The Contractual and Transnational Nature of Sovereign Donor-Trustee International Aid Contributions

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ABSTRACT

Donor pledges and commitments at international conferences are typically channeled through inter-governmental funds. Given that the pledging conference itself does not enjoy international personality, the donors must contract with the trustee so the latter can receive, hold, invest, and reimburse the funds to their intended beneficiaries. Although inter-governmental organizations, such as the World Bank, make the vast majority of contributions to states and trustees, treaties do not convey the pertinent transactions. Rather, the two parties tend to situate their contractual relationship within the broader realm of transnational law. As a result, they have shown a preference for flexible instruments such as memoranda of understanding, ad hoc contracts (such as instruments of commitment), simple unilateral acts, and others. Relevant instruments, while facilitating the transformation of a promise/pledge into an asset-based contribution, at the same time relinquish both the donor and trustee from all possible liability.

I. INTRODUCTION

The time of States providing international aid directly to other target States by simply depositing money into a sovereign account are long gone. This practice was discredited because it lacks transparency, fails to account for the use of the assets by the recipient government, and is generally ineffective. Sadly, corruption and intermediary fees constitute a significant dimension of aid programs, and local governments are generally incapable of mobilizing domestic resources to enhance local ownership over the process. This is all the more so given two significant developments in the field of international development finance. The first development is concerned with aid, which is a broader concept than simply providing money. Aid includes debt relief, either as a stand-alone

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action or as part of a poverty reduction strategy for subsequent lending;[1] political and financial guarantees[2] in order to attract low-interest loans;[3] non-World Bank debt relief from the so-called "Paris Club;"[4] debt-for-equity swaps;[5] overseas development assistance, whether unilateral or multilateral;[6] and capacity building.[7]

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1. *See* M.S. ELLIS, THE WORLD BANK; FIGHTING POVERTY – IDEOLOGY VERSUS ACCOUNTABILITY (Krista Nadakavukaren Schefer ed., 2011); *see* Nadakavukaren Schefer, *Poverty & International Economic Law: Duties to the Poor*, EUR. J. INT'L L. (2013).

2. A typical example is the World Bank's Policy-Based Guarantee (PBG), which is applied to facilitate distressed sovereign borrowing in support of structural and social policy reforms. The PBG effectively covers or guarantees part of a debt's servicing, allowing a private financier to lend money to a sovereign that would otherwise be ineligible. The structural conditionalities imposed on the borrowing state, usually draconian, leave little doubt that the Bank will come out victoriously. *See Guarantees Program*, THE WORLD BANK (Feb. 4, 2021), *available at* http://www.worldbank.org/en/programs/guarantees-program (last visited Apr. 2, 2021).

3. *See* AGASHA MUGASHA, THE LAW OF MULTI-BANK FINANCING (Oxford Univ. Press 2007).

4. Although the Paris Club is formally distinct from the IMF, Paris Club members own the bulk of the special drawing rights in the IMF and control this IFI. In practice, no debt relief is possible before the Paris Club if the applicant has not agreed with the IMF. As a result, the requirements of the IMF and the latter's seal of approval are necessary. *See* Mauro Megliani, *Paris Club*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2015).

5. A debt-for-equity swap allows an indebted state to exchange/swap part of its debt for stocks in local state enterprises. *See* RALPH REISNER ET AL., LATIN AMERICAN DEBT MANAGEMENT, INTER-AM. DEV. BANK 111 (1990).

6. Since the launch of the MDGs, the question of aid effectiveness has become critical for donor states. As a result, in 2005, the Paris Declaration on Aid Effectiveness was adopted to disburse and manage ODA more effectively. The Declaration is not binding and established a bilateral partnerships framework between donors and creditors and individual aid-recipient countries. Aid effectiveness is linked to five mutually reinforcing principles: (1) recipient countries exercise efficient ownership over their development strategies; (2) support is based on recipient countries' strategies and institutions (alignment); (3) harmonization and transparency of donors' actions; (4) improvement in decision-making and management; (5) mutual accountability of donors and recipients. The Paris Declaration was rigidly technocratic and only incidentally concerned with development outcomes. Hence, it avoids references to human rights, unlike its follow-up instrument, the 2008 Accra Agenda for Action. Moreover, the OECD DAC published its *Action-Oriented Policy Paper on Human Rights & Development* in 2007. It identified ten principles whereby human rights play an inextricable part in donor effectiveness and harmonization. However, in *Evaluating Development Cooperation: Summary of Key Norms & Standards*, the DAC explains its five principles for evaluating development assistance (i.e., relevance, effectiveness, efficiency, impact sustainability) without any reference to human rights indicators. *See Evaluating Development Cooperation: Summary of Key Norms & Standards, OECD* (n.d.), *available at* https://www.oecd.org/development/evaluation/dcdndep/41612905.pdf (last visited Apr. 2, 2020).

7. The Busan Partnership Agreement (BPA) was adopted at the Fourth High Level Forum on Aid Effectiveness, with support from over 160 states and civil society. The BPA builds on the Paris Declaration and the Accra Agenda for Action with a view to more efficient

The second development, which directly relates to this article, concerns the clear legal nature of unilateral aid as a non-enforceable promise. One particular aspect of this development is the proliferation of trust funds to channel and manage promised aid through and—in many cases—disburse the aid to intended beneficiaries. A tripartite relationship between one or more donors, trustees, and future beneficiaries forms these trust funds. These trusts differ from typical domestic notions of a trust[8] and the Islamic *awqaf* tradition[9] because the relationship between the donor and trustee is contractual, and the beneficiaries have no right of action against the donor or the trustee. The trustee is typically an inter-governmental organization, such as the World Bank[10] or the United Nations (U.N.), which manages the assets provided by the donors and disburses those assets,[11] as agreed to by the donors, to a class of named beneficiaries.[12] Depending on the affluence of its assets, which regular donor conferences may regularly replenish, the trust fund might require a more elaborate corporate governance mechanism; several trusts have moved away from serving as mere bank accounts of the trustee to full-blown inter-governmental organizations.[13]

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institutional arrangements based on successful policies and actions. *See Busan Partnership for Effective Development Co-Operation*, BUSAN HLF4 (Dec. 1, 2011), *available at* https://www.oecd.org/dac/effectiveness/49650173.pdf (last visited Apr. 2, 2021).

8. Clearly, inter-governmental trusts have been modeled on their domestic counterparts and are effectively creatures of comparative law as applied to their inter-state context. *See, e.g.*, MAURIZO LUPOI, TRUSTS: A COMPARATIVE STUDY (Cambridge Univ. Press 2000); Adeline Chong, *The Common Law Choice of Law Rules for Resulting & Constructive Trusts*, 54 INT'L COMP. L.Q. 855 (2005); Adair Dyer, *International Recognition & Adaptation of Trusts: The Influence of the Hague Convention*, 32 VAND. J. TRANSNAT'L L. 989 (1999).

9. *See* Haitam Suleiman, *The Islamic Trust Waqf: A Stagnant or Reviving Legal Institution?*, 4 ELEC. J. ISLAMIC & MIDDLE EASTERN L. 27 (2016).

10. *See 2017 Trust Funds Annual Report*, THE WORLD BANK (2017), *available at* http://documents.worldbank.org/curated/en/428511521809720471/pdf/124547-REVISED-PUBLIC-17045-TF-Annual-Report-web-Apr17.pdf (last visited Apr. 2, 2021) (the Bank's key instrument for managing trusts is its IBRD Operational Policy (OP) 14, 40 (Jan. 1997, as revised in 2013 on Trust Funds)).

11. *See U.S. $14 Billion to Step Up the Fight Against the Epidemics*, GLOB. FUND (Oct. 10, 2019), *available at* https://www.theglobalfund.org/en/specials/2019-10-09-global-fund-sixth-replenishment-conference/ (last visited Mar. 29, 2021) (noting that by late 2019, the total amount of funds committed by donors to the Global Fund for AIDS, TB & Malaria were $14 billion USD).

12. *See* Nele Matz, *Environmental Financing: Function & Coherence of Financial Mechanisms in International Environmental Agreements*, *in* 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 473 (2002).

13. Ilias Bantekas, *The Legal Personality of World Bank Funds Under International Law*, 56 TULSA L. REV. 209 (2021).

An agreement establishes the donor-trustee relationship, but this paper will demonstrate this is a *sui generis* agreement that excludes, for example, the elements of bargaining or consideration where the trustee typically endeavors to assume as few obligations as possible.[14] Given that most donors are States and typically inter-governmental organizations are trustees, one would expect that a treaty would record the agreement setting out this relationship, but this practice is quite rare. It is not uncommon for the trust agreement to be a memorandum of understanding (MoU)[15] or other agreement, which often lacks the binding nature of a contract. Apart from the initial act of appointing a trustee, a future donor may wish to participate in the trust arrangement as follows: by simply depositing money in the trust account; concluding a bilateral agreement with the trustee for the same purpose; or acceding to the original trust agreement. In all of these cases, there is a convergence of consent between the donor and trustee because the trustee must approve the deposit of funds into an account, demonstrated by the maintenance of the funds in the trust account or their subsequent withdrawal for disbursement purposes.[16]

The trust agreement between the appointee (or donor) and the trustee may, but does not necessarily, establish the trust fund entity. It acts as an appointment instrument, followed by a trustee's future obligation to set up the trust fund, which is usually done by opening a bank account, and thereafter arranging the modalities for deposits, financial maintenance, and disbursement. This is the standard practice of the World Bank Group, the leading trustee of humanitarian projects financed by States.[17] There may be numerous donors to a particular inter-governmental trust, but they do not all have the same international legal personality; therefore, involving inter-governmental organizations, physical persons,

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14. This is, of course, not surprising for the World Bank. *See* Tor Krever, *The Legal Turn in Later Development Theory: The Rule of Law & the World Bank's Development Model*, 52 HARV. INT'L L.J. 288 (2011) (tracing the rule of law discourse in the Bank to show its narrow understanding of the rule of law and distancing from concrete human rights obligations).

15. MEMORANDUM OF UNDERSTANDING, SWEDEN MINISTRY OF SUSTAINABLE DEV. & U.N. ENVIRONMENT PROGRAMME (Feb. 2005); *see also* MEMORANDUM OF UNDERSTANDING ON CONTRIBUTING TO THE WATER & SANITATION TRUST FUND, CANADA & U.N. HUMAN SETTLEMENT PROGRAMME (Feb. 2005).

16. *See id.* at Section 2.1.

17. The World Bank practically sets up a trust fund not only by opening a bank account but also by adopting an executive resolution that has the effect of bringing the fledgling fund within its institutional remit, both for internal Bank purposes and vis-à-vis third parties. This was the case, for example, with the establishment of the GEF fund. *See* Int'l Bank Reconstruction & Dev. Res. 91-5 (Mar. 14, 1991).

multinational corporations, and legal persons with limited international legal personality in addition to States is critical. A treaty would be the appropriate arrangement for these actors, necessitating a series of distinct legal transactions by the trustee with each entity. In such cases, some contractual arrangements will possess a private law character, but that character does not detract from the trust's international legal nature. Moreover, the trust agreement is hierarchically superior, at least in the U.N. system, to the financial rules and regulations of the U.N.'s specialized agencies. As a result, it may convey authority to the trustee—when the trustee is not the U.N. or a subdivision thereof—to audit the financial management of a specialized agency when acting as an implementing or other entity.[18]

In the following subsections, we shall examine the contractual relationship of the two most important entities associated with a trust fund: its donors and trustees. This involves a legal analysis of deposits—a transfer of assets by a state entity to the trustee or the private bank where the account holds the trust fund.[19] This is significant because some trust funds simply require the donor to deposit or transfer their contribution to a private bank account without a written agreement. Whether this amounts to a unilateral act is debatable; if it does, so too is whether such an act produces a legal obligation on the part of the depositor. We will also look at a donor agreement when the donor is a State or inter-governmental organization to assess whether a treaty or a non-binding instrument, such as an MoU, achieves the goal of the donor when the parties' intention is not to be bound to the terms of the agreement.[20] A donor agreement with private parties presents fewer

18. *Selected Legal Opinions of the Secretariats of the United Nations & Related Intergovernmental Organizations*, U.N. JURID. Y.B. 399, 414-15 (1995), *available at* https://legal.un.org/unjuridicalyearbook/volumes/1995/ (last visited Apr. 2, 2021).

19. This is an issue that generally pertains to domestic banking laws, such as the U.S. Electronic Funds Transfer Act, 15 U.S.C. 1693. There is no standard practice when it comes to monetary deposits by sovereigns. UNCITRAL has attempted to standardize electronic transfers irrespective of the depositor through its 1994 Model Law on International Credit Transfers. MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS, U.N. COMM. ON INT'L TRADE L. (Proposed Official Draft 1992).

20. This is not always the case, however. In Case C-258/14, the Court of Justice of the European Union (CJEU) came to the conclusion that MoU concluded under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under art 267(1)(b) TFEU, and hence susceptible to interpretation by the Court. *See* Case C-258/14, Eugenia Florescu & Others v. Casa Județeană de Pensii Sibiu & Others, CJEU Judgment (Grand Chamber) of 13 June 2017, ¶ 36, EU:C:2017:448. In Joined Cases C-8-10/15P, where the CJEU held that where the EC Commission is involved in the signing of MoU within the framework of the European Stability Mechanism, it is acting within the sphere of EU law. *See* Joined Cases C-8-10/15P, Ledra Advertising Ltd. & Others v. European Commission &

difficulties and is predominantly governed by domestic law.[21] Finally, we delve into the legal nature of the agreement between the donor and the trustee, which provides the latter with the authority to act in such capacity.

II. PLEDGES, COMMITMENTS, AND REPLENISHMENTS

The following sections examine the legal nature and practical effects of the various mechanisms by which donors agree to transfer financial assets to a fledgling trust fund or replenish the fund's resources through a new funding cycle. In exploring how States finance conferences, an attempt is made to apply the general rule to inter-governmental trust funds, which are an extension of the financing conferences in many cases. As a result, we differentiate between the following international law concepts—promises, pledges, and commitments. There is, of course, an institutional instrument within the U.N. that is dedicated to trust fund pledges, the Secretary-General's Bulletin on "Establishment and Management of Trust Funds,"[22] but this does not, at first view, help clarify the distinction between a pledge and a commitment. The importance of the various ways to finance trust funds should not be underestimated; it also should not be assumed that prospective state donors are eager to finance development efforts or that they generally honor their pledging commitments.

A. The Legal Nature of Donors' Pledges

An inter-governmental trust fund principally consists of assets transferred by one or multiple donors to the trustee's account.[23] By

European Central Bank, EU:C:2016:701. Therefore, it is bound to refrain from MoU that are inconsistent with EU law, including the EU Charter of Fundamental Rights.

21. Agreements between States and private entities are excluded by both the Vienna Convention on the Law of Treaties as well as by customary law from the ambit of treaties. *See* Anglo-Iranian Oil Company Case (U.K. v. Iran), Judgment, 1952 I.C.J. Rep. 93, ¶ 112 (July 22). With few exceptions, the practice of private entities transacting with States and international organizations is to adopting choice of law clauses based on private law.

22. U.N. Secretary-General, *Establishment & Management of Trust Funds*, U.N. Doc. ST/SGB/188 (Mar. 1, 1982).

23. The capital transferred to trust funds by donors does not consist of cash transfers alone. It may well involve grants, loans, a combination of both, and the parties may agree to payment in tranches, a one-off, front-end loaded payment or others. *See* Benjamin Graham, *Trust Funds in the Pacific*, ASIAN DEV. BANK 9, 58 (2005).

transferring assets to the trustee's account the donors—whether they are states, inter-governmental organizations, or individuals[24]—are undertaking a purely voluntary act, which may involve a variety of stages before the pledge of donation or the donation itself binds the donor. This section seeks to identify the point at which the pledge becomes a binding promise under international law and the degree to which the concept of a promise in international law differs from that of a pledge within a multilateral donor conference. As will become obvious, given the absence of legal commitment in State pledges related to Sustainable Development Goals (SDG), the assets/donation placed in a trust fund are an excellent way to diffuse any legal obligations and thus live up to one's political commitments. This vagueness is difficult to achieve through formal agreements, and as the following sections demonstrate, it is precisely why most donor-trustee agreements either have an ambiguous legal nature or otherwise attempt to maintain informality.[25]

It is common practice for contemporary peace treaties to call on the treaty's sponsors or other potential donors to contribute financial assets towards the realization of post-conflict agendas regarding governance, constitution building, health, infrastructure, and others.[26] Such calls are even more vociferous if the potential donors partook in the peace efforts,

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24. The UNDP's traditional legal basis for accepting donations from private parties can be traced back to the practice of its predecessor, the Special Fund, which was itself authorized to accept private contributions on the basis of the General Assembly mandate that created it. *See Legal Framework for the UNDP's Use of Donations from Non-Governmental Sources*, U.N. JURID. Y.B. 463, 463-64 (1996). *See also The Use of the United Nations Name & Emblem*, U.N. JURID. Y.B. 461, 426-27 (1997) (wherein the opinion highlighted the creation of purposely established foundations under U.S. law in order to channel tax-deductible private contributions to the UN50 Trust Fund).

25. *See generally* JOOST PAUWELYN, RAMSES WESSEL & JAN WOUTERS, INFORMAL INTERNATIONAL LAW MAKING (Oxford Univ. Press 2012). That international transactions are gradually moving towards informality, particularly through the process of transnational law is slowly emerging in the legal literature. *See, e.g.*, Ilias Bantekas, *The Rise of International Commercial Courts: The Astana International Financial Centre Court*, 33 PACE INT'L L. REV. 1, 41 (2020); Ilias Bantekas, *The Contractualization of Public International Law & Its Impact on the Rule of Law*, 21 INT'L J.L. CONTEXT 1-8 (2021).

26. *See* Arusha Peace and Reconciliation Agreement for Burundi, protocol IV, ch. III, art. 17(1), Aug. 28, 2000, (called for the establishment of an Inter-Ministerial Reconstruction & Development Unit (the Development Unit)) [hereinafter Burundi Agreement]. The Development Unit was charged with drafting a detailed reconstruction plan, in cooperation with the World Bank, the United Nations Development Programme & other multilateral entities; *see also* Agreement on the Basis for the Legal Integration of the Unidad Revolucionaria Nacional Guatamalteca, ¶ 5-55, Dec. 12, 1996 [hereinafter Guatemala Agreement]; Interim Agreement for Peace & Self-Government in Kosovo, ch. 4, ¶ 3, Feb. 23, 1999 [hereinafter Kosovo Agreement]; Peace Agreement Between the Government of Sierra Leone & the Revolutionary United Front of Sierra Leone, art. XXVII(1), July 7, 1999.

assisting in a country's national reconstruction plan.[27] When donor states are involved in reconstruction efforts, the negotiators and parties to a conflict examine the possible avenues for peace that would allow armed groups to put down their weapons and assist in finding them meaningful employment. Negotiating peace inevitably requires drafting a national reconstruction plan that addresses both finance and infrastructure. Obviously, these peace treaties are not binding on potential donor States. They solely serve as guarantors (and not as parties); moreover, the wording of these peace treaties clearly suggests that parties should seek donations from the international community. Even so, at the political level, the guarantors will be expected to make some financial contributions and try to solicit other funding. Thus, the donation clauses in post-conflict peace treaties do not give rise to a binding promise as a matter of practice or of law.

Let us now examine the nature of pledges in the context of multilateral donor conferences. The U.N.'s voluntary donor conferences passed through three stages of evolution. Until 1977 the organization hosted individual donor events for each one of its programs, but following a restructuring the U.N. began organizing a massive single donor conference once a year based on the belief that this would prevent donor fatigue and rejuvenate State interest.[28] This strategy probably worked well for a while, but in the early 2000s the practice and donor habits of the most influential States changed. Developed countries were no longer inclined to pour money into a development program or a developing State without a results-based mechanism or significant recipient accountability. They also wanted local ownership over the projects to increase and governmental intrusion to decrease, which leads to corruption and embezzlement.[29]

This has led the U.N. to host distinct donor conferences, particularly when setting up inter-governmental trust funds to administer collected assets, or in instances when immediate action is requested by the donor community. Two examples of donor conferences are the 2003 Madrid Conference on Reconstruction in Iraq and the 2006 London Conference on Afghanistan.[30] Despite some coherency regarding the pledging

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27. *See* Christine Bell, *Peace Agreements: Their Nature & Legal Status*, 100 AM. J. INT'L L. 373, 380-82 (2006).

28. G.A. Res. 32/197, ¶ 31 (Feb. 23, 1999).

29. U.N. Secretary-General, *Pledging Mechanisms to Fund Operational Activities for Development of the United Nations System*, pp. 4-5, U.N. Doc. A/57332 (Aug. 21, 2002) [hereinafter U.N. Doc. A/57332].

30. The explosion of acute and large-scale humanitarian crises across the globe has necessitated co-ordination, which is now offered by the UN Office for Humanitarian Affairs.

process and procedure at the U.N.'s donor conferences,[31] States' customary practice generally suggests the existence of a rule whereby conferences possess an independent right to adopt their own rules of procedure. This idea is pertinent to our discussion because it helps determine the binding nature of pledges given at specific conferences. If, for example, the organizers of a conference insist that every pledge be entered into a multilateral treaty that must subsequently be ratified by national parliaments, this is very different from a conference that only requires oral expressions of pledges.

State practices at international donor conferences demonstrate that a pledge should not be viewed as possessing the same legal effect as a promise (in the form of a unilateral act) that would otherwise constitute a binding expression of will by the promising State.[32] Rather, the legal nature of a pledge is anything but a binding promise![33] The only binding act on the potential donor is the act of contribution itself, which materializes when the actual payment or the transfer of funds or goods to the recipient collecting entity occurs. Only at the moment of receipt or deposit is the donor bound to honor the transaction. On the other hand, a pledge is merely an expression of intent to provide a voluntary contribution.[34] Therefore, a pledge is a non-binding announcement of an

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This now holds direct pledging conferences, as was the case with Yemen in 2019. *Yemen: Donors Pledge U.S. $26.2 Billion to Support a Massive Humanitarian Operation*, U.N. OFF. COORDINATION HUMANITARIAN AFF. (Feb. 26, 2019), *available at* https://www.unocha.org/story/yemen-donors-pledge-us26-billion-support-massive-humanitarian-operation (last visited Apr. 2, 2021).

31. U.N. Doc. A/57332, *supra* note 29, at 3-4.

32. This distinction is not made by ILC Rapporteur Victor Rodriguez Cedeño in his Report on Unilateral Acts of States. Victor Rodriguez Cedeño (Special Rapporteur on Unilateral Acts of States), *First Rep. on Unilateral Acts of States*, U.N. Doc. A/CN.4/486 (Mar. 5, 1998).

33. This is not very different from the treatment of promises in domestic contract law. Generally, a binding offer is distinguished from a mere invitation to treat (which does not amount to a binding offer). Advertising-related cases, which involve an alleged unilateral act (by the seller), provide significant evidence to this effect. *See* the English leading case of *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 QB 256 (Eng.); *see also Fisher v. Bell* [1961] 1 QB 394 (Eng.). The position in the U.S. is similar. *See* Lefkowitz v. Great Minn. Surplus Store, Inc., 86 N.W.2d 689 (Minn. 1957). Equally in the civil law tradition, albeit more cautious. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 145 (Ger.) (indicating that the display of goods in a window is not an offer, but merely an invitation to make an offer).

34. The matter is not beyond contention in domestic law. In the U.S., for example, there is sharp disagreement between two distinct camps. The first asserts that pledges made to charitable organizations should not be treated any different to ordinary principles of contract formation, arguing that unless agreed otherwise, such pledges are invitations to treat or unenforceable promises. *See* Md. Nat'l Bank v. United Jewish Appeal Fed'n of Greater Wash., Inc., 407 A.2d 1130, 1136 (Md. 1979). The other camp argues that such pledges

intended contribution under international law,[35] unless that pledge adopts the form and content of a binding agreement.[36] An intermediate category between pledging and contribution does not exist. In fact, a pledge's binding character is derived from its assimilation to an offer under a country's domestic contract laws, by which the donor specifies the committed amount and which amount is subsequently accepted by the trustee.

It is, therefore, possible for a pledging conference to accumulate numerous pledges[37] that do not translate into concrete commitments. This situation can only be remedied by implementing appropriate conference mechanisms that leave little room for pledges and that create instruments binding potential donors.[38] Thus, the only option to implement a binding commitment is to conclude a multilateral treaty (or another binding undertaking) between the donors at the conference, or to

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should be enforced on public policy grounds and the philanthropic purposes underlying charities. *See* Jewish Fed'n of Cent. N.J. v. Barondess, 560 A.2d 1353, 1354 (N.J. Super. Ct. L. Div. 1989); *see also* Salsbury v. Nw. Bell Tel. Co., 221 N.W.2d 609, 613 (Iowa 1974).

35. *See* J. E. Archibald, *Pledges of Voluntary Contributions to the United Nations by Member States: Establishing & Enforcing Legal Obligations*, 36 GEO. WASH. INT'L L.R. 317, 317-29 (2004). Archibald rightly comments that, with regard to unpaid voluntary contributions, the U.N. does not invoke Art. 19 of the U.N. Charter, at 325-26.

36. *See also* RUTSEL SILVESTRE J. MARTHA, THE FINANCIAL OBLIGATION IN INTERNATIONAL LAW 263 (Oxford Univ. Press 2014). The issue has not received any particular treatment in general international law, nor in the expert work on unilateral acts of the U.N. International Law Commission (ILC). *See* C. ECKART, PROMISES OF STATES IN INTERNATIONAL LAW (2012).

37. This is in fact the case with SDG-related financing. Modern cooperation on development was effectively established at the first International Conference on Financing for Development that took place in Monterrey in 2002. The principles of a holistic and integrated approach to the multifaceted challenges of development were expressed in the 'Monterrey Consensus,' which gave birth to a series of Financing for Development follow-up meetings. *See* U.N. Int'l Conference on Financing for Development, U.N. Doc. A/CONF.198/11 (Mar. 22, 2002); *see also* A. Caliari, *Guest Editorial: The Monterrey Consensus, 14 Years Later*, 59 DEV. 5 (2016). The financing of development strategies and programs was, however, streamlined and fully developed in the Addis Ababa Action Agenda (AAAA). G.A. Res. 69/313, Addis Ababa Action Agenda of the Third Int'l Conference on Financing for Development (AAAA) (July 27, 2015). The AAAA aligns all financial flows and policies with economic, social, and environmental priorities, ensuring in the process the sustainable nature of all financing and actions. There is nothing, however, in the pledges made that suggests that they are anything more than political commitments.

38. This is achieved in respect of trust mechanisms that employ contractual terms with their donors, as is the case with the GEF's instrument of commitment, whereby donors "formalize their promise to contribute" to the trustee. Where the promise requires subsequent parliamentary approval, the promise is conditional. *See* RUTSEL SILVESTRE J. MARTHA, THE FINANCIAL OBLIGATION IN INTERNATIONAL LAW 264 (2015); *see also* G. DROESSE, FUNDS FOR MULTILATERAL DEVELOPMENT: MULTILATERAL CHANNELS FOR CONCESSIONAL FUNDING 281-83 (2011).

form bilateral agreements between the trustee and each individual donor. In either case, because the negotiated agreement is a treaty, the constitutional authorities in the signing State will need to ratify it, and it is possible, although unlikely in practice, for said authorities to refuse ratification for a variety of reasons.[39]

In this eventuality, no binding obligation for that State would arise. This means it would possess the same legal qualities as the pledge until the donor agreement is ratified. The U.N. Secretary-General's bulletin on establishing trust funds aptly recognized this reality and stated that a pledge is:

[A] written commitment by a prospective donor to make a contribution to a trust fund. (A written commitment which is subject to the need to secure an appropriation or other national legislative approval is considered a pledge.) A pledge can be accepted only after the trust fund has been formally established.[40]

The making of a pledge and its acceptance is recorded in an exchange of letters or, if deemed appropriate, a more formal agreement.[41]

This definition is somewhat problematic because it seems to equate an otherwise "committed" contribution, presumably subject to the international law of promise, to a contribution that may be rejected by the national legislature. A coherent interpretation of this provision must be as follows: 1) the terms "pledge" and "commitment" have the same meaning in the Secretary-General's Bulletin; 2) only written pledges are considered binding; 3) pledges, not otherwise qualified, are binding either upon exchange of letters, another agreement, or when received in writing by the administrator of the trust fund; and 4) qualified pledges become binding only when the qualification is lifted, otherwise they produce no legal effect for the pledging State.

In order to avoid hosting donor conferences where the outcome is merely making pledges that do not translate into concrete cash, it became evident that conferences must end in binding commitments. Above, paragraph 29 of the Secretary-General's Bulletin aims to remedy this lacuna by requiring a degree of formality in the pledge. At this stage, it is also worth noting that only a portion of the money committed and

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39. The Instrument for the Revitalised Global Environmental Facility (GEF) of Mar. 2008, Annex C, 2(b), states that in cases of qualified instruments of commitment, the donor state "undertakes to exercise its best efforts to obtain legislative approval for the full amount of its contribution by the [agreed] payments date."

40. U.N. Secretariat, Letter dated Mar. 1, 1982 from the Secretary-General addressed to all heads of offices and departments and all executive and administrative officers, U.N. Doc. ST/SGB/188 ¶ 26 (Mar. 1, 1982).

41 *Id.* at ¶ 29.

collected as a result of donor conferences is earmarked for trust funds. The trustee may attempt to set up a particular legal mechanism to turn pledges into concrete commitments depending on the trustee's experience in the administration of trust funds, his influence, and based on the mandate established by the creators of the trust fund. Largely, the World Bank has managed to standardize and streamline this process, but only with respect to particular trust funds.

A typical example is the Global Environmental Fund (GEF), whereby donors must sign an Instrument of Commitment, which constitutes a binding agreement subject to ratification by national parliaments. The same type of binding commitment is established by the trustee regarding the various replenishments required to keep the GEF alive.[42] These Instruments of Commitment are a useful mechanism for replacing pledges without inferring that outdated pledges serve no useful purpose, as in some situations particular donors will feel disinclined to be cornered.

A multilateral treaty, or a legal instrument of the same effect, is another mechanism. In each case, the intention of the parties to commit themselves requires verification. The Foundation Remembrance, Responsibility and Future, founded to compensate the Jewish victims of Nazi Germany, was set up by a Joint Statement between the governments of various States, and the German government promised to pay specified dollar amounts to the trust fund. This Joint Statement is not a pledge because of its otherwise binding language, and its implementation was given effect the same day, as a result of a clause in the Joint Statement to that effect.[43] The Joint Statement embodies an Executive Agreement adopted between Germany and the United States.[44]

The U.N. Legal Counsel highlighted some tax-related problems regarding the tax-deductible nature of contributions made to the U.N. and its agencies.[45] Under U.S. law, for example, only charitable institutions

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42. *Instrument for the Establishment of the Restructured Global Environment Facility*, GEF (Sept. 2019), *available at* https://www.thegef.org/sites/default/files/publications/gef_instrument_establishment_restructured_2019.pdf (last visited Feb. 6, 2021).

43. Similarly, Art. 2 of the 2001 Washington Agreement between the United States and France Concerning Payment for Certain Losses Suffered during World War II (including Annexes), *available at* http://www.civs.gouv.fr/download/uk/washington.pdf. (last visited Apr. 2, 2021)

44. Agreement Concerning the Foundation "Remembrance, Responsibility & the Future," Ger.-U.S., July 17, 2000, U.S.T. 13104.

45. Legal Framework for the United Nations Development Programme's Use of Donations from Non-Governmental Sources UNDP Financial Regulations & Rules, 1996 U.N. JURID. Y.B. 463, U.N. Doc. ST/LEG/SER.C/34.

founded in that country are eligible to receive tax-deductible contributions; inter-governmental organizations are not. Tax-deductible donations to U.N. agencies are possible if they are channeled through a properly established foundation under U.N. law which is thereafter authorized to transfer the contributions to the desired agency.[46] Hence, the U.N. Association of the United States and the U.N. Association of the U.S. Committee for United Nations International Children's Emergency Fund serve this purpose. Foundations serve as vehicles to channel funds while performing their typical functions.[47] This brief case study illustrates the problems faced by trust funds, whether in the U.N. system or elsewhere, in receiving private contributions. In each case, the political prowess of the major donor States to an inter-governmental trust fund and the trustee's influence can determine, to a large degree, the methods of soliciting and payment by other donors.

B. The Practice and Politics of Earmarking

Earmarking involves proactively determining a donation's terms of condition, which means the donation will only be used for the particular purpose associated with the trust fund.[48] Where a multilateral funding treaty stipulates that donor members are obligated to provide funding without specifying where to use the funding, the risk that donors will reserve how funds are to be used remains. The submission of a unilateral declaration that a particular donor's contribution is earmarked for a specified purpose would amount to an interpretative declaration, and would depend on the relevant circumstances to ascertain whether this designation is tantamount to a reservation.[49] In any event, reservations and interpretative declarations are permissible as long as they are compatible with the object and purpose of the treaty;[50] thus, where both

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46. *Id.* at 465.

47. *Id.*

48. *See* EDWARD ELGAR, RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS 124 (J. Klabbers et al. eds., 2011); Piera Tortora and Suzanna Steensen, *Making Earmarked Funding More Effective: Current Practices and a Way Forward*, OECD (2014), *available at* https://www.oecd.org/dac/aid-architecture/Multilateral%20Report%20N%201_2014.pdf (last visited Feb. 6, 2021).

49. The term "reservation" means "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

50. Reservations to Convention on Prevention & Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15 (May 28).

the instrument of commitment and the fund's constitutive agreement (even if not a treaty) are silent on the matter of earmarking, its permissibility is strongly presumed.[51]

Some inter-governmental trust funds are, by their very nature, subject to earmarking, especially in the case of single donor funds created by a State to finance a particular contingency in a developing country. In such situations, the trustee cannot divert the purpose of the fund, nor can donor States prohibit the trustee from earmarking its contribution, as that would defeat its very purpose. In practice, given that in the vast majority of cases the trust constitutive instrument will stipulate whether earmarking is permissible, however, only in exceptional circumstances will the trustee have permission to authorize a request to earmark the instrument of commitment with a donor. An exception of this nature would undoubtedly involve an extraordinarily large contribution whereby the donor will explicitly demand how and where the funds are used. Because such requests violate the trust fund's constitution, the trustee would need approval from the fund's executive board in order to satisfy the prospective donor's demands; otherwise, he would be acting *ultra vires*. If the trustee receives the money without any formal objection to the condition attached by the donor, it must be presumed the trustee acquiesced to the earmarked funds' stated condition.

Three types of earmarking identified in the process of this study are permissible, qualified, and prohibited earmarking. We have already discussed permissible earmarking—trust funds that permit donors to earmark their contributions. As far as this author is aware, although very little, if any, information is publicly available, trustees and donor conferences are generally averse to discriminatory earmarking requests, which favor the donor's interests. Between the two extremes, there is an intermediate category wherein the trust's constitution or terms of reference permit earmarking to the extent that such requests can be accommodated. Article 5 of the Terms and Conditions of the World Bank's International Reconstruction Fund Facility for Iraq (IRFFI) states:

A donor may state a preference that its contribution be used to support one or more of the fourteen sectors and cross-cutting themes defined under needs assessment with the exception of mine action from which no funds from the World Bank Iraq Trust Fund may be allocated. In the event that a donor's preference cannot be accommodated, the Bank

51. Where neither the constitutional text of the trust fund nor the instrument of commitment contains a provision on earmarking, an earmarking provision appended to the instrument of commitment is a true interpretative declaration and is wholly permissible, unless the preparatory works of the trust fund clearly and overwhelmingly demonstrate otherwise.

may allocate the contribution to other sectors with the agreement of the donor.[52]

The institutional law of earmarking is different from but not wholly unrelated to the practice of conditional contributions. A donor may agree with the trustee that he is willing to make a substantial contribution as long as a particular policy of the trust fund is altered or, if the specific allocation is not possible, that other projects satisfying the policy considerations of the donor receive the earmarked money. The U.S. government, for example, established the President's Emergency Plan for AIDS Relief (PEPFAR),[53] under which the Global Fund for AIDS, Malaria, and Tuberculosis receives a significant amount of its funding.[54] In its Guidance No. 1, PEPFAR proclaimed that only projects premised on the triptych of "abstinence, be[ing] faithful and consistent condom use" (ABC) would receive funding.[55] Consistent with its policy

52. IRFFI Terms of Reference (Dec. 11, 2003).

53. United States Leadership Against HIV/AIDS, Tuberculosis, & Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711 (2003).

54. The Global Fund for AIDS, TB, and Malaria was constituted in 2002 as a foundation (non-profit) under articles 80ff of the Swiss Civil Code, after which it began to enjoy legal personality under Swiss private law until the subsequent conferral to the Global Fund of a limited degree of international legal personality through its Headquarters Agreement with the Swiss Federal Government. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] Dec. 10, 1907, SR 210, RS 210, arts. 80ff (Switz.). In order to retain the Global Fund on Swiss soil, the federal government of that country launched a well-organised bid, which encompassed, on the one hand, the signing of an Administrative Services Agreement (ASA) with the World Health Organisation (WHO), under which the Fund's Secretariat would be subsumed within the WHO's international legal personality, while remaining independent for the purposes of its own functions. Subsequently, the Fund entered into an ASA with the WHO on May 24, 2002, which, although it served to confer international law rights and privileges to the Global Fund and its personnel, was itself subject to Swiss law and therefore did not constitute a treaty. *See* Global Fund, *Report on Legal Status Options for the Global Fund*, GF Doc. GF/B4/12 (Jan. 29, 2003). The nature of the HQ Agreement only confers IO-like status to said entity in the country where this is granted. Switzerland has a strong tradition of conferring such status to particular NGOs operating therein on the basis of its Federal Decree of September 30, 1955 'On the Conclusion and Modification of Agreements with International Organizations in View of Determining their Legal Status in Switzerland.' Similar agreements have been concluded with the International Olympic Committee (IOC), the International Air Transport Association (IATA) and others. *See* M-C Krafft, *Legal Opinion on the Modifications Which Should be Made to the Legal Status of the Global Fund in View of the Transformation of the Fund into an Intergovernmental Organisation*, GLOBAL FUND (Apr. 2003), *available at* https://www.theglobalfund.org/media/2928/bm05_07gpcreportannex6_annex_en.pdf (last visited Mar. 22, 2021).

55. PEPFAR Guidance No. 1, Abstinence, Be Faithful and Consistent Condom Use (2003). For a critical analysis, *see* Kent Buse et al., *A Farewell to Abstinence & Fidelity?*, 4 LANCET 600 (2016).

objectives, PEPFAR notified the Global Fund that it would only contribute to the programs of countries that incorporated its ABC requirement. This stipulation rendered the requirement attached to the United States contribution a hybrid between earmarking and conditional funding. It is obvious that only sufficiently powerful trust funds can deny conditional funding and exceptional earmarking (or simply earmarking). The stronger a trust fund is, both politically and financially, the greater the likelihood that its potential contributors will respect its earmarking prohibition. As a result, the trust fund will have greater political enforcement power. Therefore, the practice of political bargaining is commonplace, given that the only chance of trust funds' survival is through the contributions of member States. It is no accident that there is relative flexibility with respect to accommodating some or all of prospective donors' wishes. This author is not advocating that this kind of practice leads, or tends to lead, to poor results or that it stifles the work of trust funds.

III. THE DEPOSIT OF THE DONATION IS NOT A UNILATERAL ACT DEVOID OF OBLIGATION

In previous sections, this article explains that funding pledges are not generally binding on pledging States; signing an instrument of commitment, however, has the exact opposite effect.[56] This section will assess the legal nature of depositing or transferring assets to the trust fund. In this connection, the principal legal question is whether transferring funds to the trust fund's name by a contributing State is a unilateral act. Some unilateral acts may give rise to an international legal obligation,[57] whereas others may not. A unilateral act, devoid of legal significance, involves the actions of a single State[58] and, by its very nature, does not create any rights or obligations for other States or inter-governmental organizations.[59] *Prima facie*, it would seem that the

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56. *See id.* at § 2.1.

57. This is clear in the jurisprudence of the ICJ, particularly in Nuclear Tests (Aus. V. Fr.), Judgment, 1974 I.C.J. Rep 253, at 267-68 (Dec. 20). *See also* A.P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1 (1977).

58. Unilateral acts may be individual or collective, particularly where they are undertaken through a joint multilateral declaration. *See* Víctor Rodríguez Cedeño (Special Rapporteur on the Unilateral Acts of States), *First Rep. on the Unilateral Acts of States*, 79 INT'L L. COMM'N 139, U.N. Doc. A/CN.4/486 (Mar. 5, 1998).

59. The ILC plenary was eager to emphasize that "the criterion for unilateral acts should be the concept of an international legal obligation and not that of their legal effects, which was a broader and vaguer concept applying to all unilateral acts of States." *Rep. on the Work*

deposit or transfer of a donation/contribution into a bank account is a unilateral act. Moreover, such a transfer does not establish any further legal obligations or corresponding rights for the trust fund or the trustee, particularly if the contractual agreement is clear about what the State is bound to contribute. This assumption is untrue for several reasons.

First, as previously noted, in the majority of cases pledging money is a binding promise to act in a particular manner.[60] Even so, in the specific practice of multilateral donor conferences, merely making a pledge does not generally give rise to a legal obligation absent an express intention to that effect. However, when a donor who makes an oral pledge unilaterally deposits the money, this act represents the implementation of the promise by the contributor, and at that time, the deposit coincides for all legal purposes with the pledge. In any event, by its own operation, the deposit creates legitimate expectations for the depositing State.[61] This no doubt gives rise to conduct-based estoppel.[62] Courts across the world differ on this point. The courts of Hong Kong confirmed conduct-based estoppel,[63] whereas their Canadian counterparts rejected it on the basis that tacit assent cannot be arbitrarily presumed without proof of positive action.[64]

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of Its Fifty-Sixth Session, INT'L L. COMM'N ¶ 224, U.N. Doc. A/59/10, (July 5, 2004-Aug. 6, 2004).

60. *See id.* at ¶ 195. Moreover, the ICJ held in *Nicaragua v USA* (*Military and Paramilitary Activities in and against Nicaragua*) that the unilateral declarations adopted by states under Article 36(2) of the ICJ's Statute, by which they accept the Court's compulsory jurisdiction, constitute "a series of bilateral engagements." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Rep. 392, ¶ 60 (Nov. 26). Judge Jennings was only prepared to accept, however, that they could be regarded as *sui generis* treaties. Nicar. v. U.S., 1984 I.C.J. at 415, ¶ 53.

61. Although criticized for his emphasis on this point, the ILC Special Rapporteur on Unilateral Acts has successfully claimed that most of such acts are premised on a pre-existing treaty obligation. In such cases, this is, in fact, the source of the binding nature of unilateral acts. *See* Int'l L. Comm'n, Rep. on the Work of Its Fifty-Sixth Session, ¶¶ 91, 97-99 U.N. Doc. A/59/10, (July 5, 2004-Aug. 6, 2004).

62. *See* Andrew Robertson, *Reasonable Reliance in Estoppel by Conduct*, 23 U. NEW S. WALES L. REV. 87 (2000).

63. *See* Hissan Trading Co. v. Orkin Shipping Corp., [1992] 43 H.K.C. 286, 286 (C.F.I.) (presenting the issue of a cargo claim where there existed an agreement between the parties that any disputes would be referred to arbitration, and that the arbitration should be conducted in Japan).

64. *See* Achilles (USA) v. Plastics Dura Plastics (1977) Ltd., [2006] C.A. 1523 (Can.) (seized of a motion seeking to refer to arbitration an action relating to an international commercial dispute). *But see* Ferguson Bros. of St. Thomas v. Manyan Inc., [1999] 98 O.T.C. 265 (Can.) (where it was held that a cheque referring to an invoice amounted to a record of

Secondly, from the very fact that the trustee does not engage in retail banking, it is implicit that two separate transactions are borne following, or at the time of, the transfer of money by the contributing State. The first transaction consists of transferring or depositing money to the private bank that handles the accounts of the trustee. This action is subject to domestic law, and confers an obligation on the bank to hold and handle the money and provide access to the trustee and the trust fund. Thereafter, the private bank must act as an agent of the trustee (under the terms of their respective contract), as the transfer imposes a legal obligation. This agency relationship, too, is subject to domestic law and private agreements rather than treaties.[65] In this web of transactions, the contributor's intent is to provide money to a corresponding entity endowed with an international legal personality. The transfer of money to an independent legal entity, even when not accompanied by a written agreement or non-binding memorandum of understanding, produces legal consequences for both the trustee and the trust fund.[66] Regarding the trust fund itself, all monies deposited are thereafter part of its budget. The trustee, if it is the World Bank, for example, is obligated under its terms of agreement with the trust fund to handle, invest, and disburse money deposited in its account.[67] If the transfer, therefore, was a unilateral act devoid of any legal effect, the contributing State could claim the reimbursement of the money contributed at any time on the basis that,

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the issuer's consent to an arbitration clause inserted in a contractual offer to which the issuer had heretofore not replied in writing).

65. Agency principles are common to the majority of nations. For an excellent account of uniformity, *see UNIDROIT Principles of International Commercial Contracts, Arts 2.2.1.*, UNIDROIT (2010), *available at* https://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf (last visited Apr. 6, 2021).

66. It is common practice for public international financial institutions, such as the World Bank, to require state donors, based on of their respective treaty, to send a copy of their deposit instruction to their Accounting Trust Funds department, as well as instruct the private bank where the donation has been deposited to notify the Bank. *See Administration Agreement between the Government of the United Kingdom of Great Britain & Northern Ireland through DEFRA, IBRD, IDA & IFC for Contribution to TF073003*, THE WORLD BANK (Apr. 6, 2018), *available at* http://documents1.worldbank.org/curated/en/425341523648989641/pdf/Official-Documents-Administration-Agreement-between-the-Government-of-the-United-Kingdom-of-Great-Britain-and-Northern-Ireland-through-DEFRA-IBRD-IDA-and-IFC-for-Contribution-to-TF073003.pdf (last visited Apr. 6, 2021); *see also Extractive Industries Transparency Initiative (EITI) Multi-Donor Trust Fund (MDTF)*, THE WORLD BANK (Dec. 2015), *available at* https://www.worldbank.org/en/programs/eitimdtf (last visited Apr. 5, 2021).

67. *See* Ilias Bantekas, *Effective Management of International Aid Through Intergovernmental Trust Funds*, 17 LOY. U. CHI. INT'L L. REV. 1 (2021).

by its action, it did not create any legitimate expectations vis-à-vis the trust fund or the trustee.

Thirdly, the private bank and trustee must meet the contributing State's contribution with a corresponding acceptance. In some cases, this acceptance may be tacit but, even so, the private bank's records of deposit or the trustee's official audits will no doubt record it. Normally, as is consistent with audit practices, internal rules and regulations require the trustee to approve the contribution and make a clear record of it.[68] The trustee's possible refusal to accept an earmarked contribution by the donor to the dissatisfaction of the trustee[69]—or where it is deemed inconsistent with the terms of the fund—confirms that this is a clear correspondence of the will of the respective parties.

However, only the arousal of legitimate obligations through a transfer/deposit between the contributing State and the trust fund or trustee is subject to international law; the transaction between the contributor and the private bank is not. Whether the said transfer of money by the contributor to the trust fund and the trustee—whence the latter enjoys sufficient international legal personality—is also governed by treaty law is an altogether different matter. The crucial issue is whether the transfer amounts to an autonomous written agreement or, alternatively, if it is based on another treaty. In his dissenting opinion to the South-West Africa case, Judge Fitzmaurice noted: "Unilateral engagements may have a quasi-treaty character when they interlock with one another or interlock with provisions of an existing treaty. Otherwise, they lack the elements of a treaty altogether."[70]

In the vast majority of cases, such transfers are not predicated on autonomous written agreements; cost and time would render this practice ineffective. One way of treating them, as explained above, is as unilateral acts that entail the assumption of obligations. Equally, although this may constitute a somewhat radical theorization, oral agreements may assimilate such money transfers to the informality associated with

68. Rule 103.5 of the U.N.'s Financial Regulations & Rules requires the approval of the Organization. Equally, under Regulation 3.12, money accepted for purposes specified by the donor shall be treated as trust funds. *See* U.N. Secretary-General, *Financial Regulations & Rules of the United Nations*, §§ 103.5, 3.12, U.N. Doc. ST/SGB/2013/4 (July 1, 2013).

69. *See, e.g.*, Regulations of the Trust Fund for Victims, ICC-ASP/4/Res. 3 (Dec. 3, 2005). Regulation 27 states that voluntary contributions from states shall not be earmarked. Interestingly, Regulation 26 stipulates that the Board shall establish mechanisms for the verification of the sources of funds received by the Trust Fund. This is further evidence of the binding character of the deposit of funds, even though *prima facie* a deposit resembles a unilateral transaction that does not produce legal effects.

70. South-West Africa (Eth. v. S. Afr.), Judgment, 1961 I.C.J. Rep. 465 (May 20).

agreements to arbitrate, which equally may be predicated on oral agreements. In recent years, the traditional requirement that an agreement to arbitrate be in writing has been deemed satisfied by any means of telecommunication that provides a record of the agreement, including a telegram, fax, and email.[71] Moreover, several domestic arbitration laws accept oral agreements,[72] and the doctrine of incorporation by reference allows a term not expressly included in the original agreement to be considered as part of it, as long as it is referred to in the said agreement.[73] Oral agreements and terms incorporated by reference or conduct share many of the characteristics of deposits/transfers. Some of those shared characteristics are: 1) concluding a written agreement to implement an otherwise non-binding pledge is impracticable or cost-prohibitive; 2) the interlocutor (i.e. trustee/bank) may react positively or negatively to the transfer in the same manner as its counterpart; 3) both acts are subject to an underlying corpus of law or industry-standard contractual terms; and 4) it may be argued that only private businesses law has employed this paradigm, which cannot now be arbitrarily transplanted to regulate legal relationships between states—particularly in a field generally governed by the law of treaties. However, when the state donor is contributing to a private bank account, that donor is subject to a significant amount of private law, not treaty law. The emerging customary international law of trust funds that we have alluded to in this paper does not encompass the range of transactions that are subject to private domestic law.

It should be emphasized that only specific obligations arise as a result of the transfer of money, particularly when the parties have no other agreement. Certainly, a single donation does not involve a perpetual

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71. UNCITRAL Model Law on International Commercial Arbitration art. 7(2), U.N. Doc. A/40/17, Annex I (June 21, 1985). This is considered as being consistent with the fundamental principle of equal treatment. *See* Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 INT'L & COMP. L.Q. 991, 998 (2020).

72. *See* ILIAS BANTEKAS ET AL., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY 129-31 (Cambridge Univ. Press 2020). *See also Rock Advertising Ltd. v. MWB Business Exchange Centres Ltd. [2018] UKSC 24 (UK)* (where the U.K. Supreme Court implicitly confirmed the binding nature of oral agreements, by arguing that 'No Oral Modification Clauses' in contracts were valid and enforceable).

73. *See* Sphere Drake Ins. PLC v. Marine Towing Inc., 16 F.3d 666 (5th Cir. 1994) (which considered a similar, although not identical situation, involving an arbitration clause in a larger contract not signed by the contesting party). As this was not a stand-alone arbitration agreement (which would have required mutual recording of consent) the contesting party's signature was not required. Conversely, *see* Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 186 F.3d 210 (2d Cir. 1999) (holding that the parties were required to append signatures to the arbitration clause itself as opposed to just the compromise).

obligation to contribute funds, and all liabilities and legal effects concern only particular donations.

IV. THE DONOR AGREEMENT

The intended trustee of a donor agreement is a complicated matter. As the following sections demonstrate, the parties have used a variety of mechanisms to express their consent, many of which find little support in the Vienna Convention on the Law of Treaties or even in contract law. However, they demonstrate the complexity of this relationship and, to a large degree, exhibit some of the forward-thinking tendencies and flexibility of transnational law.

A. Donor Agreements in the Form of Treaties

A typical example of an inter-governmental trust fund, whose relationship with its donors is contractual in nature and encompasses the virtues of treaty law, is the Instrument for the Establishment of the Restructured Global Environmental Facility (GEF).[74] Unlike its predecessor, the Restructured GEF Instrument was adopted in 1994 by a number of States and U.N. specialized entities acting in a contractual capacity with the aim of setting up a trust fund. It was not the aim of state parties to the Restructured GEF Instrument to delegate this function *in toto* to a trustee without producing any legal effects for themselves—apart from their donation pledges. Nonetheless, without further investigation, the GEF Instrument's status as a treaty under the 1969 Vienna Convention on the Law of Treaties should not be taken for granted.[75] This is particularly true since the entity it envisaged creating was meant to receive the assets of its predecessor, the Global Environmental Trust Fund (GET), and carry on its obligations and functions. The GET itself was created on the basis of a resolution adopted by the International Bank for Reconstruction and Development (World

74. The Restructured GEF Instrument is reproduced in (1994) 33 I.L.M. 1273, as subsequently amended in March 2008. *See* Peter Sands, *Trusts for the Earth: New International Financial Mechanisms for Sustainable Development, in Sustainable Development & International Law* (Springer 1995); *see also* WINFRIED LANG, SUSTAINABLE DEVELOPMENT & INTERNATIONAL LAW 167 (Springer 1995).

75. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

Bank),[76] whereby an independent legal personality was not conferred to the GET.[77]

Two significant matters arise in order to subject the GEF Instrument to the law of treaties: 1) whether a contractual regime may validly subject assets, duties, and liabilities of an entity that does not enjoy international legal personality; and 2) whether participating states to the GEF Instrument expressed their unequivocal consent to be legally bound by this instrument's terms.[78]

The first query is essentially practical by nature. It concerns the ownership of the trust fund's assets and the legal implications of transferring rights and duties from an inter-governmental organization's account, as was the GET, to a group of states organized around a treaty-based mechanism that claims to be an independent legal entity. Under the customary law of trust funds, the assets attached to them are in the trust ownership of their trustee for the duration of the trust relationship.[79] Let us assume that the donors are opposed to transferring the trust fund's assets to a multilateral entity. If such transfer were in the best interests of the trust fund's objectives and purposes as set out in the initial trust agreement, then such a transfer would be wholly within the trustee's prerogatives. An exception would arise where the trustee was precluded from exercising such discretion from the terms of the trust agreement. In the present case, the GET was predicated on an agreement between donors, which confirms its legal nature as a contract, and the donors are in the vast majority States establishing the GEF Instrument. Equally, the contractual relationship with donor States and the implicit nature of the tasks expected from its capacity as trustee grounded the assumption of rights and duties by the World Bank. It is not theoretically possible to distinguish any rights or duties that the trustee is prohibited from

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76. The GET was established by IBRD Exec. Directors' Res. 91-5 (Mar. 14, 1991). Following the agreement to restructure the GET into the GEF, the IBRD formally executed this transformation through IBRD Decision 94-2 (May 24, 1994).

77. *See U.N. Legal Counsel Opinion of 4 Nov. 1993*, U.N. JURID. Y.B. 427, 429-30 (1993) (where it was clearly stated that the GET was expressly established in such a way as to lack an independent personality and all of its operations were to be subsumed under the international legal personality of its trustee).

78. *See generally The World Bank Group's Partnership With the Global Environment Facility*, THE WORLD BANK (2015), *available at* https://ieg.worldbankgroup.org/evaluations/gef (last visited Apr. 6, 2021).

79. *See GEF Instrument*, Annex B, Role & Fiduciary Responsibilities of the Trustee of the GEF Trust Fund, ¶ 1; *2002 Agreement between IBRD & the Global Fund to Fight AIDS, TB & Malaria on Establishing a Trust Fund*, Art. 4; J. Gold, *Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles*, 72 AM. J. INT'L L. 856, 863 (1978).

performing from the assets of the trust fund. A probable exception is certain consultancy-related mandates that are not tied to the assets that any agency other than the World Bank could perform. Therefore, it is evident that no legal obstacle exists that prohibits the trustee—unless explicitly mentioned in the trust agreement—from transferring the fund's assets and corresponding rights and duties to a distinct multilateral or other entity.

The second matter raises a query as to whether the GEF Instrument is a legally binding treaty. The GEF Instrument establishes three different and distinct relationships: 1) membership to the GEF, open to state entities and U.N. specialized agencies under different terms of reference; 2) conferral of implementing agency status to the World Bank, the United Nations Development Program (UNDP), and the United Nations Environmental Program (UNEP);[80] and 3) appointment of the World Bank as trustee.[81] Paragraph 7 of the GEF Instrument stipulates that "participants" are member States and U.N. specialized agencies.[82] However, these two categories of actors do not enjoy equal rights because, in accordance with paragraph 16, the GEF Council, the Fund's most senior decision-making body, is only composed of State entities from a particular geographical area.[83] Equally, from the wording of paragraph 7 of the GEF Instrument, unlike the case with participating States, participating inter-governmental organizations are not required to contribute to the assets of the Fund.[84] Thus, inter-governmental organizations may validly partake in the workings of the GEF as non-paying participants. This conclusion is deduced from the fact that paragraph 7 requires both States and inter-governmental organizations to confirm their participation by lodging a so-called instrument of participation; except in the case of States, the GEF Instrument renders participation implicit if a State already lodged an instrument of commitment.[85] This instrument of commitment is tantamount to a binding pledge to make a financial contribution to the Fund.[86]

The GEF establishes two distinct legal relationships for participating States and inter-governmental organizations. The first concerns the status of their participation. Much like other treaties, the GEF Instrument

80. Sands, *supra* note 74, at ¶ 22.

81. *Id.* at ¶ 8.

82. *Id.* at ¶ 16.

83. *Id.* at ¶ 7.

84. *Id.*

85. *GEF Instrument*, *supra* note 79, at ¶ 7.

86. On the legal nature of trust pledges generally, *see infra* § 2.1.

requires participating entities to submit an instrument of participation to the GEF Secretariat.[87] For State parties, this is equivalent to an instrument of ratification because it requires the instrument "be signed on behalf of the Government by a duly authorized representative thereof."[88] It is assumed that the submission of this instrument is required only once since the GEF Instrument is silent on this point. The second contractual relationship is premised on the instrument of commitment,[89] through which participating entities make their pledges to the Fund.[90]

It is also important to assess whether the instruments of participation and commitment require parliamentary assent,[91] in generally the same way as treaties. This is a question of constitutional law that touches on the two forms of integrating international law domestically: monism and dualism. In a number of countries, it is the constitutional prerogative of domestic government departments to enter contractual agreements with inter-governmental organizations and other States, particularly with respect to loans, fiscal and similar issues without parliamentary assent, and subsequent publication in the Official Gazette.[92] Even where formal ratification is, in fact, required by pertinent constitutional principles, the dispatch of the ratification instrument may precede the adoption of implementing legislation.[93] Therefore, the fact that the instrument of commitment, in particular, has not undergone the legal transition into the domestic legal order of the State at issue is not a serious indication

87. *GEF Instrument*, *supra* note 79.

88. Sands, *supra* note 74.

89. *Id.* at Annex C2.

90. A new "Instrument of Commitment" needs to be deposited every time parties pledge money, or where they are requested to replenish the Fund. *See IBRD Executive Directors' Res. 98-2* (July 14, 1998), *available at* http://documents1.worldbank.org/curated/en/462171468137103226/pdf/656650WP0GEF0I00Box365714B00PUBLIC0.pdf (on the Second Replenishment of GEF Resources) (last visited Apr. 3, 2021).

91. This, of course, depends on the characterization of the instrument of commitment under a particular constitution. Certain treaties of an executive or financial character may not require full parliamentary approval but simply assent by the pertinent minister. *See* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 144-46 (C.A. Bradley ed., 2019).

92. *See* Uzbek International Agreements Law, Art 14(5) (1995); *see also* ANTHONY AUST, MODERN TREATY LAW & PRACTICE 80-85 (3rd ed., 2000). *See also* Ilias Bantekas, *Natural Resource Revenue Sharing Schemes (Trust Funds) in International Law*, 52 NETH. INT'L L. REV. 31, 40-50 (2005); Ilias Bantekas & R. Vivien, *The Odiousness of Greek Debt in Light of the Findings of the Greek Debt Truth Committee*, 22 EUR. L.J. 539, 542-46 (2016).

93. *See also* U.N. Secretary-General, *Establishment & Management of Trust Funds*, ¶26, U.N. Doc. ST/SGB/188 (Mar. 1, 1982) (renders a pledge subject to ratification by parliament tantamount to a qualified agreement).

weighing against its contractual nature. Given that inter-governmental organizations also deposit the relevant instruments, the ensuing contractual relationships are not subjected merely to the law of treaties between states but also to the regime of treaties between states and inter-governmental organizations.

Following the deposit of the aforementioned contracts, the GEF Instrument and the individual instruments of commitment become the governing instruments. Finally, decisions adopted by the executive boards of the representative agencies may result in the assumption of duties by the trustee and other implementing agencies.[94] These decisions only generate an intra-institutional effect, but they are premised on the contractual undertaking of the trustee and the agents arising from the GEF instrument. The trustee is bound as a party to the GEF Instrument vis-à-vis all other "participant" parties. The GEF itself is further tied, although not necessarily in the strict contractual sense, to legal relationships with other governing bodies of particular environmental treaties, such as the 1992 Convention on Biological Diversity[95] and the 1992 Framework Convention on Climate Change.[96]

The GEF Instrument establishes the premise of the GEF Trust Fund and possesses the attributes of a treaty constituted by both States and inter-governmental organizations. Ratification of the GEF Instrument is legally distinct from the contractual undertaking to donate money to the Fund. The undertaking to donate is therefore equally subjected to international law and, more particularly, to the regime of the law of treaties. Although under the GEF Instrument the World Bank, as trustee, is bound to perform its duties under its Articles of Agreement and by-laws,[97] the nature of such duties is necessarily affected by the treaty nature of the GEF Instrument. The consequence that accrues from the GEF Instrument's nature as a treaty—as well as the instrument of commitment—is that even if the Fund was registered as a legal person under the laws of a particular jurisdiction, international law would still govern the rights and liabilities of participants.[98]

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94. *See, e.g.*, U.N. Developmental Programme Decision DP/1994/9 (May 13, 1994); U.N. Environmental Programme Decision SS.IV.1 (June 18, 1994); International Bank for Reconstruction & Development Decision 94-2 (May 24, 1994).

95. Convention on Biological Diversity, June 4, 1992, 1760 U.N.T.S 79.

96. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

97. Global Environment Fund, Annex B, ¶ 3 (1992).

98. Some authors are of the view that the GEF does not possess international legal personality. *See* RUDIGER WOLFRUM & VOLKER ROEBEN, DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 445 (2005).

What is unclear is whether the GEF Instrument supersedes the institutional law of the trustee and implementing agencies, which all possess inter-governmental organization status. This issue arose in 1995 when the U.N. Legal Counsel advised on the normative hierarchy between the UNDP Financial Regulations and Rules, the UNDP/World Bank Agreement on April 24, 1991, GEF, and paragraph 20(j) of the GEF Instrument, which provides that the GEF Council shall arrange periodic financial and performance audits of the UNDP Secretariat and implementing agencies regarding activities undertaken in respect of the GEF. If the GEF Instrument's relevant provision took precedence over the UNDP's Financial Regulations, the UNDP would have conferred audit rights to an entity outside the UNDP.[99] The U.N. Counsel first noted that the UNDP/World Bank Agreement is a pilot program that, upon the termination of its predecessor, the GET, ceased to have any legal effects on the parties.[100]

The UN Legal Counsel did not, however, exclude the possibility that an international agreement such as the GEF Instrument may impose an external audit on a UN specialized agency in respect of its asset management. Such an eventuality may happen only when the specialized agency in question expressly and clearly agrees to be bound—thus excluding the possibility of implicit undertakings. This is because of the long-standing U.N. practice whereby each agency applies its own rules for the financial management of assets placed under its custody.[101]

In this case, the U.N. Counsel pointed out that the "shall arrange" phraseology in paragraph 20(j) does not impose a strict obligation on the UNDP, and it was assumed that the GEF Council would authorize the World Bank to conclude specific audit agreements with the GEF's implementing agencies.[102] Equally, and under the same legal rationale, the UNDP was held incapable of engaging in lending-type activities stipulated in paragraph 9(c) of the GEF Instrument because such activities are not expressly authorized by its own Financial Regulations.[103]

The GEF Instrument is a complicated example of a treaty that sets up a trust fund; others are more straightforward. A multilateral treaty between four nations created the Tuvalu Trust Fund.[104] The Global Crop

99. U.N. JURID. Y.B. 413 (Feb. 14, 1995).

100. *Id.* at 414.

101. *Id.* at 415.

102. *Id.*

103. *Id.* at 416.

104. Agreement Concerning an International Trust Fund for Tuvalu, June 16, 1987, 1536 U.N.T.S. 48. It was founded in 1987, almost a decade following the tiny island's independence, based on a multilateral treaty between Tuvalu, New Zealand, Australia, and

Diversity Trust was also based on a multilateral agreement, the sole purpose of which was to set up the trust and endow it with the status of international organization.[105] Multilateral treaties are not ideal instruments for setting up trust funds in situations that require an urgent international response, particularly those involving natural catastrophes and humanitarian aid. The Palau Compact of Free Association (COFA) Trust Fund between the United States and Palau is an example of a bilateral treaty.[106] The unattractiveness of treaties is even more poignant because a trust fund seeks the engagement of non-State stakeholders, like private foundations and affected communities, while a treaty might exclude them or sustain a discriminatory two-tier membership. Moreover, treaties require lengthy negotiations and may take a significant amount of time to conclude, leaving beneficiaries who are the intended recipients of the treaty's provisions in a precarious state. The best model under these circumstances is a type of trust fund set up by a resolution of an international organization, such as the U.N. or the World Bank. This model may later emerge as a concrete legal entity through a series of bilateral agreements with the trustee serving in its capacity as such. In respect to long-standing revolving trust funds set up to address serious fiscal imbalances, such as the Tuvalu and the Palau trust funds, bilateralism and multilateralism are preferred in practice and generally do not pose problems for the parties.

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the U.K. It is expressly given the status of an international organization and is administered by a Board of Directors composed of representatives from the four contracting states in an equal capacity. The Board, not surprisingly, acts as the Fund's trustee and is assisted by an Advisory Committee whose function is to advise the government of Tuvalu as to the progress of its economy, as well as on the social and economic effects of the Fund on the island. *See* BENJAMIN GRAHAM, TRUST FUNDS IN THE PACIFIC: THEIR ROLE & FUTURE (Asian Dev. Bank, 2005).

105. The Global Crop Diversity Trust, which unlike the Global Fund for AIDS, was founded based on a treaty between states—and the participation of other inter-governmental organizations—the Agreement for the Establishment of the Global Crop Diversity Trust. The Trust's objective is to ensure the long-term conservation and availability of plant genetic resources for food and agriculture to achieve global food security and sustainable agriculture. To accomplish this objective, significant resources are required. Thus, the Trust established an endowment fund for this purpose through which it solicits contributions from member states and organizations, and private entities voluntarily. *See* Constitution of the Global Crop Diversity Trust, art. II.

106. The Palau Compact of Free Association (COFA) Trust Fund was established pursuant to § 211(f) of the 1995 Compact of Free Association Agreement between the U.S. & Palau, 48 U.S.C. § 1931. Much like the Tuvalu trust fund, its Palau counterpart was premised on an international agreement, albeit a bilateral one. Decision-making does not rest solely with the government of Palau, save for appropriations into the budget. The U.S. maintains a right, in consultation with Palau, to decide on investment options.

B. Informal and Other Agreements

In previous sections, we established that States might contribute to a trust fund by way of a unilateral act, although, in this case, the act would be purely unilateral, entailing the assumption of an obligation or a bilateral agreement because it includes an offer, acceptance, and an intention to be bound. The starting point in this discussion must examine the entity the State donor will ultimately agree with, particularly the legal relationship regarding the content and the deposit of the pledged contribution. In the vast majority of cases, this role is entrusted to the trustee under the terms of the instrument that establishes this trust relationship. The alternative is an agreement between all of the donors wherein the protagonists act under the guise of a joint entity, but this option has two significant limitations: 1) it involves a self-contract leading to a substantial conflict of interest; and 2) given that only a few trust funds are organized as entities enjoying a sufficient degree of international legal personality, their agreements with state donors would be problematic and potentially subjected to the law of the State wherein the trust funds are organized. Thus, the trustee, especially the World Bank, is not only able to negotiate and conclude donor agreements uniformly but is also best suited to receive, handle, and invest donations. The trustee can also provide donors with accurate financial statements as part of the agreement or the Bank's operational policies.[107] The same is obviously true regarding the range of trust projects undertaken by the United Nations.

Having established the two contracting entities, let us now consider the nature of the agreement itself. In accordance with its operational policies, the World Bank, when acting as a trustee, enters into framework agreements with the donors.[108] Under these policies, donors are required to enter into an additional Trust Fund Administration Agreement, on the basis of which the Bank recovers its costs to manage and administer the trust fund.[109] The elaborate mechanism by which the above agreements are drafted, signed, and implemented, as well as the absence of lighter, non-binding alternatives, suggests that the World Bank intends to conclude binding treaties with contributing States, rather than contracts

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107. THE WORLD BANK, OPERATIONAL POLICY (OP) 14.40 'ON TRUST FUNDS,' n.11 (1997) (amended 2013) (exceptionally, a grant agreement acceptable to the Bank may be made directly between the donor and the recipient country). This has been implemented in the case of the Special Program of Assistance in Africa. *See* THE WORLD BANK, OPERATIONAL MANUAL: BANK PROCEDURES BP 14.40 (July 1, 2008).

108. Global Environment Fund, *supra* note 97, at art. 1.

109. *Id.* at art. 7-8.

subject to private law. In fact, the Bank, where possible, enters into standard binding agreements with all donors to a particular trust fund in order to harmonize results and reduce cost.[110]

Each Letter of Agreement expressly states the Bank's applicable Standard Provisions.[111] For example, in the Agreement between the European Communities (EC) Commission and the World Bank for the Asia-Europe Meeting (ASEM) Trust Fund of December 23, 1998, it was stated in relevant part: "[w]e are pleased to confirm the intention of the Commission to make available to the World Bank the sum of [. . .]" Equally, "the contribution shall be used for the purposes [earmarked and agreed to]," and "the Commission shall deposit," but "the Bank shall make available to the competent bodies of the EC, upon request, all relevant information . . . "[112]

In cases where the U.N. Secretariat acts as a trustee, although not always consistently, donors may be requested to engage in a binding agreement with the United Nations. Article 6 of the U.N. Special Missions Trust Fund[113] requires that "[t]he making of a pledge and its acceptance are to be recorded in an exchange of letters . . . or if deemed appropriate, in a formal agreement."[114] This provision, which is a verbatim reflection of the relevant paragraph in the U.N. Secretary-General's Bulletin on the Establishment and Management of Trust Funds,[115] refers to the form of the pledge only, and not to the contractual modality for the participation of the donor in the trust fund. The Bulletin distinguishes the latter relationship. A general trust fund does not require a written agreement. Such an agreement is required only when it "is deemed necessary,"[116] albeit no further guidance exists to elaborate on

110. ASEM-EU Asian Financial Crisis Response Fund, U.K, June 29, 1998, TF 020147; ASEM-EU Asian Financial Crisis Response Fund, Den.-I.B.R.D., Nov. 10, 1998.

111. *Id.*

112. TF 020147, Project No. ALA/ASI/98/0419, preamble.

113. The Secretary-General's authority to establish such a trust fund stems from Article 97 of the UN Charter related to the Secretary-General's capacity as the UN's chief administrative officer. Equally, it is also derived explicitly from Regulation 4.13 & Rule 104.3 of the UN's Financial Regulations and Rules and the Secretary-General's Bulletin on the Establishment and Management of Trust Funds. The Special Missions Trust Fund stipulates that "the making of a pledge and its acceptance are to be recorded in an exchange of letters, or if deemed appropriate, in a formal agreement." Special Missions Trust Fund, Terms of Reference, § 6. This is no doubt a verbatim reflection of the Secretary-General's Bulletin on the Establishment & Management of Trust Funds, U.N. Doc. ST/SGB/188 (Mar. 1, 1982), ¶ 29.

114 The same is not, however, stipulated in the Trust Fund for Preventive Action (TFPA).

115. ST/SGB/188, *supra* note 114, at ¶ 29.

116. *Id.* at ¶ 31.

this requirement. Conversely, technical cooperation trust funds always require a written agreement.[117] It is clear, therefore, that general trust funds set up by the Secretariat and the General Assembly do not require a formal arrangement between the donors and the U.N., let alone a treaty.

Consequently, it is evident that the adoption of treaties between the trustee and State/inter-governmental organization donors is not a general requirement of the international law of trusts, although it is good practice when the trustee is able to enforce them. Where the trustee is a U.N. specialized agency, such as the UNEP—which alone manages a sizeable amount of international trust funds—none of the surveyed Terms of Reference require the UNEP to conclude donations in the form of treaties.[118] As a result, the UNEP's agreements with donors can take many legal forms, including treaties with MoU,[119] even where donations are reflective of similar projects and sums.[120]

The same is true regarding donor agreements that the UNDP accepts. The UNDP's Financial Regulations and Rules require the conclusion of an agreement but fail to specify its legal nature;[121] it is thus possible for donor agreements consummated with the UNDP to possess non-binding characteristics under the U.N. rationale analyzed above. In practice, however, the UNDP has set up a model trust administration agreement which it now uses in all of its relationships with donors. The adoption of a MoU instead of a treaty is not always more beneficial to the contributing State.[122] On the contrary, it would seem that a binding treaty

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117. *Id.* at ¶ 32. In fact, in respect of technical cooperation trust funds there exists a model agreement as set out in the Secretary-General's Administrative Instruction for Technical Cooperation Trust Funds, U.N. Doc. ST/AI/285.

118. Vienna Convention on the Protection of the Ozone Layer, COP Decision VCI/9 (Apr. 28, 1989), *available at* http://ozone.unep.org/Publications/VC_Handbook/Section_2_Decisions/Article_6/Decs-financial_matters/Decision_VCI-9.shtml#Annex%20III (last visited Apr. 6, 2021).

119. Even though the parties' general intention in concluding a MoU is the avoidance of entering into a binding instrument, we agree with the position that the normative character of a MoU is judged both by its content and the intention of the parties. The two may sometimes be conflicting, but certainly, one should not disregard the wish of the parties not to be bound by the terms of an agreement. *Supra* note 82, at 26-34.

120. MoU between Swedish Ministry of Sustainable Development & UNEP (Feb. 2005); *see also* UN-HABITAT MoU with Canada for Contributing to the Water & Sanitation Trust Fund. Other countries such as Norway preferred instead the conclusion of agreements.

121. UNDP Financial Regulations and Rules, Reg. 5.07(a) (Apr. 2000). Rule 108.1 states that trust funds shall be established either on the basis of a written agreement, or by the issuance of its terms of reference, in anticipation of receipt of contributions by prospective contributors.

122. MoU are common in sovereign finance, especially following the post-2008 financial crisis, chiefly as a means of avoiding obligations, whether parliamentary scrutiny, or the

is a secure basis for confirming the rights and duties of the parties, given that it is in the interests of the trustee and the trust fund itself to bind the contributors to their pledge amount. The likely benefits of an MoU are perhaps its speedy conclusion and adoption—particularly where the donation is below a particular threshold—its confidentiality, and avoiding a perpetual obligation.[123]

It is also common practice for donors to conclude an MoU with the potential trustee and recipient States. The purpose of these instruments is not to set up the trust fund or agree to the terms of the donation, but rather to record the intention of the parties to enter into appropriate agreements in due course. This was expressly mentioned in the various identical MoU between the Netherlands, on the one hand, and Indonesia and the World Bank, on the other, addressing the establishment of a multi-donor trust fund following the catastrophic effects of the 2004 earthquake and tsunami.[124] Eventually, given that the World Bank was appointed trustee to the Multi Donor Fund (MDF) for Indonesia, contribution agreements were entered with each State donor in the form of treaties. The Bank's policy is to treat all donors equally, in a manner whereby the agreements must be "substantially the same." Disagreement arose between the various departments in the Bank as to whether "substantially the same" means word-for-word identical, or if a request by a donor State that did not alter the obligations of the agreement could,

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application of human rights or other rules. *See* Menelaos Markakis & Paul Dermine, *Bailouts, The Legal Status of Memoranda of Understanding, & the Scope of Application of the EU Charter: Florescu*, 55 COMMON MKT. L. REV. 643 (2018). In fact, the use of informal agreements in a manner that violates human rights is at the heart of the business and human rights debate. *See* Ilias Bantekas, *The Linkages Between Business & Human Rights & Their Underlying Causes*, 43 HUM. RTS. Q. 118 (2021); Ilias Bantekas, *The Emerging UN Business and Human Rights Treaty & its Codification of International Norms*, 12 GEO. MASON INT'L L.J. 1 (2021).

123. *See* Anthony Aust, *The Theory & Practice of Informal International Instruments*, 35 INT'L COMP. L.Q. 787 (1986). Lipson has added to this list the desire to prevent formal and visible pledges, the desire to avoid ratification, the ability to renegotiate or modify as circumstances change, as well as the need to reach agreements quickly. Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 500 (1991). Moreover, Bilder has argued that states may choose the option of non-binding accords out of a desire to manage more efficiently the risks of international agreement. Richard B. Bilder, *Managing the Risks of International Agreement*, U. WIS. L. STUDIES RES. PAPER NO. 1327, 24 (1981).

124. The Multi-Donor Trust Fund was adopted on Apr. 25, 2005. *See Indonesia: MoU on the Establishment of the Multi-Donor Trust Fund to Support Aceh & North Sumatra Rehabilitation & Reconstruction ADB's Contribution*, ADB (May 10, 2005), *available at* https://reliefweb.int/report/indonesia/indonesia-mou-establishment-multi-donor-trust-fund-support-aceh-and-north-sumatra (last visited Apr. 6, 2021).

in fact, be accommodated.[125] A formal cap on administrative costs, the designation of terrorism therein, and the conclusion of an expiration date for the agreement also provoked disagreement. In connection with the terrorism language, for example, one donor was content with the definition, but because it imposed a condition on the assets, the MDF was forced to amend its Standard Provisions. This, however, meant that the donors reached a subsequent agreement on this issue.[126]

Finally, accession to donor agreements is possible through an appropriate provision in the general agreement, where applicable, or in each individual agreement. Article 3 of the Donor Agreement for the establishment of an Anti-Corruption Activities Fund between Norway and the Inter-American Development Bank (IDB) states that the Fund shall accept contributions from any donor through the subscription of a Letter of Adherence to the Donor Agreement.[127] Arrangements may become complicated if new contributors besides States, international organizations, and private entities were included.

In this case, since the Donor Agreement is a treaty, it is not possible for the private entity to accede to it. Therefore, it must be assumed that the trustee will enter into a new agreement with the private donor under the terms of the treaty, as long as the terms of the treaty apply to private entities and are subject to applicable private law. Alternatively, the same result will be presumed—albeit State parties will take it for granted that the Agreement has a dual status—depending on whether the entity under consideration is a State or private party.

V. DONOR AGREEMENTS WITH PRIVATE ENTITIES

Private parties, like states, must contract with the trustee rather than the trust fund regarding any transactions with the trust fund. Similarly, an agreement must be entered into, even though this agreement will be a contract governed by the law chosen by the parties rather than a treaty.[128]

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125. The World Bank, *Review of Post-Crisis Multi-Donor Trust Funds: Final Report*, NORAD (Feb. 2007), *available* at https://www.norad.no/globalassets/import-2162015-80434-am/www.norad.no-ny/filarkiv/vedlegg-til-publikasjoner/reviewofpostcrisismultidonortrustfunds_finalreport.pdf (last visited Mar. 29, 2021).

126. *Id.*

127. The Agreement is attached to IDB Doc. CC-6146 (Feb. 26, 2007).

128. *See* F.A. Mann, *The Proper Law of Contracts Concluded by International Persons*, 35 BRIT. Y.B. INT'L L. 34 (1959); ELISABETTA MORLINO, PROCUREMENT BY INTERNATIONAL

Given that contracts must be "substantially the same" so as to ensure equal treatment of the contracting entities, the governing law will be different in the trustee's agreements with the private donors. This will likely be the law of the seat (or country of incorporation) of the trustee,[129] but when a contract is performed in a third territory, the applicable law may be the law of that country.[130] This is certainly a choice between the parties and subject to the principle of party autonomy. Generally, although State donors will face administrative costs to set up the trust fund, this is not the case with private parties. Indeed, the contractual terms for the latter are far simpler because the constitutional formalities relating to treaty-making are inapplicable. Nonetheless, any liability that may accrue from such a relationship will burden the private entity on account of its lack of privileges;[131] this stands in stark contrast to burdens accrued by the World Bank or the U.N., which enjoy significant privileges. Obviously, in its mutual relationship with the private party, the trustee will be an equal contractual partner. Private entities may, where applicable, be entitled to simply transfer or deposit money in a trust fund without requiring a written agreement. They simply need to notify the trustee in writing that they have deposited the money. In this case, since the private entity is not a state, its actions cannot be assimilated to a unilateral act—with or without legal obligation. The applicable banking and contract law governing a particular transaction will determine the legal nature of these acts.[132] In any event, they entail privity of contract and should be viewed as such by all interested actors.

ORGANIZATIONS: A GLOBAL ADMINISTRATIVE LAW APPROACH 261 (Cambridge Univ. Press 2019).

129. The law of the seat is fundamental to the interpretation of arbitration clauses in contracts. Arbitration clauses are procedural in nature and hence if they are subject to the law of the seat, such law is the seat's civil procedure law. *See* Ilias Bantekas, *The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy*, 27 J. INT'L ARB. 1, 2-4 (2010).

130. *See* P. SANDS ET AL., BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 462 (Sweet & Maxwell, 2001).

131. It is usual for trustees to be mandated by the donors to enter into arrangements with the private entity in order to provide it with tax deductibility allowances in respect of its donation. *See infra* note 150 at art. 27(a)(i)(2). Otherwise, the relevant financial or operational regulations clearly stipulate that no special advantages or benefits should accrue to private donors, such as Article 6 of the World Bank's OP 14.40. Equally, when acting as trustee, the Bank should avoid providing any benefits to private investors that would give rise to a conflict of interest or a distortion of its procurement rules 2.13 *et seq.* of the World Bank Trust Fund Hand-Book, IBRD Doc. 17304 (Apr. 1997).

132. This is a complex issue that is not susceptible to generalizations. The Court of First Instance (CFI) of the EU has long confirmed that the law of EU member states is not applicable to public contracts granted by entities set up by the EU Council of the EU. *See*

The U.N. Legal Counsel has made it clear that the Organization can incur private liabilities, particularly when such liabilities arise from contracts, purchase orders, leases, and other agreements.[133] Equally, therefore, the choice of forum and *lex arbitri* is a matter settled by agreement between the parties. The governing law of private contracts entered by international organizations and private entities is usually designated by reference to the law of the seat of the international organization, particularly when the private party's operations lie therein.[134] Conversely, where the performance under the contract will occur in a territory other than the seat of the organization, especially in the event of small scale contracts that do not involve significant resources, the national law of the country where performance will occur is deemed to constitute the governing law. Loan agreements with private entities entered by the IBRD and the International Monetary Fund (IMF) are governed either by the law on whose territory the private contracting banks are incorporated, the law of the State of New York,[135] or a neutral law that is typically liberal and commerce-friendly, such as the laws of England.[136] One should exercise caution when ascribing the characterization of a contract to a particular transaction, in the sense that an agreement encompasses both consideration and acceptance. Agreements at the international level between a variety of actors are more complex than contracts under domestic law, as is the case with the IMF's

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Case T-411/06, *Sogelma - Società generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (AER)*, ECLI:EU:T:2008:419, ¶ 115 (the CFI argued that such a principle was applicable, unless otherwise provided, to any international organization in the EU).

133. Legal Opinion of 23 Feb. 2001, (2001) U.N. Jurid. Y.B. 381, 384-85.

134. W. JENKS, THE PROPER LAW OF INTERNATIONAL ORGANIZATIONS 171 (Stevens & Sons, 1962).

135. Art. 11(a), IMF-Monetary Agency of Saudi Arabia Loan Agreement, IMF Decision 6843 (81/75), 6 May 1981, *cited in* P. SANDS, P. KLEIN & D. W. BOWETT, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 462 (Sweet & Maxwell, 2001). In such cases the World Bank Group may well trigger its privilege of immunity from suit by invoking it before the court. However, great reluctance is applied in invoking immunity. By way of example, an action against the IMF for failure to pay the amount due under any note or coupon may be brought before the federal courts of New York, England, or Geneva. The IMF agreed in that case to waive its immunity from suit and execution. *See* J. GOLD, INTERPRETATION: THE IMF & INTERNATIONAL LAW 69 (Springer, 1996).

136. *See* Ilias Bantekas, *A Human Rights-Based Arbitral Tribunal for Sovereign Debt*, 29 AM. REV. INT'L ARB. 52 (2018); Ilias Bantekas, *The Contractualisation of Fiscal and Parliamentary Sovereignty: Towards a Private International Finance Architecture?*, G. CONSTITUTIONALISM (2021) (forthcoming). For good or bad, English contract law has become indispensable in the majority of transnational transactions. *See* Ilias Bantekas, *The Globalization of English Contract Law: Three Salient Illustrations*, 137 L.Q. REV. 130, 131-40 (2021).

stand-by-arrangements, which are not considered to entail a contractual relationship in any way.[137]

Amerasinghe is of the view that agreements between international financial institutions, such as the International Bank for Reconstruction and Development (IBRD), the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB), and others, with private parties that are predicated on another loan or guarantee agreement with the private parties' respective States, should be governed by international law.[138] He rests his hypothesis on the international law provisions in the loan agreements "or by implication resulting from association."[139] The World Bank's policies generally exclude the possibility of such agreements,[140] whereas the U.N.'s specialized agencies that administer trust funds have taken a varied approach to the legal modalities of private contributions.[141] The legal nature of the

137. Under Article XXX(b) of the IMF Articles of Agreement, a stand-by-arrangement is defined as "a decision of the Fund by which a member is assured that it will be able to make purchases from the General Resources Account in accordance with the terms of the decision during a specified period and up to a specified amount." It is clear that Article XXX(b) only refers to the Fund's decision and not the letter of intent that is required of the petitioning state, which sets forth the objectives and policies that will make up the financial program for which assistance is sought. In order to clarify that stand-by-agreements are not in fact contracts, the IMF adopted two distinct decisions, *see* Decision No. 2603-(68/132) Sept. 20, 1968; Decision No. 6056-(79/38) Mar. 2, 1979. In particular, ¶ 7 of the 1968 Decision stated that "in view of the character of stand-by-arrangements, language having a contractual flavour will be avoided in stand-by-documents." *See generally* J. GOLD, THE LEGAL CHARACTER OF THE FUND'S STAND-BY-ARRANGEMENTS AND WHY IT MATTERS (IMF Pamphlet Series No. 35, 1980). *See also* Ilias Bantekas, *Exceptional Recognition of Governments & Political Parties in Respect of Sovereign Loans: The Greek Case*, 82 NORDIC J. INT'L L. 317, 320-21 (2013).

138. The EBRD does not distinguish between states and non-state entities in its contractual arrangements with borrowers and as a result has no hesitation to institute a uniform and consistent application of public international law as the governing law of its contracts with all borrowers. *See* J.W. Head, *Evolution of the Governing Law for Loan Agreements of the World Bank & other Multilateral Development Banks*, 90 AM. J. INT'L L. 214, 230 (1996).

139. *See* C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 388-89 (Cambridge Univ. Press 2005).

140. In 2016 an updated standardized Administration Agreement template with sixteen of the World Bank's largest donors who provide 90% of IBRD/IDA trust fund resources was adopted, including standard provisions on disclosure of information and communication on fiduciary issues. This was supplemented with a series of notes on governance arrangements in trust funds, preferencing arrangements, donor reporting, managing trust funds for results, and indicative budgets. *2017 Trust Fund Annual Report*, WORLD BANK (2017), *available at* http://documents1.worldbank.org/curated/en/428511521809720471/683696272_201803110085340/additional/124547-REVISED-PUBLIC-17045-TF-Annual-Report-web-Apr17.pdf (last visited Apr. 6, 2021).

141. Article 17 of the U.N. Secretary-General's Guidelines on Cooperation between the U.N. and the Business Community envisages four types of partnership arrangements. Of

agreement also depends on the type of contribution made. It is common for private contributors, particularly those in a specific industry, to donate in-kind rather than in cash. In 2003, the pharmaceutical corporation Novartis agreed to provide tuberculosis medicine to treat 500,000 patients over a five-year period. This undertaking was consummated through an MoU, not a binding contract. The medicines were delivered to the Global Drug Facility (GDF) of the Stop TB Partnership for use by programs supported by the Global Fund against AIDS, Tuberculosis, and Malaria.[142] There is no mention in U.N. Financial Regulations 4.13 and 4.14 about the legal format of agreements with donors, thus the U.N.'s principal organs and its specialized agencies are free to agree the legal terms of their agreements with private entities. In Section VII of this paper, the reader will come to appreciate the possibility of setting up a trust fund solely based on private contracts in order to accommodate private and public entities speedily and with greater efficiency in a single instrument.

VI. THE TRUSTEE (ADMINISTRATION) AGREEMENT AND THE AGREEMENT BY WHICH A TRUST FUND ASSUMES THE ROLE OF FINANCING MECHANISM

One would think the agreement that appoints an entity as a trustee of monies and other assets contributed by States would by necessity assume only a single legal form, i.e. a treaty. However, this has not occurred, and the appointment of trustees has been achieved through varied legal formulas, as demonstrated by this paper. Treaties remain the standard agreement form, whereby the institutional rules of the trustee, as in the case of the World Bank, require adopting a binding agreement with the donor,[143] or whereby the use of model administration agreements with prospective donors has been institutionalized, as in the case of the

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interest in this connection is paragraph (a) dealing with direct contributions, whereby it is advised that this be accommodated through a trust fund or special account agreement with the partner subject to the applicable U.N. Rules and Regulations. *See Guidelines on Cooperation between the United Nations and the Business Sector*, U.N. (Nov. 20, 2009), *available at* https://www.un.org/en/ethics/assets/pdfs/Guidelines-on-Cooperation-with-the-Business-Sector.pdf (last visited Mar. 23, 2021).

142. *Partnerships to Build Healthier Societies in the Developing World*, IFPMA (Sept. 2006), *available at* https://issuu.com/ipha/docs/ifpma_building_healthier_eng_2007 (last visited Mar. 23, 2021).

143. *See* OP 14.40, Art. 1. The authority of the IDB to set up and receive donations for trust funds through the conclusion of treaties is prescribed in Res. DE-51/91 (Mar. 20, 1991); IBD Doc. GN-1808 (Feb. 5, 1991).

UNDP. Treaties like this between a State and a public international financial institution, or a U.N. specialized agency, will either expressly designate the latter as the trustee,[144] or this type of appointment may be inferred from the range of powers and responsibilities entrusted to the particular entity.[145]

In the latter case, parties will take for granted the inter-governmental financial institution as the designated trustee from the outset, even if this is not explicit in the administration agreement, as such an occurrence is rather rare. Where the World Bank has already set up a trust fund, or an agency/organ of the U.N., and where States have entrusted these entities with the role of trustee through existing instruments, subsequent agreements will either: 1) tacitly recognize the assumption of the trustee role by the Bank/U.N.; 2) make no reference to the trustee, but implicitly recognize it on account of the fact that the Fund's Instrument, Terms of Reference, etc. is attached as an integral annex to the Agreement;[146] and 3) expressly recognize its contracting partner as the trustee.[147] Where donors finance a trust fund through such subsequent donor agreements, they cannot unilaterally alter or amend any of the provisions of the trust fund's Instrument or Standard Provisions without the prior consent of the trustee and the other parties to the trust fund, although they can amend provisions with the consent of the trustee. Thus, the underlying agreement—whether called a Fund Instrument, Attached Standard Terms, or by another name—is treated the same as a multilateral treaty under Articles 40-41 of the 1969 Vienna Convention on the Law of Treaties, because the parties have agreed that said instruments govern their legally binding relationships. While such an underlying instrument may not be legally binding on its own accord, it becomes binding through its incorporation in the treaty between the trustee and the donor or, alternatively, because the administration agreement renders it binding upon the parties.

Given that both the U.N. and its specialized agencies do not require a treaty format for concluding trustee administration agreements or donor

144. *See* Administration Agreement between the U.K. & IBRD/IDA Concerning the Multi-Donor Trust Fund for the Extractive Industries Transparency Initiative (TF 053509) (Aug. 19, 2004), Preamble.

145. *See* IDB-Norway Donor Agreement for the Establishment of the Anti-Corruption Activities Fund (Mar. 2007). A Draft of the Agreement is contained in IDB Doc. CC-6146 (Feb. 26, 2007).

146. *See* Agreement between the U.K. & IBRD/IDA for the ASEM-EU Asian Financial Crisis Response Fund (TF 020147) (June 29, 1998), Annex I.

147. *See* Italy-UNDP Trust Fund Agreement for Anti-Poverty Partnership Initiatives (June 27, 2000).

agreements—in fact, the relevant Financial Regulations do not stipulate the two as separate contracts—it is not surprising that several MoU have appeared to conclude these agreements. Typical trust agreement examples are: the MoU between the conference of parties (COP) of the Convention to Combat Desertification; the International Fund for Agricultural Development (IFAD)[148] regarding the Modalities and Administrative Operations between the Global Fund;[149] and the MoU between the COP to the Biological Diversity Convention and the GEF regarding the Institutional Structure Operating the Financial Mechanism of the Convention.[150]

The GEF and IFAD are financing mechanisms for these conventions, not trustees. Their role is to finance the projects, in full or in part, decided by the COP to these conventions, as long as these decisions are consistent with the respective constitutional instruments of IFAD[151] and the GEF.[152] In the case of the COP-GEF MoU, one may

148. The practice of most COP confirms that, because they must interact with other actors, they must be assumed to possess some, at least, legal personality. COP to environmental treaties regularly, for example, adopt decisions by which they appoint a third entity as a trustee to a financing mechanism stipulated under their founding treaty followed thereafter by the conclusion of an MoU with the designated trustee. *See* U.N. Doc. UNEP/CBD/COP/1, Decision I/2, ¶ 2; U.N. Doc. UNEP/CBD/COP/2/19, Decision II/6, ¶ 1. MoU between the COP to the Convention on Biological Diversity (CBD) & the Council of the Global Environmental Fund (GEF), U.N. Doc. UNEP/CBD/COP/3/38, Decision III/8; *see also* the MoU between COP to the Convention to Combat Desertification (CCD); The International Fund for Agricultural Development (IFAD) regarding the Modalities and Administrative Operations of the Global Mechanism, U.N. Doc. ICCD/COP(3)/10 (Aug. 30, 1999), Annex I.

149. The MoU is attached as Annex I in Doc. UNEP/CBD/COP/3/10 (Oct. 11, 1996).

150. Art II(C). The Draft MoU is attached as Annex I to Doc. ICCD/COP (3)/10 (Aug. 30, 1999).

151. According to Art. 2 of the 1976 Agreement Establishing the IFAD, the objective of the Fund shall be to mobilize additional resources under concessional terms for agricultural development in developing member states. This involves projects designed to introduce, expand or improve food production systems and to strengthen related policies, taking into consideration the need to increase food production in the poorest food-deficit countries, the need to increase food production in other developing countries and the importance of improving the nutritional level of the poorest populations. IFAD has entered into an agreement with the UN under Art. 57 of the UN Charter and is a specialized agency thereof. *See* IFAD Lending Policies and Criteria, Res. 83/XVII, U.N. IFAD 2nd Sess., (Dec. 14, 1978) adopted by IFAD Governing Council on 14 Dec 1978 (as recently amended by Res 106/XXI (12 Feb 1998)).

152. The Restructured GEF Instrument is reproduced in Nicholas Van Praag, *The Global Environment Facility*, 33 INT'L LEGAL MATERIALS 1273-308 (1994) (subsequently amended in Mar. 2008, ¶¶ 2 3 stipulate also "that the agreed incremental costs of other relevant activities under Agenda 21 that may be agreed by the Council shall also be eligible for funding insofar

obviously argue that the choice of this instrument is necessarily dictated by the fact that neither of the two entities possess sufficient legal personality to enable them to negotiate a treaty or other binding agreement.[153] In any event, while the parties to such an MoU are generally presumed to intend to desist from assuming any binding obligations, the non-binding character of these instruments may, nonetheless, be questioned on several grounds.

First, regarding trust agreements established by an MoU, the trustee is appointed as the account holder, when applicable, and administrator of the trust fund and its assets. This in itself entails a reciprocal obligation whereby the trustee owes particular duties to the donors, which can hardly be assumed on a non-binding basis. As most of these duties stem from widespread practice in the field of the international law of trust funds, it is not out of the question to posit that they have become part of customary international law between States and trustees; as such they are not merely voluntary, but binding. Moreover, the trustee owes some fiduciary duties to the beneficiaries once these have been designated.[154] It would thus be absurd for the trustee and the donors to appoint the trustee without either of these entities owing any obligations to the beneficiaries at any stage of the trust process.

Equally, despite the lack of inter-governmental character regarding environmental financing to treaty-bodies by the GEF, some obligation must arise for the trustee under relevant cooperation agreements. While this may not necessarily involve strict adherence to the policy decisions of the respective COP, it may include an obligation to, for example, prepare and submit annual financial reports.[155] Some environmental treaties fully finance their own projects and do not engage the GEF or IFAD as their financial mechanisms. In these cases, the decisions issued by the respective COPs are binding on the GEF when releasing funds (owned by the COP) for particular projects, despite the non-contractual character of their agreement.[156] The U.N. Legal Counsel has made it clear that COP operating under universal treaties possess the legal capacity,

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as they achieve global environmental benefits by protecting the global environment in the focal areas").

153. Nele Matz, *Financial Institutions Between Effectiveness & Legitimacy: A Legal Analysis of the World Bank, Global Environmental Facility & Prototype Carbon Fund*, 5 INT'L ENVTL. AGREEMENTS POL. L. & ECON. 265, 285 (2005).

154. *See* Ilias Bantekas, *The Emergence of the Intergovernmental Trust in International Law*, 81 BRIT. Y.B. INT'L L. 224, 231 (2011).

155. Biological Diversity Convention COP-GEF MoU, (n.137), Arts 3.1 & 4.

156. *See also* Doc. FCCC/CP/2001/13/Add.1 (Jan. 21, 2002), pp 40ff.

within the limits of their mandate, to enter into agreements and other arrangements with state and non-state entities.[157]

In practice, the majority of commentators argue that, despite the relevant MoU, the GEF is not legally bound by decisions of the COPs.[158] Although the intention of the parties entering into such an MoU should be respected, the content of such instruments entails a plethora of binding obligations, as either a result of customary international law or implicitly by the very function of the trustee's role. Perhaps, therefore, the best way of approaching the normative character of such agreements is article by article. Alternatively, it may be argued that the parties to an MoU establishing a trust relationship are aware of and accept the binding duties arising from such a relationship, and thus the role of the MoU is to emphasize the non-binding character of the other aspects of the relationship. It should be noted, of course, that the parties to the aforementioned MoU are not States, but largely inter-governmental organizations.

Moreover, there may be doubt about the inter-governmental status of others, such as the GEF. Nonetheless, it is undeniable that they enjoy at least some international legal personality, and even if they are unable to enter into treaties as quasi-inter-governmental organizations, they are competent to conclude contracts under domestic law. The MoU route, therefore, is not the only option. Overall, the problematic nature of MoU serving as administration agreements is limited to a small number of cases that do not generally involve State entities.

A. Jurisdiction in Respect of Disputes Arising from Administration Agreements

A brief assessment of the appropriate jurisdiction for disputes arising out of the interpretation and implementation of administration agreements is warranted. One cannot rely on the general principles underlying the international law of trust funds because the relevant practice is inconsistent. Some agreements provide for arbitral proceedings, while others do not. Even so, where arbitration is incorporated in the body of an agreement, the parties generally fail to elaborate on its modalities. In the absence of an arbitration clause, it is wholly unreasonable to conclude that the World Bank's General

157. Legal Opinion of Nov. 4, 1993, U.N. JURID. Y.B. (1993) 427, 429.

158. In fact, the COP to the CBD, in its first review of GEF effectiveness as the CBD's financial mechanism expressed discontent with the GEF's level of compliance. *See* Matz, *supra* note 141, at 285-86.

Conditions Applicable to Loan and Guarantee Agreements are applicable, assuming the World Bank is a trustee in that case.[159] The IBRD and IDA submit their own loan and credit arrangements with State entities[160] to public international law,[161] subject to very minor and specific exceptions in respect of necessarily local matters such as the creation of sureties. Equally, the relevant arbitration provision in the Bank's Articles of Agreement cannot resolve trust fund disputes with a donor State that is not a party to the Articles of Agreement. This result differs if the donor is a party thereof.

One way of resolving this legal vacuum is by subjecting the dispute to the appropriate jurisdiction of domestic courts, particularly the seat of the World Bank, which corresponds to its standard practice respecting the introduction of choice of forum clauses in international credit contracts.[162] This is indeed the most appropriate solution. The State can neither invoke the procedural defense of State immunity, nor raise issue with the fact that the agreement in question was a treaty rather than a private contract in order to avoid the civil jurisdiction of the courts of the

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159. Incorporation by reference would be inapplicable in this case, unless an instrument containing an arbitration clause was expressly mentioned in a first agreement. It is generally accepted that the instrument incorporated by reference need not be an agreement previously concluded by the parties. It may just as well be one of the parties' standard terms or an instrument to which none of the parties has any other relationship. *See* Thyssen Can. Ltd. V. Mariana, [2000] 3 F.C. 398 (judgment from Canadian Court of Appeal) (Can.); Fai Tak Engineering Co. v. Sui Chong Construction & Engineering Co., [2009] H.K.D.C. 141 (judgment from Hong Kong District Court) (H.K.).

160. The IBRD typically enters into a loan and guarantees agreements with borrowing states. These states assume full responsibility for carrying out the project in respect of which the funds were borrowed. The direct borrower is a private entity, the Bank will enter into a Guarantee Agreement with the government of the relevant member state.

161. Int'l Bank for Reconstruction and Dev. [IBRD], *General Conditions Applicable to Loan and Guarantee Agreements* § 10.01, IBRD Doc. 75043 (Mar. 15, 1974) (in accordance with which the Agreement expressly prevails over any domestic law to the contrary); IBRD, *General Conditions for Loans* § 8.01 (Oct. 16, 2006); *see also* IBRD, *General Conditions Applicable to Development Credit Arrangements* § 10.01 (Dec. 2, 1997). These General Conditions, much like those of the UN, constitute integral components of subsequent agreements with recipient states and are implicitly binding on the parties. *See* The World Bank Grp. [WBG], *IDA-Chad Development Credit Agreement (Management of the Petroleum Economy Project)*, Credit No. 3316 CD (Mar. 20, 2000). The same is true of § 7.01 of the IBRD's Loan Regulations (1956), which expressly exclude the application of all or any municipal law in contracts between the Bank and a borrower.

162. *See* Norbert Horn, *'Non-Judicial Dispute Settlement in International Financial Transactions'*, *in* NON-JUDICIAL DISPUTE SETTLEMENT IN INTERNATIONAL FINANCIAL TRANSACTIONS 9 (Norbert Horn & Joseph J. Norton eds., 2000) (Horn, however, notes that the incorporation of such clauses has declined almost to extinction in favor of arbitration and many states, particularly Latin American, have enacted constitutional amendments that preclude the state from being sued before the civil courts of any other state).

forum, unless it is shown that its contribution to the trust fund was made in a *jure imperii* capacity, rather than as *jus gestionis*. In every case, the object and purpose of the relevant transaction and the nature of the trust fund will inform such determinations, as this is set out in its founding instrument or through later institutional actions.[163] The existence of sovereign immunity, if persistent, would constitute a procedural bar to the jurisdiction of local courts, yet it is unlikely that a trustee with some degree of international legal personality would decide to settle its disputes with a contributing State before domestic courts. This route is only appropriate with respect to disputes that arise with private contracting entities.

VII. CAN AN INTERNATIONAL TRUST BE SET UP BY MEANS OF A PRIVATE CONTRACT?

The likelihood that an international trust fund between States and international organizations can be set up by a contract, rather than a treaty, exists neither in the world of fiction nor in the realm of legal impermissibility. We have already examined several trust instruments, the participants in which, whether as equal parties or otherwise, included both States and private actors. The latter's legal relationships with States and international organizations are not susceptible to regulation by means of treaties,[164] but are nonetheless amenable to an MoU and private contracts. These instruments retain their particular character even where their governing law is principally predicated on public international law.

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163. Again, this is a complex issue that cannot be exhausted in the limited confines of this article. The general rule arising from the *Tin Council* cases is that member states to an international organization do not incur liability from conduct attributed to the organization. *See, e.g.*, J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade & Indus. & Others and related appeals [1990] 2 AC (HL) 418; MacLaine Watson & Co. v. Dep't of Trade & Indus. [1988] 3 All ER 257 (Eng.); Maclaine Watson & Co. v. Int'l Tin Council, Judgement, 81 I.L.R. 670, 678 (Oct. 26, 1989). The privileges and immunities of a quasi-international entity, besides general international law, may be circumscribed by its HQ agreement with the host state. Although the Swiss government conferred international legal personality to the Global Fund through their respective HQ Agreement, Article 5 of said Agreement exempted from immunity of legal process, among other things, "counterclaims directly related to principal proceedings initiated by the Fund," arbitration awards between itself and Switzerland, as well as "[d]isputes arising out of contracts and disputes of a private law character to which the Global Fund is a party." Agreement between the Swiss Fed. Council & the Glob. Fund to Fight AIDS, Tuberculosis & Malaria, art. 5, GF/B7/7 (Dec. 13, 2004); *Id.* at art. 25(1).

164. Anglo-Iranian Oil Co. Case (U.K. v. Iran), Judgement, 1952 I.C.J. Rep. 93, 112 (July 22).

With respect to trust funds encompassing private parties, reference to an instrument other than a treaty is the only viable way to aptly regulate the legal relations of asymmetrical actors. For this reason, the Instrument of the Prototype Carbon Fund (PCF) cannot be considered a treaty between private and public actors, further necessitating the conclusion of bilateral agreements between the trustee and individual participants.[165] We have pointed to the theoretical possibility that the PCF Instrument could incorporate public and private relationships in a single document.[166] Throughout this paper there are numerous examples of trust funds encompassing a variety of actors in different legal capacities, all of which regulate a myriad of contractual relationships. None of these trust funds, however, are predicated on a private contract.

The emerging international law of trust funds places no requirement on the legal nature of the instrument setting up the trust fund. Generally, however, a treaty would organize those funds set up between States and/or between States and international organizations. States and international organizations are not precluded from entering into private agreements among themselves where they determine to regulate their relationships only on the basis of private law. States typically prefer the treaty option because it deprives the courts of other nations from examining their affairs and, in many cases, private law is not capable of regulating matters of sovereignty, such as maritime delimitation, cession of territory, self-determination, space exploration, and others.[167]

As a result, donors that prefer the contractual option do not need to be concerned with being sued in a national court because any suits will be directed against the trustee or the person of the trust fund itself.[168]

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165. The PCF Instrument gives rise to a membership based on legal equality that comprises both states and private corporations. These membership types are reflected in the instruments of participation, which, however, are different in legal nature depending on whether the entity in question is a state or a non-state actor. Whereas in the former case, the agreement is a treaty, it is a contract of a private nature. This suggests that the PCF Instrument cannot constitute a treaty for some participants while representing a private agreement in respect of other participants. The Instrument Establishing the Prototype Carbon Fund was amended by IBRD Res 2000-1 (15 May 2000), on "Changing the Terms of a Second Closing and on Certain Other Amendments to the Instrument Establishing the PCF," and subsequently by IBRD Res 2001-3 (Mar. 22, 2001) on "Changing the Composition of the Participants' Committee and on Certain Other Amendments to the Instrument Establishing the PCF," and finally by IBRD Res 2005-5 and PCF Participants Meeting Resolution adopted on 10 Nov. 2005, as subsequently adopted by the IBRD Board of Executive Directors on 22 Dec. 2005.

166. *Id.*

167. With the advent of transnational law, which does not exclude state capitalism, states are increasingly turning to private contracts under governing laws of convenience. *See* Bantekas, *supra* note 25.

168. Bantekas, *supra* note 142, at 271.

Apart from trusts adopted to deal with the fiscal stabilization of small island states, where the employment of treaties provides a degree of security between the parties, trusts set up to address all other matters do not need require the conclusion of a treaty. The State parties to a private agreement of this nature would only be liable to the trustee as far as the delivery of their contribution is concerned, and in respect of their decision-making authority, if any, in the context of the trust fund's organs.

Given the private nature of the contract, the parties may have subjected the functioning of these internal operations to the corporate governance or private foundation laws (referring to governance) of a particular country. This option is not generally advisable, given its potential for extensive intra-party litigation and the possibility of third parties trying to intervene on the basis of domestic law, particularly because all such matters could far more easily be subjected to the trustee's internal procedures. Overall, concluding a contract would be simpler because it would require only ministerial consent, not parliamentary approval.

The parties may adopt international law as the governing law of the contract and exclude local courts during the settlement of any ensuing dispute in favor of arbitral resolution. This would, in effect, be a mixed[169] agreement, whereby the arbitrator may apply the law of the country of signature or that of the seat.[170] The tribunal may also designate another law, when the relevant rules of international law are deemed insufficient to provide a concrete solution. Certainly, the arbitrator will make use of the *lex arbitri* to regulate the conduct of proceedings and to seek injunctions and other measures from authorities.

Following this discussion, we have only determined the parties' intra-relationships in the eventuality of forming a contract. We have not fully considered the implications regarding the trust fund's recognition as

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169. An example of a mixed agreement that turned sour concerned the choice of law in the Libyan oil concessions to western oil companies. This was to be governed and interpreted in accordance with "the principles of law of Libya common to the principles of international law..." Texaco Overseas Petroleum Co. v. Libya, I.L.R. 389 (1979). *See* Christopher Greenwood, *State Contracts in International Law: The Libyan Oil Arbitrations*, 53 BRIT. Y.B. INT'L L. 27 (1983).

170. The parties may wish to delocalize the arbitration altogether by avoiding its subjection to any state's law. In this sense, the *lex arbitri* would have a minimal role. It would be unwise for the parties to believe that the international law of trust funds (which may be assimilated to a *lex mercatoria*) can supply the tribunal with the appropriate *lex arbitri*. *See* GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 36-37 (Oxford Univ. Press 2004). Delocalization is best explained by reference to contract theory. *Id.* at 39ff.

an entity subject to the international law of trust funds. It seems logical to assume that the legal nature of the agreement plays no role in the recognition of the trust under international law so long as the parties, at least one of which is a State and the trustee endowed with international legal personality, agree that international law governs the trust. In this case, the trust is detached and independent from the parties' other private law relationships until the conclusion of the contract.

This result is further fortified by the clause in the contract providing for a trustee such as the World Bank, or another international financial institution or international organization, such as the United Nations. From the moment of conclusion, the trust's governing law, in respect of both its internal and international processes, is subsequently supplemented by the trustee's institutional rules, which itself is subject to international law by virtue of the trustee's founding treaty or implied powers. The trust entity is not wholly independent from the trustee, except for the trustee's limitation of liability as usually enshrined in the trust's instrument, because an institutional act of the trustee practically triggers its birth (e.g. an IBRD Executive Board resolution). As a result, the trust entity is, for all legal purposes, subsumed within the international legal framework of the trustee unless the agreement between the parties' states otherwise.

VIII. CONCLUSION

The vast labyrinth of agreements utilized by donors and trustees is evidence that existing domestic and international treaty and contractual legal regimes are inadequate for the relevant actors. It would be fair to say that these contractual relations have migrated into the flexible sphere of transnational law.[171] There, we find a fusion of both domestic and international law, adaptable to the commercial needs of the parties. Intergovernmental funds are no longer agents of states, but entities that pursue various purposes, both public and private, and whose managerial and other roles make them financially accountable to their direct stakeholders.[172] Moreover, it is generally agreed that investment or aid should lead to development, and not solely to prosperous investors or

171. *See* T.C. HALLIDAY & G. SHAFFER, TRANSNATIONAL LEGAL ORDERS (Cambridge Univ. Press 2015); A.C. Cutler, *The Judicialization of Private Transnational Power & Authority*, 25 IND. J. GLOBAL LEGAL STUD. 61 (2018).

172. *See* Ilias Bantekas, *Effective Management of International Aid Through Intergovernmental Trust Funds*, 18 LOY. CHI. INT'L L. REV. (2021).

financial institutions.[173] In fact, trusts must invest their assets as a means of replenishing them, but the literature is silent on the rights and obligations of trust funds as investors.[174]

This article has made a first attempt to describe how inter-governmental trusts transact with their direct stakeholders. As transnational actors, trustees and contributors have exhibited a tendency to seek contractual forms that are flexible, liability-averse, extra-constitutional, and outside the narrow confines of international or domestic laws.[175] The starting point for such a tendency is the legal nature of donor pledges, which are perceived as non-binding unless donors expressly consent for such pledge to take the form of a validly made offer, acceptance, or the equivalent of deed-based promise. In such a context, the function and aims of trusts would be in peril because pledges would not translate into assets fulfilling the aims agreed with the trustee. Hence, the use of soft law instruments and pledge diplomacy ensures that donors feel that no liability can arise from their pledge, and that what they agree to contribute is, in fact, consistent with what they can afford. This pledge diplomacy and the non-binding instruments employed in the process have helped achieve this outcome. Until the early 2000s, donor States often defaulted on their pledges. Current practice suggests that States are cautious with the amounts pledged, and as a result donor conferences are usually unable to meet their targets.[176] Although there is no empirical evidence, this author strongly believes that trust pledging diplomacy has enhanced the SDGs' finance side of things.

This paper has shown that there are many ways to attract assets and disburse them other than traditional inter-state agreements. Moreover, it is evident that transnational actors unshackled from the constraints of

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173. Ilias Bantekas, *The Human Rights & Development Dimension of Foreign Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws*, 31 FLA. J. INT'L L. 339 (2020).

174. At best, this process is referred to as state capitalism, but without the level of investment law analysis as that offered for private investors. *See* J. KURLANTZIK, STATE CAPITALISM: HOW THE RETURN OF STATISM IS TRANSFORMING THE WORLD (Oxford Univ. Press 2016); A. Cuervo-Cazurra et al., *Governments as Owners: State Owned Multinational Companies*, 45 J. INT'L BUS. STUD. 919 (2014).

175. *See* R. GOODE ET AL., TRANSNATIONAL COMMERCIAL LAW 1.04 (Oxford Univ. Press 2d ed. 2015). There is an abundance of soft and hard law rules that facilitate this process, including the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and the Hague Principles on Choice of Law in International Commercial Contracts.

176. *Donor Pledges Fall Short of Target at Brussel's II Syria Conference*, EUR. COUNCIL ON REFUGEES & EXILES (Apr. 27, 2018), *available at* https://ecre.org/donor-pledges-fall-short-of-target-at-brussels-ii-syria-conference/ (last visited Apr. 6, 2021).

their usual governing laws—i.e., constitutions, international law etc.—are entrepreneurial and can shape complex relationships through relatively simple agreements. However, it is important that both donors and trustees are accountable to the nominal owners, namely the citizens of member States. Many trustees have shown a sharp antipathy to human rights despite being funded by taxpayers' money expressly in order to alleviate global poverty, such as the World Bank and the IMF.[177] Therefore, it is crucial that human rights-based processes ground all relevant transactions, be culturally sensitive,[178] and that actions are not undertaken in a vacuum devoid of them.[179]

177. *See* G. SARFATY, VALUES IN TRANSLATION: HUMAN RIGHTS & THE CULTURE OF THE WORLD BANK (Stanford Univ. Press, 2012).

178. *See* Eleni Polymenopoulou, *Localizing Intellectual Property & UNESCO Claims*, 6 CANADIAN J. HUM. RTS. 87 (2017); Eleni Polymenopoulou, *Cultural Rights in the Case Law of the International Court of Justice*, 27 LEIDEN J. INT'L L. 447 (2014).

179. The human rights considerations should permeate development finance programs was raised by the OHCHR during the third international conference on financing for development and the negotiations of the Addis Ababa Action Agenda (AAAA), its outcome document. It was emphasized that the objective of financing development should be the equitable distribution of resources so that all persons have their most basic needs met and human rights are made a reality for all. *See* OHCHR, *Key Messages on Financing for Development and Human Rights*, U.N. HUM. RTS. (n.d.), *available at* https://www.ohchr.org/Documents/Issues/Development/KeyMessageHRFinancingDevelopment.pdf (last visited Apr. 6, 2021).