

WHY TREATIES MATTER
(Opening Remarks - First Annual Conference
“Interpretation Under The Vienna Convention On The Law of Treaties -
25 Years On”)
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Ladies and Gentlemen:

Good morning. I would like to start by thanking the organizers for their kind invitation to this annual conference on treaty interpretation, which is taking place on the occasion of the 25th anniversary of the adoption of the Vienna Convention on the Law of Treaties, the so-called “treaty on treaties”.

I have been asked to open this conference with a few remarks on why treaties matter. Well, while treaties matter to all international legal subjects as one of the classic sources of rights and obligations, treaties matter all the more to international organizations. In fact, for international organizations treaties are not only one of the most important tools to conduct their operations, but treaties are also their constituent instruments. We thus owe our very existence to treaties and we conduct our work within their

¹ Dr. Maurizio Ragazzi, Senior Counsel on International Law, The World Bank, collaborated substantially in the preparation of these opening remarks.

framework. Treaties therefore certainly matter, especially for international organizations.

Accordingly what I would like to do in the next few minutes is to touch upon the constituent instruments of the World Bank and ICSID. I would like to add then a few words on the World Bank's bilateral treaties with States and international organizations, and conclude with some brief observations on the position of the World Bank vis-à-vis the 1986 Vienna Convention and the role the World Bank has played in drafting international treaties to which it is not a party. In this way, I hope to provide you with a brief overview of the practice of the World Bank with respect to different types of international treaties.

1. The Constituent Treaties of the Bank and ICSID

As you know, the expression “World Bank Group” is short-hand for five international organizations which, while separate, are linked in many respects. The International Bank for Reconstruction and Development (IBRD or the “Bank”) and the International Development Association (IDA) (jointly referred to as the “World Bank”) promote economic development projects primarily through loans (in the case of IBRD), and credits and grants (in the case of IDA). IBRD, which was founded at Bretton Woods in 1944 and has today 184 members, focuses on middle income and creditworthy developing countries; IDA, has focused on the poorest countries in the world; the International Finance Corporation (IFC),

promotes private sector development in developing countries; the Multilateral Investment Guarantee Agency (MIGA), promotes foreign direct investment into developing countries by providing political risk insurance and non-commercial guarantees. Finally, the International Centre for Settlement of Investment Disputes (ICSID), provides facilities for the conciliation and arbitration between States and foreign investors. ICSID is somewhat separate from the other four affiliates of the World Bank Group, both because of its non-financial character and the need to maintain its independence.

Despite their separate legal personality and institutional autonomy, IDA, IFC, MIGA and ICSID share strong bonds with the Bank: they are all headquartered in Washington, D.C., and their membership, in general terms, is open to those countries that are also members of IBRD. Moreover, the four financial institutions of the World Bank Group are headed by the same President while, in the case of ICSID, the General Counsel of IBRD has traditionally been elected by the Administrative Council to serve as the Secretary General of ICSID. In the case of IBRD and IDA, the same officials (including counsel) work for both institutions, and the personnel working for ICSID is in its entirety employed by IBRD, though assigned to ICSID.

The constituent instruments of the five institutions of the World Bank Group are all international treaties registered with the United Nations (UN) Secretariat. While this is not the right occasion to discuss any of these treaties in detail, let me please call your attention, given the topic of this

conference, to the provisions on interpretation contained in the constituent instruments of the Bank and ICSID.

In the case of ICSID, we have a classic example of a clause providing for compulsory jurisdiction by the International Court of Justice. In fact, according to Article 64 of the ICSID Convention, if a dispute between two contracting parties on the interpretation or application of the Convention is not settled by negotiation, or the parties do not agree on another method of settlement, the dispute must be referred to the International Court of Justice.²

On the other hand, the Bank's Articles of Agreement (like the constituent instruments of IDA, IFC and MIGA) require any question of interpretation to be submitted to the Board of Executive Directors for a decision, which is then subject to a final decision by the Board of Governors.³

The entrusting of interpretation to the same body that approves policies and operations suggests that, at these international financial institutions,

“the interpretation function, while it always should be subject to a correct legal approach, is also meant to be responsive to the needs of the institution and its members as a whole. It should therefore combine strictly sound legal analysis with considerations related to

² For commentary on Article 64, see Schreuer, *The ICSID Convention: A Commentary* (2001), 1259-64.

³ Compare Article IX(a) and (b) of the Bank's Articles with Article X(a) and (b) of the IDA's Articles, Article VIII(a) and (b) of the IFC's Articles, and Article 56(a) and (b) of the MIGA's Convention.

the business exigencies of the organization, where the efficiency of the institution in achieving its purposes and its continued relevance to the needs of its members are important factors to be taken into account.”⁴

Before I conclude on this point, I’d like to note that six characteristics have turned ICSID, over these 40 years, into a prominent arbitration center worldwide for the settlement of disputes between foreign investors and host States. These are: universality of its system, its autonomous legal framework, its specialization, the consensual nature of its role, its independence from national judiciaries, and the automatic enforcement of its awards. The ICSID contribution to treaties and treaty interpretation consists also in the fact that, typically, the countries that have ratified the ICSID Convention are also parties to bilateral, regional and multilateral treaties on investment protection. Together with the ICSID Convention, these international instruments (which often are also the subject of interpretation by the arbitral tribunals under the ICSID system) contribute towards creating a predictable legal framework, which is essential for sustained economic development.

⁴ Shihata, “The Dynamic Evolution of International Organizations: The Case of the World Bank”, 2 *Journal of the History of International Law* (2000), 217-49, at 222-3.

2. Bank Treaties with States

According to the Bank's Articles, the legal instruments to be used in lending operations are called "loan contracts".⁵ In practice, these "loan contracts" have taken many forms: loan agreements (between the Bank and the borrower), guarantee agreements (between the Bank and the member State, if the borrower is not the member State), project agreements (between the Bank and the entity carrying out the project, if different from the borrower), supplemental letters (amplifying, if necessary, the above-referred agreements), and additional arrangements whenever needed.⁶

To appreciate the magnitude of the number of agreements concluded by the Bank and IDA since their establishment, one need only take the number of loans and credits, amounting to almost 9,000 on June 30, 2005,⁷ and consider that, for each loan and credit, there is usually more than one agreement (for example, a guarantee and a loan agreement, or a credit agreement and a project agreement, not to mention the supplemental letters relating to each loan and credit). To this already considerable number of agreements, one should add the thousands of grant agreements concluded by the Bank and IDA as administrator of trust funds, as well as some *sui generis* treaties to which the Bank is a signatory, such as the Indus Water

⁵ See Article IV, Section 4, of the Bank's Articles.

⁶ On Bank agreements, see Nurick, "Certain Aspects of the Law and Practice of the International Bank for Reconstruction and Development", in Schwebel (ed.), *The Effectiveness of International Decisions* (1971), 100-28.

⁷ See "IBRD and IDA Cumulative Lending by Country, June 30, 2005", contained in the Bank Annual Report 2005, electronically available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTANNREP/EXTANNREP2K5/0,,m enuPK:1397361~pagePK:64168427~piPK:64168435~theSitePK:1397343,00.html>.

Treaty.⁸ The final count is in the order of tens of thousands treaties with States, to which the Bank or IDA is a party.

The Bank agreements with member States are governed by international law. A loan agreement with a borrower, other than a member State is insulated from the impact of domestic law by virtue of the interdependence between this agreement and the accompanying guarantee agreement with the sovereign member, who acts as primary obligor (and not merely a surety), hence a joint co-debtor.⁹ While innovative at the time these arguments and conclusion have since been widely accepted.¹⁰

3. Bank Treaties with International Organizations (more particularly, the UN)

In addition to States, international organizations too have been parties to agreements with the Bank. Most of them have an operational nature, such as those concluded by the Bank with regional development banks or United Nations programs, either in its own capacity or as administrator of trust funds, for specific projects or activities.

⁸ On this treaty, and the role of the Bank in the Indus dispute, see Salman, “Good Offices and Mediation and International Water Disputes”, in The International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of International Water Disputes* (2003), 155-99, at 183-97.

⁹ Broches, “International Legal Aspects of the Operations of the World Bank”, 98 *Hague Recueil* (1959, III), 297-409, at 343-53.

¹⁰ See Delaume, “Issues of Applicable Law in the Context of the World Bank’s Operations”, in Horn and Schmitthoff (eds.), *The Transnational Law of International Commercial Transactions* (1982), 317-28, at 320-4.

A foundational text, for the Bank, is the relationship agreement it concluded with the UN in 1947, whereby it became a UN specialized agency. A distinguishing feature is that the relationship agreement expressly acknowledges that the Bank, by the nature of its international responsibilities and the terms of its constituent instrument, “is, and is required to function as, an independent international organization”. Thus, while the Bank is not obliged by UN resolutions, in the 1947 Agreement it obliged itself to give due regard to these resolutions. Independence is therefore an important element in the interpretation of the reciprocal rights and obligations of the Bank vis-à-vis the UN.

Over the last few years, the contractual relationship between the Bank and the UN has found a new area of expansion in the common work of the two institutions in post-conflict situations. A case in point is the exchange of notes between the World Bank Group and UNMIK (the international civil administration in Kosovo) on the privileges and immunities of the World Bank Group and its officials in Kosovo, which was then implemented in Kosovo by UNMIK Regulation 2000/44.¹¹

¹¹ The text of the Regulation is electronically available at http://www.unmikonline.org/regulations/unmikgazette/02english/E2000regs/RE2000_44.htm.

4. The Bank and the 1986 Vienna Convention on Treaties with International Organizations

Given the Bank's extensive practice with international treaties, both with States and with international organizations, one may query why the Bank has not become a party to the Vienna Convention adopted in 1986,¹² all the more so as even a cursory review of the official records of the Conference leading to the adoption of the Convention reveals the Bank's contribution to its drafting.¹³

When the codification process was still under way, the Bank flagged two main reasons for concern. The first one was "the possibility that a problem of validity or of interpretation of an international agreement would receive a different solution depending on whether the agreement was subject to the Vienna Convention or to customary international law". The second one was the Bank's preoccupation that certain provisions (such as those on the invalidity, termination and suspension of treaties) would be ill suited to long-term financial agreements.¹⁴

While I cannot elaborate here on these two expressions of concern, my main point is that they have not precluded the Bank's contribution to the drafting of the 1986 Vienna Convention and the application, in the Bank's practice, of some of its provisions reflecting customary international law.

¹² The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations has not yet entered into force. No international financial institution has become a party to it.

¹³ Bank representatives (Broches and Szasz) had also participated, as observers, in the two sessions of the conference leading to the adoption of the 1969 Vienna Convention on the Law of Treaties.

¹⁴ See the Bank's comments of 1983 reported in Doc.A/38/145/Add.1, 27-32.

5. The Bank's Contribution to the Drafting of Treaties to which it is not a Party

The drafting of the 1986 Vienna Convention is not an isolated instance of Bank contribution to the drafting of an agreement to which it is not a party. Actually, there have been several cases in which the role of the Bank has not merely been that of a contributor among others, but rather that of the driving force behind the agreement.

For example, I recalled earlier how the idea of ICSID was originally conceived, in 1961, by the then General Counsel. A more recent example is the creation of MIGA, with respect to which former General Counsel Ibrahim Shihata has written it is “no exaggeration to state that MIGA owes its establishment primarily to the persistent efforts of a few Bank staff members”.¹⁵

We have here, therefore, a case in which the treaty-making activity of the Bank did not find expression in the preparation of a treaty to which it would be a party, but of the constituent instrument of an international organization, endowed with separate legal personality, to which the Bank would not be a party.

¹⁵ Shihata, “MIGA’s Creation and Evolution – A Personal Account”, in Briner *et al.* (eds.), *Law of International Business and Dispute Settlement in the 21st Century. Liber Amicorum Karl-Heinz Böckstiegel* (2001), 741-52, at 741.

Well, in these introductory remarks, which are also my last public remarks as General Counsel, I have only touched upon a few aspects of the Bank's practice on treaties. Despite the necessarily succinct exposition, I hope I have been able to give you an idea of why treaties do matter for international organizations and why I very much look forward to today's discussion on the many facets of treaty interpretation.

Thank you very much.
