

MEMORANDUM

To: Charles Shreve, Esquire
Corporation Finance Division

From: Edward H. Cashion, Chief Counsel
Corporation Finance Division

Subject: International Bank for Reconstruction and Development

Several questions have been presented as to the applicability of the various Acts administered by this Commission to the International Bank for Reconstruction and Development. These questions are stated and considered below.

1. Will the International Bank be subject to a filing fee under the Securities Act of 1933 or would this be construed as a tax which the Bank would not be required to pay.

Section 11 of the Bretton Woods Agreements Act (Public Law No. 171, 79th Cong., 1st Sess.), authorizing the President to accept membership for the United States in the International Bank, provides that Article VII, Sections 2 to 9 inclusive, of the Articles of Agreement of the Bank, shall have full force and effect in the United States. Article VII, Section 9, of the Articles of Agreement provides in pertinent part:

“(a) The Bank, its assets, property, income and its operations and transactions authorized by this Agreement, shall be immune from all taxation and from all customs duties. The Bank shall also be immune from liability for the collection or payment of any tax or duty.”

This section also provides that certain discriminatory taxation shall not be levied on obligations or securities issued or guaranteed by the Bank.

It thus becomes necessary to determine whether the filing fee provided for by Section 6(b) of the Securities Act of 1933 is a tax within the meaning of Section 11 of the Bretton Woods Agreements Act and the Articles of Agreement of the Bank.

The cases indicate that statutory filing fees, required to be paid to acquire a privilege or license to exercise a right under the control of the Government, are not considered to be taxes unless the fees charged are so far in excess of the probable cost of maintaining the office or

department administering the statute that it clearly appears that the purpose of the charge is to raise general revenue.¹ On this basis, the filing fee required by Section 6(b) of the Securities Act could not be considered to be a tax.² Further, it does not appear from the Bretton Woods Agreements Act that the Congress intended that the Bank would be exempt from the payment of this kind of charge. Consequently, it is my opinion that the Bank would be required to pay the filing fee provided for by Section 6(b) of the Act.

2. Is the Bank subject to or exempt from the Trust Indenture Act.

No general answer can be given to the above question because of the different types of transactions in which the Bank will engage. Article III, Section 4 of the Articles of Agreement of the Bank provides that the Bank, under certain conditions, may guarantee, participate in, or make loans to any Member (foreign government or the United States), or any political subdivision thereof, and to any business, industrial, and agricultural enterprise in the territories of a Member. Under Article IV, Sections 1 and 8, the Bank may borrow money, and buy and sell its own securities and those which it has guaranteed or in which it has invested.

Under Article III, Section 4, when the Bank guarantees any loan, if the Member in whose territory the project is located is not the borrower, the Member or the central bank, or some comparable agency of the Member, must fully guarantee the repayment of the principal, the payment of interest and other charges on the loan. Consequently, with respect to guarantees issued by the Bank, it would appear that they will be guarantees of securities issued or guaranteed by a foreign government or a department or agency thereof, (exempt under Section 304(a)(6)) so that the exemption provided by Section 304(a)(7) would ordinarily be available for such guarantees.

The problem is more difficult with respect to debt securities issued directly by the Bank itself. This Commission has taken the position that the exemption provided by Section 3(a)(2) of the Securities Act of 1933 will not exempt securities of the Bank from the registration requirements of the Securities Act.³ This would make unavailable the exemption provided by Section 304(a)(4) of the Trust Indenture Act.

Section 304(a)(6), exempts debt securities issued or guaranteed "by a foreign government or by a subdivision, department, municipality, agency or instrumentality thereof". If an exemption is to be found under the Trust Indenture Act, for debt securities issued directly by the Bank, it would have to be under this section. The Bank is clearly not a foreign government or a

¹ Stewart v. Verd Hiver Irrigation and Power District, 49 Ariz. 551, 68 P.2d. 329 (1937) Port Smith Gas Co. v. Wiseman, 189 Ark. 675, 74 S.W.2d. 789 (1934).

² See Twelfth Annual Report of the Securities and Exchange Commission, page 127, Fiscal Affairs, which shows that for the fiscal year ended June 30, 1946, the fees collected by this Commission under the various Acts administered by it were only a small percentage of the cost of administering the agency.

³ See memorandum dated January 23, 1946, to Walter C. Loucheim, Jr., re: Registration status of securities issued or guaranteed by the International Bank for Reconstruction and Development.

subdivision, department or municipality thereof. The problem remains as to whether it is an agency or instrumentality of a foreign government or foreign governments, within the meaning of this section of the Trust Indenture Act.

The Bank's Members are foreign governments and the United States. Its purposes are to assist in the reconstruction and development of territories of Members by facilitating the investment of capital for productive purposes; to promote private foreign investment and to supplement such private investment; to promote international trade by encouraging international investment; and to assist in bringing about a smooth transition from a wartime to a peacetime economy. It must operate within the limitations and restrictions contained in the Articles. All the powers of the Bank are vested in the Board of Governors, consisting of one Governor and one Alternate appointed by each Member. The Board selects one Governor as Chairman. The Executive Directors conduct the general operations of the Bank and have such other powers as are delegated to them by the Board of Governors, except that certain enumerated powers are prohibited to them. Any Member may withdraw at any time and if a Member fails to fulfil any of its obligations the Bank may suspend it by a decision of the Governors exercising a majority of the total voting power.

In view of the integrity of the Bank, and its independence and freedom of control from any single foreign government, it is difficult to construe the Bank to be "an agency or instrumentality" of a foreign government or any group of foreign governments. It is rather an independent world organization, dependent upon the support of its various Members, but really controlled by no one or any group of them, except as they may, within the framework of the Bank's Articles, effect the accomplishment of the Bank's purposes.

It is my opinion that there is no exemptive provision under the Trust Indenture Act which would be applicable to debt securities issued by the Bank. If such an exemption is to be available, it would probably have to be created by the Congress.

3. Could the Bank's bonds be designated for exemption by the Secretary of the Treasury, or by the Commission, under Section 3(a)(12) of the Securities Exchange Act of 1934.

Section 3(a)(12) of the Securities Exchange Act of 1934 includes in the definition of "exempted securities" "such securities issued or guaranteed by corporations in which the United States has a direct or indirect interest as shall be designated for exemption by the Secretary of the Treasury as necessary or appropriate in the public interest or for the protection of investors". It also empowers the Commission to designate "exempted securities" by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions...". In my opinion this language is broad enough to permit the Secretary of the Treasury to designate the Bank's securities as "exempted securities". Similarly, the Commission, by rule, could designate the Bank's securities as "exempted securities" either unconditionally or upon specified terms and conditions. It would, of course, be necessary for the Secretary of the Treasury or the Commission, as the case may be, to make the findings required by the Act. In this connection, it would be well to bear in mind that the debates in connection with the Bretton Woods Agreements Act indicate that the Senate

contemplated that the surveillance and watchfulness of the Securities and Exchange Commission would be an everpresent safeguard to investors in connection with securities issued by the Bank.⁴

4. Is the Bank an investment company subject to the Investment Company Act of 1940.

It is difficult to give any definite answer to the above question on the basis of the sparse facts presently available. The Bank is not likely to be an investment company within the meaning of Section 3(a)(1) of the Investment Company Act of 1940. It could not be one within the meaning of Section 3(a)(2). On the other hand, it will probably engage in the business of investing, reinvesting, owning, holding or trading in securities within the meaning of Section 3(a)(3). However, it cannot be stated at this time whether it will own or acquire "investment securities" having a value exceeding 40% of its total assets on an unconsolidated basis. Further, on the facts available, it would not appear to be excluded from the definition of investment company by any of the provisions of Section 3(c). It is suggested that the determination of this problem be reserved until there are available more facts upon which a definite opinion can be expressed.

5. Are there any items in the program for amendment of the Securities Acts which would affect or be of interest to the International Bank.

I am not aware of any proposal in the present amendment program which would directly affect the International Bank or be of particular interest to it.

⁴ See remarks of Senators Taft and Berkley, in the Congressional Record of July 16, 1945, p. 7689.