INFORMAL AND POLITICAL AGREEMENTS AS SOURCES OF OBLIGATION? SKETCHING A THEORY OF INTERNATIONAL POLITICAL NORMATIVITY

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ABSTRACT

This Article argues that a particular trend is emerging whereby states and intergovernmental organisations are relying less on treaties and contracts in certain fields of regulation in favour of more flexible types of agreements. These agreements, although predicated on language suggesting non-binding (or soft law) obligations, are of a sui generis nature, which this article suggests give rise to international political normativity. That is, while its protagonists maintain that they are not bound by the terms of their pledges and undertakings, in fact the practice of participating states demonstrates a desire to set up elaborate mechanisms that encompass complex webs of commitment to and with other stakeholders. Participation in these complex mechanisms portrays a normative character that cannot be explained by reference to treaties and contracts, nor by reference to non-binding, soft law, agreements. This type of normativity is distinct from the similar term coined by political scientists, albeit many of its connotations strike a familiar chord.

I. INTRODUCTION 38
II. MOU AS AN EMANATION OF INTERNATIONAL POLITICAL NORMATIVITY 43
III. INDETERMINATE INTERNATIONAL AGREEMENTS 51
A. *Unilateral Pledges Under International Law.* 51
B. *International Instruments with Unclear Legal Status* 55
IV. MOU AS INTERNATIONAL AGREEMENTS 57
A. *MoU in the Field of Environmental Financing* 59
B. *Administration Agreements for Environmental Funding Mechanisms* 61
V. MOU ADOPTED BY THE INTERNATIONAL MONETARY FUND. 64
A. *IMF MoU with Distressed States in the Post-2008 Financial Crisis* 68
B. *World Bank and U.N. Donor Agreements with States* 72
VI. CONCLUSION 76

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I. Introduction

Memoranda of understanding (MoU) have appeared with much force in both the domestic and international landscape since the early 1900s. The scholarship has mainly focused on the binary distinction between agreements designated as MoU that were not intended to be binding and those that assumed a normative character even if not declared as such. Since the early 2000s, especially with the rise of mega-projects requiring significant financing such as the Millennium Development Goals (MDGs), this binary distinction gave way to a new way of thinking about commitments encompassed within instruments that were traditionally perceived as non-binding. As the section on international political normativity will demonstrate, while the distinction between binding and non-binding agreements is still important, states have realised that treaties are no longer the most optimum means of expressing the broad notion of "commitment" and that they would rather do away with the formality that comes with treaties and international contracts. The Damocles "sword of obligation" is no longer accepted by most states in their engagement with mega-financing projects. In fact, while states engage such projects with enthusiasm at the political level, they are very much reluctant to create international legal obligations. This gives rise to an important dilemma: Should form prevail over substance?

Of course, this is not to say that all MoU provide the legal effect expounded by the parties. What is at stake is whether an agreement, irrespective of its form, entails concrete obligations for the parties, with a common intention to fulfill and implement such obligations. By way of illustration, the conditionalities set out in the post-2008 restructuring of the Greek debt were contained in MoU, the aim of which was to render any issues arising therefrom inadmissible from local or international courts.[1] In addition, the authority of the administering authority (the so-called troika) established by the MoU was exceptionally broad and in practice could sanction any policy or law, even if not directly related to the Greek debt-restructuring plan. On the basis of these MoU, the International Monetary Fund (IMF), the European Central Bank (ECB), as well as informal European Union (EU) institutions, such as the EuroGroup, were granted powers to oversee Greek budgetary reforms as

1. It was only in Eugenia Florescu and Others v. Casa Jude ţeanaˇ de Pensii Sibiu and Others, Case C-258/14 Judgment of the Court (Grand Chamber) of 13 June 2017, EU:C:2017:448, ¶ 36, that the 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.

well as attendant laws. As a result, the powers conferred in these MoU replaced the authority of the Greek government to adopt policy and laws in a sovereign manner, even though the latter was found not to be accountable under EU law.[2] In fact, no entity in the family of lenders, including facilitating institutions, such as the EC Commission, retained any kind of liability in its contractual or extra-contractual dealings with borrower states.[3] As a result of these broad-ranging powers, the Court of Justice of the EU (CJEU) emphasized that the EU Commission must "refrain from signing an MoU whose consistency with EU law it doubts."[4] In equal measure, there is growing case law by domestic courts who view certain MoU as giving rise to concrete obligations.[5]

States assume international obligations in two ways, namely: (a) written agreements demonstrating an intent to be bound (expressed through treaties and contracts); and (b) practice, whether individual or joint, coupled with an intention to be bound (expressed through

2. In Joined Cases C-105-109/15, Konstantinos Mallis and Others v. European Commission and European Central Bank, EU:C:2016:702, ¶ 47 (Sept. 20, 2016), the CJEU found that the Eurogroup is an informal grouping of the euro area finance ministers, and as a result its acts could not be attributed to the Commission or the ECB. *But see* Joined Cases C-8-10/15P, Ledra Advertising Ltd and Others v. European Commission and European Central Bank, EU:C:2016:701 (Sept. 20, 2016), 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. Therefore, it is bound to refrain from MoU that are inconsistent with EU law, including the EU Charter of Fundamental Rights.

3. *See* Case T-531/14, Leïmonia Sotiropoulou and Others v. Council of the EU, EU:T:2017:297 (May 3, 2017) which entrenched the non-contractual liability of the EC Council concerning Decisions adopted within the framework of arts 126 and 136 TFEU (Excessive Deficit Procedure).

4. Joined Cases C-8/15 P to C-10/15 P, Ledra Advertising and Others v European Central Bank, ¶ 59 (Sept. 20, 2016). *See* Menelaos Markakis, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu*, 55 CML REV. 643 (2018).

5. In Angle World LLC ("Angle") v. Jiangsu Beier Decoration Materials Co., Ltd. ("Jiangsu Beier") the parties had entered into an MoU containing an arbitration clause. CIETAC agreed that the clause was valid and Angle applied to the Chinese Fourth Middle Court to set the award aside on the ground that no valid arbitration clause can exist in a non-legally binding instrument. The Chinese court disagreed, arguing that Parties concluded and amended agreements through emails during their long-term business practice, and the MOU was also handled in such a manner. Therefore, the Court inferred that Angle accepted the arbitration clause. The Court also found that in fact both Parties had actually performed the terms of the MOU. Therefore, the Court held that the MOU in question was in fact an agreement which had come into effect, and the arbitration clause contained therein was valid and binding. Judgment (2019) Jing 04 Min Te No.588. Interestingly enough, when the winning party attempted to enforce the award in the United States, it was refused on the ground that there was no valid agreement to arbitrate. A summary of this ruling is available at: https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=30237.

custom, general principles and unilateral acts).[6] The MoU does not fall within this paradigm because it is structurally meant to lack a common intention to be bound. It is of course well established that it is the parties' intention to be bound by their respective offer and acceptance that forms or establishes their contract. Offer and acceptance alone are insufficient.[7] This is well reflected not only in the common and civil law traditions,[8] but also as far away as Islamic law.[9] National laws have established several means whereby intent may be deemed as manifested, as well as others where it is not so manifested.[10] It is not uncommon for some courts to impute an express contractual choice to a clause that lacks an intent.[11] Some national courts have gone as far as declare the existence of such common intention, although this is rare. French courts generally assume a "common intention to arbitrate" where one of the parties has by its silence accepted arbitration, particularly where there is a history of consistent and repeated practice by the parties of arbitration in successive contracts, even if the disputed contract in question contains no arbitration clause.[12] In the field of international arbitration more specifically, questions as to the existence of consent, however, can also arise even when the arbitration clause is clear,[13] particularly in the commercial context, as commercial contracts are often the result of protracted negotiations, and can be assembled in large

6. It is instructive that the U.N. Secretary-General has registered even certain unilateral declarations as part of its mandate to register treaties. DECLARATION (WITH LETTER OF TRANSMITTAL TO THE U.N. SECRETARY-GENERAL) ON THE SUEZ CANAL AND THE ARRANGEMENTS FOR ITS OPERATION, 265 U.N.T.S. 299 (Apr. 24, 1957).

7. *See* Bob A. Hepple, *Intention to Create Legal Relations*, 28 CLJ 122 (1970); equally, JACK BEATSON, ANDREW BURROWS, JONATHAN CARTWRIGHT, ANSON'S LAW OF CONTRACT 73–77 (OUP 2010, 30th ed).

8. *See generally* Thomas Kadner Graziano, *Comparative Contract Law*, 129ff (Edward Elgar, 2d ed. 2019).

9. *See* Ilias Bantekas et al., *Islamic Contract Law* (OUP 2023) ch. 3.

10. Letters of intent and preliminary contracts are not viewed as expressions of intent to be bound in English law. *See* British Steel Corp v. Cleveland Bridge and Engineering Co Ltd [1984] 1 All ER 504. Where, however, the language in such an instrument is sufficiently clear, the court will have little problem finding intent. *See* Damon Cia SA v Hapag-Lloyd International SA (The Blackenstein) [1985] 1 All ER 475. The same is also true under German law. *See* Martin Hogg, PROMISES AND CONTRACT LAW: COMPARATIVE PERSPECTIVES 235 (CUP 2011).

11. In Arsanovia v. Cruz City [2013] 2 All ER (Comm) 1, it was held that express terms do not stipulate only what is absolutely and unambiguously explicit and hence the court had no problem imputing the parties' clear intention in two clauses that the contract be governed by English to another clause that was silent on this issue; this case was cited with approval by the Court of Appeal in Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait) [2020] EWCA (Civ) 6, ¶ 67.

12. Van Dijk case [1983] (Paris Court of Appeals judgment).

13. *See* Kabab-Ji SAL, *supra* note 11, ¶ 67.

part through the compilation of pre-existing texts, or even over the. telephone.[14] Because of this background, commercial contracts will sometimes include conflicting dispute resolution clauses, incorporating both an agreement to litigate disputes before a selected state court and an arbitration agreement. In such cases, courts have generally adopted one of three alternative approaches: (a) adopt a pro-arbitration stance and enforce the arbitration agreement on the ground that the wording of the arbitration clause is clear enough to demonstrate the will of the parties to submit to arbitration;[15] (b) ignore any reference to arbitration on the ground that there is no conclusive evidence that this was the parties' unequivocal choice;[16] or (c) interpret the contract in a way that will give effect to both clauses, while potentially not giving full effect to either. Alternative (a) relies on the view that the parties' common intent should be given weight as much as possible; therefore, as litigation in national courts is the default method of dispute resolution, incorporation of arbitration into a contract indicates a clear choice by the parties to submit certain disputes to arbitration.[17] Alternative (b), on the other hand, emphasizes that access to state justice is a fundamental right, enshrined in constitutions and in several international instruments.[18] Therefore, arbitration clauses should be enforced only inasmuch as they are clear enough to rule out any doubts as to whether the parties actually agreed to resolve their disputes through private adjudication, with any significant ambiguity being resolved in favour of litigation in domestic courts.[19]

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14. *See* Bear Stearns Plc v. Forum Global Equity Ltd. [2007] EWHC 1576 (Comm) (noting a presumption of intention to be bound in commercial transactions).

15. Audiencia Provincial Civil de Madrid, Camimalaga, S.A.U. v. DAF Vehiculos Industriales S.A.U., Decision No. 147/2013; Rampton v. Eyre, Ontario Court of Appeal judgment [2007] ONCA 331; P. T. Tri-M.G. Intra-Asia Airlines v. Norse Air Charter Limited, Singapore High Court judgement [2009] SGHC 13; BGH [German Federal Court of Justice] [2007] VII ZR 105/06, judgement.

16. Kenon Engineering Ltd. v. Nippon Kokan Koji Kabushiki Kaisha, [2004] Hong Kong Court of Appeal HKCA 101.

17. The distinction between contract construction and gap filling or "implication of terms" is crucial. The UK Supreme Court has definitively held that implication can only be undertaken "if it is necessary for business efficacy." Marks and Spencer Plc v. BNP Paribas Securities [2015] UKSC 72, ¶ 14. The application of this principle in the context of ascertaining the intention of parties to a contract containing an arbitration agreement is problematic because compelling arbitration is hardly necessary for business efficacy.

18. Art. 47 EU Charter of Fundamental Rights; Art. 6 European Convention on Human Rights. *See* Ilias Bantekas, EQUAL TREATMENT OF PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION, 69 ICLQ 991 (2002).

19. See Sembcorp Marine v. PPL Holdings Pte Ltd., [2013] SGCA 43, decided by the Singapore Court of Appeal, which is in agreement with Marks and Spencer Plc v. BNP Paribas Securities, [2015] UKSC 72.

In treaty law the parties' intention to be bound is manifested in yet another way. One should distinguish between "signing"[20] and "ratifying"[21] a treaty. In practice, states sign the text of a newly agreed treaty without necessarily indicating by the mere act of signing that they also wish to be bound by the treaty in question.[22] An intention to be bound is typically expressed through a subsequent act of ratification, acceptance or approval.[23] Even so, a treaty may provide that a state is considered bound by the signature of its representative in two distinct ways, namely: (a) *ad referendum* and (b) by way of a "definitive signature." An *ad referendum* signature is conditional upon its subsequent official confirmation by the state. As a result, it becomes definitive once confirmed by the responsible organ. A "definitive" signature, on the other hand, establishes the consent of the state to be bound by the treaty without further action.[24] Definitive signatures are available in respect of many bilateral treaties as well as those (few) multilateral treaties that are not subject to ratification, acceptance, or approval procedures. The norm, however, is reflected in Article 10(1)(b) of the Vienna Convention of the Law of Treaties (VCLT), which stipulates that in the absence of a specified procedure, the authentication of a treaty's text (as being definite) is achieved "by the signature, signature *ad referendum* or initialing by the representatives of those states of the text of the treaty or of the Final Act of a conference incorporating the text."[25] This non-binding signature is known as a "simple signature."[26]

With these observations in mind, this Article will seek to explore the legal nature of MoU and political commitments not based on the classical criteria of contract (and by extension) and treaty law (chiefly, the "common intention to be bound"), but by reference to the *sui generis* character of such agreements. The idea of international political normativity is thus critical to this discussion and intended to become the basis of our understanding of these alternative commitments as they are evolving in international practice. This author is aware of the

20. *See U.N. Treaty Handbook* 5–6 (2012).

21. *See id.* at 8–10.

22. Martin A Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 ME. L. REV. 263 (1980).

23. This notwithstanding, art 18(a) VLCT makes it clear that upon signing a treaty and until such time as the ratifies or declares its intention not to ratify, it shall not act in a way that defeats the object and purpose of the treaty. Hence, the act of signing does carry certain obligations under international law.

24. *U.N. Treaty Handbook*, *supra* note 20, at 6.

25. Vienna Convention of the Law of Treaties, art. 10(1)(b) [1969].

26. *U.N. Treaty Handbook*, *supra* note 20, at 5.

limitations of this, as well as other theoretical models, yet the opportunity is ripe. Given that one of the aims underlying MoU is the confidentiality of the actions agreed thereunder, the data available is incomplete. While there is some scattered information about security-based MoU between states, this nonetheless constitutes hearsay and no one can be certain if such agreements actually exist.[27] Even so, there is still a considerable body of MoU that is being used by states and intergovernmental organisations, particularly the latter, that is publicly available. It is these instruments that are of interest in this Article and which will be employed to ground our analysis.

This Article is organised as follows: Part II explores the notion of international political normativity as applies to agreements and unilateral acts discussed in this Article with a view to demonstrating their sui generis "normativity." Part III discusses two types of indeterminate agreements, namely donor pledges made by states and certain international instruments with an unclear legal status. Part IV looks at MoU and administrative agreements employed in the financing of projects set out under international environmental treaties. Finally, Part V delves into donor and other agreements, including those designated as MoU, entered into, or administered by the United Nations (U.N.), IMF and World Bank.

II. MoU as an Emanation of International Political Normativity

The notion of international political normativity set forth in this Article requires some clarification and qualification for two reasons: first, because the term has already been coined in the political science domain and its scholarship,[28] and second because it has not previously been employed in international legal parlance. It is instructive to provide a brief survey as the term is employed by political scientists. Moralists contend that the underlying tools, as well as the validation of a political process, must be predicated on moral arguments and objectives. The outcome of such a process produces "political normativity" among those involved and the wider stakeholders.[29] Realists, on the

27. *See* EU Parliament, *EU External Migration Policy and the Protection of Human Rights*, at 45 (Sept. 2020) https://www.europarl.europa.eu/cmsdata/226387/EU_External_Migration_Policy_and_the_Protection_of_Human_Rights.pdf.

28. *See* Bernard Williams, In the Beginning Was the Deed: Realism and Moralism in Political Argument (Princeton Univ. Press 2005); Robert Jubb & Enzo Rossi, *Political Norms and Moral Values*, 40 J. Phil. Rsch. 455 (2015).

29. *See* John Horton, *Realism, Liberal Moralism and a Political Theory of Modus Vivendi*, 9 Eur. J. Pol. Theory 431 (2010).

other hand, argue that that political processes must be governed by political principles distinct from moral justifications, and hence distinguish between moral and political normativity.[30] In the middle of these two positions exists a uniting ideological movement, chiefly influenced by moralists, which contends that there is only a single political normativity, whereby morality and politics are inseparable.[31] The politics scholarship, whether moralists or realists, applies the notion of political normativity to inadvertently explain matters pertinent to legal questions, while clearly interested in understanding the validation of political processes.[32] This theory has been developed by political scientists in domestic politics, whereby it is taken for granted that any political process culminates in its ratification by a parliamentary entity and becomes law. Such political processes include parliamentary debates, typically preceded by white, green, or other papers, political dialogue between political parties, elites, lobby groups, private stakeholders, and many others. In such processes, political scientists are effectively referring to *procedural* political normativity whether through moralism[33] or realism, as these are clearly contested and largely opposed. If an agreement is reached, this gives rise to *substantive* political normativity. Clearly, procedural political normativity in the politics scholarship is far more important than its substantive counterpart because the latter is by necessity shaped by the range of moral and realist arguments used by the participants. Hence, if the tools are moralistic in nature, so too will the outcome have a moralistic outlook and this will be reflected in the legislation that embodies it.[34]

In international law, there is no guarantee of normativity for any process, no matter how long it takes, unlike domestic politics where even a negative or stalemate political produces some normative outcome. One of the greatest challenges in international politics is the inability to rationalize why some interstate processes effectively produce certain normative outcomes when in fact the participants made it clear from the

30. *See* Enzo Rossi &Matt Sleat, *Realism in Normative Political Theory*, 9 PHIL. COMPASS 689 (2014); William Galston, *Realism in Political Theory*, 9 EUR. J. POL. THEORY 385 (2010).

31. *See generally* Jonathan L. Maynard & Alex Worsnip, *Is There a Distinctively Political Normativity?*, 128 ETHICS 756 (2018).

32. *See id.* at 759–62.

33. By way of illustration, while endorsing the position that certain principles are politics-specific, many moralists still contend that they qualify as moral principles. *See generally* Charles Larmore, *What Is Political Philosophy?*, 10 J. MORAL PHIL. 276 (2013).

34. *See generally* Eva Erman & Niklas Möller, *Why Political Realists Should Not Be Afraid of Moral Values*, 40 J. PHIL. RSCH. 459 (2015).

very outset that the outcome was political and not normative.[35] The two paradigmatic examples are the Sustainable Development Goals (SDGs), and the Organisation for Economic Co-operation and Development's (OECD) Financial Action Task Force (FATF).[36] In both cases, state participants to the SDGs and the OECD clarified they were under no legal obligation to make financial contributions to the SDGs or adhere to FATF recommendations.[37] The absence of any obligation (i.e., normativity) was in fact the foundation of both the SDGs and FATF. Although until recently there was little debate in international law about the morality of treaty-making or institution-making (such as the SDGs), moralism has become integral to treaty negotiations.[38] This is not surprising, given it was generally desirable to "water down" a multilateral treaty to attract as many participants as possible. In the context of the SDGs and FATF, it was never the intention of the participants to render the outcome normative. Yet, because the purpose underlying the SDGs was predicated on moral grounds, procedural political normativity was imperative to convince all participants (industrialized and non-industrialized states). This was not an indirect attempt to impose neo-colonialism, nor indeed an enterprise that would harm taxpayers without producing any tangible outcomes.[39] The stated intention against any substantive political normativity could only be counter-balanced by a robust procedural political normativity that is predicated wholly on moralistic grounds. Conversely, international treaty-making processes intended to produce a substantive normative outcome irrespective of the parties' political differences have no need for moralistic underpinnings at the procedural (negotiating) level, because any transparency or moralistic arguments may harm the attainment of outcomes other stakeholders find abhorrent or immoral. By way of illustration, most people

35. Political scientists have long argued that there is no normative correctness. *See generally* CHRISTINE M. KORSGAARD ET AL., THE SOURCES OF NORMATIVITY (Onora O'Neill ed., Cambridge Univ. Press 1996).

36. FATP, https://www.fatf-gafi.org; G.A. Res. 70/1, at 14 (Oct. 21, 2015).

37. See Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 764–66 (2005), for a human rights critique on the Millennium Development Goals (MDGs); *see generally* Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 EUR. J. INT'L L. 390, 390–92 (2012).

38. *See generally* Alexander Boldizar & Outi Korhonen, *Ethics, Morals and International Law*, 10 EUR. J. INT'L L. 279 (1999).

39. *See generally* Bonny Ibhawoh, The Right to Development: The Politics and Polemics of Power and Resistance, 33 HUM. RTS. Q. 76 (2011) (noting that the insular political and ideological jockeying that has characterized the discourse on the right to development raises questions about the normative objectivity of the international human rights movement).

in Europe and North America find using Russian gas immoral, even if their cost-of-living exponentially increases. In trying to find alternative sources of energy, European and North American governments will desire to come to agreement with undemocratic governments (i.e., Venezuela) in negotiations where political bargaining is obscure and secretive.[40]

With this in mind, an otherwise political process, predicated on moralistic considerations, such as the SDGs, may claim to lead to sui generis normative outcomes, which in this Article we label as political normativity.[41] International lawyers generally distinguish between claims that give rise to an obligation for one or more entities (normative claims) and those that do not.[42] Normative claims may be found in unilateral acts, treaties, customs, and general principles. Non-normative claims, encompassed chiefly under the broad banner of soft law, are increasingly employed as incubators of hard international law,[43] although devoid of hard normative content. Experience shows hard international law is not always desirable, let alone achievable.[44] However, neither normative theories of international law, nor their soft law counterparts, can sufficiently explain the outcomes derived from processes such as the SDGs and FATF. In both of these processes the political commitments of the sovereign participants, while not normative, are effectively transformed into a web of interconnected actions that are not free from normative claims.[45] By way of illustration, let us assume state A pledges 0.7 of its GDP towards its SDG commitments

40. *See* Samantha Schmidt et al., *Biden Administration Begins Easing Restrictions on Venezuelan Oil*, WASH. POST (May 17, 2022, 7:54 PM), https://www.washingtonpost.com/world/2022/05/17/venezuela-oil-sanctions-chevron/.

41. There is no doubt today that international law is understood as a "social conception." *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA, THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 187–91 (Cambridge Univ. Press 1989).

42. *See generally* Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413 (1983) (but also noting the dangers of stripping international law and institutions of their normative character).

43. *See* Fabián Augusto Cárdenas Castañeda, *A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin*, XIII ANUARIO MEXICANO DE DERECHO INT'L 355, 369–70 (2013).

44. The paradigm of the ILC's Articles on State Responsibility and the wisdom of then ILC Rapporteur James Crawford to reject the draft treaty option resulted in their unequivocal recognition as principles of customary international law. *See generally* James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874 (2002).

45. *See generally* Susan Block-Lieb, *Soft and Hard Strategies: The Role of Business in the Crafting of International Commercial Law*, 40 MICH J. INT'L L. 433 (2019).

and this is earmarked for the reform of the water sector in country X. In doing so, the government of A will need to seek legitimacy from its electorate (in fact this might well be a political boost) and then ratify the pledge in parliament through the pertinent constitutional channels and procedures. At the international level, succeeding governments of A will have negotiated trade-offs for their pledge and in the process committed themselves and others to a diverse range of actions. Once the pledged amount is placed in a trust fund and applied to the water reform project of country X, other distinct and overlapping pledges will be distributed and applied there. An entire SDG mechanism with several layers of complexity is already set up to receive, administer, and oversee the implementation of the Goals.[46] This level of complexity and interconnectedness between the various participants, their actions, and their connection with private stakeholders is such that cannot readily be explained by reference to the otherwise stated political (i.e., non-normative) character of the SDGs.

In the traditional conception of soft law, extensive mechanisms, such as assemblies of international organizations exist, but what is at stake are the decisions or declarations of the participants in these mechanisms. In this sense, the mechanism is a mere facilitator. Whether a claim ultimately gives rise to a multilateral obligation depends on the stance of states with voting power in the mechanism in question. The U.N. General Assembly and the Security Council are paradigmatic of this approach. These entities are facilitators of claims, but the normative character of claims entertained therein are distinct from the nature of the mechanism producing them.[47] The mechanism underlying the SDGs is of a different nature. It is not a facilitator as such. It is an outcome producer in and of itself. The outcome(s) produced by the SDG mechanism is different from that delivered by an assembly or other entity of an intergovernmental organization in the following ways: First, the SDG mechanism does not make claims as such. Second, normativity is not an essential feature of the outcome produced by the SDG-type mechanism, in the sense that participants can just continue to operate in the absence of normativity. This is not possible in the context of other mechanisms, such as the U.N. Security Council. Finally, the SDG

46. *See generally* Sakiko Fukuda-Parr, *Global Goals as a Policy Tool: Intended and Unintended Consequences*, 15 J. HUM. DEV. & CAPABILITIES 118 (2014) (explaining the mechanisms by which global goals have influence on development agendas).

47. *See generally* Efthymios Papastavridis, *Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis*, 56 INT'L & COMP. L.Q. 83 (discussing the character of Security Council resolutions).

mechanism is multi-layered, complex, inter- and intra-connected in such a way that it makes no political and financial sense for powerful participants to abruptly terminate their participation.[48]

While it is wrong to label the SDGs outcome as normative, as this goes against the participants' intended will, the suggestion that they constitute non-binding soft law is equally wrong.[49] The thesis here is that the outcome produced by the SDGs is best described as a species of *international political normativity*. This type of "normativity" is wholly distinct from claims supporting an international obligation and is in no way justiciable. Moreover, despite the interconnectedness of actions, none of the actions and outcomes in the SDGs mechanism give rise to legitimate expectations.[50] Notwithstanding the absence of a true legally binding obligation in the pledges and actions of participants, especially wealthy industrialized states, the outcome of the SDGs is not in doubt, even if states may occasionally decrease their contributions because of budgetary or other constraints. Although the thesis is yet untested, the author believes the moralistic dimension of the negotiating process renders the substantive outcome politically robust even in the absence of a treaty framework.[51] This high level of mutual trust created by the moralistic underpinnings of the project in question has led to a *process*, rather than a claim, that is far more effective than any binding treaty mechanism. Since the late 1990s, many of the powers traditionally associated with parliamentary assemblies of intergovernmental organizations were assumed by trust funds[52] lacking intergovernmental status, as well as conferences of parties (COP), otherwise known as assembly of

48. *See generally* Duncan French, *The Global Goals: Formalism Foregone, Contested Legality and "Re-Imaginings" of International Law*, ETHIOPIAN Y.B. INT'L L. 151 (2016).

49. *See generally* Alan E Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L.Q. 901 (1999); *see generally* C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989).

50. The claim is chiefly raised by investors against host states (where the burden of proof is very high), *see generally* Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV. 88 (2013), but it is also a principle in the law of contracts, *see generally* Jay M Feinman, *Good Faith and Reasonable Expectations*, 67 ARK. L. REV. 525 (2014) (explaining that "reasonable expectations always include the context of which the normative structure is an essential part").

51. It is generally accepted that constant progress or progress along a single particular path is a "false necessity." *See generally* ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (Verso 1987). This in turn allows us to reconsider whether normativity is in fact the right process for attaining all types of outcomes, particularly ethical ones.

52. *See generally* Ilias Bantekas, *Effective Management of International Aid Through Inter-Governmental Trust Funds*, 17 LOY. U. CHI. INT'L L. REV. 1 (2021).

parties (ASP), meetings of states parties (MOP), and conferences of states parties (COSP).[53] Some COP, such as the that of the Global Crop Trust, assumed powers and functions typically conferred on intergovernmental organizations.[54]

Political normativity is hence an outcome-based process meant to operate under the parties' mutual and enduring trust, which is why it is bereft of a strict normative dimension predicated on international legal obligations. The relative success of the SDGs demonstrates absolute normativity is not an essential feature of a successful system of mutual undertakings. What is important is an elevated level of mutual trust among participants, a relatively similar level of domestic laws and human rights, and a common plan by which to implement a morally sound project (i.e., human rights, climate change, sustainable development, and others).[55] These elements combined override the need for

53. *See generally* Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1 (2002); Art. 63 of the 2003 UN Convention against Corruption (CAC) established a Conference of the States Parties to the Convention (COSP) with extensive powers, namely: to improve capacity and cooperation between states, as well as promote and review the implementation of CAC. *See* U.N. Office on Drugs & Crime, U.N. Convention Against Corruption art. 63, U.N. Doc. A/58/422 (2003). To this end it has established an elaborate review mechanism of CAC. *See generally* Conference of the States Parties to the United Nations Convention against Corruption, *Summary of the State of Implementation of the United Nations Convention Against Corruption: Criminalization, Law Enforcement and International Cooperation*, U.N. Doc. CAC/COSP/2015/5 (Aug. 19, 2015). For an analysis of COSP in the context of the negotiation of Article 40 of the Convention on the Rights of Persons with Disabilities (CRPD), *see Expert Paper on Existing Monitoring Mechanisms, Possible Relevant Improvements and Possible Innovations in Monitoring Mechanisms for a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, OHCHR, Ad Hoc Comm. on a Comprehensive & Integral Int'l Convention on Protection & Promotion of the Rights & Dignity of Persons with Disabilities on Its Seventh Session, ¶¶ 65–66, U.N. Doc. A/AC.265/2006/CRP.4 (Jan. 18, 2006).

54. It is exactly the expression of this pragmatism in practice that has led commentators to argue that the Meetings of Parties (MOP, or otherwise known as Conferences of Parties (COP)) to Multilateral Environmental Agreements (MEAs), while lacking Secretariats and permanent seats, operate not as mere treaty bodies but as "international organizations with a distinct legal personality." *See* Robin R Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 623–27 (2000). This perceived intergovernmental organization status is objective and is based, in the opinion of said commentators, on the ability of MOPs to, *inter alia*, establish subsidiary bodies, amend the treaties establishing them, adopt protocols and interact with other intergovernmental organizations. *See id.* at 633–49.

55. *See generally* Matiangai Sirleaf, *Ebola Does Not Fall from the Sky: Structural Violence & International Responsibility*, 51 VAND. J. TRANSNAT'L L. 477 (2018) (arguing that global health epidemics cannot be overcome in the absence of international cooperation and capacity building of poorly developed state healthcare infrastructure).

obligations as such, albeit international law has a crucial role to play in this system of international political normativity. To reach a sufficient level of mutual trust, states must first build capacity and multilateral institutions. This role can only be played by the processes and institutions of international law.[56] The EU is an excellent example of an organization seeking to crystallize trust among its member states to achieve its stated aims. Even so, there are few institutions in the EU that operate on political normativity. A good example is offered by the so-called Eurogroup.[57] International law is also important because it sets out the minimum standards of what is expected of sovereign actors in their international relations. The political normativity of the SDGs might today seem common sense, but it is all possible because each and every SDGs has been debated and framed multilaterally since the adoption of the U.N. Charter. Of course, it would be naïve to ignore the fact in the multifaceted web making up the SDGs there is a plethora of contractual relationships and unilateral undertakings, all of which are underpinned by treaties, custom and domestic laws. These do not operate on the same political normativity basis as the pledges of the participants and the functioning of the SDGs mechanism.[58] Hence, the international political normativity of the SDGs is a phenomenon that is best explained by the rules and processes of public international law, with input from political theory, but not by the political science scholarship on so-called political normativity. Here, we have attempted to sketch the contours of international political normativity in order to better

56. *See generally* Ilias Bantekas, *The Contractual and Transnational Nature of Sovereign Donor-Trustee International Aid Contributions*, 48 SYRACUSE J. INT'L L. & COM. 285 (2021) (arguing that the process of sovereign donor contributions, while lacking a normative character, has nonetheless reached a high level of mutual trust).

57. The Eurogroup is an informal mechanism at ministerial level that discusses the shared responsibilities of EU member states related to the Eurozone. *See Eurogroup*, EUR. COUNCIL, http://www.consilium.europa.eu/en/council-eu/eurogroup/. In Joined Cases C-105-109/15 P, Konstantinos Mallis and Others v. European Commission and European Central Bank, EU:C:2016:702, ¶ 47 (Sept. 20, 2016), the CJEU found that the Eurogroup is an informal grouping of the euro area finance ministers, and as a result its acts could not be attributed to the Commission or the ECB. *But see* Joined Cases C-8-10/15P, Ledra Advertising Ltd and Others v. European Commission and European Central Bank, EU:C:2016:701 (Sept. 20, 2016), 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.

58. *See* ASIAN DEV. BANK, FUNDS FOR DEVELOPMENT: MULTILATERAL CHANNELS OF CONCESSIONAL FINANCING 281–83 (Gerd Droesse ed., 2011), https://www.adb.org/sites/default/files/publication/28621/funds-development.pdf (demonstrating that a big part of development aid, even though intergovernmental in nature, is effectively distributed and administered through contractual mechanisms).

understand the legal nature of the participants' pledges, but it is hoped that a fuller and perhaps more empirically-based analysis will be offered in the not-too-distant future.

III. Indeterminate International Agreements

This Article identifies at least two types of indeterminate agreements under international law. The first type is the pledge, which is not the same as a promise under international law, because it is specifically meant to avoid giving rise to legitimate expectations. The second type concerns instruments that cannot readily be seen as treaties yet entails consequences for parties and third-party entities. These are explored in the following subsections.

A. *Unilateral Pledges Under International Law*

Consistent state practice international donor conferences clearly demonstrate that a pledge should not be given the same meaning as a promise (in the form of a unilateral act) that otherwise constitutes a binding expression of will by the promising state.[59] Rather, the legal nature of a pledge is anything but a binding promise. The only binding act on the potential donor is the act of contribution itself, which materialises with the actual payment of funds, or the transfer of funds or goods to the recipient collecting entity. The donor is only bound to honour the transaction at the moment of receipt or deposit. A pledge, on the other hand, is merely considered an expression of intent to provide a voluntary contribution of funds.[60] In international law, therefore, a pledge constitutes solely a non-binding announcement of an intended contribution,[61]

59. *But see* Victor Rodriguez Cedeno (Special Rapporteur), First Rep. on Unilateral Acts of States on Its Fiftieth Session, ¶¶ 91–171, U.N. Doc. A/CN.4/486 (Mar. 5, 1998) (not making the distinction).

60. The U.N. has gone through three stages in the evolution of its voluntary donor conferences. Until 1977 the organization hosted individual donor events for each one of its programs, but as a result of a restructuring process, 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 the interest of states. *See* U.N. Secretary-General, Pledging Mechanisms to Fund Operational Activities for Development of the United Nations System, ¶ 3, U.N. Doc. A/57/332 (Aug. 21, 2002). Since the early 2000s, pledging states also want to see more local ownership over the projects and less governmental intrusion, which in most cases leads to corruption and embezzlement.

61. *See* James E. Archibald, *Pledges of Voluntary Contributions to the United Nations by Member States: Establishing and Enforcing Legal Obligations*, 36 Geo. Wash. Int'l L. Rev. 317, 317–18, 329 (2004). Archibald rightly comments that with regard to unpaid voluntary contributions, the U.N. does not invoke Art 19 of the U.N. Charter. *See id.* at 325–26.

unless it is expressed under the form and content of a binding agreement. Commitment, an intermediate category between pledging and contribution, consists in the creation of a legal, contractual, obligation between the donor and recipient entity and which specifies the committed account.[62]

It is, therefore, possible for a pledging conference to accumulate numerous pledges which eventually do not translate into concrete commitments.[63] This situation can only be remedied by putting in place appropriate conference mechanisms that leave little room for pledges and which bind the potential donors. Thus, the only available avenue is to either conclude a multilateral treaty (or a binding undertaking) between the donors present at the conference, or for the trustee to enter into bilateral agreements with each individual donor.[64] In either case, the agreement being a treaty will require ratification by the constitutional authorities of the signing state and it is possible, although unlikely in practice, for said authorities to refuse ratification for a variety of reasons.[65] In this eventuality no binding obligation is borne for

62. State's customary practice generally suggests the existence of a rule whereby conferences possess an independent right to adopt their own rules of procedure. This is pertinent to our discussion because it helps determine the binding nature of pledges at a given conference. 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 much different from a conference requiring only oral expression of pledges. *See generally* ROBBIE SABEL, PROCEDURE AT INTERNATIONAL CONFERENCES (Cambridge Univ. Press 1997).

63. 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 generally* International Conference on Financing for Development, UN Doc A/CONF.198/11 (Mar. 18–22, 2002); *see* A. Caliari, *Guest Editorial: The Monterrey Consensus, 14 Years Later*, 59 DEV. 5, 7 (2016). The financing of development strategies and programs was, however, streamlined and fully developed in the Addis Ababa Action Agenda (AAAA). Addis Ababa Action Agenda of the Third International Conference on Financing for Development (AAAA) UNGA Res 69/313 (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.

64. 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 MARTHA, THE FINANCIAL OBLIGATION IN INTERNATIONAL LAW 264 (Oxford Univ. Press 2015).

65. *See The Instrument for the Revitalised Global Environmental Facility (GEF) of March 2008*, at Annex C 2(b), WORLD BANK (March 2008) (stating that in cases of qualified instruments of

that state. This means that until the donor agreement is ratified, it possesses the same legal qualities as the pledge. This reality has been aptly recognised in the U.N. Secretary-General's Bulletin on the Establishment of Trust Funds, whereby a pledge is defined as:

> 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.[66]

The making of a pledge and its acceptance are to be recorded in an exchange of letters, or, if deemed appropriate, in a more formal agreement.[67]

The wording 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: (a) the terms pledge and commitment have the same meaning in the Bulletin; (b) only written pledges may be considered binding; (c) pledges not otherwise qualified are binding either upon exchange of letters or other agreement, or when received in writing by the administrator of the trust fund; and (d) qualified pledges become binding only when the qualification is lifted, otherwise they produce no legal effects for the pledging state. To avoid hosting donor conferences that merely result in making pledges that do not translate into concrete cash, it became evident that the culmination of a conference must involve binding commitments. Paragraph 29, above, of the Secretary-General's Bulletin aims exactly to remedy this lacuna by requiring a degree of formality as to the pledge.[68] At this stage, only a portion of the funds committed and collected from donor conferences is earmarked for trust funds. Depending on the experience of the trustee in the funds administration, his powers of influence, and the basis of the mandate received by the creators of the trust fund, the trustee may well attempt to set up a particular legal mechanism by which to turn pledges

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").

66. U.N. Secretary-General, ¶ 26, U.N. Doc. ST/SGB/188 (Mar. 1, 1982) [hereinafter Bulletin].

67. *Id.* ¶ 29.

68. Bulletin, *supra* note 66, ¶ 29.

into concrete commitments.[69] To a large degree, the World Bank has managed to standardise and streamline this process, but only in respect of particular trust funds.[70] A typical example is the Global Environmental Facility (GEF), whereby donors must sign an Instrument of Commitment, which constitutes a binding agreement, subject obviously to ratification by national parliaments.[71] The trustee has established the same type of binding commitment in respect of the various replenishments required to keep the GEF alive.[72] These instruments of commitment constitute a useful mechanism for replacing pledges, without inferring pledges that are outdated and serve no useful purpose, as in some situations particular donors will feel disinclined to being cornered.[73] Another mechanism in use is signing a multilateral treaty (which is rare), or the adoption of an instrument with the same legal effect.[74] In each case, the true intention of the parties to commit themselves requires verification. The Foundation "Remembrance, Responsibility and the Future," established to compensate Jewish victims of the Nazi era was set up through the adoption of a Joint Statement between the governments of various states, whereby the German government also promised to pay specific amounts of money to

69. It is common practice for public international financial institutions, such as the World Bank, to require state donors, on the basis 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 and Northern Ireland through DEFRA, IBRD, IDA and IFC for Contribution to TF073003* (Apr. 6, 2018) (on file with author); *see also Extractive Industries Transparency Initiative (EITI) Multi-Donor Trust Fund (MDTF)*, WORLD BANK (Feb 5, 2021), https://www.worldbank.org/en/programs/eitimdtf (last visited Feb. 5, 2021).

70. Ilias Bantekas, *The Legal Personality of World Bank Funds under International Law*, 56 TULSA L. R. 209 (2021).

71. *Instrument of the Restructured Global Environmental Facility*, at 83, GLOBAL ENVIRONMENTAL FACILITY (March 2015), https://www.thegef.org/sites/default/files/publications/GEF_Instrument-Interior-March23.2015_1.pdf.

72. *Revitalised GEF Instrument*, *supra* note 65, Annex C.

73. 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*, ¶ 2(a), (July 14, 1998), http://documents1.worldbank.org/curated/en/462171468137103226/pdf/656650WP0GEF0I00Box365714B00PUBLIC0.pdf on the Second Replenishment of GEF Resources (last visited Feb. 8, 2021).

74. The GEF Instrument establishes the premise of the GEF Trust Fund and possesses the attributes of a treaty comprised of both states and intergovernmental 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. U.N. JURIDICAL YEARBOOK 413 (Feb. 14 1995). A multilateral treaty between four nations created the Tuvalu Trust Fund. Agreement Concerning an International Trust Fund for Tuvalu, June 16, 1987, 1536 U.N.T.S. 48.

the fund. This Joint Statement does not constitute a pledge, not only because of its otherwise binding language, but also because its implementation was given effect on the same day, following a clause in the Joint Statement to that effect,[75] by an Executive Agreement adopted between Germany and the United States.[76]

B. *International Instruments with Unclear Legal Status*

Multilateral treaties are not ideal instruments for setting up trust funds in situations requiring urgent international responses, particularly those involving natural catastrophes and urgent humanitarian aid. The unattractiveness of treaties is even more poignant where the trust fund seeks to engage non-state stakeholders, such as private foundations and affected communities, given that a treaty would seem to exclude them or sustain a discriminatory two-tier membership.[77] Treaties, moreover, require lengthy negotiations and may potentially take a long time to conclude, thus leaving the beneficiaries, or the purpose for which they are set up, in a precarious state. The best model under such circumstances seems to be the type of trust fund susceptible to creation by resolution of an international organisation, such as the U.N. or the World Bank, and which is later given more concrete legal form through a series of bilateral agreements with the trustee in his capacity as such.[78] In respect of long-standing revolving trust funds set up to address serious fiscal imbalances, such as the Tuvalu and the Palau trust funds, bilateralism and multilateralism do not generally pose problems for the parties concerned and are preferred in practice.[79]

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75. *Revitalised GEF Instrument*, *supra* note 65, 4(b); *cf.* 2001 Washington Agreement between USA and France Concerning Payment for Certain Losses Suffered during World War II art. 2, Fr.-U.S., https://web.archive.org/web/20040219123909/http://www.civs.gouv.fr/download/uk/washington.pdf.

76. Agreement of 17 July 2000 Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-Ger., July, 17, 2000, 39 ILM 1298.

77. 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 UN Legal Counsel Opinion on a Legal Framework for the UNDP's Use of Donations from Non-Governmental Sources* 1996 U.N. JURID. Y.B. 463–64, U.N. ST/LEG/SER.C/34; *see also UN Legal Counsel Legal Opinion on the Use of the United Nations Name and Emblem* 1996 U.N. JURID. Y.B. 426–27, where 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.

78. Bantekas, *supra* note 70, at 240–42.

79. *Id.* at 242–44.

A typical example, although rare in its conception, is the Prototype Carbon Fund (PCF).[80] Just like the GEF, the PCF was established by an institutional resolution of the International Bank for Reconstruction and Development (IBRD),[81] as subsequently revised. The PCF Instrument required its varying participants to first exchange bilateral participation agreements with the trustee before their membership to the trust fund could commence.[82] Unlike the GEF, the PCF did not initially exist in the form of a dormant legal person and in the guise of a mere agreement between willing participants; rather, it was created *de novo*.

However, states could possibly set up a mechanism (i.e., GEF) by an MoU but simultaneously subject its survival and operation to a series of instruments of participation, which are treaties of a bilateral nature (i.e., between the contracting state and the entity/organisation).[83] The idea, again, is to avoid a lengthy process setting up the desired entity,

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80. The Prototype Carbon Fund (PCF), which was set up under an initiative of the World Bank in order to attract companies and governments from developed States with a view to offsetting their carbon emissions through the establishment of carbon-free projects in the developing world in the form of earned credits. *See* Sophie Smyth, *The Prototype Carbon Fund: A New Departure in International Trusts and Securities Law*, 5 SUSTAINABLE DEV. L. & POL'Y 28–29 (2005).

81. International Bank for Reconstruction and Development [IBRD], *Authorizing Establishment of the Prototype Carbon Fund*, IBRD Res. 99-1 (July 20, 1999).

82. The PCF Instrument gives rise to a type of membership on the basis of legal equality that comprises both states and private corporations. These types of membership 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, in the latter it is clearly a contract of a private nature. This suggests that the PCF Instrument cannot constitute a treaty for some participants while at the same representing a private agreement in respect of other participants. The Instrument Establishing the Prototype Carbon Fund was amended by, on International Bank for Reconstruction and Development [IBRD], *Changing the Terms of a Second Closing and on Certain Other Amendments to the Instrument Establishing the PCF*, IBRD Res. 2000-1 (May 15, 2000), and subsequently by International Bank for Reconstruction and Development [IBRD], *Changing the Composition of the Participants' Committee and on Certain Other Amendments to the Instrument Establishing the PCF, IBRD Res. 2001-3 (Mar. 22, 2001)*, and finally by IBRD Res 2005-5 and PCF Participants Meeting Resolution adopted on Nov. 10 2005, as subsequently adopted by the IBRD Board of Executive Directors on Dec. 22 2005.

83. These instruments of ratification serve the function of so-called implementation agreements under international law, whose role is to render a treaty operative. These agreements may either be stipulated in the original treaty, or independently at a later date, although the former eventuality is generally the case. They can affect the legal relations of the parties in two ways: a) as an amendment that modifies the original treaty between all the parties, and; b) as an *inter se* agreement, which modifies relations between particular parties only. Implementation agreements have been extensively employed in the context of the U.N. Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994). *See* Louis B. Sohn, *The 1994 Agreement on Implementation of the Seabed Provisions of the*

allowing it to function while at the same time space is given to all nations to participate (and to convince their national parliaments) based on the good work of the entity. If the operation of the entity were to require participation by all, it would not even get set up.

Unlike other trust funds established by the World Bank, there exists a more compelling reason as to why one should not readily subject the PCF Instrument to the law of treaties. The PCF gives rise to a type of membership based on legal equality comprising of both states and private corporations[84] These types of membership are reflected in the instruments of participation, which are different in legal nature depending on whether the entity is a state or a non-state actor. Whereas in the former case the agreement is a treaty, in the latter it is clearly a contract of a private nature.[85] This suggests that the PCF Instrument cannot constitute a treaty for some participants while at the same representing a private agreement in respect of other participants. Were the parties to impart unequal rights among themselves, particularly as regards the allocation of voting and decision-making powers, the Instrument could validly constitute a treaty for some, but not all members, because it would not require of participating non-state entities to ratify the interstate provisions of the agreement. All remaining provisions, to which private actors could become parties, could then be considered as mini contracts – or as provisions of a single contract—that do not conflict with the treaty provisions of the agreement.

IV. MoU as International Agreements

This Article has made clear that the term "agreement" is broader than its "treaty" counterpart.[86] Unlike treaties whose formal requirements are fairly well circumscribed, an agreement may just as well consist of a committed unilateral act that is accepted through conduct by other states. Irrespective of the nature of the agreement, its particular circumstances and the parties' intentions are paramount. In international relations, states converse through a variety of processes, many of which ultimately reflect some kind of agreement. This may manifest

Convention on the Law of the Sea: International Law Implications of the 1994 Agreement, 88 A.J.I.L. 696 (1994).

84. *See* PCF Instrument, *supra* note 80.

85. 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 Co. (U.K. v. Iran) Judgment 1952 ICJ Rep. 93, 112 (July 22).

86. Kelvin Widdows, *What is an Agreement in International Law?*, 50 Brit. Y.B. Int'l L. 117 (1979).

itself in the form of agreed minutes.[87] Such minutes undoubtedly may constitute an agreement, but a conclusive outcome will depend on factors such as the parties subsequent conduct (i.e., registration with the U.N., protest by the other party), although none of these on their own is necessarily definitive.[88] The International Tribunal for the Law of the Sea (ITLOS) determined the Agreed Minutes between Bangladesh and Myanmar, which served as the basis for delimiting their maritime boundaries, did not constitute an agreement.[89] In the *Aegean Sea Continental Shelf* case, Greece attempted to entertain the International Court of Justice's (ICJ) jurisdiction by reference to a joint communique between the Greek and Turkish Prime Ministers.[90] In rejecting its normative character, the ICJ emphasised whether or not a communique or other instrument (including for our purposes MoU) constitutes a binding agreement "essentially depends on the nature of the act or transaction to which [it] gives expression," "as well as its actual terms and the particular circumstances in which it was drawn up."[91]

There have been relatively few occasions whereby international courts and tribunals have encountered MoU with the aim of at least one party to endow it with binding authority. In *Somalia v Kenya*, the parties entered into an MoU, which Kenya registered with the U.N. Secretariat without protest by Somalia.[92] When a dispute arose, Kenya sought relief from the ICJ, which subsequently was asked to decide whether the MoU was a treaty in force so as to confer it jurisdiction. The ICJ ultimately held that the MoU was a binding agreement because: (a) its terms were sufficiently indicate as to the assumption of obligations; (b) Somalia had not protested to the registration of the MoU as a treaty by Kenya for a period longer than five years; and (c)

87. See Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between the Faroe Islands, Iceland and Norway in the Southern Part of the Banana Hole of the Northeast Atlantic, GOV'T OF NOR., https://www.regjeringen.no/en/dokumenter/Agreed-Minutes/id446839/.

88. *See* Case Concerning Maritime Delimitation and Questions between Qatar and Bahrain (Qatar v. Bah.), Judgment on Jurisdiction and Admissibility 1994 ICJ Rep. 114, ¶ 29. *See* Danai Azaria, *Secret Treaties in International Law and the Faith of States in Decentralized Enforcement,* 111 AM. J. INT'L. L. 469 (2017).

89. Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl. v. Myan.), Judgment, 2012 ITLOS Rep. 4, ¶ 99.

90. Aegean Sea Continental Shelf Case (Greece v. Turk.) 1978 ICJ Rep. 3.¶ 96 .

91. *Id.* ¶ 96; *see also* Hoshinmaru Case (Japan v. Russ.), 2007, ITLOS Rep. 18, ¶ 86; Case Concerning Maritime Delimitation and Questions between Qatar and Bahrain (Qatar v. Bah.), Judgment on Jurisdiction and Admissibility 1994 ICJ Rep. 114, ¶ 29.

92. Somalia v Kenya Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Preliminary Objections Judgment, 2017 ICJ Rep. 4, ¶ 42.

the MoU contained a clause providing for its entry into force upon signature.[93] It is evident that international courts and tribunals have not carved out a special place for MoU as distinct from other irregular instruments such as joint communiques or agreed meetings. As a result, the same criteria are *mutatis mutandis* applicable. The following two sections will explore two particular types of MoU, namely those concerning environmental financing and administration of environmental financing.

A. *MoU in the Field of Environmental Financing*

Following the Paris Agreement[94] and the Glasgow Summit of 2021,[95] the impact of climate change on our natural environment is no longer under contention and we are closer to comprehending conflict in places where such impact devastates traditional lifestyles, the economies, if not the very existence, of entire countries, and forces various groups to compete for scarce natural resources.[96] Contemporary environmental treaties encompass a funding mechanism for financing activities in developing nations in a manner that offsets ordinary polluting practices.[97] Prominent examples of financial mechanisms are those founded under Article 21 of the Convention on Biological Diversity (CBD) and Article 28 of its affiliated Cartagena Protocol on Biosafety,[98] Article 21 of the 1994 International Convention to

93. *Id.*

94. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. The Agreement's core concerns encompass national mitigation measures and international cooperation on mitigation, adaptation and transfer of finance and technology. Its key aim is to hold the increase in the global average temperature "well below" the 2 degrees Celsius above pre-industrial levels. *See* Lavanya Rajamani & Daniel Bodansky, *The Paris Rulebook: Balancing International Prescriptiveness with National Discretion*, 68 INT'L COMPAR. L.Q. 1023 (2019).

95. The COP stressed "the urgency of enhancing ambition and action in relation to mitigation, adaptation and finance in this critical decade to address the gaps in the implementation of the goals of the Paris Agreement." Glasgow Climate Pact, Decision, ¶ 4, Nov. 13, 2021, https://unfccc.int/documents/310489.

96. *See generally* Gabriel Eckstein, *Water Scarcity, Conflict, and Security in a Climate Change World: Challenges and Opportunities for International Law and Policy*, 27 WIS. INT'L L.J. 409 (2009).

97. *See generally* Nele Matz, *Environmental Financing: Function and Coherence of Financial Mechanisms In International Environmental Agreements*, 6 MAX PLANCK Y.B. U.N. L. 473 (2002).

98. U.N. Convention on Biological Diversity art. 21, June 5, 1992, 1760 U.N.T.S. 79; Cartagena Protocol on Biosafety to the Convention on Biological Diversity art. 28, Jan. 29, 2000, 2226 U.N.T.S. 208.

Combat Desertification (ICCD),[99] and Article 11 of the 1992 U.N. Framework Convention on Climate Change (FCCC).[100] These financial mechanisms are binding among states parties as a result of their incorporation in the relevant treaties to the extent (a) of an obligation to establish them, and (b) that contributions thereto are mandatory in accordance with a specified scale of assessments.

These treaties, contrary to what is sometimes proclaimed, do not establish an automatic legal relationship with other entities whose task is to fund environmental projects, such as the GEF. The funding of activities pertaining to these multilateral environmental treaties (MEA) requires a distinct collaboration agreement with the GEF or IFAD. The GEF has signed binding agreements with the governing bodies of various MEA with the object of financing the environmental burdens assumed by their members, among others. These agreements by no means infer that the GEF has acceded to these MEA, or vice versa. The GEF's role thereto as a financing mechanism, generally assumed based on a Memorandum of Understanding (MoU) should be distinguished from that of trustee, as the two are quite distinct and the GEF is nothing of the sort. Except for the ICCD (whose financial mechanism is IFAD), the appointment of the GEF as a funding mechanism to the aforementioned environmental trust funds was accomplished through the adoption of a decision by the Conference of Parties (COP),[101] followed thereafter by the conclusion of an MoU.[102]

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99. U.N. Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa art. 21, O. 14, 1994, 1954 U.N.T.S. 3.

100. U.N. Framework Convention on Climate Change art. 11, May 9, 1992, 1771 U.N.T.S. 107; *see generally* Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1 (2002).

101. Strategic Plan, *National Reporting and Operations of the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/6/INF/17, Decision I/2, ¶ 2, Decision II/6, ¶ 1 (Mar. 15, 2002). It should be noted that the UN Legal Counsel has made it clear that the COP to such treaties possesses the legal capacity, within the limits of its mandate, to enter into agreements and other arrangements with both State and non-State entities. Memorandum to the Executive Secretary of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, 1993 U.N.Y.B. 427, 429, U.N. Doc. ST/LEG/SER.C/31.

102. Rep. of the Third Meeting of the Conference of the Parties to the Convention on Biological Diversity, U.N. Doc. UNEP/CBD/COP/3/38, Decision III/6 (Feb. 11, 1997); *see also Memorandum of Understanding Between the Conference of the Parties of the Convention to Combat Desertification and the International Fund for Agricultural Development Regarding the Modalities and Administrative Operations of the Global Mechanism,* U.N. Doc. ICCD/COP(3)/10, annex I (Aug. 30, 1999).

B. *Administration Agreements for Environmental Funding Mechanisms*

One would think that the agreement by which an entity is appointed as a trustee of monies and other assets donated by states would by necessity assume only a single legal form; that of a treaty. This, however, has not occurred and the appointment of trustees has been achieved through varied legal formulas. Treaties remain the standard form of agreement where the institutional rules of the trustee, as in the case of the World Bank, require the adoption of a (binding) agreement with the donor,[103] or where the United Nations Development Program (UNDP) has institutionalised the use of model administration agreements with prospective donors.[104] Treaties of this manner concluded between a state and a public international financial institution, or a U.N. specialised agency, will either expressly designate the latter as the trustee;[105] or alternatively, this type of appointment may be inferred from the range of powers and responsibilities entrusted to the particular entity.[106] In the latter case, the parties will take it for granted from the outset that the said intergovernmental financial institution is the designated trustee, even if this is not explicit in the administration agreement, although admittedly such an occurrence is rather rare. Where a trust fund has already been set up by the World Bank or an agency or organ of the U.N., and where these entities have through existing instruments been entrusted with the role of trustee, subsequent agreements will either: (a) tacitly recognise the assumption of the trustee role by the Bank or the U.N.; (b) make no reference to the trustee, but implicitly recognise it on account of the Fund's Instrument, Terms of Reference, etc. attached as an integral annex to the Agreement;[107] or (c) expressly recognise its contracting partner as the trustee.[108] Where donors finance a trust fund through such subsequent donor agreements, they cannot unilaterally alter or amend any of the provisions of the fund's Instrument or Standard Provisions

103. World Bank [WBG], *Operational Manual*, ¶ 1, OP 14.40 (Feb. 1997), http://web.worldbank.org/archive/website01541/WEB/0__-3286.HTM.

104. See Trust Fund Agreement Regarding Support to the Palestinian Education System, It.-UNDP, Jun. 7, 2000, https://info.undp.org/docs/pdc/Documents/PAL/Trust_Fund_ITALY-_SPEP.pdf [hereinafter Italy-UNDP Trust Fund Agreement].

105. Administration Agreement between the UK and IBRD/IDA Concerning a Fund for the EITI, preamble (2004).

106. See Donor Agreement for the Establishment of the Anticorruption Activities Fund, IDB-Nor., Mar. 19, 2007.

107. *See* Agreement for the ASEM-EU Asian Financial Crisis Response Fund, annex I, IBRD-U.K., June 29, 1998, TF 020147.

108. Italy-UNDP Trust Fund Agreement, *supra* note 104, ¶ 5, at 2.

without the prior consent of the trustee and the other parties to the fund, although they can thereafter amend provisions thereto with the consent of the trustee. Thus, the underlying agreement—whether termed Fund Instrument, Attached Standard Terms, etc.—is treated in the same way as a multilateral treaty under the terms of Articles 40-41 of the VCLT because the parties have agreed said instruments govern their legal relationships in a binding manner. While on its own accord such an underlying instrument may not be legally binding, it becomes binding by reason of its incorporation in the treaty between the trustee and the donor, or alternatively because the administration agreement renders it binding upon the parties.

Since both the U.N. and its specialised agencies do not require a treaty format for concluding trustee (administration agreements) or donor agreements—in fact, the relevant Financial Regulations do not stipulate the two as separate contracts—it is not surprising that several MoU have appeared in this respect. Typical examples, albeit not as trust agreements, are the MoU between the COP of the Convention to Combat Desertification and the International Fund for Agricultural Development (IFAD) regarding the Modalities and Administrative Operations between the Global Fund,[109] as well as the MoU between the COP to the Biological Diversity Convention and the GEF regarding the Institutional Structure Operating the Financial Mechanism of the Convention.[110] The GEF and IFAD serve as financing mechanisms for these conventions and not as trustees. Their role is to finance part or all of the projects decided by the COP to these conventions, as long as these decisions are consistent with the respective constitutional instruments of IFAD[111] and the GEF. In the case of the COP-GEF MoU one

109. Memorandum of Understanding Between the Conference of the Parties of the Convention to Combat Desertification and the International Fund for Agricultural Development Regarding the Modalities and Administrative Operations of the Global Mechanism, art. II(c), U.N. Doc. ICCD/COP(3)/10, annex I (Aug. 30, 1999).

110. Memorandum of Understanding Between the Conference of the Parties to the Convention on Biological Diversity and the Council of the Global Environment Facility Regarding the Institutional Structure Operating the Financial Mechanism of the Convention, U.N. Doc. UNEP/CBD/COP/3/10, annex I (Oct. 11, 1996) [hereinafter Biological Diversity Convention COP-GEF MoU].

111. According to art. 2 of the 1976 Agreement Establishing the IFAD, the objective of the Fund shall be to mobilise 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

may argue that the choice of this instrument is necessarily dictated by the fact that neither of the two entities possesses sufficient legal personality that would enable them to conclude a treaty, or other binding agreement.[112] In any event, while the parties to such MoU are generally presumed to have intended to desist from assuming any binding obligations, the non-binding character of these instruments may, nonetheless, be questioned on several grounds. Firstly, in respect to trust agreements established by MoU, the trustee is appointed as the account holder (where applicable) and administrator of the trust fund and its assets. This in itself entails a reciprocal obligation and 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 international law trust funds, it is not out of the question to posit that they have become part of customary international law between states and trustees, and as such are binding and not merely voluntary.[113] Moreover, the trustee owes some fiduciary duties to the beneficiaries once these have been designated. 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 intergovernmental character in respect of environmental financing to treaty-bodies by the GEF, some obligation must arise for the trustee under the relevant agreements of cooperation. While this may not necessarily involve strict adherence to the policy decisions of the respective COP, it may encompass an obligation, for example, to prepare and submit annual financial reports.[114] 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 in respect of releasing funds (owned by the COP) for particular projects, despite the non-contractual character of their agreement.[115] In practice, the

of the UN Charter and is a specialised agency thereof. Agreement Establishing the International Fund for Agricultural Development art. 2, June 13, 1976, 1059 U.N.T.S. 191; *see also* Int'l Fund for Agric. Dev., Policies and Criteria for IFAD Financing (Dec. 14, 1978), https://www.ifad.org/documents/38711624/39421030/ifad_financing_e.pdf/46846eb9-1053-4bcc-acf1-1e8756831fbb?t=1653556237925.

112. *See* Nele Matz, *Financial Institutions Between Effectiveness and Legitimacy – A Legal Analysis of the World Bank, Global Environmental Facility and Prototype Carbon Fund*, 5 INT'L ENV'T AGREEMENTS 265, 285 (2005).

113. Bantekas, *supra* note 70, at 226, 264.

114. Biological Diversity Convention COP-GEF MoU, *supra* note 110, § 3.1, at 3, § 4, at 4.

115. *See U.N. Conference on Climate Change, Report on the Conference of the Seventh Session*, Decision 6/CP.7, U.N. Doc. FCCC/CP/2001/13/Add.1 (Jan. 21, 2002).

vast majority of commentators argue that despite the relevant MoU the GEF is not legally bound by decisions of the COPs.[116] Although the intention of the parties entering into such MoU should be respected, the very content of such instruments necessarily entails a plethora of binding obligations, whether implicitly by the very function of the trustee's role or as a result of customary international law. 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 emphasise the non-binding character of all the other aspects of this relationship. The parties to the aforementioned MoU are not states in their vast majority, but intergovernmental organisations. Moreover, as previously explained, the intergovernmental status of others, such as the GEF, may be in doubt. Nonetheless, it is undeniable that intergovernmental funds enjoy at least some international legal personality and even if they are unable to enter into treaties as quasi-intergovernmental organisations they are competent to conclude contracts under domestic law. The MoU route, therefore, does not have to be 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.

V. MoU Adopted by the International Monetary Fund

The relationship between the IMF as trustee and the borrowers is not wholly clear from the terms of the relevant instruments. Certainly, the IMF does not expressly subject these to the regime of stand-by-arrangements under Article XXX(b) of its Articles of Agreement, nor is it possible to assimilate them to extended arrangements because the financial resources loaned to the borrower are not derived from the IMF's General Resources Account, as is otherwise required in respect of extended arrangements. To decipher the precise legal nature of this relationship, one has to assess the practice of the Fund. Thus, eligibility for a loan requires the borrower to submit a so-called Poverty Reduction Strategy Paper (PRSP) in consultation with civil society, where the borrower must sufficiently elaborate and explain his financial situation, the steps taken to improve it and in what ways the loan under the terms of the PRGF would be utilised, and the expected

116. 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 112, at 285–86.

outcome. This is a typical example of assigning full local ownership to the requesting state through the adoption of PRSP that are country-owned and therefore country-specific in orientation. These PRSP are in fact no different from the Letters of Intent required for stand-by-arrangements which the IMF has consistently described as being non-contractual in nature. In practice, PRGF and HIPC borrowers submit such reports to the IMF under both designations as either PRSP or letters of intent, in anticipation of a PRGF or HIPC loan.[117] Once a country has met or made sufficient progress in meeting these criteria, the Executive Boards of the IMF and IDA formally decide on its eligibility for debt relief and the international community subsequently commits itself to reducing debt to the agreed sustainability threshold.

Therefore, the IMF clearly intends to avoid contractualisation of this relationship under the same terms as its stand-by-arrangements based on its Board's executive decision. This is certainly the personal understanding of this author. This non-contractual nature is further reinforced by the practice of some borrowers to append a MoU to their PRSP, which is intended to serve the same function as reservations and interpretative declarations to multilateral treaties, although as we have already stressed that the IMF's decisions to grant loans are not considered treaties, but are treated as internal decisions that lack a contractual character. The non-contractual character of these arrangements vis-à-vis the borrower can be confirmed by the very fact that the borrower chooses to employ the services of an MoU to explain his implementation of the imposed conditionalities.

Unlike the compulsory contributions to the IMF's General Account by its members on the basis of their obligations under the Fund's Articles of Agreement, contributions to the Fund's special trusts are not restricted to Fund members, states or intergovernmental organisations.[118] The relevant provisions are almost identical and by way of example, section II of the Special PRGF Trust Instrument notes that:

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117. *See* IMF, *Lao People's Democratic Republic: Second Poverty Reduction Strategy Paper*, 2008 IMF STAFF CNTY. REP. 341 (Oct. 21, 2008); The Gambia Letter of Intent, Memorandum of Economic and Financial Policies, *in* letter dated Nov. 27, 2000 from the government of The Gambia to the IMF addressed to the Managing Director (Nov. 27, 2000), https://www.imf.org/external/np/loi/2000/gmb/02/index.htm.

118. *See* IMF, *Multilateral Debt Relief Initiative and Related HIPC Initiative Amendments*, § II, Decision 13588-(05/99) (Nov. 23, 2005), *in* Selected Decisions and Selected Documents 217, 221 (13th ed. 2005); IMF, *Establishment of a Trust for Special PRGF Operations for the Heavily Indebted Poor Countries and Interim PRGF Subsidy Operations*, § II, Decision 11436-(97/10) (Feb. 4, 1997), *in* Selected Decisions and Selected Documents 80, 84 (25th ed. 2000); IMF, *Poverty Reduction and*

> The trustee may accept contributions of resources for the Account on such terms and conditions as may be agreed between the trustee and the respective contributors, subject to the provisions of this Instrument. For this purpose, the Managing Director of the trustee is authorised to accept grants and enter into loan, deposit or other types of investment agreements with the contributors to the Trust.

The texts of the instruments pose no visible limitations to contributors. In practice, given that neither the GAB nor the New Arrangements to Borrow (NAB),[119] through which the IMF receives financial contributions that are additional to its members' SDR, involve private entities it is wholly implausible to assume that an exception is possible in respect of the IMF's trust funds. This assumed limitation would not exclude central banks and public banks. On the other hand, there is no visible

Growth Facility and Exogenous Shocks Facility Trust, § IV(2), Decision 8759-(87/176) (Dec. 18, 1987), *in* Selected Decisions and Selected Documents 128, 143 (13th ed. 2005).

119. Typically, the IMF's contemporary resources are derived from four sources: a) member States generally provide assets in accordance with quotas prescribed by the IMF, on the basis of their economic size and financial characteristics. Quotas are denominated in Special Drawing Rights (SDRs), which is the IMF's unit of account. The size of a member's quota is very important because it determines that member's voting rights in the Fund, as well as the maximum amount it can borrow from the Fund in the future; b) as a supplement to the Fund's quota-based resources, General Agreements to Borrow (GAB) were introduced, whereby eleven industrialised States, all members of the IMF, lent the Fund specified amounts of currencies with an interest consistent with prevailing market rates. The IMF later adopted a decision giving itself power to call upon non-member States to make exceptional contributions where the inadequacy of the Fund's resources had the potential of "threatening the stability of the international monetary system." However, the financial calamities that hit the global economy in successive waves from the late 1980s onwards necessitated the pooling of cash resources far in addition to the members' SDR and GAB contributions; c) as a result, and following the Mexican financial crisis of 1994, the IMF's Executive Board adopted a decision to establish the so-called New Arrangements to Borrow (NAB). The NAB essentially creates a set of credit arrangements between the IMF and industrialised, predominantly, States with the purpose of doubling the amount of assets held by the IMF under the GAB. IMF, *New Arrangements to Borrow*, Decision 11428-(97/6) (Jan. 27, 1997), *in* Selected Decisions and Selected Documents 417, 417 (23d ed. 1998). Similar arrangements were not unknown prior to the NAB, however, since the IMF had in fact proceeded to create various facilities in the past to deal with particular economic woes of its members. Thus, the Compensatory Financing Facility (FCC) was aimed at addressing export instability in developing countries. For a survey of its operations, see Graham R. Bird, INTERNATIONAL FINANCIAL POLICY AND ECONOMIC DEVELOPMENT: A DISAGGREGATED APPROACH 43–46 (1987). Lending to the IMF under the GAB is not perceived as contractual, but as a stand-by arrangement. This is reflected in the association agreement with Saudi Arabia. IMF, *General Arrangements to Borrow: Association Agreement with Saudi Arabia*, Decision 7403-(83/73) (May 20, 1983), *in* Selected Decisions and Selected Documents 20, 20 (10th ed. Supp. 1984).

reason under the terms of the trusts' instruments to assume the exclusion of private contributions and there does not seem to exist any legal impediment to this effect either. The only possible limitation that may be read in the texts is the commitment by the IMF to use contributions in respect of the stated purposes of the relevant trust fund, which is also a requirement in relevant IBRD trust funds.[120] Other than that, private persons face no institutional impediment in contributing resources to the IMF's special accounts.

Practice confirms this conclusion. In fact, the PRGF and the MDRI, as do all the IMF's special trust vehicles, rely on the additional contributions of member states,[121] as well as on those of private entities, particularly in the area of debt relief.[122] Under the HIPC and MDRI, contributions are not only received by the positive act of depositing financial assets, but more importantly by agreeing to extinguish preexisting debts owed to them by HIPC and MDRI-eligible states. Debt relief under these IMF initiatives has been supplied by the so-called Paris Club, an informal group of nineteen sovereign creditors among the globe's industrialised states that meets in Paris with the aim of offering debt relief and/or debt restructuring. Since the adoption of the PRGF the Paris Club has offered better debt restructuring to HIPC-eligible countries than non-HIPC countries. At the time of writing, and since the mid-1950s, the Paris Club has entered into more than four hundred debt relief agreements with debtor states.[123] Participating

120. For example, the Sep. 21, 1999 Agreement between China, the IBRD and the IDA for the ASEM-EU Asian Financial Crisis Response Trust Fund stated in relevant part that "the contribution shall be used for the purposes described in the Standard Provisions Applicable to Grants to the Trust Fund, attached hereto as Annex I, which forms an integral part of this Letter of Agreement." Agreement for the ASEM-EU Asian Financial Crisis Response Fund, ¶ 2, China-IBRD, Sep. 21, 1999, TF 020147.

121. *See* ECB Opinion of 11 Aug. 2005 Concerning a Draft Federal Law on the Payment of a Contribution by Austria to the Trust Fund Administered by the IMF for Low Income Developing Countries Affected by Natural Disasters, whereby the ECB confirmed that such contributions are consistent with the obligations of parties with Art 101(2) of the EC Treaty. European Central Bank [ECB], *Opinion of the European Central Bank*, ¶ 5, at 2, ECB Doc. CON/2005/29 (Aug. 11, 2005), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005AB0029&from=EN.

122. The IMF defines debt relief as "Agreements by creditors to lessen the debt burden of debtor countries by either rescheduling interest and principal payments falling due over a specified time period, sometimes on a concessional basis, or by partially or fully cancelling debt service payments falling during a specified period of time." *See* IMF, IMF FINANCIAL OPERATIONS 2015 (IMF Publication, 2015) 156.

123. *See, e.g.*, Press Release, PARIS CLUB, Paris Club Agrees on Reduction of Debt of Gambia in Framework of Enhanced Heavily Indebted Poor Countries Initiative (Jan. 24, 2008), https://clubdeparis.org/en/communications/press-release/reduction-of-the-debt-of-gambia-24-01-2008.

creditor countries and the debtor country usually sign an Agreed Minute at the end of a negotiation session. This is not a legally binding document but merely a recommendation by the heads of delegations of participating creditor countries to their governments to sign a bilateral agreement implementing the debt treatment. When there are only a few creditors concerned the Paris Club agreement is exchanged through mail between the Chair of the Paris Club and the government of the debtor country and is called terms of reference. In some cases, the multilateral debt agreement takes the form of an MoU. Either way, one must examine the particular language of the respective agreements to ascertain their binding or non-binding nature. As regards non-Paris Club creditors, they typically enter into bilateral agreements with debtor states, either under the HIPC or independently of it. Numerous bilateral agreements have been concluded in this manner whether as treaties or MoU.[124] It is, therefore, evident the IMF's special facilities/trust funds are not based in all their dimensions on the Fund's institutional law, as is the case with its stand-by-arrangements. Rather, the Fund's trustee relationship with its debtors is institutional, whereas its relationship with creditors—as well as that between creditors and the debtors in some cases—is contractual. The following two subsections deal with MoU designed by the IMF during the post-2008 financial crisis and donor agreements between states and the World Bank/U.N.

A. *IMF MoU with Distressed States in the Post-2008 Financial Crisis*

Since early 2010 the then-newly elected government of the Hellenic Republic (Greece) began official discussions with the IMF and its EU partners[125] with a view to finding solutions to its fiscal and balance-of-payments problems. In short, the primary issue was Greece's inability to service its debt, which in turn gave rise to a serious systemic risk to the single European currency and the insolvency of numerous lenders who

124. *See* IMF, *Enhanced Heavily Indebted Countries Initiative–Status of Non-Paris Club Official Bilateral Creditor Participation*, at 7–11 (Sep. 10, 2007), https://www.imf.org/external/np/pp/2007/eng/091007.pdf. The IMF and the Paris Club have identified several legal impediments to debt relief agreements. Among these one may note: a) impediments arising where central banks are the holders of the debt; b) those cases where some creditors have argued that the mandate of specialized agencies holding guaranteed claims does not allow them to provide debt relief at HIPC Initiative terms; c) sale of HIPC claims to private investors, which increases the likelihood of litigation. *See id.* at 12.

125. The popular phrase for the team of sovereign creditors who converse directly with the Greek government and its Ministers is the *troika*. Bilateral creditors are represented and coordinated by the EC Commission - on the basis of an Inter-creditor agreement concluded among themselves on 8 May 2010—whereas the IMF represents itself.

were unable to recover their capital in case of sovereign default.[126] This led to several relatively short, albeit intense, negotiating rounds between the aforementioned actors which culminated in the adoption of two loan facility agreements with Greece, the first in May 2010[127] and the second in March 2012.[128] These were, not surprisingly, subject to several conditions.

Greece's lenders realised early on that the pace of events could well overtake their knowledge of the state of the Greek economy or their other initial financial predictions and as a result the loan agreements risked becoming obsolete within a matter of weeks or months after being signed. These sovereign creditors required several months, if not years, to decipher how best to restructure the Greek economy, decide how better to collect taxes and scrutinise the work of the various ministries to be able to make accurate predictions regarding the recovery of the country's financial system. The loan agreements were cumbersome enough to negotiate and adopt, so it was out of the question that they would be subject to constant rounds of revision with unpredictable political fluctuations.

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126. Ilias Bantekas & Renaud Vivien, *The Odiousness of Greek Debt & Findings of the Greek Debt Truth Committee*, 22 EUR. L.J. 539–40 (2015) (arguing that this inability was the result of the nationalisation of private-related debt incurred by Greek banks, which subsequently passed to the Greek state as owner of the banks).

127. These consisted of bilateral loans with EU member States through a single loan facility agreement, worth a total of EUR 80 billion and a stand-by-arrangement with the IMF at a value of EUR 30 billion. Although the loan facility may be described as a treaty under certain circumstances, stand-by-arrangements are regulated under Art XXX(b) of the IMF's Articles of Agreement, with the IMF having consistently described them as non-contractual in nature. Articles of Agreement of the IMF, art. XXX(b). In order to clarify that stand-by-agreements are not in fact contracts the IMF adopted two distinct decisions: Decision No 2603-(68/132) 20 Sep 1968 and Decision No 6056-(79/38) 2 March 1979. IMF, *Use of Fund's Resources and Stand-By Arrangements*, Decision 2603-(68/132) (Sep. 20, 1968), *in* Selected Decisions and Selected Documents 30, 30 (4th ed. 1970); IMF, *Guidelines on Conditionality*, Decision 6056-(79/38) (Mar. 2, 1979), *in* Selected Decisions and Selected Documents 19, 19 (9th ed. 1981). In particular, para 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." *Id.* at 31. *See generally* Joseph Gold, *The Legal Character of the Fund's Stand-by-Arrangements and Why it Matters*, IMF PAMPHLET SERIES NO. 35 (1980).

128. By Feb. 8 2012, when Greece requested an additional loan, EU member nations had already set up the European Financial Stability Facility (EFSF), which was now the vehicle for disbursing assistance loans on behalf of the EU and individual sovereign lenders. On 14 March 2012 a Master Financial Assistance Facility Agreement was entered into between Greece and the EFSF, which is known as the second loan agreement, for an amount of EUR 109 billion. The IMF made an additional contribution worth a further EUR 28 billion. The agreement further facilitated a debt exchange with the holders of Greek sovereign bonds.

As a result, the *troika* introduced a parallel type of agreement to the existing loan agreements, in the form of a MoU. Despite the absence of a formal definition of MoU in international law,[129] such types of instruments typically comprised agreements lacking the element of compulsion and were otherwise premised on the good will of the parties that they will carry out the commitments contained therein.[130] Depending on the subject matter their "informal" nature is preferred over the formal character of treaties because they are easier and faster to conclude and as a result entail smaller transactional and political costs. Exceptionally, the parties may prefer the choice of a MoU for an agreement they would otherwise consider binding and which would ordinarily have taken the shape of a treaty for the sole reason that a treaty would have to be ratified by the legislature and become public.[131] Under the latter set of circumstances the MoU may, but not always, verge on the border of unconstitutionality, but naturally this depends on the particular constitutional arrangements of each nation.[132] Of course, irrespective of the designation given by the parties to a particular type of agreement, its classification as binding or otherwise necessarily depends on the nature of the commitments undertaken therein.[133] If said commitments can only be construed as entailing mutual

129. *See* Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMPAR. L.Q. 787 (1986). Undemocratic nations shield certain treaties from parliamentary scrutiny and public exposure by cladding them in the guise of private contracts and the insertion of confidentiality clauses. This is typical of many oil and gas concessions.

130. Menelaos Markakis, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu*, 55 COMMON MKT. L. REV. 643 (2018).

131. *See* Efthymios Papastavridis, *Fortress Europe and Frontex: Within or Without International Law?*, 79 NORDIC J. INT'L L. 75 (2010) (referring to a growing number of secret MoU that provide for a right to visit on the high seas and which are essentially imposed by powerful nations on their weaker counterparts).

132. Art. 14(5) of the Uzbek 1995 International Agreements Act introduces an important exception to art. 78(21) of the country's Constitution, which requires parliamentary approval of all treaties. This exception stipulates that international loan and guarantee agreements with international financial institutions, such as the World Bank group, are in force upon signature by the executive branch of government.

133. Vienna Convention of the Law of Treaties, art. 10(1)(b) [1969].This was certainly the unequivocal conclusion reached by the ICJ in Qatar v. Bahrain ¶ 25, where it held that the recorded minutes of a meeting constituted a binding agreement between the two sovereigns because they encompassed "a reaffirmation of obligations previously entered into … and enumerate the commitments to which the parties have consented." The name and form of an agreement, the Court concluded, may be diverse. Thus, what makes it binding is the "creation of rights and obligations in international law for the parties." Case Concerning Maritime Delimitation and Questions between Qatar and Bahrain (Qatar v. Bah.), Judgment on Jurisdiction and Admissibility 1994 ICJ Rep. 114, ¶ 25.

obligations and give rise to concrete liabilities or sanctions in case of non-performance, then one may be justified in claiming that the agreement possesses the attributes of a treaty, if governed by international law.

Greece's lenders adopted a series of MoU as a supplement to the loan agreements with the explicit understanding that their terms would be altered unilaterally—at the initiative of the lenders—in the passage of time. In theory, the government would have to approve the terms of the MoU. In practice, however, this was by no means the case. By way of illustration, if it was assessed that Greece had not collected enough revenues in any given quarter the *troika* would introduce a new MoU by which it would identify new sources of taxation or public expenditure cuts. Alternatively, it could just as well construe previous memoranda under this light and "instruct" government Ministers to act accordingly. Despite the fact that these MoU were never introduced for ratification before the Greek parliament,[134] a large part of the country's legal community, following public sentiment, argued that the successive memoranda were treaties in disguise because they gave rise to legitimate expectations which the government duly obeyed with unflinching loyalty. Thus, the MoU took on a greater significance than the loan agreements because of the radical socio-economic measures they imposed on the Greek people. In fact, the term "memoranda" was so prolific among the Greek public in the post-2008 crisis that it became synonymous with the IMF and austerity. The loan agreements referred specifically to the MoU in a manner which clearly suggested that the Greek government did not have the choice of non-compliance. By way of illustration, section 7 of the preamble to the 14 March 2012 loan agreement facility stipulated that the provision of financial assistance would be conditional, among others, on Greece's "compliance with the measures set out in the MoU."[135] The interconnectedness of the loan agreements and the MoU is beyond doubt, which moreover demonstrates the latter's binding character, despite their designation as memoranda.[136]

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134. Law No. 3845/2010, art. 1(4) originally envisaged that both the loan agreements and MoU would be submitted to parliament for approval and ratification. Five days later, however, and three days after the signing of the first loan agreement and MoU, the aforementioned legislation was amended through Law No 3847/2010, art. 1(9) of which stipulated that loan agreements and relevant MoU are submitted to parliament for discussion and informative purposes only. They are effective and in force from the date they are signed.

135. Memorandum of Understanding Between the European Commission Acting on Behalf of the Euro Area Member States, and the Hellenic Republic, Eur. Comm'n-Greece, Dec. 6, 2011, http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-03-01-greece-mou_en.pdf.

136. By the end of summer 2012 and following the creation of a new coalition government by three political parties, the troika no longer required a new MoU each time it required the passing

B. *World Bank and U.N. Donor Agreements with States*

In this Article we have set out to examine informal agreements and how some of these culminate in a process of international political normativity. The agreements surveyed thus far are generally clear about their legal nature and in any event one can be made aware whether an agreement is binding by the nature of the obligations contained therein. While conference or assemblies of parties operate chiefly through informal agreements, the same is not always true with U.N. sub-agencies and entities. A few illustrations are apt for the reader to better appreciate the context of particular agreements, which prima facie suggest that one or more parties are merely making pledges devoid of obligation. In accordance with its operational policies, the World Bank, when acting as a trustee, enters into framework agreements with the donors.[137] Under said 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.[138] The elaborate mechanism by which the above agreements are drafted, signed and implemented, as well as the absence of any "lighter"—non-binding—alternative, suggests that the intention of the World Bank is to conclude binding treaties with contributing states, rather than contracts 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 harmonise results and reduce cost.[139] The Bank's Standard Provisions applicable to each trust fund are expressly stated in each Letter of Agreement as forming an integral part thereof.[140] Further proof that these agreements constitute treaties, not memoranda of understanding, that generally lack an intention to commit is demonstrated by the language employed in these instruments. For example, in the Agreement between the EC Commission and the World Bank for the Asia Europe Meeting (ASEM) Trust Fund of 23 December 1998, it is stated in relevant part: "We are pleased to confirm the intention of the Commission to make available to the

of further measures. It simply made its demands to the government and made it clear that in case of non-compliance it would withdraw the next loan tranche or that the country would be forced to exit the eurozone. *See* Ilias Bantekas, *The Contractualisation of Fiscal and Parliamentary Sovereignty: Towards a Private International Finance Architecture?*, 10 GLOB. CONSTITUTIONALISM 1 (2021).

137. OP 14, 40, art. 1; BP 14.40, art. 1, *supra* note 69.

138. OP 14, 40, art. 7–8.

139. Agreement for the ASEM-EU Asian Financial Crisis Response Fund, U.K.-IBRD, June 29, 1998, TF 020147; Agreement for the ASEM-EU Asian Financial Crisis Response Fund, Den.-IBRD, Nov. 10, 1998.

140. *Id.*

World Bank the sum of . . . .” Equally, “the contribution shall be used for the purpose . . .” and “the Commission shall deposit . . .,” whereas “the Bank shall make available to the competent bodies of the EC, upon request, all relevant information . . . .”[141]

In cases where the U.N. Secretariat acts as a trustee to a trust fund, although not always consistently, donors may be requested to engage in a binding agreement with the U.N. Article 6 of the U.N. Special Missions Trust Fund[142] requires 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.”[143] 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,[144] refers to the form of the pledge only and not the contractual modality for the participation of the donor in the trust fund. The latter relationship is distinguished in the Bulletin and in the case of general trust funds it does even require a written agreement. Such an agreement is required only when it “is deemed necessary,”[145] albeit no further guidance exists in elaboration of this requirement. On the contrary, technical cooperation trust funds always require the conclusion of a written agreement.[146] It is clear, therefore, general trust funds set up by the Secretariat and the General Assembly do not require a formal arrangement between the donors and the United Nations, let alone a treaty.

Consequently, it is evident the adoption of treaties between the trustee and state/intergovernmental organisation donors is not a general requirement in the international law of trusts, although it is good practice where the trustee is able to enforce them. Where the trustee is

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

142. The Trust Fund for Special Missions and other Activities related to Preventive Diplomacy and Peace-making (Special Missions Trust Fund) was set up by the UN Secretary-General under the authority vested upon the Secretariat under art. 97 of the UN Charter. Section 6 of the Terms of Reference to this 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.” This is no doubt a verbatim reflection of the Secretary-General’s Bulletin on the Establishment and Management of Trust Funds. U.N. Secretary-General, Bulletin dated Mar. 1, 1982, ¶ 29, U.N. Doc. ST/SGB/188 (Mar. 1, 1982).

143. The same is not, however, stipulated in the Trust Fund for Preventive Action (TFPA), equally set up as the Special Missions Trust Fund. U.N. Secretary General, ESOG Trust Fund for Preventive Action 2004, U.N. Doc. S/1092/0036 (Feb. 9, 2004).

144. *See* Bulletin , *supra* note 66 ¶ 29.

145. *Id.* ¶ 31.

146. *Id.* ¶ 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.

a U.N. specialised agency, such as the U.N. Environmental Program (UNEP), which alone manages a sizable amount of international trust funds, none of the surveyed Terms of Reference require UNEP to conclude donations in the form of treaties.[147] As a result, UNEP's agreements with donors can take many legal forms, ranging from treaties to MoU,[148] even where donations are granted in respect of similar projects and sums. The same is true with donor agreements accepted by the UNDP. The UNDP's Financial Regulations and Rules require the conclusion of an agreement but fail to specify its legal nature.[149] It is thus possible for donor agreements consummated with the UNDP to possess a non-binding character under the U.N. rationale analysed above. In practice, however, the UNDP has set up a model trust administration agreement which it now employs in its relationships with all its donors. It should not be thought that the adoption of a MoU instead of a treaty is more beneficial to the contributing state. On the contrary, a binding treaty 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 fund itself to bind the contributors to the amount of their pledge. The likely benefits of a MoU is perhaps its speedy conclusion and adoption, particularly where the donation is below a particular threshold, its confidentiality, as well as the avoidance of a perpetual obligation.[150]

It is also common practice for donors to conclude MoU with the potential trustee and recipient states. The purpose of these instruments is not to set up the trust fund or agree the terms of the donation but

147. COP Decision VCI/9 (28 Apr. 1989) (Vienna Convention on the Protection of the Ozone Layer), https://ozone.unep.org/treaties/vienna-convention/meetings/first-conference-parties/decisions/decision-vc-i9-financial-arrangements?source=decisions_by_article_topic_relation&args%5B0%5D=159&parent=2287&nextParent=2286.

148. Even though the general intention of the parties in concluding a MoU is the avoidance of entering into a binding instrument, we are in agreement 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. ANTHONY AUST, MOD. TREATY L. & PRAC. 26–34, 41–46 (2003).

149. *UNDP Financial Regulations and Rules*, Reg 5.07(a), UNDP (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.

150. Lipson has added to this list the desire to avoid 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, 501 (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. *See* RICHARD B BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT, 24ff (1981).

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, regarding the Establishment of a Multi-Donor Trust Fund following the catastrophic effects of the 2004 earthquake and tsunami.[151] Eventually, given that the World Bank was appointed trustee to the Multi Donor Fund (MDF) for Indonesia, contribution agreements were entered into with each one of the state donors in the form of treaties. Because the Bank's policy is to treat all donors equally, whereby as a result agreements must be "substantially the same," disagreement arose among the various departments in the Bank as to whether "substantially the same" means word-for-word identical, or whether a request by a donor state that did not alter the obligations of the agreement could in fact be accommodated.[152] Disagreement arose in connection with a formal cap on administrative costs, the designation of terrorism therein and the conclusion of an expiration date for the agreement.[153] In connection with the terrorism language, for example, one donor was content with the definition, but because it imposed a condition on the funds the MDF was forced to amend its Standard Provisions.[154] This, however, meant that a subsequent agreement had to be reached on this issue anew with all the donors.[155]

Finally, accession to donor agreements is possible through an appropriate provision in the general agreement—where applicable—or each individual agreement. Article 3 of the Donor Agreement for the Establishment of an Anti-Corruption Activities Fund, concluded 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.[156] Arrangements may potentially become complicated where new contributors include, besides states and international organisations, also private entities. In this case, since the Donor Agreement is a treaty, it is not possible for the private entity to accede to this instrument. Therefore, the trustee will enter into a new agreement with the private donor under the terms of the treaty—and so far as the terms of the treaty are

151. These were adopted on Apr. 25, 2005.

152. *Review of Post-Crisis Multi-Donor Trust Funds*, at 48, WORLD BANK (Feb. 2007).

153. *Id.* at 51–52.

154. *Id.*

155. *Id.*

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

applicable to private entities but subject to a given 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 a private party.

It is not unusual for private parties to wish to contribute without the formality of a binding agreement. The adoption of non-binding private instruments should not be excluded where the institutional rules of the trustee either allow, or omit reference to, such informal arrangements. The World Bank's policies generally exclude the possibility of such agreements, whereas the U.N. specialised agencies that administer trust funds have taken a varied approach to the legal modalities of private contributions.[157] The legal nature of the agreement will also depend on the type of contribution made. It is common for private contributors, particularly those in a specific industry, to donate in-kind, rather than cash. In 2003 the pharmaceutical corporation Novartis agreed to provide TB medicine for the treatment of 500,000 sufferers over a period of five years. This undertaking was consummated through a MoU and not a binding contract. The medicines were delivered to the Global Drug Facility (GDF) of the Stop TB Partnership for use in programs supported by the Global Fund against AIDS, Tuberculosis and Malaria.[158] There is no mention in U.N. Financial Regulations 4.13 and 4.14 as to the legal format of agreements with donors and thus the U.N.'s principal organs and its specialised agencies are free to agree to the legal terms of their agreements with private entities. This subsection provided a glimpse of international practice involving an array of binding and non-binding agreements and in the process highlighted the context and exigencies driving the participants' choice. Needless to say, there is a plethora of practices, and each is characterised by distinct policies and politics.

VI. Conclusion

While the literature on relative normativity in international law, as well as the distinction between soft and hard law remains meaningful,

157. Art. 18 of the UN Secretary-General's Guidelines on Cooperation between the UN and the Business Community (July 17, 2000) envisages five types of partnership arrangements. Of 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 Rules and Regulations of the UN.

158. International Federation of Pharmaceutical Manufacturers & Associations [IFPMA], *Partnerships to Build Healthier Societies in the Developing World* 37 (Sept. 2006), http://www.lmi.no/IFPMA_Building_Partnerships_Eng_18Jul06_0K6Fy.pdf.file.

there is now an expectation that this binary is not always apt to describe the proliferation of agreements in international affairs. states do not only engage with other states, but also with private entities, intergovernmental organisations and also operate as investors in their own right,[159] as well as donors, trustees and many other capacities. States realise that treaties are the least optimum mechanisms in respect of rapid and evolving international collaboration efforts and this is reinforced by the fact that they entail direct international obligations. At the same time, there is a similar realization that non-binding agreements, while overriding many of the obstacles associated with formal treaties, are generally unable to act as catalysts for capacity building and cooperation in mega-projects such as the SDGs. These tensions are not always obvious and in fact public international law textbooks perpetuate the myth that states operate chiefly through treaties. There are a number of reasons for this tendency, the chief one being purely methodological. Those MoU which the parties desire to remain secretive or at best obscure will never surface for the benefit of scholars and hence will remain outside the reach and empirical and library-based research. The same is true of those contracts involving states that contain confidentiality clauses. Treaties, on the other hand, are public and typically adopted by parliamentary entities before becoming law. Access to these instruments is therefore easy, as is a growing case law by domestic and international courts and tribunals. By extension, this reflects the exponential growth of the literature on treaties, as opposed to its counterpart dealing with MoU or even contracts adopted by states with non-state actors, which is miniscule.

States have attempted in the past fifty years to bypass otherwise binding obligations, particularly constitutional laws and human rights obligations, through the use of transnational legal processes, as well as by artificially fragmenting the international law of foreign investment from other international legal obligations.[160] Hence, the process analyzed in this Article is not a far leap from such practices. The practice of the IMF to use MoU entailing financial consequences if not adhered to

159. *See* JOSHUA KURLANTZIK, STATE CAPITALISM: HOW THE RETURN OF STATISM IS TRANSFORMING THE WORLD (2016); Alvaro Cuervo-Cazurraet et al., *Governments as Owners: State Owned Multinational Companies,* 45 J. INT'L BUS. STUD. 919 (2014).

160. BITs generally create a cocktail of rights for investors that override constitutional norms and even general international human rights law; the latter on the ground that international foreign investment law is fragmented from other spheres of international law and hence there is no real need to reconcile possible conflicts. *See* Kenneth J Vandevelde, *The Economics of Bilateral Investment Treaties,* 41 HARV. INT'L L.J. 469, 499 (2000) (arguing that BITs 'seriously restrict the ability of host states to regulate foreign investment').

by borrowing states is instructive. The MoU label was merely a guise to avoid parliamentary scrutiny of the provisions therein. If the same agreement had been presented in the form of a contract or a treaty, the borrowers' national parliaments would have most likely disapproved of the lending conditions and the attendant austerity measures.[161] If formal agreements are indeed difficult and expensive to negotiate, while at the same time states are disinclined to pass certain agreements through parliamentary scrutiny, there is a real danger that MoU will ultimately become tools that undermine political dialogue and democratic values.[162]

International political normativity has the potential to avert the ill-effects of informal agreements, or agreements lacking normativity. With this background in mind, this Article has sought to present a third alternative that has started to appear in international law-making processes, namely instruments that although not expressly binding are not meant to be devoid of all obligation. States parties, as well as intergovernmental organisations, to several MoU and similar instruments express a desire to accomplish unilateral acts, individually as well as jointly, without necessarily giving a justiciable character to their respective undertakings. While the commitment is of a purely political nature, yet the practice of states suggests a much "heavier" undertaking. In the context of the SDGs and MoU adopted in respect of environmental financing, the participants have set up elaborate mechanisms they cannot readily abandon and, in the process, created complex webs of commitment with other stakeholders. Participation in these complex mechanisms portrays a normative character that cannot be explained by reference to treaties and contracts, nor by reference to non-binding, soft law, agreements. It is in this light that the Article situates the MoU and other agreements explored here. Whether or not this will become

161. It is fictitious to claim that debtor states *consent* to the conditionalities agreed with the IMF or the Paris Club. The international finance architecture is structured in such a way that developing states or states in distress are unable to make alternative choices. *See* LORAND BARTELS, HUMAN RIGHTS CONDITIONALITY IN THE EU'S INTERNATIONAL AGREEMENTS (2005); HEATHER GRABBE, THE EU'S TRANSFORMATIVE POWER: EUROPEANIZATION THROUGH CONDITIONALITY IN CENTRAL AND EASTERN EUROPE (2005). In many cases, conditionalities are forced upon states through political and financial pressure and sometimes through unilateral or multilateral sanctions. *See* Kris J Mitchener & Marc D Weidenmier, *Supersanctions and Sovereign Debt Repayment*, 29 J. INT'L MONEY & FIN. 19 (2010) (viewing these super-sanctions as a form of neo-imperialism).

162. It is beyond the scope of this article to discuss so-called secret agreements, which is broader than simply unregistered agreements. *See* Megan Donaldson, *The Survival of the Secret Treaty: Publicity, Secrecy and Legality in the International Legal Order*, 111 AM. J. INT'L L. 575 (2017); Ashley S. Deeks, *A (Qualified) Defense of Secret Agreements*, 49 ARIZ. ST. L.J. 713 (2017).

the dominant way of "action-making" as opposed to "law-making," which carries stronger undertones of international normativity, remains to be seen. For the time being, there is a clear preference by states to operate through MoU and similar mechanisms in respect of most international financing operations. This modus operandi, unsurprisingly, has equally been shared by multilateral development banks, specialized agencies of the United Nations, as well as the International Monetary Fund. Most of the informal instruments analysed and referred to in this Article demonstrate clear signs of international political normativity, even if participating states and intergovernmental organisations did not plan or envisage this from the outset. Unlike the case with secretive MoU, which might just as well give rise to mutual obligations, politically normative agreements are transparent and very much depend on public support for their success. Secretive MoU are effectively killed by any type of scrutiny and are framed under the table because they would give rise to widespread hostility from the general public. While this author is not suggesting that secretive MoU have a role to play, especially in regional security contexts,[163] such agreements clearly can only produce narrow and short-term outcomes. There is little doubt that international political normativity is here to stay, and the expectation is that this model of agreements will be emulated in other fields of international law.

163. *See* Donaldson, *supra* note 162 (demonstrating that the vast majority of secret agreements generally encompass national security implications).