

INTERPRETATION AS PRACTICED AT THE WORLD BANK

“Interpretation

- (a) *Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Article V, Section 4 (h).*
- (b) *In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board, the Bank may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.*
- (c) *Whenever a disagreement arises between the Bank and a country which has ceased to be a member, or between the Bank and any member during the permanent suspension of the Bank, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Bank, another by the country involved and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the Permanent Court of International justice or such other authority as may have been prescribed by regulation adopted by the Bank. The umpire shall have full power to settle any questions of procedure in any case where the parties are in disagreement with respect thereto.”*

*Article IX of the International Bank for Reconstruction
and Development (IBRD)’s Articles of Agreement*

“Delegation of Authority

The Executive Directors are authorized by the Board of Governors to exercise all the powers of the Bank except those reserved to the Board of Governors by Article V, Section 2(b) and other provisions of the Articles of Agreement. The Executive Directors shall not take any action pursuant to powers delegated by the Board of Governors which is inconsistent with any action taken by the Board of Governors.

Section 14 of the IBRD By-Laws

I. INTRODUCTION

The need for interpretation of applicable rules of law may be traced back to the beginnings of every legal system. This need might even have been greater at such beginnings due to the perceived divine origin of the rules. What was made by God could not have been amended by man, but the divine will could be interpreted and elaborated on differently by different persons. Legal scholars and judges had thus historically preceded positive legislators, both domestically and at the international level.

In a modern context, the importance of interpretation has led some schools of jurisprudence to contend that legislation is only a source of the law, the real law being what the courts pronounce in fact.¹ In any event, issues of interpretation gain particular importance for constitutional provisions, be they contained in the text of the basic law (constitution) in a domestic framework or in the charter of an international organization under international law. These basic documents have a certain sanctity and hierarchy in their respective legal regimes. They are meant to last for long periods of time and not to be subject to frequent amendments. The conditions and relationships they govern are inevitably, however, subject to change. Short of amending such basic texts pursuant to their cumbersome requirements – a course usually avoided for practical reasons unless deemed to be necessary – they may over time either bear little relevance to the changed facts of life, or be adapted to these facts through a continuous process of creative interpretation.² But interpretation cannot be substituted for amendment or employed as a to avoid the difficulties of the latter process. This is particularly relevant in the context of an international organization's charter where the jurisdiction of member states, or, to use a more common expression, their sovereignty, and the rights of minority members in particular, are at stake.³ The challenge lies therefore in the ability to introduce innovations through a process of interpretation that enables the text to achieve its purpose without contradicting its provisions, i.e., through additions that do not amount to amendments. This process must be conducted according to rules of interpretation under applicable law and be guided by the principles of effectiveness (*effet utile*), reasonableness, good faith and the common interests of the organization and its members as a whole. It also has to be credible as much as it has to serve its practical purposes. This dual

¹ Practice varies in this matter. Generally, in civil law countries' courts apply legislation as it stands and, at times, call on the legislator to review such legislation. In some common law countries, notably the United States, there are cases where courts have themselves exceptionally ignored existing legislation under the guise of interpretation or simply found it inapplicable. Jurisprudential writings are even more varied on this matter. Under American Legal Positivism, for instance, law is the pronouncement of courts and legislation is only a source of law. See O.W. Holmes, *The Path of the Law*, first published in 10 HARV. L. REVIEW 457 (1897); J. Brown, *Law and Evolution*, 29 YALE L.J. 394 (1920); J.C. Gray, *THE NATURE AND SOURCES OF THE LAW* (2nd ed., 1927).

² For the "evolutionary dynamic interpretation" of the UN charter, see Georg Ress, *The Interpretation of the Charter*, in *THE CHARTER OF THE UNITED NATIONS – A COMMENTARY* 28 (Bruno Simma ed., 1994) [hereinafter *COMMENTARY ON THE UN CHARTER*].

³ For elaboration of this point, see this chapter *infra*, pp. 14-15 under the sub-title "Unauthorized Amendment."

objective creates a challenge that is often compounded by the underlying socio-political factors that call for change.

II INTERPRETATION AND THE FILLING OF GAPS

The text of a basic document may be silent on a certain matter or may have regulated it in a manner that has clearly become irrelevant and obsolete. In either case, the question will arise as to whether adding a new ruling to fill the resulting gap constitutes a proper interpretation of the text, an amendment by addition, or an exercise of “implied powers.” This question is not theoretical, even though certain scholars have asserted that there cannot be a gap in any applicable law, as silence of the text should always mean in their view non-regulation or permissibility.⁴ This particular issue was raised in the World Bank in the context of the prolonged discussion on the standard of value or *numéraire* of the IBRD’s capital after the demise of the gold US dollar mentioned in the Articles of Agreement. On that occasion, an *ad-hoc* Board committee was assigned the task of looking into the meaning of the “US gold dollar,” a unit of account that no longer existed. This writer was asked after the submission of a detailed legal opinion on the substantive issue in December 1983,⁵ to provide a clarification of the question of whether a new unit such as the SDR, but with a capped current US dollar value, may be adopted by interpretation. The answer given on that occasion may be restated here in full:⁶

“The Issue

1. In the course of the meeting of the Ad Hoc Committee on the Valuation of the Bank’s Capital held on February 14, 1985, a speaker enquired whether the adoption by the Executive Directors of an SDR subject to a ceiling of US\$1.20635 equivalent (the so-called capped SDR) as the Bank’s standard of value could be reached through the interpretation of Article II, Section 2(a) of the Bank’s Articles of Agreement, rather than through the exercise by the Executive Directors of the Bank’s implied powers to reach solutions for matters which the Articles fail to address. The answer to this question depends on how the Executive Directors view the scope and limits of their power of interpretation under Article

⁴ Doctrinal writings both on domestic and international law differ on whether gaps in a legal order represent a real problem for courts or constitute a legal fiction devised to avoid unjust results of assuming permissibility in the absence of restrictions in the applicable law. See H. Kelsen, *GENERAL THEORY OF LAW AND THE STATE* 146-49 (1945); *ibid.*, *PRINCIPLES OF INTERNATIONAL LAW* 304-05, 383-85, (1952), and I. Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 626-32, 689-91 (4th ed. 1990).

⁵ See Legal Opinion on Valuation of IBRD Capital, Postscript (CVBC 84-5, April 26, 1984), reproduced in Chapter 1 of this book.

⁶ “Interpretation” and the “Exercise of Implied Powers” in Respect of the Bank’s Standard of Value, Memorandum of the Vice-President and General Counsel, May 7, 1985. The numbering of notes in that memorandum has been changed to follow the sequence in this introductory chapter and references to the 1983 legal opinion reproduced in this book have been made to the relevant pages in this book.

IX. Throughout the discussions of the valuation of the Bank's capital since the late seventies, the adoption of the SDR has been presented as a possible interpretation of the language used in Article II, Section 2(a), although it was recognized that the SDR could not have been originally intended as the unit of value, if only because it did not exist at the time the Articles were drafted. The proposal to adopt a capped SDR was also introduced as a possible interpretation to be considered by the Executive Directors. Implied in the power of interpretation under Article IX is the power of the Executive Directors to determine whether the issue in question may be settled through interpretation. The exercise of this preliminary *compétence de la compétence* is indeed inherent in the exercise of the power of interpretation and of the judicial function in general.⁷

Judicial Practice

2. In my Legal Opinion on the "Valuation of IBRD Capital," dated December 15, 1983,⁸ I dealt in some detail with the theoretical distinction between interpretation in the strict sense, i.e., clarifying the meaning of a given text, and providing a solution for matters where the text is silent or has become devoid of any meaning and, therefore, incapable of interpretation. I also gave examples of judicial cases where municipal courts understood monetary units expressed in terms of gold francs to mean, after the abolition of the gold value of the franc, either their equivalent in SDR or the last par value of the franc. Some tribunals described this conclusion as the result of the courts' interpretation of relevant provisions while others described it as the result of filling a *lacuna* or a legislative gap following the disappearance of the gold franc.⁹ Some courts also adopted such standards subject to possible adjustment in certain circumstances. For instance, a French commercial court interpreted the French gold franc to mean the most recent par value of the French franc with the adjustment of its value in accordance with the latest domestic retail price index.¹⁰ And the U.S. Supreme Court read a gold dollar-based unit in terms of the last par value of the dollar while recognizing that "in the long term, effectuation of the [1929 Warsaw] Convention's objective of *international* uniformity might require periodic adjustment ... of the dollar-based limit to account both for the dollar's changing value relative to other western currencies and, if necessary, for changes in the conversion rates adopted by other Convention signatories."¹¹ In reaching such conclusions, courts were acting on the premise that they

⁷ For a comprehensive treatment of this preliminary power, see Ibrahim Shihata, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION, *COMPÉTENCE DE LA COMPÉTENCE* (1965).

⁸ Note 5, *supra*.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Restated in the Legal Opinion referred to in *supra*, note 5.

could not simply state that, absent the prescribed gold unit, there did not exist any applicable standard of value. Under the judicial principle of *non-liquet*, a court of law cannot deny justice on the basis that the law is silent on the issue or that its provisions have become devoid of meaning. It has to provide a solution using appropriate techniques of legal jurisprudence.¹²

Nature of Interpretation in Legal Theory

3. Views differ greatly in comparative jurisprudence on the nature and scope of legal interpretation and more generally on the role of courts in the application of the law. The most traditional view sees interpretation as merely a search for the intended meaning of a disputed text, the judge being only the “mouth that pronounces the words of the law,” while the most avant-garde contends that interpretation always involves a creation of a new rule, the judge being in fact the true legislator. There is no disagreement, however, that the application of legal provisions involves the two tasks of discovering the latent meaning of obscure texts as well as filling the gaps which are often found in such provisions. These two tasks are commonly described in modern legal literature as elements in the process of interpretation. Some jurists maintain, however, the fine distinction elaborated on in my Legal Opinion where the filling of gaps is characterized as a distinct judicial function necessitated by the principle of *non-liquet* rather than as interpretation proper.¹³ Some domestic legal codes (e.g., the Swiss Civil Code of 1907) recognize this distinction by explicitly providing for the power of the judge, in the absence of applicable statutes or custom, to pronounce “according to the rules which he would establish if he were to assume the part of a legislator” drawing his inspiration from the doctrine of the learned and the jurisprudence of the courts. This function is necessitated by the obligation of courts to reach decisions on matters falling within their jurisdiction and, in this way, need not be hidden under the cloak of interpretation.

Interpretation of the Bank's Articles

4. ‘Any question of interpretation of the provisions [of the Bank's Articles of Agreement] arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision’ subject only to appeal by any member before the Board of Governors (Article IX). As stated in my Legal Opinion of December 15, 1983, reference of these questions to the Executive

¹² See H. Lauterpacht, *Some observations on the Prohibition of “Non Liquet” and the Completeness of the Law*, in *SYMBOLAE VERZIJL*, 96-221 (1958).

¹³ For a brief but clear discussion of these issues, see B. N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* (1st ed., 1921). See also Chapter 1, *infra*.

Directors rather than to a court of law indicates that the framers of the Articles wanted disputes related to their provisions to be settled through a process internal to the Bank which involves its policy-making organs. In interpreting the Articles, the Executive Directors should thus have adequate latitude to enable them to achieve the Bank's objectives in the changing conditions in which the Bank operates. They are not expected to act strictly as a court of law and they should weigh carefully both the strict requirements of legal interpretation as well as the policy requirements dictated by the Bank's objectives and its changing environment. They should not, however, amend existing provisions under the guise of interpreting them. Amendment is a separate process to be undertaken under the different requirements of Article VIII. Between interpretation and amendment remains the possibility of the filling of gaps, supplementing the text and allowing its provisions to meet the requirements of its purpose. This possibility is even recognized for courts of law as part of their judicial function. It is practiced by international organizations as an incidental power dictated by considerations of necessity and efficiency. As indicated earlier, this possibility has been seen in legal theory (e.g., American legal positivism) as part and parcel of the process of interpretation. The filling of recognized gaps in the Bank's Articles is a perfectly justified task of the Executive Directors provided they do it to enable the Bank to pursue its objectives, while fully respecting the requirements reflected in the Bank's Articles of Agreement.

Conclusion

5. The Executive Directors are endowed with the power to interpret the Bank's Articles of Agreement. They are also delegated by the Board of Governors "all the powers of the Bank" except those specifically reserved to the latter Board. Consequently, they have a clear mandate both to clarify obscurities in the text of the Articles and to provide solutions where the text is silent. This power is limited only by the requirements of the Articles of Agreement and by the overall requirement of the pursuance of the Bank's objectives.
6. In respect of the standard of value of the Bank's capital, the Articles' provisions expressed the Bank's capital in terms of a given gold value of the U.S. dollar which no longer exists. The Executive Directors, in determining how to deal with this issue, may conclude that, following the abolition of the dollar's par value, the text has become devoid of any meaning and should, therefore, be replaced through an amendment. In the absence of such amendment, they may recognize the gap and fill it by creating a substitute standard of value as a necessary measure to be followed until the Articles are properly amended. However, the Executive Directors may also proceed to interpret the text pursuant to Article IX.

The solution proposed in my note of January 10, 1985,¹⁴ assumes that the Executive Directors would so proceed. Conceptually, to reach the conclusion embodied in the current proposal [of a capped SDR], the process of interpretation would go through the following logical steps: The words “United States dollars of the weight and fineness in effect on July 1, 1944” could, in the absence of a gold content for the U.S. dollar, be read to mean “United States dollars according to their last par value.” Recognizing, however, the shortcomings of adopting such a national currency unit as the standard of value as well as the developments that have taken place in the international monetary system since the abolition of par values, the Executive Directors, weighing these policy considerations, could conclude that the last par value of the U.S. dollar would be maintained only as the ceiling of the standard of value which would otherwise be the SDR. The latter unit has often replaced the U.S. gold dollar in international transactions as a uniform and relatively stable *numéraire* with the additional advantage reflected in the international decision-making process of its valuation. In this sequence, the so-called capped SDR may emerge as the interpretation of the language used in Article II, Section 2(a), necessitated by the demise of the standard of value mentioned in the Articles of Agreement. This would dispose of the need to resort to the process of amendment provided for under the Articles, on which no agreement has been possible in fact. The Executive Directors have the power to interpret the Articles of Agreement. They also exercise the implied power to fill in gaps that may exist or emerge in the application of the Articles.¹⁵”

III. TREATY INTERPRETATION UNDER INTERNATIONAL LAW

Contemporary international law rules of treaty interpretation are in many respects codified in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties.¹⁶ These rules read as follows:

“Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

¹⁴ Valuation of the Bank's Capital - A Compromise Solution (CVBC 851, January 15, 1985).

¹⁵ As explained in Part I of this book, the idea of a capped SDR was later discarded in favor of a SDR defined in terms of a fixed current US dollar value.

¹⁶ UN DOC. A/CONF. 39/11/Add.2. These rules are repeated in Articles 31 and 32 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. (UN DOC.A/CONF.129/15).

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.”

Although these articles are generally seen at present as declaratory of customary international law,¹⁷ they do not strictly reflect a consensus of the doctrinal schools preceding them. Many among the latter schools tended to adopt a single approach to interpretation: textual (linguistic), quasi-textual (linguistic as conceived by the parties), contextual (linguistic in the context involved), subjective (intentionist) or teleological (purposive). By contrast, the rules of the Vienna Conventions combine some of these approaches with a certain order of priority. They refer to the ordinary meaning of the words in their context (textual and contextual approach), having regard to the object and purpose of the treaty (teleological approach) but accept as supplementary means of interpretation recourse to the preparatory work of the treaty (intentionist approach) when the above approaches leave the meaning ambiguous, lead to manifestly absurd or unreasonable results or when a special meaning of the words rather than their ordinary meaning, was intended. They also recognize subsequent practice as evidence of the agreement of the parties.

¹⁷ See *Arbitral Award of 31 July 1989 Case*, ICJ Rep. 199, at 70. See also S.T. Bernárdez, *Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties*, in LIBER AMICORUM, PROFESSOR IGNAZ SEIDL-HOHENVELDERN 721, 730-48 (1998).

The interpretation of multilateral conventions establishing international organizations has normally taken into account the need for further flexibility to enable these organizations to achieve the objectives provided for in these conventions. In the case of the charters of international financial institutions, in particular, there exists an explicit, common requirement in their articles of agreement to the effect that all their decisions, including decisions on interpretation, “shall be guided by the purposes” stated in the respective charter of each organization. Interpreters of these charters are thus required to give prominence to a purposive, teleological construction of their provisions. However, the requirement for the interpreters is to be guided by those purposes stated in the text, not by new purposes conveniently created for the occasion. In this manner, the differences between this teleological approach and the Vienna Conventions’ formula and its customary law roots may not be as great as they may otherwise seem.¹⁸

Changes introduced by way of interpretation, rather than amendment, cannot in any event change the fundamental features of the charter of an international organization,¹⁹ as is the case in respect of the constitution of a state.²⁰ Within these limits, as a practical matter, interpretative changes do occur and are eventually sanctioned. In the case of an international organization, they are approved by a competent organ of the organization and generally accepted or tolerated by member states. Some United Nations organs and specialized agencies seek an advisory opinion from the International Court of Justice (ICJ) for such interpretations.

It is worth repeating, however, that interpretation cannot reach the point of virtually amending the text, substituting the will of the interpreters for the presumed will of those who negotiated and approved the text (and its formal amendments), as reflected in its language and object. In every legal system, interpretation and amendment of binding rules are in principle different processes, subject to different proce-

¹⁸ The phrase “having regard to the object and purpose of the treaty” in Article 33, para. 4 of the Vienna Conventions was introduced by the US delegation during discussions at the United Nations Conference and did not appear in the proposal of the International Law Commission (in Article 29 of the original draft). See UN DOC. OFF. REC. OF THE UN CONF. ON THE LAW OF TREATIES. FIRST SESSION (1968). Summary records of the plenary meetings of the meetings of the Committee of the Whole, 34th meeting of the Committee, at 188-189. The importance of this addition in interpreting the charters of international organizations is confirmed by their practice and the continued expansion of IFIs in particular in pursuit of their stated purposes.

¹⁹ Two former General counsel of the World Bank thus took the position that having a common standard of value for the IBRD capital is “central to the Articles of Agreement” and cannot be interpreted away. See, Chapter 1, pp. 6-7, *infra*.

²⁰ Indeed, some constitutions of sovereign states prohibit certain fundamental changes even through the amendment process. Under the French Constitution, Article 89, the republican form of government cannot be revised, by an amendment. Article 79 para. 3 of the German Constitution likewise prohibits amendments that change the fundamental structure of the constitution and its basic values. Under the IBRD Articles of Agreement, amendment of certain provisions requires acceptance by *all* members. These as cited earlier in Article IX, are those provisions which give every member the right to withdraw from the Bank and the right to maintain its proportionate share in the Bank’s capital on the occasion of a capital increase as well as the provision that limits the liability of each member to the unpaid portion of the issue price of the shares subscribed by it.

dures, no matter how limited the amendment is or how extensive the interpretation may be.²¹ The practical difference in the results of these two processes may not always be clear-cut, however. For the charter of an international organization, the words of the text as used in their context may, through interpretation, be enriched by adoption of new policies consistent with the text's purpose. As already mentioned, answers to new challenges and questions that keep arising after the text enters into force are also made in practice by analogy and by pursuing the logic of the text and its object as a whole.

The overall purpose of an international organization and the actual challenges and needs to which, consistent with that purpose, it is required to respond are in practice determinant factors in interpreting its charter. Gaps created by a factual change, as was the case after the demise of the gold dollar, (the original *numéraire* and standard of value of the capital of many IFIs) must be filled, preferably by an amendment; should this prove impractical, however, the gap would be, and in fact has been filled through the organ in charge of interpretation. In other words, interpretation can and, in the case of international organizations, especially IFIs, should be responsive to actual needs. It may complement the text, consistently with its purpose. It cannot, however, reach a meaning that goes into directions unrelated to the declared objective of the text or violates its explicit wording. If such a violation takes place, it would amount to an actual amendment beyond the powers of the interpreters. An exception of course exists in the rare cases where the ordinary meaning of the words used in the text leads to a manifestly absurd or unreasonable result.

IV. METHODS OF INTERPRETATION

There is always a danger that reliance on a purposive, functional interpretation may lead to subjective constructions of the text, expanding always the powers of the organization at the expense of the jurisdiction of its members. While the pursuit of effectiveness has many arguments in its favor,²² it must be subject to the charter's other requirements and international law rules of interpretation.

²¹ See generally, J. Gold, INTERPRETATION: THE IMF AND INTERNATIONAL LAW 79 (1996): "No lawyer would doubt that the IMF is debarred from substituting alleged interpretation, whether under the authoritative or the informal procedure, for amendment in accordance with the Articles as a subterfuge for avoiding the difficulties of amendment." See also *id.* at 81-82. For details on the approach to interpretation in the civil law system, see F. GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, English translation (2nd ed. 1954), and in the common law system, see O. W. HOLMES, THE COMMON LAW (1991) and G. Williams, LEARNING THE LAW (1957). Under Islamic law (*Shari'ah*), a comprehensive jurisprudence known as *'ilm usul al-fiqh* (the science of the roots of jurisprudence) was produced by scholars to discipline the interpretation of the primary sources of that law which are considered to be divinely inspired. See ISLAMIC LEGAL INTERPRETATION – MUFTIS AND THEIR FATWAS 2-43 (M.K. Masudi, B. Messik and D.S. Powers, eds.) (1996); A.W. Khalaf, *Usul Al. Fiqh* (1956).

²² See, D. Simon, L'INTERPRÉTATION JUDICIAIRE DES TRAITÉS D'ORGANISATIONS INTERNATIONALES 317 (1981).

Some IFIs, which are endowed with broad regulatory powers, notably the International Monetary Fund (IMF), in recognition of the effect of changes in the scope of their mandate or in their methods of operation on the jurisdiction of their member states, have repeatedly introduced changes through extensive formal amendments to their Articles of Agreement.²³ When they issued interpretations of these Articles, they are said to have paid particular regard to the intention of the drafters, while respecting the textual and purposive approaches to interpretation.²⁴

Seeking to identify the true intention of the drafters of the text by examining the *travaux préparatoires* and the prevailing conditions at the time the text was agreed is no doubt useful in shedding light on the intended meaning. It is not, however, a generally accepted or practiced method of interpreting multilateral treaties and in particular charters of international organizations. The International Court of Justice,²⁵ the already quoted 1969 Vienna Convention on the Law of Treaties and 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,²⁶ suggest limiting resort to the *travaux préparatoires* to cases where the text is obscure or when its plain meaning leads to unreasonable results. They support instead the construction of such charters in light of the “ordinary meaning of the words in their context,” paying attention to the purposes of the organization, along with its subsequent practice which often

23 The First Amendment was introduced in July 1969, the Second Amendment in April 1978, and the Third Amendment in November 1992. A Fourth Amendment adopted by the IMF Board of Governors in September, 1997 has not yet received acceptance by the required majority (85 per cent), of the total voting power of member states.

24 See GOLD, *supra* note 21, at 177-92. On p. 180 the author states that “[t]he intent of the negotiators is sought because sovereignty is thought to require this technique.” He adds, however, in p.184: “Probably, it is the assumed will of [IMF] members rather than public international law that is responsible for this approach to interpretative technique: the personnel of the [IMF] organs are overwhelmingly economists, many of whom have been and will again be national officials, and not lawyers”.

25 See the ICJ Advisory Opinion in *Competence of the General Assembly Case*, ICJ Reports 8 (1950): “If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.” See also the *Namibia Case*, ICJ Reports 47 (1971) in which the ICJ noted that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.” See further the *Voting Procedures Case* (ICJ Reports 90-123, 106 (1955)) to the effect that: “proper interpretation of a constitutional instrument must take into account, not only the formal letter of the original instrument, but also its operation in actual practice and in light of the revealed tendencies in the life of the organization.”

26 See, *supra* note 15 and accompanying text. See also commentary of the International Law Commission (ILC), *id.*

includes the exercise of implied powers.²⁷ Even in the case of the IMF, where “a denial or depreciation of the value of the technique [of the search for the intention of the drafters, in *travaux préparatoires*] was found possibly to be “costly and impractical.”²⁸ The expansion of activities in recent years to issues such as “good governance” of its members and “poverty reduction” had *not* in fact been introduced through amendments to its Articles. Nor could it be reasonably reached through an “intentionist” interpretation. Rather, it seems to have been based on a broad, though controversial, reading of the Fund’s purposes and object as currently understood.

V. INFORMAL AMENDMENTS

Interpretation has in fact been used at times by domestic courts to introduce changes to archaic legislation that has become irrelevant or blatantly unfair. Such courts have also provided solutions when the legislative text was silent on the issue at hand or no controlling precedent existed, without necessarily questioning the completeness of applicable law.

In the practice of international organizations, some provisions in their charters may no longer serve a practical purpose and thus become irrelevant or obsolete. A typical example is the provision in the charters of long established IFIs regarding the amount of the subscriptions of members, especially in terms of their size (that has since been changed) and mode of payment (that has not been followed in subsequent capital increases). Specific requirements in these charters, such as the imposition of certain charges on loans made in the first ten years of operations, could also become obsolete after the lapse of this period.²⁹ *Obsolescence*, however, is not the only way

²⁷ Article V, Section 2 (f) of the IBRD Articles of Agreement gives the Board of Governors and the Executive Directors, to the extent authorized, the power to “adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank.” This is not synonymous, however, with the broader doctrine of implied powers of international organizations (See GOLD, *supra* note 20, at 45-6, BOWETT, *supra* note 42, at 342-43). The Articles of IFC (Art. III, Sec. 6 (v)), IDA (Art. V, Sec. 5 (vi)) and MIGA (Art. 2 c)) provide explicitly for “incidental powers as shall be necessary or desirable in the furtherance of [the organization’s] purpose [or objective].” This power was recognized by the ICJ early in 1949. See *Reparation of injuries suffered in the service of the United Nations*, ICJ Rep. 182 (1949). It has since been reemphasized. See *Effect of Awards of compensation Made by The United Nations Administrative Tribunal*, ICJ Rep. 56-57 (1954). It is now generally considered part of the customary law of international organizations, with some disagreement on its criteria (see H. G. SCHERMERS AND N. M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 158, 748-750 (1995)). Implied powers have been ordinarily used by the IBRD. Some publicists prefer to speak of the “inherent powers” of international organizations to do what is needed to serve their purpose. See F. Seyersted, *Basic Distinctions in the Law of International Organizations – Practice versus Legal Doctrine* in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY, ESSAYS IN HONOUR OF KRYSZTOF SKUBISZEWSKI 691-99 (ed. J. Makarczyk, (1996)). This position finds little support in doctrinal writings. There is no disagreement, however, that an international organization, much like a domestic corporation, does not have absolute and unlimited powers and that its legal capacity is limited by its purposes. See Schermers and Blokker, *supra* at Chapter 3.

²⁸ Gold, *supra* note 21 at 180.

²⁹ See, e.g., Article IV, Sec. 4 (a) of the IBRD Articles of Agreement and similar texts in the charters of some regional IFIs.

through which an existing text becomes ineffective. Certain provisions, though they remain unamended, may be followed only as a paper formality³⁰ or they may altogether fall into *desuetude* when they are not applied for a long time until a general conviction prevails that they are no longer relevant.³¹ In the practice of IFIs, instances of *desuetude* include for example the requirement in the IBRD Articles of Agreement that its “Special Reserve” will continue to be funded through commissions on loans and guarantees,³² or that an Advisory Council consisting of experts in various fields (appointed by the Board of Governors) will advise the Bank on general policy matters.³³

Certain provisions of the organization’s charter may also undergo over time a process of *informal modification*, through a subsequent, repetitive practice accepted by member states without interruption or controversy, and thus establishing a virtual agreement of the parties.³⁴ Such a modification cannot, however, be intentionally introduced from the beginning as an amendment of the text by unauthorized means; it may only be retrospectively deduced by a careful gleaning of the practice of the organization. An example of this may be found in the Bank’s extensive practice of financing the local cost of projects, notwithstanding the restrictive provisions in the IBRD Articles of Agreement (Article IV, Section 3).³⁵

³⁰ The “competent committee” consisting of expert staff and a representative of the governor of the borrowing country required under IBRD Articles to recommend loans (and guarantees) for Bank’s approval continues to exist in practice as the “Statutory Committee.” However, its members sign the recommendation to the Board after the loan has already been negotiated with the borrower and has been approved by the “Regional Loan Committee” or the “Operations Committee,” depending on the nature or complexity of the operation. The latter committees consist only of Bank senior staff. While the “Statutory Committee” has thus come to be seen generally as a formality, on some occasions, this writer as a (former) member of the Statutory Committee did object to certain aspects of the proposed operation. Recommendations that were included in spite of earlier objections on legal grounds previously stated in the Operations Committee meetings, were reconsidered as a result. These were, to the knowledge of this writer, the only occasions where approval of the statutory committee report became more than a “paper formality.”

³¹ Without this general conviction, the *opinio juris* required for the fall of the text in *desuetude* would not exist. As long as the text remains unamended, however, there is no legal impediment for its possible revival.

³² Under the IBRD Articles (Art. IV, Sec. 4 (a)), the commissions which fund the Special Reserve may be reviewed after the first ten years of operations. They have been “reduced to zero” in 1965 and have not been reintroduced since.

³³ See Article V, Sec. 6 of the IBRD’s Articles of Agreement. The Council has not been reconstituted since 1950. More recently, the Bank President has convened a number of meetings with leaders of the private sector in a number of member countries to explain the Bank’s policies and benefit from their comments. These informal meetings are clearly different from the advisory council provided for in the IBRD Articles of Agreement.

³⁴ As quoted earlier, Under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties “subsequent practice which establishes the agreement of the parties regarding [the treaty’s] interpretation” represents the current understanding of the treaty. See, *supra*, note 16, and accompanying text.

³⁵ See Article IV, Sec. 3 of the IBRD Articles of Agreement and a detailed treatment of this subject in Chapter 11 of this book.

VI. UNAUTHORIZED AMENDMENT

The question of whether it is legally correct to introduce a change to the charter of an international organization through methods other than those provided for in the charter itself is nevertheless a serious one. Its seriousness is based on the fact that for an international organization the constituent charter is the “constitutional and organic framework that governs the orderly deployment of its activities.”³⁶ Equally important, it is the legal basis of the organization’s juridical personality, capacity and powers. An unauthorized amendment deprives the basic text of its superiority in the legal regime of the organization. It deprives the minority of members of the protection of their interests guaranteed by the high majority (or unanimity) required for amendments. For IFIs, where the power of interpreting the Articles of Agreement is vested in the Board of Directors (Executive Directors), acting by a simple majority, disguised amendments introduced by this Board would simply represent a usurpation of the amendment power vested by the Articles exclusively first in the Board of Governors, and then (in most of them) in the member states, acting individually. For the World Bank in particular, where non-borrowing countries have a voting majority in the Board of Executive Directors, a disguised amendment introduced by way of interpretation could result in imposing on borrowing members obligations different from those they accepted under the Articles of Agreement.³⁷ Worse, it could lead the Bank to act *ultra vires*, i.e., to overstep its mandate, and therefore the legal capacity envisaged in the constituent agreement, in manners unrelated to the Bank’s purposes. This, for instance, would be the case, if, through interpretation, the Bank were to interfere in matters prohibited under its Articles,³⁸ contrary to the basic principle of *pacta sunt servanda*, the cooperative nature of the Bank and the consensual basis of its actions in a member country. A Bank member can appeal the interpretation before the Board of Governors but the voting there is also weighted and the decision will also be made by a simple majority.³⁹ A country that accepts membership in the Bank according to the formal text of the Bank’s Articles of Agreement legitimately expects the Bank to act according to these Articles and, certainly, not contrary to their explicit provisions, until these provisions are properly amended. The importance of this point in organizations operating on a weighted voting basis cannot be overstated. It explains the introduction in the IMF Articles of the requirement that, in case of an appeal by a member against an interpretation issued by the Fund’s

³⁶ See W. Karl & B. Mützelburg, *Amendments*, in COMMENTARY ON THE UN CHARTER, *supra* note 2, at 1164.

³⁷ In defending respect for the limits originally introduced on the sovereignty of the states parties to a multilateral treaty, Sir Joseph Gold mentions that “in an institution like the IMF, in which voting power is weighted, the concept [of sovereignty] helps to protect weaker members against a powerful member, like the United States, or a powerful combination of members, like the countries of the EC, which often attempt to have a unified position in their attitude to current problems within the IMF.” Gold *supra* note 21 at 181.

³⁸ For details of this point, see, the legal opinions reproduced in Chapters 7 and 8.

³⁹ See Article IX (b) of the IBRD Articles of Agreement. Compare the situation under the IMF Articles of Agreement after their First Amendment referred to in the following note.

Executive Board, a “Committee on Interpretation” of the Board of Governors decide on the appeal by a non-weighted majority of its members. The decision of this Committee becomes the decision of the Board of Governors unless rejected or altered by that Board by an eighty-five percent majority of the total voting power.⁴⁰ No similar arrangement has been introduced to charters of other IFIs, including those belonging to the World Bank Group.

VII. INTERPRETATION OF CHARTERS OF INTERNATIONAL FINANCIAL INSTITUTIONS (IFIs)

Without prejudice to the above observation that should always be high in the minds of interpreters, it should be recalled that interpretation of the IFIs’ charters has never been sought from a court of law. This is unlike the case of the “principal organs” of the UN and many of its specialized agencies, which have exercised the faculty of seeking an advisory opinion from the International Court of Justice as authorized in the UN Charter⁴¹ and the charters of these agencies, or in their relationship agreements with the UN.⁴² Decisions on interpretation in IFIs are also not subject to appeal before the ICJ or an arbitral tribunal, unlike the case of a number of the UN Specialized Agencies (FAO, WHO, IMO and ICAO).⁴³ Rather, interpretation of the IFI’s Articles is performed by the same body that approves the institution’s policies and operations. As already emphasized, this suggests that for IFI’s the interpretation function, while a legal process subject to rules of law, 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 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.⁴⁴ The first Article in the World Bank’s

⁴⁰ See Article XXIX (b) of the IMF Articles of Agreement as amended and GOLD, *supra* note 21, at 133-34 and 153-54. See also, JOSEPH GOLD, MEMBERSHIP AND NON-MEMBERSHIP IN THE INTERNATIONAL MONETARY FUND 388 (1974). France and other European States, for the same reason, earlier proposed that matters of interpretation be referred to an external tribunal that would not decide by weighted voting.

⁴¹ See Article 96 (1) of the UN Charter which states that “[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question” and Article 96 (2) of the UN Charter which provides that “specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.”

⁴² The Relationship Agreement between the UN and the IBRD (Article VIII), signed on August 15, 1947, entered into force on November 15, 1947 upon its approval by the UN General Assembly. This Agreement gives the Bank the possibility to seek advice from the ICJ “on any legal question arising within the scope of the Bank’s activities other than questions relating to the relationship between the Bank and the United Nations or any specialized agency.” Such a possibility has not been considered in practice, however.

⁴³ For details see D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 268-69 (4th ed. 1982).

⁴⁴ Compare GOLD, *supra* note 21, at 80, where he states that “[t]he IMF cannot be distinguished from courts in this respect.”

Articles of Agreement which states the Bank's purposes (and a similar provision in the charters of other IFIs) explicitly requires all decisions of the Bank to be guided by this Article, i.e. by the Bank's purposes as stated. This requirement applies to decisions on the Articles' interpretation. It clearly gives the teleological or purposive approach to interpretation a special prominence in the interpretative process of the IFIs' charters.

VIII. INTERPRETATION OF THE IBRD AND IDA ARTICLES OF AGREEMENT

In the case of the IBRD, the provisions of the Articles of Agreement, agreed upon in 1944, have been subject to frequent interpretations, formal and informal, explicit and implied. As stated, the Bank's Board of Executive Directors has, among its statutory powers, the power to resolve questions of interpretation of these Articles, subject only to a possible (though so far never invoked) review by the Board of Governors upon the request of a Bank member. This power of interpretation includes resolving any dispute between the Bank and a member country or among Bank members with respect to the meaning or implications of the Articles of Agreement. The process was intentionally meant to be internal to the Bank.⁴⁵

In the first year of the IBRD's practice, interpretation of the Articles was made by the Executive Directors upon the recommendation of a then standing Board Committee on Interpretation.⁴⁶ The Committee consulted the General Counsel before it prepared its report to the full Board. Three interpretations were issued in this manner in 1946. Subsequently, formal interpretations, nine in total (seven in the period 1947 – 1951, one in 1960 and one in 1964), were issued by the Executive Directors directly, with the General Counsel's advice. Since 1964, however, that is through 35 years of the Bank's work, no formal decision on the interpretation of the Articles has been made, with one exception in 1986 (which in fact filled the gap resulting from the demise of the gold dollar).⁴⁷ Instead, whenever clarification of the Articles' requirements was needed, the Executive Directors discussed it in light of a legal opinion by the General Counsel. Formal interpretation by the Executive Directors has been generally avoided due, perhaps, to the inflexibility it may generate.

The opinion of the General Counsel, it should be noted, does not in itself amount to an authoritative interpretation of the Articles; the power to make such an

⁴⁵ See Proceedings and Documents of the United Nations Monetary and Financial Conference: Bretton Woods Conference, Hampshire, 1944, Vol. 1, Doc. 255, at 428 (related to the originally similar provision on interpretation of the IMF Articles).

⁴⁶ The difference between this committee of the Board of Executive Directors and the IMF's Committee on Interpretation of the Board of Governors alluded to above should be noted. The amendment of the IMF Articles introducing the latter committee has no counterpart in the Bank's Articles.

⁴⁷ Decision of the IBRD Executive Directors dated October 14, 1986 on "Valuation of Bank's Capital and Related Issues" with Annex on "Implementation of Maintenance of Value Settlements." The text of that decision appears in Chapter 2, Annex A, *infra*.

interpretation being reserved to the Board of Executive Directors. However, the Board's endorsement of, or concurrence with, the General Counsel's opinions allows for their incorporation in the Bank's subsequent practice. The practice under the International Development Association's (IDA) Articles of Agreement has followed the latter course from the inception of IDA (with one exception in 1987 related to the formal "interpretation" of the gold dollar as the standard of value).⁴⁸ While this informal approach maintains a large measure of flexibility for the Board, it also enhances the value of the General Counsel's legal opinions as a *source* of the Bank's law. During the long period when this writer served as General Counsel, there was no case where the Board objected to the conclusions of these opinions.

In issuing his legal opinions, the General Counsel takes into account the fact that the Board does not constitute a court of law. While Executive Directors expect from the General Counsel legally sound analysis and advice, they are primarily interested in developing solutions on which they can agree. Their mandate is to serve the purposes and interests of the Bank and its members as a whole. It may not be enough, therefore, for the General Counsel's advice to be legally correct; it is also expected to be such as to enable the Executive Directors to perform their responsibilities in a manner which best suits the needs of the Bank's business.⁴⁹ Meeting both requirements can prove particularly troublesome at times. Yet, the absence of the latter requirement would likely lead to continuous divergence of views among Executive Directors, rendering the advice unhelpful, and the absence of the former would make the advice merely a personal view based on the expediency of the moment, not a legal opinion of the General Counsel.

The Bank's successive General Counsel have carefully studied the *travaux préparatoires* of the Articles of Agreement in an attempt to identify the intended meaning. They have, however, accorded greater attention to the ultimate objective of the Articles and the overall mandate of the Bank. There was no attempt to strictly adhere to an interpretation that is limited by the intentions of the drafters in the context of the facts and situations known to them at the time the Articles were drafted. Legal opinions have rather served the purposes of the Bank as stated in its charter as an international institution concerned with the reconstruction and development of its members: a financier of investment for productive purposes, and a facilitator of international investment and trade. They have enabled the Bank to address many areas related to the economic development of its borrowing countries that were not necessarily deemed to be so related at the time the Articles of Agreement were concluded.

A teleological, functional approach to interpretation based on the purposes stated in the text has in fact been found by the World Bank and its members to be most

⁴⁸ Decision of the IDA Executive Directors dated June 22, 1987 on "Valuation of Initial Subscriptions and Related Issues", reproduced in Chapter 2, Annex B, *infra*.

⁴⁹ This is not to suggest that policy and expediency considerations would prevail over legal standards in the *General Counsel's clarifications*. On the contrary, if a solution that meets both purposes cannot be found, the responsibility of his office requires him to submit to the Board the meaning resulting from the application of rigorous legal analysis.

appropriate for the Bank's Articles, as it has been generally for charters of other multilateral institutions. This assumes, however, that such an approach genuinely serves the purposes of the institution as defined in the charter, not the subjective choices of those who have the required majority in the organ in charge of interpretation and who might be tempted to interpret the text to serve other ends.

The adoption of such a teleological approach is clear when it does not conflict with the "textual" approach, that is, with the ordinary meaning of the terms used in the text.⁵⁰ It may, however, exceptionally prevail over the textual approach if a strong case can be made for a special meaning of the words as used in their proper context (because such a special meaning, rather than the ordinary meaning, was specifically meant to apply from the beginning,⁵¹ or because the context in which the words are used suggests a broader or a more restrictive meaning).⁵² Quite often, however, the textual approach to interpretation is confirmed by the pursuit of the intentionist and teleological approaches.

The self-generated evolution of the Bank's policies and operations has been supported, and in some cases initiated, through this internal interpretative process. The following legal opinions provide ample examples of the "evolutionary dynamic interpretation" of the Bank's Articles of Agreement in support of this process. Such a process, it should be noted, has been complemented by the wide use of trust funds administered by the Bank (or IDA). These funds have been financed by transfers from the Bank's net income and/or contributions from donors. They are meant to enable the Bank as trustee to further expand the scope of its activities without being strictly confined by detailed requirements that the Articles of Agreement impose on the lending and guarantee operations funded from the Bank's own resources. Trust funds administered by the Bank must aim, however, to serve the Bank's overall purposes and should at all times operate in a manner consistent with these purposes.⁵³

⁵⁰ For old texts, there may be a discrepancy between the ordinary meaning of certain words at the time the text was drafted and their meaning at the time of interpretation. Although schools differ on which of these meanings should be taken in the interpretation of a charter of an international organization, with the International Court of Justice leaning towards the first in the *South-West Africa Case* (Second Phase), ICJ Reports 23 (1965) and towards the second in the *Namibia Case*, *id.* at 31 (1971), both meanings must, in the view of this writer, be carefully examined in the light of the organizations' purposes and, under the teleological approach, preference would be given to the meaning that better advances such purposes.

⁵¹ See Article 31 (4) of the two Vienna Conventions on the Law of Treaties, referred to in *supra* note 16.

⁵² See *IMCO Case*, ICJ Reports 158 (1960).

⁵³ For the use of trust funds as a mechanism to expand the Bank's work without amending its Articles of Agreement see SHIHATA, *Techniques To Avoid Proliferation Of International Organizations - The Experience Of The World Bank*, in PROLIFERATION OF INTERNATIONAL ORGANIZATIONS 111-34, (N.M. Blokker and H.G. Schermers, eds.) (2000).