes that there is an equal need for covering in Article 4 the second category of international agreements mentioned therein, namely "treaties which are . . . adopted within an international organization". Three treaties (each of which is at the same time the constituent instruments of an international organization), namely the Articles of Agreement of IFC and IDA and the Convention on the Settlement of Investment Disputes, were "adopted within" the Bank. Each of these agreements was "adopted" (in the sense in which that term is used in the Commission's Commentary to Article 8: that is to say, of settling "the form and content of the proposed treaty") by the Executive Directors of the Bank, who thereupon submitted the proposed instruments to the member governments of the Bank for signature followed by acceptance, ratification or approval. This technique of treaty making is one that is not reflected in the Draft Articles.

14. Article 4 states that the applicability of the treaties defined therein "shall be subject to any relevant rules of the organizations". The Bank suggests that this language might be clarified, first by making express reference to the constituent instruments themselves, which might not be considered as included in the expression "relevant rules", and second, by adding the words "or decisions" after "rules". A reference

to the decisions of organizations would seem to be desirable, since in institutions like the Bank treaty making is undertaken on an ad hoc basis, pursuant to decisions of the plenary organ (such as the Board of Governors) or pursuant to powers delegated to another organ (such as the Executive Directors), and no standing rules are either included in the constituent instrument or have been or are likely to be adopted <sup>15/</sup>.

#### Article 8

15. The delegate of Ceylon has drawn attention to the fact that "the Draft Articles did not seem adequately to cover at least one of the new techniques of treaty making which has developed in recent years, namely the adoption of the text of a treaty by an international organization pursuant to its inherent power" <sup>16/</sup>. Specific examples cited were the Articles of Agreement of IFC, IDA and the Convention on the Settlement of Investment Disputes. Article 8, when read in conjunction with Article 4, makes it clear that, as stated in the Commission's Commentary (para. (6) to Article 8): "the voting rule for adopting the text of the treaty must clearly be the voting rule applicable in the particular organ in which the treaty is adopted"; in this respect, therefore, there is no need to amend Article 8. The Bank notes, however, that while the Article is intended to deal solely with the voting majority by which the text of a treaty may be adopted, it is cast in terms which make it appear that the text of a treaty is invariably "adopted" or that the "form and content of the proposed treaty" are always "settled" <sup>17/</sup> by States. In this sense Article 8 fails to recognize the particular technique of treaty making referred to above.

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<sup>15/</sup> See also paras. 17 and 18, below, and footnote 17 to para. 21, for additional reasons for referring in Article 4 to the "decisions" of organizations.

<sup>16/</sup> A/Conf.39/5 (Vol.1), p.106.

<sup>17/</sup> Using the Commission's language in para. (1) of its Commentary on Article 8.

16. In justifying its formulation of another provision<sup>18/</sup>, the Commission stated that that provision "recognizes a practice which occurs with some frequency today and requires notice in the Draft Articles". The Bank suggests that the same considerations would justify amending Article 8 so as to recognize the fact that "adoption" of a treaty may be an act of an organ of an international organization rather than of States. While this result could be achieved by simply inserting the words "by States" after "the text of a treaty" in paragraphs 1 and 2 of Article 8, it might be preferable to complete the otherwise apparently full catalogue of treaty adoption techniques by also adding a third paragraph along the following lines:

"3. The adoption of the text of a treaty by an international organization takes place by action of a competent organ according to its rules."

Article 17(3)

17. This provision reflects the correct view that "in the case of instruments which form the constitutions of international organizations...it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable".<sup>19/</sup> The Commission considered the retention of the paragraph to be desirable notwithstanding a partial overlap with Article 4:

"to provide a rule in cases where the rules of the international organization contain no provision touching the question".<sup>19/</sup>

This comment raises a question as to the meaning of "rules" in Article 4 and suggests that a "decision" by the competent organ of an organization is not covered by the term "rules". This uncertainty underscores the desirability

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<sup>18/</sup> See para. (1) of the Commentary on Article 22.

<sup>19/</sup> See para. (20) of the Commentary on Articles 16 and 17.

of adding "decisions" to "rules" in Article 4, as proposed in the Bank's observations on that Article (para. 14, above).

18. Paragraph 3 of Article 17 also raises a different problem, since the provision can be applied only after the constituent instrument of the international organization has entered into force. Consideration might therefore be given to stating this expressly by speaking of "a constituent instrument of an international organization which has entered into force". However, with or without the addition of the underscored words, paragraph 3 does not provide any procedure for dealing with reservations formulated prior to the entry into force of a constituent instrument, including such reservations on whose acceptability depends whether the minimum participation required for entry into force has been achieved. Where the constituent instrument has been adopted within another international organization which is at the same time the depositary, the latter might play a useful role in deciding on the acceptability of such early reservations; Article 4, especially if it is amended by adding a reference to the "decisions" of organizations, would cover this situation.

#### Article 17(4) and (5)

19. While both of these provisions may be satisfactory to the parties to certain treaties, they may not be appropriate for others. Consequently, both paragraphs should be introduced by the words: "Unless the treaty otherwise provides ...".

#### Articles 27 and 28

20. The Bank shares the views of the governments that expressed regret at the Commission's low estimate of the significance of travaux préparatoires in the interpretation of treaties, particularly as related to multilateral instruments. A distinction in this regard between bilateral or restricted multilateral treaties and those of a general or quasi-general nature seem justified as an abstract proposition and this is confirmed by experience. The provisions of a treaty frequently reflect the results of compromises. As the number of participants in the adoption process increases, so does the likelihood that the terms used will depart from their "ordinary meaning".

The difficulties in this respect are exacerbated by the ever mounting number of multilateral agreements and the correspondingly reduced time and effort which can be given to their formulation. The proposition might therefore be advanced that recourse to travaux préparatoires should be the rule rather than the exception in establishing a "special meaning" under paragraph 4 of Article 27. Certainly, the Bank's experience in interpreting its own Articles of Agreement has given it cause to regret that only a portion of the travaux préparatoires of the Bretton Woods Conference has been preserved.

21. Apart from these general observations on the whole of Articles 27 and 28, a specific comment is in order with respect to paragraph 2 of Article 27. In connexion with each of the three multilateral international agreements sponsored by the Bank and adopted by its Executive Directors<sup>20/</sup>, the Executive Directors 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. It was thus clearly intended that these documents constitute part of the "context for the purpose of the interpretation" of these treaties. However, they do not fall within any of the categories in Article 27, since they are not agreements or instruments made between parties as required by that provision. It is realized that it may be cumbersome to take specific account in Article 27 of a legislative technique whereby a treaty is adopted by an organ of an international organization composed of persons most of whom represent several governments, while consent to be bound by the treaty is expressed by States in the customary manner.<sup>21/</sup> But the problem may be solved by adding a new sub-paragraph to paragraph 2 of Article 27:

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

Alternatively, a new sub-paragraph might be added to paragraph 3:

"(d) Any relevant practice of the international organization within which the treaty was adopted, and any explanatory material published by the organization at or before the time the treaty is first submitted to States.

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<sup>20/</sup> See footnote 2.

<sup>21/</sup> Indeed, it may not be necessary to do so if the word "decisions" is added to Article 4, as proposed by the Bank in para. 14 above.