August 1960

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Link to publisher version (DOI)
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Economic Development Loan Agreements

Part I

Public Economic Development Loan Agreements; Choice of Law and Remedy

Cecil J. Olmstead*

In an era of political, economic and social evolution that places a variety of strong demands upon the economically developed parts of the world to render investment and developmental assistance to those areas whose economies have not developed to an extent sufficient to provide a decent standard of living to their peoples, the methods of providing stability to both public and private investments that may be established in the latter types of areas present a pressing problem that demands immediate solution if the investment needs of a large part of the world are to be met. The scope of this paper includes a description of selected, but characteristic, international organization and bilateral national types of international investment that are currently being utilized in economic development loan arrangements with governments or their agencies in less developed areas, the methods, both existing and prospective, by which they may be protected and remedies that may be available in the event of governmental interference with such investments.

Investments by governments of States and by international organizations in less developed parts of the world take a variety of forms, but the

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*Professor of Law and Director, Inter-American Law Institute, New York University School of Law.

1 This article is the first of two which deal with international organizational, bilateral governmental and private investment and developmental agreements with governments of underdeveloped countries or their agencies. This first article deals with international organizational and governmental agreements. Private investment and developmental agreements will be considered in the second article scheduled for publication in the December issue of this legal periodical.

2 In 1958, United States Government bilateral aid of a nonmilitary character to underdeveloped countries approximated $2,250,000,000. Other countries, including the Soviet Union, invested about $1,000,000,000 in such programs. N.Y. Times, March 12, 1960, p. 1, col. 5. See Statistical Office of the United Nations Department of Economic and Social Affairs, 1958 Statistical Yearbook 401. (U.N. Pub. Sales No. 58–xvi–1). However, this level fails substantially to meet the ever growing need for increased aid. Ibid. See U.N. Dept of Economic Affairs, Measures for the Economic Development of Underdeveloped Countries 76 (U.N. Pub. Sales No. 1951, II.B.2). Mr. Paul G. Hoffman, Managing Director, Special United Nations Fund for Economic Development, has estimated that the industrial world would have to supply underdeveloped countries with an additional $3,000,000,000 a year for the next ten years over and above present assistance, in order to raise their standards of living by two percent annually. This estimate has been deemed "over-optimistic." American Survey, The Economist, March 5, 1960, p. 897.
most common types are straight loans for general developmental or for specific project purposes and for technical assistance. These investments are usually made pursuant to an agreement between, on the one hand, the capital-providing international organization or government and, on the other hand, the capital-receiving government or its instrumentality. Normally, these agreements state the purposes for which the investment funds may be utilized and terms and provisions for repayment, if any.³

INTERNATIONAL LAW REMEDIES FOR NON-PERFORMANCE OF INTERNATIONAL ORGANIZATION AND GOVERNMENTAL INVESTMENT AGREEMENTS

Governmental and international organization loan agreements have not given rise to recent instances of repudiation or breach.⁴ This record of performance of State loan agreements probably results in large part from the nature of remedies available to creditor States in the event of non-performance. As the loans are established pursuant to an agreement between the States themselves, in the absence of contrary stipulation, the remedies for breach of the international agreement are those generally available to States for violation of international obligations.⁵

While it is not the writer's intention at this point to deal definitively with remedies for the breach of international agreements between States, among those that may be available are international claims, resort to the

³ Representative international organization and bilateral national type loan arrangements are those of the International Bank for Reconstruction and Development and the Development Loan Fund of the United States of America, respectively. The conditions for loans of the Bank are: Loans and guarantees may be made to member states, political subdivisions thereof and private enterprises therein, provided, inter alia, that (1) if to a borrower other than a member state, it or its appropriate agency guarantees loans to such borrower within its territory; (2) the borrower is unable to obtain the loan on reasonable terms from another source; (3) prospects of repayment are reasonable; and, (4) the purposes of the arrangement are for reconstruction or developmental purposes. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ARTICLES OF AGREEMENT, art. III, § 4.

The Development Loan Fund is intended to function more flexibly and provides, inter alia, for loans or guaranties to persons, private corporations, States or other entities located in less developed areas for projects which contribute to the economic growth of the country and are economically and technically sound. Furthermore, financing must be unavailable on reasonable terms from other sources and the prospects for repayment must be reasonable. DLF Signs Agreement to Lend $3,700,000 for Private Cement Plant in the Philippines, DLF Press Release, No. 3, Oct. 26, 1959; DLF Signs $700,000 Loan to Syrian Woolen Mill, DLF Press Release, No. 8, Nov. 12, 1959; DLF Approves $4,500,000 Loan for Peru Highway, DLF Press Release, No. 10, Nov. 16, 1959.

⁴ A possible exception is the settlement of the United States war-time lend-lease agreements with the Soviet Union. See N.Y. Times, Dec. 25, 1959, p. 1, col. 1. But even here, there has been no repudiation of liability but disagreement as to the amount to be repaid. See N.Y. Times, Jan. 9, 1960, p. 1, col. 6.

⁵ BISHOP, INTERNATIONAL LAW 53–61 (1953); RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 121, comment c (Tent. Draft No. 3, 1959).
International Court of Justice provided the States have adhered to its jurisdiction, voluntary arbitral proceedings, impairment of the future credit of the defaulting State and general economic sanctions.

In the case of loans made to States by the United Nations or its specialized agencies, such as the International Bank for Reconstruction and Development, it is probable that in the event of a default, not settled according to the procedures established in the loan agreement of the parties, remedies would be available similar to those of States. This conclusion would seem to follow from the underlying reasoning of the International Court of Justice in its advisory opinion in the case of Reparation for Injuries Suffered in the Service of the United Nations. There the court stated that the United Nations was an appropriate international entity to bring an international claim against a State for injury to its official alleged to have resulted from the failure of a State to afford such official adequate protection in the performance of his duties.

Similarly, the United Nations may be viewed as the appropriate international entity to enforce the agreements of its specialized agencies with States. Consequently, should a State fail to perform its loan or guarantee agreement with the World Bank, it would appear that the United Nations, through appropriate international remedies including an international claim, could proceed against such State.

While the Articles of Agreement of the World Bank expressly authorize it “to institute legal proceedings,” no provision is made for the Bank to bring an international claim against a State that may default upon a loan obligation to it. However, the expressed purposes and powers of the Bank may lead to an implication that the Bank itself, as an international entity, has those powers necessary and proper to effectuate the organization's pur-
poses and objectives. Appropriate international means of enforcing a claim for a defaulted loan obligation should constitute such an implied power.

But, it is doubtful in the extreme that the United Nations or its specialized agencies would find themselves placed in a position where they would be faced with resort to such remedies against a State to which credits or loans had been extended. In the case of World Bank loans, the sanction of world opinion would be most effective, for it is inconceivable that a State in need of outside capital for development would risk being stigmatized a poor credit risk in the eyes of the United Nations or its agencies. In addition to the loss of world respect, such a State would by non-performance of its obligations to the United Nations or its agencies seriously endanger further investments or loans from any source. Notwithstanding the probable availability of remedy by international claim, the World Bank, pursuant to its Articles of Agreement, Loan Regulations and Loan Agreements, provides for a detailed system of enforceability of its loan agreements.

The general provisions relating to the legal status of the World Bank are contained in its Articles of Agreement, but are only stated to be accorded to it in the territories of member States. These provide that the World Bank "shall possess full juridical personality," including "the capacity to institute legal proceedings." It is unusual that this personality should be limited to territories of member States and would in all probability be judicially considered an attribute of the Bank's world-wide legal status as an agency of the United Nations. Certainly, the World Bank may find it convenient to institute proceedings against a defaulter that holds assets in the territory of a non-member State.

II

ENFORCEMENT AND CHOICE OF LAW PROVISIONS OF WORLD BANK AGREEMENTS

The more precise protective and remedial provisions for the World Bank's loans are set out in its Loan Regulations and the agreements in connection with each loan. There are two sets of Loan Regulations applicable, respectively, to loans to member governments and to those made to other categories of borrowers. In practice particular loan agreements are made

11 *Id.,* arts. I and VII; "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." Reparation Case, [1949] I.C.J. Rep. 174, 182.

12 *International Bank for Reconstruction and Development, Articles of Agreement,* art. VII.

13 Further provisions fix the places at which suit may be brought against the World Bank, make its assets immune from any form of executive or legislative action, establish the immunities of its personnel and archives and make it immune from taxation. *Id.* at §§ 3, 4, 5, 8 and 9.

14 *International Bank for Reconstruction and Development, Loan Regulations*
subject to the provisions of the Loan Regulations.\(^\text{15}\)

The World Bank is limited in its investment arrangements to dealings with member States, political subdivisions thereof or private borrowers within the territories of such States provided the member State or its appropriate instrumentality guarantees the payment of the loan.\(^\text{16}\) As a result of these limitations, a government is always involved, either as borrower or guarantor, in a World Bank loan.

The basic protective feature of World Bank loan agreements, both with member States and non-member borrowers, provides that the rights and obligations of parties, including a guarantor of a loan, shall be valid and enforceable according to the terms of such agreements notwithstanding any conflict with the law of any State or political subdivision thereof.\(^\text{17}\) Furthermore, none of the parties to a loan arrangement is entitled to claim that any provision of the agreement is invalid or unenforceable for any reason.\(^\text{18}\) Subject to their validity, which is discussed below, the effect of these provisions is to make the terms of the loan agreements, which incorporate the regulations by reference, the proper law of the agreement in the event of a conflict with the law of a State in which a question as to enforceability may arise. The validity under public international law of these novel choice of law provisions should be examined both with regard to their use by the World Bank and for consideration of their utility by private lenders to foreign governments under principles of private international law.

It must be borne in mind that the World Bank is an international organization, operating as a specialized agency of the United Nations. Hence, a question may arise as to the character of a loan agreement between the Bank and a government. Because of the nature of the parties, that is a State as borrower or guarantor and an international organization as the lender, the World Bank loan agreements should be considered international agreements and their validity subject to public, rather than private, international law.\(^\text{19}\)

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\(^{15}\) International Bank for Reconstruction and Development, Loan Regulations No. 3, June 15, 1956, are applicable to loans made by the Bank to member governments; International Bank for Reconstruction and Development, Loan Regulations No. 4, June 15, 1956, are applicable to loans made by the Bank to borrowers other than member governments including private borrowers and non-member governments.

\(^{16}\) International Bank for Reconstruction and Development, Articles of Agreement, art. III, § 4(f).

\(^{17}\) International Bank for Reconstruction and Development, Loan Regulations No. 3 & 4, art. VII, § 7.01 (1956).

\(^{18}\) Ibid.

\(^{19}\) For a definition of international agreements and the parties thereto see Restatement, Foreign Relations Law of the United States § 101 and comment a at 3 (Tent. Draft No. 3, 1959).
Within the framework of suggested consideration, analysis of World Bank loan agreements requires that their essential validity and choice of law features be tested against international law. That system of law imposes certain minimum limitations upon the subject matter that may be treated by agreements between its subjects. Generally, the limitations prohibit the inclusion of provisions that conflict with generally accepted international conduct and the Charter of the United Nations.\textsuperscript{20} Exhaustive examination of the Loan Regulations and representative agreements of the World Bank does not disclose any provisions that would conflict with this international limitation on subject matter. Accordingly, we may assume that under international law, the basic law of such agreements, they are essentially valid. This essential validity of agreement may not be left entirely to the choice of the parties but is governed by the legal system with which the agreement is most closely connected.\textsuperscript{21} It seems clear that a loan agreement between an international organization and a State whereby the former would lend funds and provide technical assistance for the development of an illegal narcotics industry would be void under international law. However, the agreements of the World Bank are entirely consistent with international law and seek to carry out its objectives.

Assuming that the subject matter and terms of the loan agreement are valid in that they do not violate basic principles of international law, nevertheless, a question may arise as to whether the person who concluded the agreement on behalf of the borrowing State was authorized to do so. Such authority is, under international law, determined by the law of the State of the person acting on its behalf.\textsuperscript{22} However, the State may, nevertheless, be bound by the terms of an agreement concluded by its official who acted with apparent authority or with the authority of his office, provided that the other party to the agreement is not properly chargeable with knowledge of a deficiency of actual authority.\textsuperscript{23}

The matter of the authority of the agent of a State entering into a loan


\textsuperscript{21} Cf. statement by Judge Learned Hand: "But an agreement is not a contract, except as the law says it shall be ... Some law must impose the obligation, and the parties have nothing whatever to do with that ..." \textsc{E. Gerli & Co. v. Cunard S.S. Co.}, 48 F.2d 115, 117 (2d Cir. 1931). See \textsc{Restatement (Second), Conflict of Laws} §§ 332 and 332a (Tent. Draft No. 6, 1960) which permit the parties to choose the law governing validity within certain limitations among which is that the choice of the parties is valid unless the agreement has no substantial relationship with state of choice or the choice is not otherwise reasonable. It seems that this principle is equally applicable to the essential validity of international agreements.

\textsuperscript{22} \textsc{Restatement, Foreign Relations Law of the United States} § 103 (1) (Tent. Draft No. 3, 1959).

\textsuperscript{23} \textit{Id.} at subsection (2); Eastern Greenland Case, P.C.I.J., Ser. A/B, No. 53 (1933).
agreement with the World Bank might arise if such an agreement were valid under the principles of international law but, notwithstanding, violated the law of such State, as for example if it were in excess of a statutory limit upon the total debt that might be incurred by an agent on behalf of such State. If the bank had knowledge, or were properly chargeable with knowledge of such a statutory limitation upon the borrowing State, it would appear probable that a provision of a loan agreement in conflict with it would be governed by the effect of the statute. On the other hand, mere conflict between the law of the borrowing state and the terms of the loan agreement may not subject the agreement to the law of the borrowing State with respect to the conflict. And under the law of many States such an international agreement would, under domestic law, supersede inconsistent local law. Accordingly, it is only those provisions of domestic law that limit the authority of State agents which will invalidate an agreement if known by, or properly chargeable to the knowledge of, another party.

World Bank loan agreements valid under international law, in that their provisions are not inconsistent with basic principles of international law and the person who acted on behalf of the party State acted within his actual or apparent authority, and containing the choice of law provisions of the Loan Regulations applicable in the event of dispute present interesting and novel choice of law problems for our consideration.

Public international law itself does not deal with choice of law problems that may arise with respect to the contractual elements of performance, interpretation and discharge and, consequently, does not, in its current stage of development, provide criteria that will lead to a proper choice. This lacuna may result from the historical absence of international agreements between States and international organizations that deal with economic and technical development of States. As such agreements now appear to be a regular feature of governmental relations, we should consider means of bridging this choice of law gap in the law of international agreements.

When the articulated system of international law fails to provide doctrine for resolution of a new problem, courts and tribunals have well-defined sources to which they resort. The International Court of Justice may render its decisions according to, inter alia, international custom and general

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26 Those provisions are summarized in text at notes 17 and 18, supra.
principles of law recognized by civilized nations. Each of these sources may be useful in deriving principles of choice of law for international agreements.

Certainly, international custom is a well recognized source although there is some question among authorities as to the precise meaning of the word custom as used in the Statute. Indeed, there may be no real distinction between these two sources and both may be evidenced by what is considered another source, the decisions of national courts. For our purposes of identifying a public international choice of law rule for deciding the proper law of problems of performance, interpretation and discharge, we may fruitfully consider private international and conflict of law rules applied by States in their domestic courts. If such a consideration discloses general custom or a consensus of principle, it would not seem unreasonable that international law incorporate these findings into its rules of law of international agreement between States and States and international organizations.

As a departure point in our examination, we conclude that international law does not contain a principle or rule that would prohibit the parties to an international agreement from choosing the law to govern matters of performance, interpretation, discharge or breach. Consequently, the question with regard to the World Bank loan agreements is whether there is a sufficient consensus among municipal systems of law to permit the adoption by international law of the rule that the law chosen by the parties governs such matters of international agreements.

The long-term trend of private international law or conflict of laws is in the direction of maximizing the choice of law intended by the parties. Certaiously, such a trend is consistent with the historical liberalization of general individual choice.

Our comparative survey of the efficacy of the principle that the parties to a contract may choose the law to govern it may begin with examination of the common law. According to the law of England, the parties may exer-

27 Statute of the Permanent Court of International Justice, art. 38 (1920).
29 The Permanent Court of Arbitration has incorporated principles of municipal law into its jurisprudence for the resolution of a case between States when public international law offered no solution. The Russian Indemnity Case (Russia v. Turkey) in Scott, Hague Court Reports 297 (Perm. Ct. Arb. 1916).
30 Restatement (Second), Conflict of Laws, Introductory note to Chapter 8, pp. 3-5, §§ 332a, 333-34a, 334e-346a, 346c and d. The basic section 332a provides that "The validity of a contract is determined by the ... law ... of the state chosen by the parties unless ... (b) the contract has no substantial relationship with the chosen state and there is not other reasonable basis for the parties' choice ... ."; 2 Rabel, The Conflict of Laws: A Comparative Study 360-62 (1947); Wolff, Private International Law §§ 393-98; Cook, The Logical and Legal Bases of the Conflict of Laws 389 et. seq. (1942).
cise complete freedom in the selection of the legal system to govern their contract.31 If the parties incorporate foreign law in their contract, the rules of such law are treated as if they were expressly set out in the contract.32

The choice of law rules of the United States, although appearing to be as liberal as the English with respect to incorporation of foreign law, were developed in factual patterns that involved a close connection with the State whose law was chosen as applicable.33 In the absence of such a connection, one can only speculate as to whether an American court would accept a choice of the law of a State with which there is no contact other than the choice.34 The Restatement (Second) requires a "substantial relationship with the chosen state" or "other reasonable basis."35 The restaters say: "The rule does not apply where all of the contacts are located in a single state; here the local law of this state will always govern the validity ...."36 However, a reasonable basis for choice is not always based upon a substantial relationship in the case of a multi-state contract. The parties may choose a state that is unconnected with the transaction if, for example, it is necessary to give the parties a stable legal system that is understood by them.37

While there may be limitations of some factual connection in the American law that are not stated as limiting the parties' choice under the law of England,38 they are at the most peripheral, illusory and of little practical

31 Jacobs, Marcus & Co. v. The Credit Lyonnais, 12 Q.B.D. 589 (1884); Mount Albert Borough Council v. Australasian Temperance Society, [1938] A.C. 224, 240 (P.C.); and see statement of Lord Mansfield: "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." Robinson v. Bland, 2 Burr. 1077, 1078, 97 Eng. Rep. 717, 718 (1760); Dicey, CONFLICT OF LAWS 718-51 (7th ed. 1958); CHESIRE, PRIVATE INTERNATIONAL LAW 42, 214 et. seq. (5th ed. 1957).
33 Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955) (Parties expressly chose English law and part performance in England); Hal Roach Studios, Inc. v. Film Classics, 156 F.2d 596 (2d Cir. 1946); Swift & Co. v. Bankers Trust Co., 280 N.Y. 135, 140, 19 N.E.2d 992 (1939); Dougherty v. Equitable Life Assurance Society, 266 N.Y. 71, 193 N.E. 897 (1934) (Insurance contract to be performed in Russia subject to parties' choice of Russian law).
34 Duskin v. Pennsylvania-Central Airlines Corp., 167 F.2d 727 (6th Cir. 1948) cert. denied, 335 U.S. 829 (1948) (dictum supporting free choice in absence of factual connection); see Pritchard v. Norton, 106 U.S. 124 (1882) (strong statement supporting unrestricted choice but antecedent obligation to the one under consideration; connection with law found to have been impliedly intended by parties).
35 RESTATEMENT (SECOND), CONFLICT OF LAWS § 332a (Tent. Draft No. 6, 1960).
36 Id., comment a, p. 14.
37 Id., comment j, pp. 21-22.
38 Vita Food Products Inc. v. Unus Shipping Co. [1939] A.C. 277, 290 (P.C.). There, the Privy Council, Lord Wright, stated that "it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy."
difference. It is doubtful that any distinction of consequence can be found in the Restatement (Second) rule\(^{39}\) and the statement of Lord Wright\(^{40}\) in the Vita Food case, the high water mark of the English rule of freedom of choice by the parties where it was held that "connection with English law is not as a matter of principle essential."\(^{41}\)

A brief examination of the status of civil law countries is, of course, necessary in seeking a consensus of State views as to the effectuation of the choice of law of the parties as a rule of the international law in regard to agreements.

With varying degrees of qualification, it is safe to conclude that representative civil law jurisdictions recognize the application of the law chosen or intended by the parties to govern their contracts.\(^{42}\) Generally, we may conclude that the choice of law of the parties must be either to the law of a State that is actually connected with the contract or, if not to such a law, to a legal system whose application does not contravene any compulsory requirements of the otherwise proper law of the contract.\(^{43}\) Rabel states: "In British common law ... and in the great majority of the other countries, the courts firmly hold the ... view" that the parties may choose the law to govern their contracts.\(^{44}\)

The draft Benelux Convention on Uniform Conflict of Laws provides an excellent current expression of civil law thinking and trend with respect to the choice of law in problems of contract.\(^{45}\) In Section 17 it is provided:

> When a contract is so closely connected with a given country that it must be reckoned to belong mainly to the legal system of that country, that contract shall be governed by the law of that country unless the parties intended the contract to be governed wholly or in part by the law of some other country. Such an intention shall not have the effect of withdrawing the contract from any imperative rules of the legal system with which it is so closely connected as aforesaid.

The limitation on the parties' choice is very similar to that found in the Restatement of Conflict of Laws (Second).\(^{46}\)

According to Rabel's comparative review on this subject, certain other American Republics, while not rejecting a choice of law of the parties, do give priority to the law of the forum in certain types of contracts.\(^{47}\)

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\(^{39}\) See note 30 supra.

\(^{40}\) See note 38 supra.


\(^{42}\) For an excellent and comprehensive survey of civil law systems in this regard see 2 Rabel, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 368–74 (1947).

\(^{43}\) WOLFF, PRIVATE INTERNATIONAL LAW 417–18 (1950).

\(^{44}\) Op. cit. supra note 42, at 368–69. There are cited extensive references to civilian codes.

\(^{45}\) For a complete English translation see 1 INT'L & COMP. L.Q. 426, 430 (1952).


On the basis of this review which though not exhaustive is highly representative, one would appear justified in concluding that the practice of national courts, as evidenced by judicial decision and the writings of distinguished scholars, includes the almost universal acceptance of the principle that the parties to a contract may choose the law which they intend to govern it. Although there are differing limitations upon the extent of freedom of the choice, varying from the English rule of no limitation to limits prohibiting a choice that would negate the fundamental policy or imperative law of the State with which the contract is factually most closely connected, the choice of law provisions of loan agreements of the World Bank clearly fall within any such broad limitations.

As has been indicated above, these loan agreements are international agreements and are therefore most closely factually connected with international law. The loan regulations and agreements of the Bank contain no provisions contrary to imperatives of that system of law so that the choice of the parties, although negatively expressed in a manner to exclude from consideration any law or other reason that would invalidate the rights and obligations of the agreements, is a valid one under international law.

III

ARBITRAL PROVISIONS OF WORLD BANK AGREEMENTS

In the event of a dispute arising from a loan agreement and not settled by the agreement of the parties, the regulations provide only for the submission of the State to an arbitral tribunal of three, appointed respectively by the World Bank, the borrower, and the joint agreement of such parties, or in the event of their failure to agree on such a third member, by the President of the International Court of Justice or failing appointment by him, by the Secretary-General of the United Nations.50

Taken together the choice of law or enforceability provision and the arbitral provision provide a valid and comprehensive system of settling disputes which is valid under international law. In the event of a dispute, a refusal by one of the parties to follow such provision would constitute a breach of an international agreement which would permit the aggrieved party to invoke remedies under international law.51

48 See text at note 19 supra.
49 See text at notes 17 and 18 supra.
50 International Bank for Reconstruction and Development, Loan Regulations Nos. 3 & 4, art. VII, § 7.03(a) (b) (c).
51 Those remedies and methods of procedure are discussed in the text at notes 5–11 supra.
IV
STATUS OF DEVELOPMENT LOAN FUND

The Development Loan Fund and its agreements for the financing of economic development projects in developing areas of the world are selected for consideration as a State example because the Fund was recently organized for the principal purpose of assisting in economic development under a broad and flexible authorization that permits it to operate either as a single lending agency or in cooperation with other institutions, public or private.\(^5\)

The Fund was established by act of Congress as a corporation and agency of the United States with an authorization for appropriations not to exceed $1,800,000,000.\(^6\) It is empowered to conclude agreements with foreign governments or with any private person.\(^5\) It may sue and be sued in its corporate name but the Fund, its officers and property are exempt from process.\(^5\)

From its legislative establishment, it seems clear that the Fund is a governmental instrumentality of the United States and therefore has international legal status. As an incident of such status it is clothed with the rights and obligations of international law including the right to invoke sovereign immunity and the right to have its disputes with foreign States disposed of by the United States according to international remedies. Additionally, the loan and other agreements concluded by the Fund recite that it is a United States Government agency.\(^6\) A question could arise with respect to whether its loan and other agreements for economic development projects are acts in exercise of **jus gestiones** or **jus imperii**; if the former, it might be argued that, although between governments, such transactions would be governed by private, rather than by public, international law. Irrespective of how classical international law would have classified such

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\(^5\) Hereinafter referred to as the “Fund.”

\(^6\) For a general description of its purposes and **modus operandi** see *The International Law Association, Report of the Forty-Eighth Conference* 343, 352-54 (1959). Other public sources of economic development funds that should be mentioned are: International Finance Corporation (invests without government guarantee in private enterprise with private investors); Export-Import Bank (provides loans, credits and guarantees to further overseas trade of U.S. private enterprise); International Development Association (affiliated with World Bank to make loans of hard funds repayable in soft currencies on liberal terms); Inter-American Development Bank.


\(^6\) *Ibid.*

\(^7\) E.g., see *Loan Agreement Between the Fund and the Government of the Republic of Honduras, May 16, 1958.*
agreements, the present day practice of States leads one to the conclusion that they are important relations between States intended to carry out the highest level governmental policies and as such are clearly an exercise of jus imperii.

V

ANALYSIS OF AGREEMENTS OF THE FUND

Although all categories of Fund agreements have not been made available for this article, an earlier one and comments of its officials have been reviewed. In this article concern is directed only to Fund loan agreements with foreign States or governments.

With respect to Fund loan agreements with foreign States or their instrumentalities, they are international agreements between States and as such are subject to international law including all of its remedies for breach or nonperformance. Such remedies include resort to the International Court of Justice by the United States against a defaulting party State. Of course, the continued existence of the Connally Reservation on the adherence to jurisdiction by the United States leaves the availability of this remedy in serious doubt. More likely any such dispute would be settled by diplomatic negotiation between the States or by the submission to an arbitral tribunal or conciliatory body. Of course, utilization of any of these methods of adjudication or settlement requires the consent of the parties.

Not to be discounted as a compulsion for performance by a borrowing State is the need for loans and credits that might be made available in the future.

The practice of the Fund is to include within its loan agreements with foreign States a provision that they are deemed contracts made under the laws of the District of Columbia and to be governed thereby. It is interesting to note that by the insertion of this clause in its agreements the Fund apparently concludes that public international law recognizes the efficacy

58 For the nature of international agreements see RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 3, 1959) § 101 (2) and comment e p. 7.
60 LOAN AGREEMENT BETWEEN GOVERNMENT OF THE REPUBLIC OF HONDURAS AND MANAGER OF DEVELOPMENT LOAN FUND, May 16, 1959; Letter From Ralph Golby, Deputy General Counsel, DLF to author, July 13, 1960.
61 Such remedies are discussed in the text at notes 4-11 supra.
62 Utilization of the ICJ by the United States is discussed in the text at note 6 supra, and in that note.
63 For an excellent survey and discussion of remedies for settlement of international disputes between States with consideration given to U.S. practice see BISHOP, INTERNATIONAL LAW 53-61 (1953).
64 Letter from Ralph Golby, Deputy General Counsel, DLF, to author, July 13, 1960.
of the States party to international agreements exercising their choice of law to govern them.

The earlier discussion with respect to the parties' choice of law governing their international agreements is equally applicable to those of the Fund and foreign States. However, the chosen law, that of the District of Columbia, must be examined to determine whether it falls within the international law limitations on choice, that is not unrelated to the transaction or contrary to imperatives or fundamental policy of the State with which it is factually closely connected or otherwise not reasonable.

It is apparent that the law of the District of Columbia as the chosen law of the Fund's loan agreements falls within all such limitations and is a valid choice of the parties. Consequently, a court or other tribunal in deciding a dispute with respect to such an agreement should apply District of Columbia law.

Contrary to the World Bank agreements, those of the Fund do not contain arbitral provisions. Consequently, a choice of remedy under international law would be for the agreement of the States party.

VI

CONCLUSION

On the basis of this limited examination and analysis of loan agreements for economic development between States and international organizations, one must conclude that under international law a workable and enforceable system of agreements has been established. Such a system has a most salutory effect on stimulating a flow of investment funds.

A similar analysis of agreements between private lenders and public borrowers remains for further consideration. We may well find that certain elements of the public transactions are adaptable to this other category. The flow of private investment funds has currently failed to reach the magnitude deemed essential for minimum standards of development.

* For extensive analysis of choice of applicable law under international law see text at notes 27-49 supra.