

# Tulsa Law Review

---

Volume 56 | Issue 2

---

Winter 2021

## The Legal Personality of World Bank Funds Under International Law

Ilias Bantekas

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

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

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol56/iss2/5>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

## THE LEGAL PERSONALITY OF WORLD BANK FUNDS UNDER INTERNATIONAL LAW

Ilias Bantekas\*

I. INTRODUCTION.....	210
II. TRUST FUNDS AS OBJECTIVE INTERGOVERNMENTAL ORGANISATIONS .....	216
A. The Intention to Transform a Fund into an International Organisation? The Case of the Global Fund for Aids TB and Malaria .....	217
III. TRUST FUNDS AS FULL INTERNATIONAL ORGANISATIONS .....	223
IV. TRUST FUNDS AS LIMITED INTERNATIONAL ORGANISATIONS.....	227
A. Is the IMF a Trust Fund?.....	229
V. TRUST FUNDS AS SUBSIDIARY ORGANS.....	231
A. Trust Funds as both UN Subsidiary Organs and International Organisations: The Case of UNICEF.....	232
B. Variations of Funds as Subsidiary Organs .....	234
C. Trust Funds as Informal Conferences without Any Legal Personality.....	236
VI. THE LEGAL PERSONALITY OF TRUST FUND ACCOUNTS .....	238
A. The Contractual Powers of Trust Funds.....	240
B. The Performance of Quasi-Judicial Functions by Trust Funds .....	244
C. Implied Powers of Trust Funds .....	246
i. Enforcement Powers and Collective Action against the Fund .....	248
ii. Enforcement Powers of the Trustee and the Trust's Executive Organ ..	248
iii. Collective Action against the World Bank as Trustee before the Bank's Inspection Panel.....	251
VII. CONCLUSION .....	254

*Trust funds administered or created by the World Bank Group have assumed a variety of forms. While the World Bank as trustee has focused on its duties and liability it has given little, or no, attention to the legal personality of funds under its control. This has allowed the funders and their legal advisors space to be creative and entrepreneurial, particularly since neither the trustee nor the donors/funders showed any intention of endowing trust funds with any particular rights under international law or international*

*legal personality. As a result, funds have through their own initiatives assumed various forms of legal personality, ranging from mere bank accounts to fully-fledged inter-governmental organizations. In some cases, the principal organs of funds entered into agreements with states and negotiated ad hoc privileges and immunities, and in one case a fund even managed to come under the wing of an existing inter-governmental organization, which in turn conferred all its own privileges and immunities to it. Practice suggests that funds can yield sufficient political power in international relations on the basis of their capital, which makes them attractive partners for other entities. This allows them to shape their international legal personality according to their particular needs.*

## I. INTRODUCTION

Inter-governmental trust funds are most typically funds established with contributions from one or more donors to support a variety of pre-specified activities. The fund is established through an agreement between the fund's administering authority/trustee and the donors, and it is not necessary for the fiduciaries/beneficiaries to be specified in name, as is usually the case.<sup>1</sup> Donors can be State entities, as well as international organizations and private entities.<sup>2</sup> The majority of international trust funds are related to international development and are administered by the International Bank for Reconstruction and Development ("IBRD"), a member of the World Bank Group, the United Nations ("UN") and multilateral development banks on behalf of multilateral donors.<sup>3</sup> But in many cases, other international agencies, particularly those of the UN, participate in the administration or execution of the trust funds' objectives, either alone or in partnership with the World Bank.<sup>4</sup> The trust funds administered by the World Bank and other multilateral development banks number in the many thousands. The trustee may delegate the execution of particular objectives of the fund to other international organizations or private consultants, without, however, abdicating or losing the rights and

---

\*Professor of International Law, Hamad bin Khalifa University (Qatar Foundation), College of Law and Adjunct Professor of Law, Georgetown University, Edmund A Walsh School of Foreign Service.

1. Clearly, inter-governmental trusts have been modeled on their domestic counterparts and are effectively creatures of comparative law as applied to their inter-state context. See MAURIZIO LUPOLI, TRUSTS: A COMPARATIVE STUDY (2000); Adeline Chong, *The Common Law Choice of Law Rules for Resulting and Constructive Trusts*, 54 INT'L & COMPAR. L.Q. 855 (2005); Adair Dyer, *International Recognition and Adaptation of Trusts: The Influence of the Hague Convention*, 32 VANDERBILT J. TRANSNAT'L L. 989 (1999); JONATHAN HARRIS, *THE HAGUE TRUSTS CONVENTION: THE PRIVATE INTERNATIONAL LAW OF TRUSTS* (2002).

2. See generally Ilias Bantekas, *The Emergence of Intergovernmental Trusts in International Law*, 81 BRIT. Y.B. INT'L L. 224 (2011).

3. By way of example, the realisation of universal primary and secondary education in developing States began receiving significant finances through the creation of two distinct trust funds on the basis of the principles enunciated by the Millennium Development Goals ("MDG") and later the Sustainable Development Goals ("SDGs"). The Education for All—Fast Track Initiative ("EFA-FTI") was set up in 2002 through a global partnership for this specific purpose. The World Bank acts as trustee to two funds; the Education Program Development Fund ("EPDF"), which disburses small grants with a view to developing capacity for improved sector analysis and planning, and the Catalytic Fund that provides short-term grants to countries already endorsed under the FTI in order to implement their educational plans. See *EFA—FTI Catalytic Fund: Operational Guidelines*, WORLD BANK (Oct. 2006), <https://web.worldbank.org/archive/website00683/WEB/PDF/CFOPERAT.PDF>.

4. *Trust Funds and Programs*, WORLD BANK (last updated June 12, 2020), <https://www.worldbank.org/en/about/unit/dfi/trust-funds-and-program>.

duties pertaining to the person of the trustee.<sup>5</sup> The objective of the trust fund is fulfilled with the disbursement of monies to eligible recipients, implemented through an agreement and credited usually by debit to the fund's account.<sup>6</sup> While most trust funds are established by written pledges to the administering authority, in some cases they are founded on the basis of a multilateral treaty, as is the case with the fund created under Art. 79 of the Rome Statute of the International Criminal Court ("ICC") whose purpose is to benefit the victims of crimes and their families.<sup>7</sup> An additional method of fund creation is through resolutions of the United Nations, Security Council ("UNSC"), the most prominent being UNSC Resolution 687 on the Iraq Compensation Fund<sup>8</sup> whose implementation came about later on the basis of donor agreements.<sup>9</sup>

Trust funds can exist informally, appearing only in the shape of an informal grouping of donor States, assisted by a designated Secretariat and a private bank account where contributions have been deposited.<sup>10</sup> This was the initial structure of The Global Fund to Fight AIDS, Tuberculosis and Malaria ("Global Fund") in 2002, in which the Global Fund's board instructed the Secretariat and Director to negotiate agreements with the World Bank to serve as the fund's trustee and with the World Health Organization ("WHO") for the outsourcing of administrative duties.<sup>11</sup> Parent trust funds may exist alongside an administrative trust fund, whose purpose is to manage and facilitate the reporting of donor contributions, fees, income and other administrative matters. Equally, it is not uncommon for trust funds to be composed of a non-disbursing parent fund and a number of disbursing subsidiary funds. The World Bank's trustee role is largely dispensed through financial intermediary funds. As trustee, the World Bank provides a set of agreed financial services that include receiving, holding, and investing contributed funds, and transferring them when instructed by the Financial Intermediary Funds ("FIF") governing body. Under some FIFs, the World Bank also provides customized treasury management or other agreed financial services; examples include bond issuance, hedging intermediation, and monetization of carbon credits.<sup>12</sup> FIF trusteeship does not involve

---

5. The World Bank practically sets up a trust fund not only by opening a bank account, but formally through the adoption of an executive resolution that has the effect of bringing the fledgling fund within its institutional remit, both for internal Bank purposes as well as vis-à-vis third parties. This was the case, for example, with the establishment of the GEF fund through International Bank for Reconstruction & Development [IBRD] Exec. Directors' Res. 91-5 (Mar. 14, 1991).

6. See Bantekas, *supra* note 2.

7. Rome Statute of the International Criminal Court, art. 79, July 17, 1998, 2187 U.N.T.S. 90, 136.

8. S.C. Res. 687 (Apr. 8, 1991).

9. Within the UN system, the trust agreement is hierarchically superior, over the financial rules and regulations of the UN's specialised agencies, in the sense that it may provide authority to the trustee (where the trustee is not the United Nations or a subdivision thereof) to audit the financial management of the specialised agency where the latter is acting as an implementing or other entity. UNITED NATIONS, LEGAL COUNSEL OPINION OF 14 FEBRUARY 1995, at 414-16 (1995); U.N. DOC. ST/LEG/SER.C/33, U.N. Sales No. E.01.V.1 (2001).

10. *Secretary-General's Bulletin*, UNITED NATIONS (Mar. 1, 1982), <https://digitallibrary.un.org/record/140819?ln=en>; see also Bantekas, *supra* note 2.

11. GLOB. FUND, *The Global Fund Annual Report 2002/2003*, at 16 (2002), [https://www.theglobalfund.org/media/1328/corporate\\_2002to2003annual\\_report\\_en.pdf](https://www.theglobalfund.org/media/1328/corporate_2002to2003annual_report_en.pdf).

12. WORLD BANK GRP., *Trust Fund Annual Report 2017*, at 160 (2017), <http://documents1.worldbank.org/curated/en/428511521809720471/pdf/124547-REVISED-PUBLIC-17045-TF-Annual-Report-web-Apr17.pdf>.

overseeing or supervising the use of funds.<sup>13</sup>

Intergovernmental trust funds share the following common characteristics: a) they are premised on agreement between the donor and the designated trustee, albeit this need not be a formal agreement. Thus, a Memorandum of Understanding (“MoU”) will suffice;<sup>14</sup> b) the trust does not give rise to rights or obligations for third parties;<sup>15</sup> c) unlike common law trusts where the beneficiary has equitable remedies against the trustee and third persons, in the case of intergovernmental trusts the beneficiaries possess no equivalent remedies until such time as they enter into a disbursement agreement with the trustee;<sup>16</sup> d) despite the lack of equitable remedies and the contractual nature of the trust, it is not correct to suggest that the trustee is an agent or proxy of the donor;<sup>17</sup> e) the trustee must be deemed to possess implied powers, whether under the terms of his mandate, or on the basis of his own institutional instruments; f) the assets of the trust fund are in the trust ownership of the trustee. Thus, the trustee is not the real owner of the property vis-à-vis the donors, but he possesses powers of ownership vis-à-vis third parties. Another consequence arising from this fundamental principle is that trust property is counted as separate from the other property of the trustee; g) trust funds need not necessarily possess any personality.<sup>18</sup>

Inter-governmental funds aim at assisting known or future beneficiaries in specified fields. Such beneficiaries are specified in the trust fund’s terms of reference—i.e., its constitutional charter—and can include State or other entities and are designated in general terms, usually by reference to some class or category. In principle, trust funds with technical or procedural functions on the one hand, and the promotion of substantive objectives on the other, can be distinguished.<sup>19</sup> As an example of the first category, the UN Secretary-General set up the UN Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes in 1989 through the International Court of Justice (“ICJ”), the purpose of this fund is to assist States financially in bringing disputes to the ICJ.<sup>20</sup>

The objective of environmental trust funds with a substantive agenda is to provide assistance to developing States in the implementation of and compliance with

---

13. *See id.*

14. For example, none of the surveyed Terms of Reference require the UN Environmental Program (“UNEP”) to conclude donation agreements in the form of treaties. As a result, UNEP’s agreements with donors can take many legal forms, ranging from treaties to memoranda of understanding, even when donations are granted in respect of similar projects and sums as other trust funds concluded by means of treaties. *See* Vienna Convention for the Protection of the Ozone Layer, First Conference of the Parties Decision VC 1/9, 1513 U.N.T.S. 293 (Apr. 28, 1989); MoU between the Swedish Ministry of Sustainable Development and UNEP (Feb. 2005); *see also* UN-HABITAT MoU with Canada for Contributing to the Water and Sanitation Trust Fund. Other countries, such as Norway, preferred the conclusion of formal agreements instead.

15. Bantekas, *supra* note 2, at 231–32.

16. *Id.* at 231, 279.

17. *Id.* at 233.

18. *See generally id.*

19. Compare United Nations, *Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice*, U.N. Doc. A/59/372, at 5–8 (Sept. 21, 2004), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/518/22/PDF/N0451822.pdf?OpenElement>, with IBRD Res. 91-5 (1991), Instrument of the Creation of GEF (1991).

20. Under the 2004 Report of the UN Secretary General, such financial assistance is available only where the applicant State does not challenge the ICJ’s jurisdiction or where the assistance is required in order to give effect to the execution of the ICJ’s judgment. *See* United Nations, *Secretary-General’s Trust Fund*, *supra* note 19.

environmental treaty obligations and especially to meet costs arising from restrictions or adaptation to new technologies.<sup>21</sup> Thus, environmental treaties either establish new and independent trust funds or make use of existing ones, where applicable.<sup>22</sup> In the latter case, implementation and compliance assistance is financed through existing trust funds, such as the Global Environment Facility (“GEF”), which was administered and set up jointly by the World Bank, the United Nations Environment Programme (“UNEP”) and UNDP.<sup>23</sup>

A third category of objectives served through trust funds is broadly concerned with development and poverty alleviation. The World Bank currently manages trust funds in the following thematic areas: a) debt service and debt reduction, such as the Heavily Indebted Poor Countries Initiative; b) environment and sustainable agriculture, such as the GEF; c) health and human development, such as the African Program to Eradicate Poliomyelitis; d) poverty reduction and social development, such as the Poverty Reduction Strategy Trust Fund; e) capacity building and technical advisory services, such as the Policy and Human Resource Development Fund; f) post-conflict and reconstruction activities, such as the Afghanistan Reconstruction Trust Fund; g) financial sector strengthening and crisis management; and h) private sector and infrastructure development, such as the Water and Sanitation Program. The World Bank’s trust program has been undergoing reform since 2017.<sup>24</sup>

The starting point for any examination of the sources of trust funds is the element of consent, far more than in any other subject matter of international law. Although there are instances where tacit acquiescence may be observed, the setting up of a trust fund requires the transfer of money by the donor to the accounts of the trustee and the trustee must have necessarily agreed to all the logistical and managerial burdens that circumscribe his very specific and onerous duty.<sup>25</sup> The primary source of intergovernmental trust funds law, therefore, is agreement and this can take many forms. The agreement to donate money towards a common purpose, usually adopted through a donors’ conference in respect of large-scale operations and later transformed into a trust fund, has not consistently been written into a treaty, with the exception of the Bank for International Settlements (“BIS”) Statute.<sup>26</sup> In numerous cases the agreement setting up a trust was informal and was only later translated into a formal arrangement through a discrete undertaking between each individual donor with the trustee.<sup>27</sup> Increasingly, donor conferences are becoming streamlined and each pledge is written into a formal agreement, which binds participating States and other pledging entities. Thus, donor conference treaties, trustee-donor framework agreements, and trust fund administration agreements (on the basis of which the Bank recovers its costs to manage and administer the trust fund)<sup>28</sup> constitute binding

21. See Nele Matz, *Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements*, 6 MAX PLANCK Y.B. U.N. L. 473, 479.

22. See *id.* at 474–78.

23. See IBRD Res. 91-5, *supra* note 19.

24. WORLD BANK GRP., *supra* note 12.

25. Bantekas, *supra* note 2, at 237, 269; see also Reg. 3.11 and 3.12 of the U.N.’s Financial Regulations and Rules, U.N. Doc. ST/SGB/2003/7, at 9 (2003).

26. See generally BANK FOR INT’L SETTLEMENTS, *Statutes of the Bank for International Settlements* (2016), <https://www.bis.org/about/statutes-en.pdf>.

27. See, e.g., GLOB. FUND, *supra* note 11.

28. International Bank for Reconstruction & Development [IBRD], *Operational Manual: OP 14.40- Trust*

treaties between the donors themselves and between the donors and the trustee, but only in those cases where the parties expressly or tacitly designate these agreements as treaties.

Where the trustee is an international financial institution, such as the World Bank Group, its respective agreements with the donors will be based on standard model treaties, all of which refer to the World Bank's Articles of Agreement and other internal documents.<sup>29</sup> These instruments that are internal to the trustee are in fact extremely important because the donor-trustee agreements are to be construed in accordance with these instruments. In the case of the World Bank, such internal instruments would be, among others, the Bank's operational policies on trust funds and in the case of the United Nations, its Financial Regulations,<sup>30</sup> and relevant Bulletins and Instructions of the Secretary-General. Moreover, the Terms and Conditions of each trust fund, as drafted by the trustee and confirmed by the donors, also constitutes a binding document between the parties, especially since this is adopted through a formal internal action by the trustee.<sup>31</sup> In this category one may also include resolutions of intergovernmental organisations by which they set up trust funds,<sup>32</sup> in which case member States to that organisation are bound in respect of their particular voting action, as well as on the basis of the constitutive instrument of the organisation. This body of soft law, save for the absolutely binding nature of UN Security Council resolutions, is an important normative dimension of the international law underlying intergovernmental trust funds.

A significant degree of customary international law exists in respect of intergovernmental trust funds, but its utility should not be overestimated. In the next Part the reader will become acquainted with some of the fundamental principles underlying trust funds, as these have emanated principally through the practice of States in the course of their interaction with their respective trustees. The consistency of this practice, e.g., as regards the requirement that the trust relationship be set up by agreement, or that the assets of the trust are in the trust ownership of the trustee and that it does not generate obligations for third States or entities, have a twofold origin; on the one hand they may be derived from customary law themselves (i.e., that agreements do not produce effects for third parties),<sup>33</sup> whereas on the other hand they clearly represent the dictates and practice of the

---

*Funds*, paras. 7–8 (Jan. 1997) (revised in 2013).

29. In 2016, an updated standardized Administration Agreement template with sixteen of the World Bank's largest donors who provide 90% of IBRD/IDA trust fund resources was adopted, including standard provisions on disclosure of information and communication on fiduciary issues. This agreement was supplemented with a series of notes on governance arrangements in trust funds, preferencing arrangements, donor reporting, managing trust funds for results, and indicative budgets. See *Review of 1997 Guidance Note on Governance Models—A Proposed Framework for Enhanced Fund Management*, IMF (Apr. 22, 2018), <https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/04/20/pp030918-review-of-1997-guidance-note-on-governance>.

30. U.N. Secretary-General, *U.N. Financial Regulations and Rules*, U.N. Doc. ST/SGB/2003/7 (May 9, 2003).

31. See IBRD Res. 91-5, *supra* note 19, at 2 (by which the IBRD established the GEF trust fund).

32. The United Nations Economic and Social Council ("ECOSOC") set up the Voluntary Fund for Technical Cooperation in the Field of Human Rights through Human Rights Commission Res. 1987/38 (Mar. 10, 1987); UN Voluntary Fund for Indigenous Populations, GA Res. 40/131 (Dec. 13, 1985). The mandate of the trust fund was subsequently expanded by G.A. Res. 56/140 (Dec. 19, 2001).

33. Vienna Convention on the Law of Treaties, arts. 34–36, May 23, 1969, 1155 U.N.T.S. 331. The International Law Commission ("ILC") Rapporteur on Effects of Treaties on Third Parties, Sir Gerald Fitzmaurice, accepted that third States may be bound *detrimentum tertiis*—as opposed to *favorem tertiis*—under

trustee, which is thereafter accepted by the donor States.

This article discusses the legal personality of intergovernmental trust funds with the overall aim of assessing whether the trust has a different identity and legal status from the legal person within which it is imbedded, where this is indeed the case. It will become obvious during the course of this article that States and contributing international organisations have a wide range of trust models to choose from, depending on their needs, the urgency of the situation they wish to address, the financial assets they are willing to contribute and the duration for which the trust is set up. For the purposes of addressing the contours of the legal personality of trust funds it is perhaps educational to distinguish between those funds set up around an entity endowed with legal personality, from which the fund derives its own personality, and trust funds which, despite their complex organisational structure, are devoid of any legal personality whatsoever, but depend for their contractual and other functions on the legal personality of their trustee. This trust fund model that is devoid of any distinct legal personality involves trusts organised much like the Commission on Security and Cooperation in Europe/Organization for Security and Co-operation in Europe (“CSCE/OSCE”), i.e., as informal groupings or associations, or as conferences, as well as trust accounts held by the trustee that lack an independent organisational structure altogether.<sup>34</sup> Trust funds with international legal personality may generally be subdivided into two categories; those that possess full international legal personality and may validly be classified as international organisations<sup>35</sup> and those that have acquired through the terms of their founding treaty only limited international personality. Such limited international legal personality is circumscribed by the terms of the respective treaties and may take any of the following forms, among others: domestic legal personality of the fund in the territories of the member States; full or partial international legal personality in the territory of the host State only on the basis of their respective Headquarters Agreement.<sup>36</sup>

The legal basis for the establishment of an intergovernmental trust fund will necessarily determine to a very large degree the contractual (treaty or otherwise) competencies of the trust, as well as the range of its immunities, privileges, and liabilities. The same instruments will certainly determine the conferment upon the trust fund of any implied powers and the means by which it may exercise these. Although the drafters of the founding instruments of trust funds do not distinguish the trust as an entity of its own right from that of its overarching legal person, nor from its trustee (where the trust is structured merely as an account for example), or from the conference of States that contribute to it, this is only true in respect of the procedural aspects of the trust.<sup>37</sup> From the point of view of substantive law, however, the law is unclear as to the distinct liability

---

particular instances, but the underlying factor in all cases is that the third State has played some part in the formation of a rule in a particular treaty (e.g., it has signed it, has accepted the binding nature of a relevant custom, or the rule concerned relates to an accepted boundary, etc.). Gerald Fitzmaurice, Special Rapporteur on the Law of Treaties, *Fifth Rep. on the Law of Treaties*, U.N. Doc. A/CN.4/130.

34. Bantekas, *supra* note 2, at 259–60.

35. The terms “international” and “intergovernmental” organisation are used interchangeably in this article with the same legal meaning.

36. Bantekas, *supra* note 2, at 259–60.

37. *Id.*

of the trust or the legal regime governing its dissolution. One of the recurring problems associated with the operation of trusts in the international legal sphere has to do with the regulation pertaining to the liabilities and immunities of the donors, the trustee, and the trust entity itself.<sup>38</sup> This issue has not generally been identified and this author is not aware of significant disputes between the pertinent actors, but this should not lead us to believe that the situation is satisfactory. In fact, in a number of areas the understanding of the relevant trust actors stemming from their power of self-regulation is in conflict with general principles of international law and notions of justice.

## II. TRUST FUNDS AS OBJECTIVE INTERGOVERNMENTAL ORGANISATIONS

There is considerable argument in the scholarly literature concerned with the legal nature of international organisations regarding the *sine qua non* elements of such entities. A traditionally rigid approach has in some quarters given ground to new, less restrictive constructions, such as the emergence of non-State entities endowed with legal personality.<sup>39</sup> It is generally agreed, however, that the single most necessary ingredient for the establishment of an international organisation is the existence of an intention to form one by at least three States.<sup>40</sup> One must thereafter look for proof of such intent; given that States conduct their international affairs by means of agreements, where these are in writing, they most commonly take the form of treaties. States, nonetheless, are not obligated to regulate their inter-relationships exclusively by reference to treaties.<sup>41</sup> They may, indeed, do so by informal written arrangements that do not carry the burden of imposing binding obligations *inter partes*, such as MoU, or by means of commercial agreements that are subject to the private law of one or more jurisdictions.<sup>42</sup> Moreover, they may equally govern their relations tacitly, yet in a binding manner, through unilateral acts that give rise to bilateral or multilateral obligations. States may alternatively choose to set up legal relationships by reference to mutually acceptable practices, thus leading to the formation of custom.<sup>43</sup> As a corollary, the discernment of the intention to create an international organisation should not exclusively be sought in treaty law,<sup>44</sup> although this represents by far standard practice.

Furthermore, although traditional intergovernmental organisations (“IOs”) encompass a three-tier basic governance structure that consists of an executive organ with limited voting membership, an assembly composed of all the constituent members of the IO, as well as a Secretariat that facilitates the day-to-day functioning of the IO, this model need not necessarily constitute the sole norm. Certainly, given that IOs possess

38. *Id.* at 229–30.

39. See generally David W. Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987).

40. Karen Mingst, *International Organization*, BRITANNICA (May 21, 2020), <https://www.britannica.com/topic/international-organization>.

41. Bantekas, *supra* note 2, at 234–35.

42. *Id.* at 235.

43. Malcolm Shaw, *International Law: Custom*, BRITANNICA, <https://www.britannica.com/topic/international-law/International-law-and-municipal-law> (last visited Jan. 29, 2021).

44. See JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 10–11 (2002) (pointing out that the creation of the United Nations Industrial Development Organisation (“UNIDO”) and the UN Children’s Fund (“UNICEF”) as IOs came about not on the basis of treaty, but by General Assembly resolutions).

international legal personality, such personality can only be conferred by those entities that possess it in the first place. These entities, therefore, can only be States. NGOs, individuals, and multinational corporations cannot, as a result, confer international legal personality and other IOs can only do so if their constitutional instrument gives them the power to act in such a manner. This limitation is aptly described by the Latin maxim *delegatus non potest delegare*.<sup>45</sup> Consequently, where the true intent of States is identified as being positive to the creation of an IO, the latter's governance structure is inconsequential to the nature of that entity as an IO, subject perhaps to a single exception; i.e., that of the appointment to the executive organ of the IO solely of persons acting in their private capacity. In such a—theoretically impossible—eventuality, the executive board members would not be acting as a college of like-minded States with the intent to pursue a common purpose through a single and discrete legal vehicle, which is exactly what the IO represents.

Finally, the customary, but most importantly the treaty, practice of IO creation suggests that given the international legal personality of such entities, their personnel enjoy the privileges and immunities of the organisation itself. Said privileges and immunities are conferred by means of the constitutional instrument of the IO, which, however, serves to bind only the IO's contracting parties. The extension of such immunities to non-contracting parties may be achieved either by formal agreement between the IO and third States generally, or by a specific formal agreement concluded between the IO and those third States in which it conducts some of its operations and in which it has a physical presence.<sup>46</sup> This result may be achieved through so-called Headquarters Agreements.<sup>47</sup> These types of agreements play a significant role in respect of the operations of intergovernmental trust funds.

The following three sub-sections will concentrate on three types of trust funds whose organisational structure and legal personality either entitles them to be defined as IOs, or which possess some of their characteristics without in fact having been endowed with IO status. Hence, we will examine so called quasi-intergovernmental trust funds, trust funds established by treaty as IOs, and trust funds that have been established as subsidiary organs of other IOs, some of which possess IO status themselves, whereas the vast majority do not. The next sub-section will focus on the three aforementioned elements that pertain to the traditional nature of IOs in order to ascertain whether, and to what degree, the Global Fund to Fight AIDS, TB and Malaria (Global Fund) satisfies the criteria for IO status.

#### *A. The Intention to Transform a Fund into an International Organisation? The Case of the Global Fund for Aids TB and Malaria*

The organisational history of the Global Fund suggests that its creators and first executive personnel were preoccupied with setting up an efficient entity. They possessed

---

45. Bantekas, *supra* note 2, at 252.

46. *Id.* at 256–57.

47. See generally C. WILFRED JENKS, *THE HEADQUARTERS OF INTERNATIONAL INSTITUTIONS: A STUDY OF THEIR LOCATION AND STATUS* (1945); see also SAM MULLER, *INTERNATIONAL ORGANISATIONS AND THEIR HOST STATES: ASPECTS OF THEIR LEGAL RELATIONSHIP* (1995); Zsolt Hetesy, *The Making of the Basic Principles of the Headquarters Agreement*, 25 *FORDHAM INT'L L.J.* 626 (2002).

no clear idea as to the translation of “efficiency” into a viable legal structure. Unlike traditional IOs whereby their creators set out a thematic target—where applicable—but direct their focus on satisfying the political realities and demands of the participating actors first, the drafters of the Global Fund paid relatively little emphasis on the various political relationships, at least as these may have concerned the emergence of a governance model or the Fund’s legal personality. Instead, political emphasis was centred on engaging States to correspond to their pledges as donors and facilitate the Fund’s objectives. This lack of policy emphasis on structure and personality, given that the creators of the Global Fund were States, denotes a major departure from the negotiating phases of traditional IOs. Given that States are constantly concerned about their distinct place in the power politics of international relations, a query arises as to why they would be willing to sacrifice structure in the case of the Global Fund, whereas they would not demonstrate equal determination in regard to other more traditional IOs. Financial considerations do not constitute a viable argument because the Global Fund possesses a working capital of several billion dollars,<sup>48</sup> being far superior in financial size in comparison to other specialised agencies and IOs. There is no doubt, therefore, that the Global Fund is very well financially endowed and as a result possesses more than ample capacity to be a leading actor in its field of interest.

The answer to the question posed above seems to lie in the following factors: a) there was no intention to commence operations on the basis of universal participation; b) existence of a congregation of like-minded States; c) none of the actors were preoccupied with legal formalities. As a result of these considerations one may even justly assume that the creators of the Global Fund never had an intention to set up an IO. This assumption would, however, be wrong. Traditional IOs are characterised to a large degree by the existence of framework normative principles and even customary law that permeates their thematic being, even before the organisations themselves come into physical existence and gain legal personality. Thus, even before the UN organisation was established its post WWII members could rely on the 1928 Pact of Paris,<sup>49</sup> subsequent customary international law relating to the use of force, the principle of non-intervention, and others. While it is true that the UN Charter also introduced new principles and reformulated older ones, it did not emerge in a vacuum. This is true with respect to all international organisations, technical or otherwise, whose members will have already regulated some of its operations, whether by bilateral or multilateral treaties or on the basis of commercial practice. In the sphere of trust funds the situation is strikingly different, because these are set up to collect, administer, and disburse monies to yet unknown recipients, and as a result their subject-matter will not have been delineated by any kind of formal agreement, apart perhaps from the occasional granting of aid.<sup>50</sup> The urgent nature—in terms of human life or the

---

48. By late 2019, the total amount of funds committed by donors to the Global Fund was fourteen billion USD. *US\$14 Billion to Step Up the Fight Against the Epidemics*, GLOB. FUND, <https://www.theglobalfund.org/en/specials/2019-10-09-global-fund-sixth-replenishment-conference/> (last visited Oct. 6, 2020).

49. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57.

50. See generally GLOB. FUND, *Bylaws of the Global Fund to Fight Aids, Tuberculosis & Malaria*, art. 2, 6.1, GF/B38/DP05 (Nov. 14, 2017), [https://www.theglobalfund.org/media/6007/core\\_globalfund\\_bylaws\\_en.pdf](https://www.theglobalfund.org/media/6007/core_globalfund_bylaws_en.pdf).

protection of the global environment—for which trust funds are established, in conjunction with the lack of a coherent international normative framework regarding the granting of aid,<sup>51</sup> has necessitated a flexible approach as to legal personality among the participating partners and stakeholders. This flexible approach did not, in the case of the Global Fund, entail the *a priori* rejection by the funding States of an IO status for the Fund.<sup>52</sup> On the contrary, the primary emphasis was to first render the Fund operational and when this was achieved, only then could a more detailed discussion on legal personality take place. During the first meeting of the Global Fund in mid-October 2001, at which time the Fund was already receiving pledges, a proposal was tabled as to whether, in the absence of a formal legal structure, the Secretariat should be formally organised as a legal entity with full authority to make contracts and hold property.<sup>53</sup> The drafters were also concerned with the “independence of the Fund and its ability to seek contributions from both public and private sources.”<sup>54</sup> It was felt that were the Global Fund to be formally organised as a whole under traditional legal structures, it risked losing its independence, which was deemed vital for the type of work it was set up to accomplish.<sup>55</sup> The legal working group led by Sweden presented two options a month later; organisation of the Fund as an independent legal entity, or alternatively as an informal alliance using an existing international organisation as a surrogate so that the Fund could feed on that IO’s legal status and benefit from its personality. Most members preferred the informal alliance model, yet others insisted that total independence was critical to establishing public confidence.<sup>56</sup>

By 2002 the TWG had decided to organise the Global Fund as an independent Swiss foundation, pursuant to a public deed and registered on the Geneva Trader Register.<sup>57</sup> This flexible solution, however, did not succeed in resolving the Fund’s constantly creeping problems, despite the fact that it was independent—as per the wishes of its founders—and retained its public-private partnership character.<sup>58</sup> It was soon discovered that the Fund’s private foundation status deprived it of a significant array of privileges and immunities typically granted to IOs operating in Switzerland.<sup>59</sup> This lack of privileges and immunities caused the Fund manifold problems in respect of its operations outside Swiss territory.

---

51. It has already been pointed out that to a very large degree intergovernmental trust funds are premised on self-regulation, subject to immutable rules of international law. On the other hand, the international legal regime of developmental aid, although permissive in nature, is seriously fragmented. Its principal legal bases are bilateral aid treaties and soft law instruments, such as the Paris Declaration on Aid Effectiveness and the UN Millennium Goals. The collection of aid *per se* and the law applicable to such operations is specific to each IO and institution.

52. See GLOB. FUND, *Bylaws of the Global Fund*, *supra* note 50.

53. GLOB. FUND, FINAL REPORT OF FIRST MEETING OF THE TRANSITIONAL WORKING GROUP TO ESTABLISH A GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS, AND MALARIA 4 (Oct. 30, 2001), [https://www.theglobalfund.org/media/1362/board\\_1sttwg\\_report\\_en.pdf?u=637319004884930000](https://www.theglobalfund.org/media/1362/board_1sttwg_report_en.pdf?u=637319004884930000).

54. *Id.* at 5.

55. *Id.*

56. GLOB. FUND, SECOND MEETING OF THE TRANSITIONAL WORKING GROUP (TWG) TO ESTABLISH A GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS, AND MALARIA 4 (Nov. 22–24, 2001), [https://www.theglobalfund.org/media/1363/board\\_2ndtwg\\_report\\_en.pdf?u=637319006045570000](https://www.theglobalfund.org/media/1363/board_2ndtwg_report_en.pdf?u=637319006045570000).

57. GLOB. FUND, UPDATE ON LEGAL STATUS FOR THE GLOBAL FUND 3 (June 5–6, 2003), [https://www.theglobalfund.org/media/2928/bm05\\_07gpreportannex6\\_annex\\_en.pdf?u=63731900263760000](https://www.theglobalfund.org/media/2928/bm05_07gpreportannex6_annex_en.pdf?u=63731900263760000).

58. GLOB. FUND, REPORT ON LEGAL STATUS OPTIONS FOR THE GLOBAL FUND 3–4 (Jan. 29–31, 2003), [https://www.theglobalfund.org/media/2885/bm04\\_12legalstatusoptions\\_report\\_en.pdf?u=63731900220150000](https://www.theglobalfund.org/media/2885/bm04_12legalstatusoptions_report_en.pdf?u=63731900220150000).

59. GLOB. FUND, UPDATE ON LEGAL STATUS, *supra* note 57, at 3, 5.

Although this matter will be dealt with more exhaustively elsewhere, it is worth mentioning that as a result of its private character, the Global Fund's employees were not exempt from Swiss income taxation, and moreover they required Swiss work permits. Equally, the Fund would have had to pay value-added tax ("VAT") and contribute to Swiss social security, thus increasing staff costs and making itself susceptible to lawsuits as an independent entity. In addition, the risk of lawsuits loomed over the heads of its personnel in their individual capacity, in accordance with the dictates of Swiss private law. The cost to the Fund, as well as the potential inability to attract good staff who would find the prospect of paying income tax unattractive, compared to employment in other IOs, meant that the Fund was forced to reconsider its fundamental premise of flexibility.<sup>60</sup> In order to retain the Global Fund on Swiss soil, the federal government of that country launched a well-organised bid, which encompassed the signing of an Administrative Services Agreement ("ASA") with the WHO, itself an IO, under which the Fund's Secretariat would be subsumed within the WHO's international legal personality.<sup>61</sup> At the same time it was envisaged that the Global Fund would remain independent for the purposes of its own functions. Furthermore, the Swiss government agreed to provide certain tax exemptions and benefits similar to the privileges afforded to other IOs.<sup>62</sup> Subsequently, the Fund entered into an ASA with the WHO on 24 May 2002, which although served to confer international law rights and privileges to the Global Fund and its personnel, was itself subject to Swiss law and did not, therefore, constitute a treaty.<sup>63</sup> Besides the provision of administrative assistance, the Agreement essentially extended to the Global Fund and its personnel the privileges and immunities of the WHO, as these were defined in the Agreement between the Swiss Federal Council and the WHO on determining the legal status of that organisation of 21 August 1948.<sup>64</sup> In addition, the benefits arising from the application of the 1947 Convention on Privileges and Immunities of Specialised Institutions were also conferred upon the Global Fund, as were the various Headquarters Agreements with nations in which the WHO physically operates.<sup>65</sup>

The effect of this Agreement is certainly not the creation of a new and distinct IO. The Global Fund remained an entity organised under Swiss private law, albeit its operations and non-Swiss staff were granted the privileges and immunities of the WHO. Yet, this model did not prove successful from a practical point of view, and attempts were made from the outset for the Fund to disengage from the WHO, an event that finally took place in late 2008.<sup>66</sup> The reasons for this unhappy symbiosis were threefold: a) lack of logistical coordination between the two entities; b) conflicts of interest for those WHO personnel that were mandated to serve the Global Fund; c) lack of immunity for the Fund

60. GLOB. FUND, REPORT ON LEGAL STATUS OPTIONS, *supra* note 58, at 3.

61. *Id.* at 2–3.

62. *Id.*

63. GLOB. FUND, UPDATE ON LEGAL STATUS, *supra* note 57, at 8.

64. *Id.* at 8–9.

65. *Id.*

66. *See generally* GLOB. FUND, DECISION POINT: TRANSITION FROM ADMINISTRATIVE SERVICES AGREEMENT (Nov. 12–13, 2007), [https://www.theglobalfund.org/media/3181/bm16\\_boardmeeting\\_decisions\\_en.pdf?u=637319003396000000](https://www.theglobalfund.org/media/3181/bm16_boardmeeting_decisions_en.pdf?u=637319003396000000). The decision was entitled "Transition from Administrative Services Agreement".

from external suits.<sup>67</sup> As a result, a new cycle of debates arose as to whether the Fund should move to a new model of legal personality, with the options available being the transformation to full IO or quasi-IO status. Subsequently, the Board directed the Secretariat to pursue the most optimal option, with a preference for intergovernmental status.<sup>68</sup> Thus, within a matter of slightly more than a year since the creation of the Global Fund, the Board had abandoned its initial premise of legal flexibility in favour of an IO, finding that the exigencies of international life necessitated mechanisms, which although structurally cumbersome and rigid to external stakeholders, were nonetheless flexible enough to navigate in international *fora*.<sup>69</sup> This sequence of events confirms, rather than contradicts, the liberal theory notion that the rise and workings of IOs results not from the rational or realist behaviour of States, but from the collective action of private stakeholders from within and outside States with a view to promoting and protecting particular values and interests.<sup>70</sup> This conclusion is further confirmed by the fact that despite the subsequent legal restructuring of the Global Fund, it did not decrease its private voting membership of the Board.<sup>71</sup> On the contrary, although it was pointed out that the communities living with the diseases could not simply be added as a voting member of the Board without affecting the existing voting mechanism of the Board,<sup>72</sup> eventually the Board approved an amendment to its Bylaws rendering such Communities' delegation a voting member.<sup>73</sup>

Let us now return to the initial question posed in this section; i.e., has there been an intent by the States parties to the Global Fund to transform it from a privileged Swiss-law foundation to an IO? The participating States have not entered into an agreement that is governed by international law with an intent of, and with a view to, establishing an IO.<sup>74</sup> This much is clear. Nonetheless, they did enter into a Headquarters Agreement with the Swiss federal government,<sup>75</sup> whose Article 1 recognises the “international juridical personality and legal capacity in Switzerland of the Global Fund”. Although this instrument in itself would not suffice to demonstrate the existence of intent as to the creation of a global—or at least *inter partes*—IO, because of its particular geographic circumscription as operable only within Switzerland, when the Board was discussing the various options for transformation it noted that intergovernmental status could only be achieved through a Headquarters Agreement (“HQ Agreement”).<sup>76</sup> Whereas the HQ

67. GLOB. FUND, REPORT ON LEGAL STATUS OPTIONS, *supra* note 58, at 3–4.

68. *Id.* at 3.

69. *Id.* at 5, 15–19.

70. Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 233 (1993); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 253 (2000).

71. See generally GLOB. FUND, REPORT OF THE GOVERNANCE AND PARTNERSHIP COMMITTEE (June 28–30, 2004), [https://www.theglobalfund.org/media/3395/bm08\\_07gpc\\_report\\_en.pdf?u=637319002688870000](https://www.theglobalfund.org/media/3395/bm08_07gpc_report_en.pdf?u=637319002688870000).

72. *Id.* at 6.

73. *Id.*

74. See generally GLOB. FUND, BYLAWS OF THE GLOBAL FUND, *supra* note 50.

75. See generally GLOB. FUND, AGREEMENT BETWEEN THE SWISS FEDERAL COUNCIL AND THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA IN VIEW OF DETERMINING THE LEGAL STATUS OF THE GLOBAL FUND IN SWITZERLAND (June 28–30, 2004), [https://www.theglobalfund.org/media/3393/bm08\\_07annex4agreement\\_annex\\_en.pdf?u=637319002360230000](https://www.theglobalfund.org/media/3393/bm08_07annex4agreement_annex_en.pdf?u=637319002360230000).

76. GLOB. FUND, REPORT ON LEGAL STATUS OPTIONS, *supra* note 58, at 6.

Agreement has been achieved, neither its text nor its general nature confer IO status to the Fund.<sup>77</sup> This is hardly surprising, however, given that HQ Agreements are only meant to confirm the entity's legal personality therein or confer privileges and immunities. With the conclusion of the HQ Agreement the Board has ceased to discuss the Fund's legal personality, deeming presumably that the matter has been resolved. Certainly, the conferral of IO-like privileges and immunities to the Global Fund by the Swiss government gives rise to the specified prerogatives on Swiss territory only, but nowhere else. In order for this to happen, further HQ or similar agreements with third States are required.

Proof of original intent cannot be sought from the HQ Agreement, because this is only of bilateral effect. Moreover, both the Fund's Bylaws and its Framework Document do not constitute treaties generating legal effects for members and as such cannot be assimilated to an IO constitutional treaty. In any event, Article 1 of the Global Fund's Bylaws expressly stipulates that the Fund is to be governed by Swiss law, while no mention is made to international law.<sup>78</sup> It must be presumed, therefore, despite Board aspirations for intergovernmental status, that there exists no expressed intention, whether through a new constitutional treaty, or otherwise, for the Fund to become an IO with international legal personality recognised vis-à-vis all member States to the Fund, or beyond. Two questions remain to be addressed. The first concerns the members' willingness to engage in bilateral HQ Agreements with recipient (in terms of financial aid) States and therefore extend its quasi-intergovernmental status to territories other than Switzerland. Secondly, is it possible to speak of objective international legal personality on the basis of the Fund's privileges and immunities and its governance structure?

We have determined that although the Global Fund enjoys a degree of international legal personality, as has been bestowed upon it by the Swiss federal government, it does not enjoy subjective international legal personality as an IO by the States that created it. Such a reference or inference is clearly excluded by the Fund's Bylaws.<sup>79</sup> Nonetheless, it is not improbable that the Global Fund enjoys objective international legal personality in other States, by virtue either of its incorporation in Switzerland,<sup>80</sup> or by the tacit recognition of such status on the basis of its functions. In both cases, personality will be determined by reference to a country's domestic criteria. The recognition of said objective personality does not entail the simultaneous recognition of IO status, especially where the creators of the particular entity have excluded this possibility. Alternatively, the Global

---

77. The nature of the HQ Agreement only confers IO-like status to said entity in the country where this is granted. Switzerland has a strong tradition of conferring such status to particular NGOs operating therein on the basis of its Federal Decree of 30 September 1955 On the Conclusion and Modification of Agreements with International Organisations in View of Determining their Legal Status in Switzerland. Similar agreements have been concluded with the International Olympic Committee (IOC), the International Air Transport Association (IATA), and others. See Legal Opinion of M-C Krafft, On the Modifications which should be Made to the Legal Status of the Global Fund in View of the Transformation of the Fund into an Intergovernmental Organisation. GLOB. FUND, UPDATE ON LEGAL STATUS, *supra* note 57, at 11–15.

78. See GLOBAL FUND, BYLAWS OF THE GLOBAL FUND, *supra* note 50.

79. *Id.*

80. In *Arab Monetary Bank (AMF) v. Hashim*, 83 ILR 243, the House of Lords held that although the AMF did not enjoy legal personality in the UK, nonetheless the treaty establishing it had been incorporated by law into the legal system of the United Arab Emirates. Therefore, the Court argued that comity required that “the status of an international organisation incorporated by at least one foreign State should also be recognised by the courts of the UK”.

Fund may enjoy legal personality in other States through the conclusion of a relevant agreement. In following Parts we will be discussing in more details the Fund's privileges and immunities.

### III. TRUST FUNDS AS FULL INTERNATIONAL ORGANISATIONS

Given the limited scope of trust funds and their emphasis on the financing of international projects, as well as the vast disparities between them in terms of financial resources, one would expect that the larger—in terms of finances—among these would eventually adopt IO status. Judging from the experiments of the Global Fund for AIDS and the GEF, this presumption has turned out to be false, although it is true that their creators have accumulated therein many of the characteristics of IOs. In this section we shall examine two trust funds<sup>81</sup> whose creators opted for an IO legal structure that does not, however, reflect all of the traditional characteristics of intergovernmental organisations.

The first of these is the Global Crop Diversity Trust, which unlike the Global Fund for AIDS was founded on the basis of a treaty between States—and the participation of other IOs—as well as the Agreement for the Establishment of the Global Crop Diversity Trust.<sup>82</sup> The objective of the Trust is to ensure the long-term conservation and availability of plant genetic resources for food and agriculture with a view to achieving global food security and sustainable agriculture.<sup>83</sup> In order to accomplish this objective significant resources are required and thus the Trust established an endowment fund for this purpose through which it solicits contributions from member States and organisations, as well as from private entities on a voluntary basis.<sup>84</sup> There is nothing in the Global Crop Trust Agreement to explicitly suggest that the Trust is an IO, save for a passage in the preamble that reads as follows: “Whereas the parties to this Agreement, acting on behalf of the international community, have agreed to establish the [Trust] as an international fund with its own international legal personality and with such powers and authorities necessary to enable it to operate effectively and to attain its objectives . . . .”<sup>85</sup>

The Agreement consists of a handful of provisions all of which relate to procedural matters, but it makes mention to the Trust's Constitution and elevates it to an integral part of the Agreement itself. Whereas the amendment procedure for the text of the Agreement requires the consent of the participating States,<sup>86</sup> any amendment to the Constitution must meet the approval of the Fund's Executive Board,<sup>87</sup> which is composed of both public and

81. This is not to say that others do not exist. Art. 1(1) of the 1987 Agreement Concerning an International Trust Fund for Tuvalu, 1536 U.N.T.S. 48, expressly provides for the establishment of an international organisation.

82. CROP TRUST, *Agreement for the Establishment of the Global Crop Diversity Trust*, at pmb. (Oct. 4, 2003), <https://cdn.croptrust.org/wp/wp-content/uploads/2017/02/Establish-Agreement-english.pdf>.

83. CROP TRUST, CONST. OF THE GLOBAL CROP DIVERSITY TRUST, art. 2 ¶ 1 (Oct. 2003), <https://cdn.croptrust.org/wp/wp-content/uploads/2014/12/Constitution-english.pdf>.

84. *Id.* at art. 3.

85. CROP TRUST, *Agreement for the Establishment of the Global Crop Diversity Trust*, *supra* note 82, at pmb. ¶ 9.

86. *Id.* at art. 3 ¶¶ 1–2.

87. *Id.* at art. 3 ¶ 3. This refers to the procedure contemplated in Article 19 of the Global Crop Trust's Constitution.

private representatives, all of which, however, are required to act in a personal capacity.<sup>88</sup> The Constitution, by virtue of its incorporation as an integral part of the Agreement is therefore of a treaty nature.<sup>89</sup> However, by the very fact that the parties to the Agreement cannot amend its provisions, the Constitution is naturally rendered a distinct and separate treaty, which nonetheless derives its treaty nature and force from the Agreement. It is clear, therefore, that the intention of the creators of the Trust was to establish an entity over which they would exercise no further control, such that would be flexible enough to achieve its aims but which would possess the necessary clout to attract funds from public and private sources.<sup>90</sup> This does not mean, however, that they intended to set up a private enterprise, or even a foundation endowed with some privileges and immunities in the host State and elsewhere where agreement could be reached, as was the case with the Global Fund for AIDS. That this was not so is evident not only from the aforementioned granting of international legal personality and other implied powers in the text of the Agreement, but also from Article 1(2) of the Trust's Constitution, which adds the word "full" to this entity's international legal personality, as well as from subparagraph 3(a) of Article 1, which states that the Trust shall have the legal capacity to enter into treaties and contracts.<sup>91</sup> There is a very clear intention by the creators of the Trust in these instruments, therefore, to establish a fund in the form of an international organisation.<sup>92</sup> Full international legal personality and treaty-making powers are only enjoyed by States and IOs and it is therefore natural to assume that the Global Crop Trust is part of that family.

The problem with this relationship is the fact that although the member States to the Agreement conferred full legal personality to the Trust and baptised it as an IO, they subsequently played no further active part in its functioning in the international arena.<sup>93</sup> While the Trust's Executive Board does include representatives from States, these individuals do not originate from parties to the Agreement, but represent developing countries and are, moreover, appointed either by the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (International Treaty), the Donors' Council of the Trust, or the Director-General of the UN's Food and Agriculture Organisation (the latter without a vote).<sup>94</sup> Furthermore, as we have already stipulated, every member on the Executive Board acts in his or her personal capacity. The literature on the institutional law of IOs, when examining the composition and powers of an IO's executive organ, necessarily focuses on that organ's relationship with the IO's member States and its independence from them.<sup>95</sup> It is said that the executive organ should have a distinct will from that of its members, otherwise the entity in question will resemble a

88. CROP TRUST, CONST. OF THE GLOBAL CROP DIVERSITY TRUST, *supra* note 83, at art. 5 ¶ 6.

89. CROP TRUST, *Agreement for the Establishment of the Global Crop Diversity Trust*, *supra* note 82, at art. 1 ¶ 1.

90. *Id.* at pmb1.

91. CROP TRUST, CONST. OF THE GLOBAL CROP DIVERSITY TRUST, *supra* note 83, at art. 1 ¶ 3(a).

92. It should be mentioned that this is also clearly stated in the Trust's official website. *See* CROP TRUST, *Governance and Policy*, <https://www.croptrust.org/about-us/governance-policy/> (last visited Jan. 31, 2021).

93. *See generally id.*

94. CROP TRUST, CONST. OF THE GLOBAL DIVERSITY TRUST, *supra* note 83, at art. 5 ¶ 1.

95. JOSE E. ALVAREZ, INTERNATIONAL ORGANISATIONS AS LAW-MAKERS 4 (2005); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 26–39 (Martinus Nijhoff ed., 2003); KLABBERS, *supra* note 44, at 169–76.

conference of States, in addition to the fact that the entity's independence will be compromised and will not persist.<sup>96</sup> The context of this principle, however, is very different from the particular context of the Global Crop Trust. In the case of traditional IOs, some member States to the founding constitutional treaty enjoy membership to that organisation's executive organ, whereas all other founding and acceding States enjoy, at least, membership in an organ that resembles the functions of the UN General Assembly. While it is a myth that the State representatives to the executive organ act collectively with the aim to formulate a will that is distinct from that of the governments they serve, in reality this is exactly the case because of the competing individual interests which the executive organ is mandated to accommodate. Where the IO's executive organ does not incorporate State parties and their government representatives, as is the case with the Global Crop Trust, while it is clear from the outset that it is the intention of the member States to create an executive organ with a distinct will, the absence of party membership thereof may render the Trust's stated international legal personality problematic. To put it simply, while a distinct will is necessary, there must certainly exist a bond between the executive organ and the member States; otherwise, the absence of the State parties suggests the delegation of authority to natural persons in the form of an agency relationship and on the basis of a treaty.

If this is indeed the case, the Global Crop Trust cannot be validly identified as an IO but a *sui generis* agency arrangement. Particular issues arise as a result in connection with the Trust's liability as an independent entity, apart from its constituent member States. If the Global Crop Trust is to constitute an IO, rather than an agency arrangement, a new theoretical construction is necessary; such construction may either substantiate the existence of a bond between the Trust's member States and its Executive Board, or it may well be that a bond of this nature is not a *sine qua non* requirement for the particular circumstances of the international legal personality of the Trust. For one thing, despite the conferral of full executive powers to persons acting in a personal capacity, the States founding the Trust as an IO remain committed members thereof. Secondly, of the ten voting Executive Board members, eight are appointed by the Governing Body—i.e., the executive wing—of the International Treaty, according to Article 19(1) of which it is composed of its member States.<sup>97</sup> Equally, although the Trust's Donors' Council is appointed by the Executive Board this body is to be composed of "public and private donors from both developing and developed countries, who have made a significant contribution to the Trust".<sup>98</sup> Given that the member States comprising the Trust will by implication of their activities make a significant contribution to the work of the Trust, at least one of these will be represented on the Executive Board. As a result, at least half of the Board's members will be appointed by member States, or other States upon whom similar authority has been conferred (i.e., the Governing Body of the International Treaty). There is no reason why the personal capacity mandate of the Board members should negate the international legal personality of the Trust, which exists independently of any

---

96. CHITTHARANJAN F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 137–39 (2005).

97. See generally CROP TRUST, CONST. OF THE GLOBAL CROP DIVERSITY TRUST, *supra* note 83.

98. *Id.* at art. 10 ¶ 2.

governance structure that the founding States may find agreeable. If, however, it is established that the independent Board members are not answerable anywhere for their actions, the Trust's international legal personality would be severely undermined. Firstly, it is implicit from the designation of the Trust as an IO, that its personnel enjoy the customary and statutory privileges and immunities of IO personnel generally in the territory of the member States. Such privileges and immunities may be extended vis-à-vis third States through the conclusion of a treaty between the Trust and said third States. Secondly, the Trust is mandated to "operate in accordance with the overall policy guidance to be provided by the Governing Body of the International Treaty".<sup>99</sup> Finally, although the Executive Board may dissolve the Trust through the adoption of a resolution if it determines that it has achieved its targets or that it can no longer function effectively, "this shall not become operative until such time as the dissolution has been agreed to by the parties to the Agreement".<sup>100</sup> In similar fashion, amendments to the Constitution adopted by the Board must meet the approval of the parties to the Agreement.<sup>101</sup> The available evidence therefore clearly suggests that the Executive Board is answerable to the member States of the Trust and that the reason for embracing a private governance structure is not to avoid liability or to establish a private institution endowed with State-like qualities and privileges, but rather to avoid the intrusion of politics in this sensitive sphere of regulation. The Global Crop Trust represents yet another example of the application of liberal theory to the creation of intergovernmental organisations and the shaping of their workings and governance structures on the basis of necessity, pragmatism and stakeholder participation.<sup>102</sup>

Another example of a trust fund endowed with IO status is that of the Common Fund for Commodities ("CFC"), which was established pursuant to a multilateral 1980 Agreement Establishing the CFC.<sup>103</sup> The purpose of this entity is to promote global action with the aim of improving market structures in international trade in commodities of interest to developing countries.<sup>104</sup> To achieve this objective, the CFC Agreement set up, in addition to a Reserve Account, two other Accounts.<sup>105</sup> The first of these is devoted to the financing of its buffer stocks and internationally co-ordinated national stocks.<sup>106</sup> The

---

99. *Id.* at art. 1 ¶ 5.

100. *Id.* at art. 20 ¶ 3.

101. *Id.* at art. 19 ¶ 3.

102. 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 organisations with a distinct legal personality". This perceived IO 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 IOs. 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, 625–35 (2000).

103. Agreement Establishing the Common Fund for Commodities, concluded at Geneva June 27, 1980, 1538 U.N.T.S. 3. Besides the CFC there exist numerous agreements on particular commodities, such as sugar, coffee, metals, and others. See J.E.S. Fawcett, *The Function of Law in Commodity Agreements*, 44 BRIT. Y.B. INT'L L. 157 (1970).

104. See Agreement Establishing the Common Fund for Commodities, *supra* note 103.

105. *Id.* at 5.

106. *Id.* at 6.

Second Account, on the other hand, is designated as the financing mechanism for measures in the field of commodities other than stocking.<sup>107</sup> Unlike the Global Crop Trust, the CFC is composed only of State parties adopting the Agreement, as well as IOs that have a pertinent role in the field of commodities, although the latter do not possess voting rights.<sup>108</sup> The positivist approach in the elevation of the CFC to the status of an IO is clearly demonstrable in its highest executive organ, the Governing Council, which is dominated solely by States whose voting capacity reflects their financial contribution.<sup>109</sup> Moreover, the CFC is to enjoy extensive privileges and immunities in the territories of all member States,<sup>110</sup> as well as “possess full juridical personality and in particular the capacity to conclude international agreements with States and international organisations, to enter into contracts . . . .”<sup>111</sup> There is no doubt, therefore, that the CFC was granted full IO status in its founding constitutional instrument and not merely a certain degree of international legal personality, such as to be able to carry out particular functions. While it is true that the CFC was adopted at least a decade prior to the contemporary international law trust funds, whose instruments promote the active participation of private stakeholders and developing States, this is not the only reason as to the State-centric approach of the CFC.<sup>112</sup> Indeed, there is a significant contextual difference between the funding of market restructuring and the funding pertaining to environmental degradation or the rebuilding of an earthquake-torn country. It is obvious that all matters related to public finances and market structures have the potential to cause serious imbalances to national economies worldwide and as such the active participation of external stakeholders that lack the element of responsibility to their constituencies would fail any test of prudence.

#### IV. TRUST FUNDS AS LIMITED INTERNATIONAL ORGANISATIONS

In 1971 an International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (“IOPCF”)<sup>113</sup> was adopted. This instrument was later replaced in 1992 by a convention by the same name (“1992 IOPFC”)<sup>114</sup> and a Supplementary Fund. The 1992 Compensation Fund is supplementary to the 1992 Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage of 1969,<sup>115</sup> which governs the liability of ship-owners in respect of oil pollution damage. Whereas the Civil Liability Protocol is premised on the principle of strict liability for ship-owners, thus creating a system of compulsory liability insurance, the trust fund under the 1992 Fund Convention was set up to compensate victims in those situations where the

---

107. *Id.* at 7.

108. *Id.*

109. Agreement Establishing the Common Fund for Commodities, *supra* note 103, at 20.

110. *Id.* at 28.

111. *Id.*

112. See UN Legal Counsel, *Opinion on the Interpretation of the Provisions of Article 57(1) of the Agreement Establishing the CFC*, 1988 U.N. Jurid. Y.B. 341, U.N. Doc. ST/LEG/SER.C/26, which discusses the CFC’s entry into force on the basis of its members’ subscription shares.

113. Int’l Maritime Org. [IMO], *Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (Dec. 18, 1971).

114. *Id.*

115. Protocol to Amend the Above-mentioned Convention (with Annex and Final Act), *concluded at London* Nov. 27, 1992, 1956 U.N.T.S. 255.

level of compensation under the Civil Liability Protocol proved to be inadequate.<sup>116</sup> Article 2 of the 1992 Fund Convention states that in each contracting party the fund shall be recognised under its laws as a legal person capable of assuming rights and obligations and of being a party in legal proceedings before the courts of that contracting State.<sup>117</sup> Despite the fact that certain official reports of the trust fund refer to its status as a “worldwide international organisation”,<sup>118</sup> there is a conspicuous absence of provisions in the treaty, such that would grant the fund the type of international legal personality that is enjoyed by the Global Crop Trust or the Common Fund for Commodities. Article 2 merely confers domestic legal personality to the fund, such that will enable it to be an equal litigant in the pursuit of compensation suits against its members.<sup>119</sup> The absence of international legal personality is evident in the lack of immunities for the trust fund’s assets, property and personnel. Under the Fund Convention, the entity simply enjoys exemptions from direct taxes in relation to its assets and income, as well as similar tax and customs relief for items it imports or exports and which pertain to its official functions. The contours of a fuller international legal personality are only manifest in the fund’s 1971 and 1992<sup>120</sup> Headquarters Agreement with the United Kingdom, Articles 5, 17 and 21 of which confer the broadest possible range of immunities to the fund’s assets and personnel. This wide international legal personality of the Compensation Fund was recognised by the UK through the adoption of a Statutory Instrument,<sup>121</sup> on the basis of the now repealed 1968 International Organisations Act. The HQ Agreement is, therefore, of paramount importance for trust entities that do not possess international legal personality.<sup>122</sup>

116. See A KHEE-JIN TAN, *VESSEL-SOURCE MARINE POLLUTION: THE LAW AND POLITICS OF INTERNATIONAL REGULATIONS* 300–09 (2006).

117. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, art. 2, ¶ 2, Nov. 27, 1992, I.O.P.C. (1992) (available at [https://transportrecht.org/wp-content/uploads/FondsUe1992\\_engl.pdf](https://transportrecht.org/wp-content/uploads/FondsUe1992_engl.pdf)).

118. Secretariat of the I.O.P.F.C., *Explanatory Note on the International Regime for Compensation for Oil Pollution Damage*, at 1 (Mar. 2011) (available at [https://www.peacepalacelibrary.nl/ebooks/files/IOPC\\_Secretariat\\_International-Regime-Compensation.pdf](https://www.peacepalacelibrary.nl/ebooks/files/IOPC_Secretariat_International-Regime-Compensation.pdf)).

119. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, *supra* note 117, at art. 2.

120. United Kingdom of Great Britain and Northern Ireland [UK], *Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Oil Pollution Compensation Fund 1992*, Cm. 3241 (Oct. 28, 1996).

121. United Kingdom of Great Britain and Northern Ireland [UK], *The International Oil Pollution Compensation Fund 1992 (Immunities and Privileges) Order 1996*, SI 1996/1295 (May 15, 1996).

122. Although the Swiss government conferred international legal personality to the Global Fund through their respective HQ Agreement, Article 5 of said Agreement exempted from immunity of legal process, *inter alia*, “counter claims directly related to principal proceedings initiated by the Global Fund”, arbitration awards between itself and Switzerland, as well as “disputes arising out of contracts and disputes of a private law character to which the Global Fund is a party” [Art. 25(1), Global Fund-Switzerland HQ Agreement]. Moreover, in an independent legal opinion delivered under instructions from the Fund by expert counsel in Swiss civil law, it was noted that the status of the Fund as a foundation under the Swiss Civil Code entailed its liability towards third parties in the same manner as any other Swiss private foundation, while its registration with the Trade Register rendered it subject to potential bankruptcy proceedings. Furthermore, in accordance with the Swiss Civil Code “An individual member of one of the Foundation’s bodies as set forth in the Bylaws would incur a personal liability for torts only if it were established that such individual, acting purposely or by negligence, infringed personally a provision of law or violated an absolute right of a third person, and in doing so, caused damages.” This provision refers to physical persons and is not applicable to States that are parties to the Global Fund. Given that the Fund is not an IO and that therefore its member States cannot hide behind a corporate veil, any unlawful act caused, or debt incurred, by them will trigger the responsibility of that State and possibly the civil liability of

The Compensation Fund is a hybrid legal person standing between the status of the Global Fund for AIDS and that of full international organisations. On the one hand, it enjoys the privileges and immunities of an international organisation in the country of incorporation, while on the other hand on the basis of its constitutive treaty it enjoys domestic legal personality in other member States, without the need to enter into an additional HQ or similar agreement. This latter element is absent in the legal personality of the Global Fund. It is clear that this model best serves the interests of member States, since their intention in conferring legal personality to the trust fund was to fulfil its compensatory functions through litigation, without however putting at risk their own potential individual liability, which may have arisen were the fund to be organised around a loose association.

*A. Is the IMF a Trust Fund?*

The answer to this question is neither simple, nor self-evident. Unlike the previous sections, where we endeavoured to discover in the nature of trust funds an element of a legal personality that would be tantamount to IO status, in the case of the IMF, this query is posed in reverse order. Its IO status is clearly confirmed by reference to Article IX of its Articles of Agreement,<sup>123</sup> as well as by its conclusion of an agreement with the UN to become a specialised agency thereto.<sup>124</sup> There is no legal impediment as to the appointment of a trustee from within the ranks of the trust fund itself, particularly where the trust fund is an IO and therefore does not need to immunize its assets or seek privileges from the States with which it interacts. Such practice is common in the establishment and functioning of the Global Crop Diversity Trust,<sup>125</sup> as well as the Common Fund for Commodities. The element that differentiates a trust fund from an entity with international legal personality that holds financial assets for the pursuit of a particular purpose, such as the IMF, is the possession of said assets in trust for the benefit of future beneficiaries, which cannot be the donors themselves.<sup>126</sup> Were the IMF to hold a donor's money for that donor's exclusive future use and withdrawal, it would be merely performing a banking function and not be engaged in a trust relationship. Equally, were the IMF to simply hold

---

the Fund. It has been explained elsewhere that the funds and other assets of the Global Fund that are held by its trustee, the IBRD, cannot be made the subject of private legal proceedings because on the basis of the trust agreement with the IBRD ownership of the assets has passed to the World Bank. Moreover, it is self-evident that the Global Fund will be subject to civil proceedings as a legal entity, as well as separately through anyone of its members or personnel, in countries outside Switzerland, depending on the laws of those countries, unless the Fund enters into HQ or other agreements to the contrary. *See* D. Hempel, Memorandum on the Liability of the Foundation and the Personal Liability of its Bodies Members (Mar. 25, 2003, on file with author).

123. Articles of Agreement of the IMF, art. 9, 2 U.N.T.S. 39.

124. *See generally* JOSEPH GOLD, INTERPRETATION: THE IMF AND INTERNATIONAL LAW (Springer, 1996); *see also* Protocol Concerning the Entry into Force of the Agreement Between the United Nations and the International Monetary Fund, April 15, 1948, 16 U.N.T.S. 330.

125. The absence of an externally appointed trustee in the Global Crop Diversity Trust (GCDDT) is striking. It should be explained that the Global Crop Trust is an international organisation within which a trust fund exists in order to finance the purposes of the organisation. GLOBAL CROP DIVERSITY TRUST CONST., art. 1, §2 and art. 3, §1. The Trust's Constitution does not designate an external trustee. Nonetheless, Article 6, §2 describes the various functions and powers of the Executive Board. All these powers and functions are typical to the role and nature of the trustee. The Executive Board is, therefore, the *de facto* trustee of the Global Crop Fund for all legal purposes. It is not unknown even in the common law for the settlor/donor to assume the role of trustee.

126. Articles of Agreement of the IMF, art. 1, 2 U.N.T.S. 39.

the donors' money and not possess it under rights of trust ownership, it would again fail to establish a trust arrangement. This is not the case, however, since the objective of the IMF, as enshrined in Article I of its Agreement, is to provide international monetary cooperation and exchange stability.

Moreover, in its transactions with struggling member States that request its assistance it does not provide them with the monies paid by them upon membership (i.e., their special drawing rights), but extends to them other monetary facilities, therefore drawing on the funds committed by other members.<sup>127</sup> Of course, one may argue that since borrowing member States can only draw up to the amount they have originally contributed to the Fund, that it is in fact their money that they are getting back from the IMF and as a result the Fund was merely saving said financial assets for the beneficiaries' rainy day. This argument has an element of truth, but the imparting of membership funds to the IMF does not necessarily mean that the State in question definitely expects to receive it back at some future point. Rather, as the global financial crisis of 2008 demonstrated, it is much more preferable for IMF resources to be used in order to help stabilise the economies of other nations so as to avoid a domino effect, instead of committing them for the future use of contributing member States.<sup>128</sup> What differentiates the IMF from general banking agreements and which therefore renders it a *sui generis* international trust fund, is that while its members (essentially its settlors) foresee the possibility of becoming beneficiaries under particular circumstances in the future, this is merely a potential.<sup>129</sup> Moreover, the overall aim of the IMF, even when it assists a particular member State, is not to assist that State in isolation, but to enhance and augment international monetary stability more generally.

As a result, the IMF may be characterised as a trust fund, but of a *sui generis* nature. Unlike the majority of trust funds the beneficiaries of the IMF's financial resources are solely States, but this is hardly surprising given its mandate.<sup>130</sup> Moreover, while the beneficiaries of ordinary intergovernmental trusts possess an entitlement as to that portion of the trust estate set aside for them—although this is not always enforceable in international law and the beneficiaries themselves are not usually named—in the case of the IMF the beneficiaries in fact constitute a *numerus clausus* (and are by implication named). Nonetheless, they are not automatically entitled to the benefits reserved for them under the Fund's Articles of Agreement, but instead require the adoption of an executive decision by the Fund's executive board. The perceptive reader will validly point out that the disbursement policy of all the trust funds surveyed in this article require also a disbursement decision by either the trust's executive organ, or its trustee. Were said trusts, however, to deal with a pre-fixed number of beneficiaries, as is the case with the IMF, they could not deny them their entitlements accruing under the trust, unless they fundamentally

---

127. See Articles of Agreement of the IMF, art. 5, 2 U.N.T.S. 39; see also IMF, *General Arrangements to Borrow*, 1289-(62/1) (Oct. 18, 1992); IMF, *Sales of Special Drawing Right by the Fund*, 6663-(80/160) S (Oct. 31, 1980); IMF, *Interpretation of Articles of Agreement*, (71-2) (Sept. 26, 1946).

128. This has been achieved through stand-by-arrangements under Articles of Agreement of the IMF, art. 30, § b, 2 U.N.T.S. 39.

129. Articles of Agreement of the IMF, art. 1, 2 U.N.T.S. 39.

130. See generally ROSA MARIA LASTRA, LEGAL FOUNDATIONS OF INTERNATIONAL MONETARY STABILITY 371-443 (2006); GOLD, *supra* note 124.

failed to conform to the demands of the donors.<sup>131</sup>

#### V. TRUST FUNDS AS SUBSIDIARY ORGANS

The establishment of subsidiary organs by the principal or other organs of international organisations is dependent on the dictates of their constitutive treaties, whether expressly provided therein, or as a result of their implied powers. In the United Nations Charter the general authority to establish subsidiary organs is stipulated in Article 7(2), without, however, any other appended qualifications, or the possibility for all principal organs to set up subsidiaries in respect of functions and powers they wish to delegate.<sup>132</sup> This specific authority is contained in other provisions and in the case of the General Assembly, for example, this power is expressed in Article 22 of the UN Charter, which permits the Assembly to set up subsidiary organs, so long as “it deems them necessary for the performance of its functions”.<sup>133</sup> The Charter, nonetheless, is silent as to whether the principal may confer to the subsidiary powers which it does not itself possess, or which it is not able to perform.<sup>134</sup> The first point of this proposition is clearly implausible and cannot be sustained, whereas the second is only possible under strict circumstances. The judgment of the ICJ in its Advisory Opinion in the *Effects of Awards* case seems to suggest that where the creation of a subsidiary organ encompasses the mere delegation of functions by the delegating principal organ, the subsidiary cannot subsequently bind its creator.<sup>135</sup> Where, on the other hand, the principal is instead exercising a power it possesses under the Charter through the subsidiary, the latter’s

131. Compensation trust funds certainly come the closest to identifying beneficiaries from a closed number of persons or entities that are identified by class or status. Compensation funds are typically set up by treaty, resolutions of the Security Council (S.C. Res. 692, § 3 (May 20, 1991)) as well as by unilateral acts of States—usually through the promulgation of a domestic law and the participation of interested States, whose intention to become parties to compensation trust processes is manifested through the conclusion of a subsequent agreement. The objects of such trust funds, i.e., the class of beneficiaries for whose benefit their assets are intended, possess little or no freedom to forego their rights as these are reflected in the fund’s terms of agreement. Compensation funds are typically set up by treaty, resolutions of the Security Council, as well as by unilateral acts of States—usually through the promulgation of a domestic law and the participation of interested States, whose intention to become parties to compensation trust processes is manifested through the conclusion of a subsequent agreement. The objects of such trust funds, i.e., the class of beneficiaries for whose benefit their assets are intended, possess little or no freedom to forego their rights as these are reflected in the fund’s terms of agreement.

132. U.N. Charter, art. 7, ¶ 2.

133. The same limitation is true with respect to the Security Council, in accordance with Art. 29 of the UN Charter. On the question as to whether the Assembly and Council should rely on Arts. 22 and 29 or instead on the more general provision of Art. 7(2), leading commentators suggest that this largely depends on the nature of the subsidiary body and its prospective functions. See Danesh Sarooshi, *The Legal Framework Governing United Nations Subsidiary Organs*, 67 BRIT. Y.B. INT’L L. 413 (1996).

134. The UN Legal Counsel has confirmed that the contribution of money by a trust fund (UN Fund for Namibia) created by a subsidiary organ of the UN General Assembly (UN Council for Namibia), where the latter was moreover the legal administering authority for Namibia, constitute “monies received from a governmental source”. Nevertheless, they were not found to constitute a “government cash counterpart contribution” for the purpose of UNDP project financing, which is where the contribution was made. *Decision 83/10 of the Governing Council of the United Nations Development Programme Concerning Monies that are Provided from the United Nations Fund for Namibia, which is Administered by the United Nations Council for Namibia, to a Trust Fund Administered by UNDP – Question Whether Such Monies Could be Considered “Government Cash Counterpart Contributions”*, 1983 U.N. Jurid. Y.B. 194, U.N. Doc. ST/LEG/SER.C/21.

135. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 ICJ Rep. 47, at 61 (July 13) (available at <https://icj-cij.org/public/files/case-related/21/021-19540713-ADV-01-00-EN.pdf>).

actions, unless *ultra vires*, are presumably capable of binding its creator because the delegation pertains to powers and not mere functions.<sup>136</sup> The two international cases that shed some light on this question concern subsidiary organs with a judicial function, i.e., both the UN Administrative Tribunal (“UNAT”) and the UN International Criminal Tribunal for the former Yugoslavia (“ICTY”), which possess, apart from any other body, inherent powers particular to all judicial institutions.<sup>137</sup>

In the specific case of intergovernmental trust funds, their establishment as subsidiary bodies of a UN principal organ, although not judicial bodies, should always give rise to an investigation as to their founding premise; i.e., whether they represent a mere delegation of functions or of a power under the Charter. That power may well be an implied one, in which case the trust fund may bind its creator. We shall have the opportunity to examine in the following section a trust fund established as a subsidiary organ by the UN General Assembly and which subsequently transformed itself into a full IO; this is the special case of the United Nations International Children’s Emergency Fund (“UNICEF”).

*A. Trust Funds as both UN Subsidiary Organs and International Organisations: The Case of UNICEF*

One typically associates UNICEF with the status of a UN agency and an IO. However, as the last letter in its acronym suggests, UNICEF is also a trust fund in the manner set out in this article.<sup>138</sup> It was established in 1946 as a subsidiary organ of the General Assembly,<sup>139</sup> with its initial assets consisting of the residual funds of the UN Relief and Rehabilitation Administration (“UNRRA”)—which had recently been disbanded—as well as from contributions from governments and the private sector.<sup>140</sup> Interestingly, the legal context for the creation of UNICEF was Article 55 of the UN Charter, which at the time that UNICEF was established was among a handful of provisions relating to the protection of human rights, even if vaguely worded and not dressed in binding language.<sup>141</sup> Two subsequent General Assembly resolutions shifted the Fund’s focus to children in developing countries and continued its existence for an indefinite period.<sup>142</sup> There is no wording in the founding Assembly resolution or the two subsequent resolutions that help to clarify UNICEF’s IO status, apart from paragraph 2(a) whereby it “shall be authorised to receive funds . . . and generally, to acquire, hold or transfer property and to take any other legal action necessary or useful in the performance of its objectives and purposes.”<sup>143</sup> Certainly, it is independent from any government, it

136. *See generally id.*

137. Decision on Interlocutory Appeal on Jurisdiction (ICTY Prosecutor v. Tadic), 35 ILM 35, ¶¶ 11, 15, 18 (Oct. 2, 1995).

138. Only general and technical cooperation trust funds established by the UN General Assembly and the Secretariat are subject to the provisions of the Secretary-General’s Bulletin on Establishment and Management of Trust Funds. 1982 U.N. Doc. ST/SGB/188. Thus, UNICEF is subject only to the UN Charter and its own constitutional instruments.

139. G.A. Res. 57(I), at 90 (Dec. 11, 1946).

140. *Id.* at 90, ¶ 2(a).

141. *See* U.N. Charter, art. 55; G.A. Res. 57(I) (Dec. 11, 1946).

142. G.A. Res. 417(V) (Dec. 1, 1950); G.A. Res. 802(VIII) (Oct. 6, 1983).

143. *See* G.A. Res. 57(I) (Dec. 11, 1946).

possesses its own budget<sup>144</sup> and governance structure, which includes an Executive Board that is composed of government representatives and as is usual with all UN funds and programmes it is subject to the authority of the Security Council. In 1994 the General Assembly somewhat transformed the organisational and policy structure of the Fund's Executive Board by subordinating its activities under the overall policy guidance of the Assembly and the United Nations Economic and Social Council ("ECOSOC") and under the authority of the Security Council.<sup>145</sup> Despite its seeming independence, a number of claims asserted by UNICEF have been dealt and claimed as UN claims.<sup>146</sup> Under the aforementioned circumstances it is hard to perceive UNICEF as a typical distinct IO because it lacks complete independence from its creator, which is a natural state of affairs in a relationship between subsidiary and principal. It is beyond the scope of this article to scrutinise the IO status of UNICEF, but it is important to note the following considerations: a) since UNICEF is recognised globally as an IO, its international legal personality as an IO must be of an objective nature; b) its policy dependence on the United Nations and its two principal organs necessarily means that the UN may be held responsible for certain unlawful acts performed by UNICEF in the course of discharging its mandate.<sup>147</sup>

Some concluding observations are necessary at the close of the subsection dealing with trust funds in the form of IOs. The astute reader will not have failed to notice the lack of external trustee in the governance and implementation of the assets of these funds. Indeed, a number of reasons may underlie this policy choice, not all of which may have been considered by the funds' drafters at the time. For one thing, the lack of trustee entails a significant decrease in expenses as a result of not having to pay the pertinent fee, particularly if the IO maintains an equivalent organ or is otherwise able to outsource this task to another body within or outside the organisation and at a much lower cost. The lack of trustee entails also a decrease in transaction costs because the body that takes the disbursement or other executive decisions subsequently implements these without going through an intermediary; i.e., the trustee. Equally, IOs are endowed with sufficient privileges and immunities, such that extend to cover their assets, which would otherwise be achieved only by subsuming these under the immunities of the IBRD on the basis of its Articles of Agreement, if the World Bank was in fact entrusted with this trustee role. Thirdly, it is not obvious that the three IO trust funds examined in the immediately previous sections perceived at the time of their creation, or even currently, their legal role in the same way as other trusts examined in this article. It is most probable that the benefits of IO status conferred upon them negated the need for a trust relationship and for assets to be held in trust—and not under the direct ownership of the IO—thus precipitating a demand for direct ownership and disbursement.

---

144. See G.A. Res. 57(I), at 90, ¶ 4, whereby the operations of UNICEF are not to be funded from the regular UN budget, although the UN Secretariat's staff and resources may be utilised so long as these can be provided from the established services and with no additional cost.

145. G.A. Res. 48/162, at 7 (Jan. 14, 1994).

146. *Balfour, Guthrie & Co. v. United States*, 90 F. Supp. 831 (1950); *United Nations v. B*, (1952) 19 ILR 490 (Brussels Civil Tribunal, Belgium).

147. Although, rather confusingly as a result of our previous considerations, the Tribunal Correctionnel de la Seine awarded damages to UNICEF in a case arising out of a contract entered into between UNICEF on behalf of UNRWA [*UNICEF UNRWA* case]. II Y.B. Int'l L. Comm'n 217.

*B. Variations of Funds as Subsidiary Organs*

The UN Secretary-General (“SG”) and the General Assembly are wholly capable, and have in fact exercised their authority, of establishing trust funds under their implied powers, but whereas the Assembly may establish trust funds as subsidiary organs, the SG cannot.<sup>148</sup> The progression and evolution of a trust fund from one form to another depends in every case on the scope and consistent growth of its activities, the support it receives from member States—and its capacity to convince said States through effective communication thereof—and its ability to demonstrate the lack of (significant!) overlap with other agencies. It is also required to demonstrate a need for independence in order to achieve its stated objectives. This is no short order and certainly demands a good deal of public relations, particularly in the context of a cumbersome and complex organisation such as the UN. This transformation was duly achieved in the case of the UN Fund for Population Activities (“UNFPA”), which was given birth in the form of a SG agency by the use of his implied powers.<sup>149</sup> With the gradual growth of its activities and relative successes, the General Assembly decided to bring the Fund under its legal wing and transform it into its subsidiary organ.<sup>150</sup> The Assembly succinctly noted that the UNFPA’s “scope of operations have now grown to a size which makes its supervision by an intergovernmental body desirable”<sup>151</sup> and “invited the [Fund’s] Governing Council to organise itself in such a way that it can exercise effectively its [ascribed by the Assembly] functions, taking into account the separate identity of UNFPA and its need to operate under the guidance of ECOSOC . . . [through the Governing Council of UNDP]”.<sup>152</sup> With the change in status comes also a change in legal personality and powers. Although no general rule may be said to exist on the matter,<sup>153</sup> subsidiary organs may subsequently create other subsidiary organs, so long as this is not excluded from their mandate.<sup>154</sup> Thus, the direct descendants of principal organs may well decide, as is generally the case, that additional trust funds be established to cover mainly technical expenses or undertake similar technical functions, so as to separate these from the main budget of the original Fund. While these entities are not generally subsidiary bodies, they may be endowed with a distinct governance structure, even if a primitive one.

More significantly, the move to subsidiary organ status may entail a relative independence from the principal organ in terms of legal personality and budgetary control. Resolution 3019 by which the Assembly transformed the UNFPA, asked the new entity’s Governing Council to concern itself with its annual budget, as well as set up appropriate

---

148. U.N. Charter, art. 22.

149. *See generally About us*, UNITED NATIONS POPULATION FUND (last updated Jan. 2018), [unfpa.org/about-us](http://unfpa.org/about-us).

150. G.A. Res. 3019(XXVII) (Dec. 18, 1972).

151. *Id.* pmb. ¶ 5.

152. *Id.* at pmb. ¶ 3.

153. G.A. Res. 3351(XXIX) (Dec. 18, 1974) (deciding that General Assembly subsidiary bodies should not under ordinary circumstances set up other bodies that require additional resources without the Assembly’s approval).

154. 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 224 (B. Simma ed., Oxford Univ. Press 2002). This is subject of course to the *delegatus non potest delegare* maxim. What this means is that subsidiary organs would not be able to delegate their powers to a further subsidiary entity, but only their functions.

administrative and financial regulations and policies.<sup>155</sup> At this juncture, it is wise to distinguish two types of subsidiary organs in respect of their budgetary dependence. On the one hand, there are those that are mandated to carry out a particular task without said task containing a fund raising or disbursement objective. This is particularly true of SC-appointed sanctions committees<sup>156</sup> as well as organs such as the Counter-Terrorism Committee.<sup>157</sup> On the other hand, principal organs establish subsidiary entities with the sole purpose of raising money in order to finance a particular type of operation. Trust funds fall squarely within the second category.<sup>158</sup> Whereas it would prove catastrophic to sever part, or all, of the budgetary links between the first type of subsidiary organs from their principal counterparts, the particular mandate of the second type creates no such problems. More importantly, it resolves the concerns raised by Assembly Resolution 3351 on the limitation of new subsidiary entities because trust funds would by their nature not require additional resources.<sup>159</sup> Nothing in the resolution establishing the UNFPA suggests that its budgetary decisions require the prior approval of the Assembly and coupled with its broad implied powers (“ . . . organise itself in such a way that it can exercise effectively [its] functions . . . ”) and “separate identity”, it must be presumed that the Assembly intended no budgetary dependence between itself and UNFPA.<sup>160</sup> This lack of dependence works both ways and hence the Fund may utilise its assets for purposes falling broadly within its mandate, even if its creator is not in full agreement. This wording, as well as that contained in Assembly Resolution 57(I) establishing UNICEF, is wider in terms of legal personality than that normally afforded to subsidiary organs or agencies of the United Nations.<sup>161</sup> All UN entities are endowed in their external relations with the personality of the organisation itself, the applicability of Articles 104 and 105 of the UN Charter, as well as the benefits of the Convention on the Privileges and Immunities of the UN. Thereafter, the extent to which a subsidiary organ may contract and enter into treaty relations with other States or IOs is a matter for the principal organ to regulate through the founding or subsequent resolutions. The authority to “take any other legal action necessary” for the performance of its objectives necessarily grants the subsidiary organ an enhanced legal

---

155. G.A. Res. 3019(XXVII) (Dec. 18, 1972).

156. *See, e.g.*, S.C. Res. 1267 (Oct. 15, 1999), as lastly modified by S.C. Res. 1735 (Dec. 22, 2006); S.C. Res. 1533 (Mar. 12, 2004).

157. S.C. Res. 1373 (Sept. 28, 2001).

158. The UN Secretary-General’s Bulletin on the Establishment and Management of Trust Funds states that the Organisation recognises two types of trust funds: general and technical cooperation trust funds. U.N. Doc. ST/SGB/188, at ¶ 4 (Mar. 1982). Specialised agencies within the UN system are free, however, to recognise further sub-specialisations of trust funds in accordance with their mandates and institutional law. Thus, UNEP, in addition to general and technical cooperation funds, distinguishes between the following categories of trust funds: a) those that provide direct support for implementation of the UNEP program of work; b) those that provide support for UNEP-administered conventions, protocols and regional seas programs, and; c) those belonging to a special category of trust funds supporting activities supported by UNEP. This latter category includes, among others, the Trust Fund serving the Montreal Protocol on Substances that Deplete the Ozone Layers and all trust funds funded by the GEF for which UNEP is an implementing agency. *See* REPORT OF UNEP EXECUTIVE DIRECTOR ON ENVIRONMENT FUND BUDGETS: PROPOSED BIENNIAL PROGRAMME AND SUPPORT BUDGET FOR 2008–09, UNEP Doc GC/24/9/Add.2, at 7 (Dec. 1, 2006).

159. G.A. Res. 3351(XXIX) (Dec. 18, 1974).

160. G.A. Res. 3019(XXVII), at pmb1. ¶ 3 (Dec. 18, 1972).

161. G.A. Res. 57(I) (Dec. 11, 1946).

personality and autonomy in its decision making capacity from that of its creator.<sup>162</sup>

Other entities, despite their significant role and mandate have not been transformed by the Council and the Assembly into subsidiary organs. The reasons for this policy choice lie in our aforementioned analysis in this section. For example, the SG's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice<sup>163</sup> is rather small for the Assembly to concern itself for any upgrade. This lack of upgrade is also a natural consequence of the limited scale of operations of trust funds that already exist as subsidiary organs. In their case a possible upgrade would enhance their position in the UN system and provide them with broader powers. The UN Trust Fund for Chile was set up by the General Assembly at the height of the country's dictatorial nightmares and in order to assist victims and their families.<sup>164</sup> Despite the subsequent consolidation of its activities to cover the theme of torture generally and with a global focus in 1981,<sup>165</sup> the new Voluntary Fund for Victims of Torture did not receive any additional powers. The same is equally true for the United Nations Trust Fund on Contemporary Forms of Slavery.<sup>166</sup> As a result, the financial or other successes of such trust funds largely depends on the ingenuity and clout of their executive board members in pushing their agendas within the UN system and thus making their voices heard, as well as using their clout to solicit financial contributions.

### *C. Trust Funds as Informal Conferences without Any Legal Personality*

The governance models employed by various trust funds demonstrate the complexity in structure that some of them eventually assume. Yet, none of these complex structures are organised around a legal person, whether domestic or international in nature. Instead their creators seem content to give them a loose legal character, deeming it sufficient that their assets are held in trust by the trustee and under the latter's privileges and immunities. In fact, their legal existence does not appear to be any more superior to that of trust accounts, since the World Bank's practice in respect of such funds is to incorporate them as trust accounts. The trend seems to have begun with the GET/GEF,<sup>167</sup> but as a matter of consistent and justifiable practice it has blossomed in respect of trust funds established in the aftermath of a large natural disaster or other emergency situations in which significant funds were urgently required to address said urgency. The accumulation of significant funds to cope with urgent situations such as the Indonesian

---

162. *Id.*

163. U.N. GAOR, 47th Sess., at 7–11, U.N. Doc. A/44/PV.43 (Nov. 1, 1989); see REPORT OF THE I.C.J. ON THE SECRETARY-GENERAL'S TRUST FUND, U.N. Doc. A/47/444 (Oct. 7, 1992), Annex, Terms of Reference of the I.C.J. Trust Fund.

164. G.A. Res. 33/174 (Dec. 20, 1978).

165. G.A. Res. 36/151 (Dec. 16, 1981).

166. G.A. Res. 46/122 (Dec. 17, 1991).

167. A typical example of an intergovernmental trust fund whose relationship with its donors is contractual in nature, such that it encompasses the virtues of a treaty, is the Instrument for the Establishment of the Restructured Global Environmental Facility (GEF). The Restructured GEF Instrument is reproduced in (1994) 33 I.L.M. 1273, as subsequently amended in 2008 and later in 2011. See Jacob Werksman, *Consolidating Governance of the Global Commons: Insights from the GEF*, 6 Y.B. INT'L ENV'T L. 27 (1995); Peter Sand, *Trusts for the Earth: New International Financial Mechanisms for Sustainable Development*, in SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 167 (W. Lang ed., Springer 1995).

tsunami, the reconstruction of post-2003 Iraq, or the reconstruction of South Sudan and its process of self-determination, require instantly available and executable pledges without the formalities of setting up an organisation or entering into a multilateral treaty. Nonetheless, no State or private donor would be willing to slice a considerable part of their national budget for the sake of a humanitarian operation without a responsible and accountable governance structure that will oversee and decide on matters relating to spending and disbursement and provide detailed reports to the donors. The outcome of these tailor-made demands have culminated in the development of emergency trust funds, which although do not involve the existence of a legal person or the adoption of multilateral treaties (but instead are premised around distinct donor agreements with the trustee) they are governed by a complex structure that resembles that of large international organisations.

Typical examples of such emergency funds that lack a formalised legal personality are the International Reconstruction Fund Facility for Iraq (“IRFFI”),<sup>168</sup> the Multi Donor Trust Fund for Sudan (“MDTF-SS”)<sup>169</sup> and the Multi Donor Trust Funds for Aceh and North Sumatra. Equally, while the GEF was predicated around a multilateral agreement, it does not possess legal personality, despite its very extensive governance structure, which is often times confusing even for the organs and entities encompassing it.<sup>170</sup> All these loose conference-type associations of contributors substitute their lack of legal personality that would otherwise preclude them from entering into legally binding relationships with third entities, by a) relying on the legal personality of their trustee or implementing agents, or; b) as in the case of the GEF, by relying on the multilateral institutions that are funded by the GEF’s accumulated assets. In this sense, the legal person of the trustee enters into agreements with the donors,<sup>171</sup> the beneficiaries<sup>172</sup> and the various agents that implement parts of the projects or serve as procurers. Although the assets of the trust fund are naturally subsumed within the legal person of the trustee and, as a result, enjoy his privileges and immunities, the contributors, both States and private entities, are liable with respect to debts or unlawful acts caused as a result of their management of the trust fund, to the extent that the debt or unlawful act can be attributed to them, whether by intention or through negligence. As regards private donors, their liability would be subject to the laws of the State where the unlawful act materialised, whereas with respect to States, their liability

---

168. The International Reconstruction Fund Facility for Iraq (IRFFI) was launched by the international community in 2004 and is composed of two distinct-purpose funds; the World Bank Iraq Trust Fund and the UN Development Group (UNDG TFI) Iraq Trust Fund. Both trust funds are administratively subsumed within IRFFI, which itself as a singular entity is governed by a Donor Committee, a Facility Coordination Committee, in addition to the two trustees of the respective funds. International Reconstruction Fund Facility for Iraq Terms of Reference, para. 8 (Oct. 29, 2007).

169. Sudan Multi-Donor Trust Funds, Operations Manual (Nov. 2006, draft version 3).

170. *See* Global Env’tl. Fund [GEF], GEF Doc., GEF/C.21/Inf.5 (Apr. 16, 2003) (clarifying the Roles and Responsibilities of the GEF Entities).

171. U.K. Int’l Bank for Reconstruction and Dev./Int’l Dev. Ass’n [UK-IBDR/IDA] Agreement for the Asia-Europe Meeting Trust Fund 2 (T.F. 027914) (Mar. 14, 2001); China Int’l Bank for Reconstruction and Dev./Int’l Dev. Ass’n [China-IBRD/IDA] Agreement for the Asia-Europe Meeting Trust Fund 2 (T.F. 027914) (Aug. 23, 2002).

172. Int’l Dev. Ass’n-Gov’t of S. Sudan [IDA-GoSS], Support to Agriculture and Forestry Development Project, Grant No. T.F. 091282 (Dec. 18, 2007); Int’l Dev. Ass’n-Gov’t of S. Sudan [IDA-GoSS], Southern Sudan Rapid Impact Emergency Project, Grant No. T.F. 055976 (Nov. 24, 2005).

would be assessed by reference to the law of State responsibility.<sup>173</sup> Certainly, the contributing nations could have opted to formalise their informal conference association subsequent to the setting up of their respective trusts, in order to avoid personal, as opposed to corporate, liability and perhaps with a view to enhancing their power status within the trust fund. In practice, however, this solution has never even been considered and one can only speculate as to the possible reasons. For one thing, convening a diplomatic conference and later setting up a formal organisation is not cost efficient, when all this may just as well be avoided. Secondly, these trusts are only set up to address urgent situations that are no doubt temporary in duration, for which the establishment of a formal organisation would be too time consuming, let alone, cost consuming in relation to its purpose. Finally, it is evident that the contributing States exercise, or can exercise if they so choose, a high degree of decision-making powers. Moreover, they confer upon the trustee many of those functions that would be too burdensome for themselves to carry out, or which are duplicative and expensive to set up ad hoc, but for which the trustee possesses the requisite amount of expertise.<sup>174</sup> In all other respects, given their nature as trust accounts, the analysis in the following section is applicable to multi donor trust funds that lack any legal personality. Unlike trust accounts, funds operating under informal conferences necessarily entail the active participation of contributors at all stages of the fund's operations. Trust accounts, on the other hand, generally presuppose that the contributors have little interest in being actively engaged in the workings of the fund, subject to exceptions obviously.

#### VI. THE LEGAL PERSONALITY OF TRUST FUND ACCOUNTS

We have so far seen that as a general rule States do not wish to proliferate institutions with distinct international legal personality, unless this is absolutely necessary for the purposes they have set out. Nonetheless, whereas not all trust funds enjoy the same personality as that of a fully-fledged IO, many are in fact able to exercise a range of functions that encompass a certain, even if limited, degree of international legal personality.<sup>175</sup> We have already alluded to the likelihood of setting up trust funds as mere bank accounts, administered wholly by their trustees. In terms of personality, one should distinguish on the one hand the account and the funds contained within it from the trust fund itself, for which the account exists. In theory the two are different, but in practice they are not, because there is no intention of granting the trust fund entity any legal personality whatsoever. The World Bank, for example, does not differentiate between the two and commingles trust fund assets maintained by it, even where the trust fund in question is managed by a distinct management committee, which is composed of donor

---

173. Bantekas, *supra* note 2, at 234.

174. Informal associations of States that yield significant powers are not a new phenomenon. The CSCE/OSCE does not possess international legal personality, yet it has undertaken most of the EC and NATO's post-conflict operations in Europe and the Caucasus. See Miriam Sapiro, *Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation*, 89 AM. J. INT'L L. 631 (1995). In fact, the Conference on Security and Co-operation in Europe, *Budapest Summit Declaration and the Decision on the Strengthening the CSCE*, ¶ 29, 34 I.L.M. 767, 775–76 (Dec. 6, 1994), made it clear that the change in name did not alter the legal status of this entity.

175. Bantekas, *supra* note 2, at 260.

States.<sup>176</sup> In all such cases, all transactions with third parties, whether of a private or public (international) character are conducted through the legal personality of the trustee and not that of the fund<sup>177</sup>—which in fact may possess a very elaborate structure within the organisation of the trustee. The same is true in respect of trust fund accounts administered by the United Nations. Given that these are established as bank accounts, in accordance with Rule 104.4(a) of the UN’s Financial Regulations and Rules, all “[b]ank accounts shall be designated ‘official accounts of the United Nations’ and the relevant authority shall be notified that those accounts are exempt from taxation.”<sup>178</sup>

Our aforementioned analysis only paints half of the picture. Indeed, where it is clear from the intention of the donors or the trustee, where the latter alone sets up a trust fund, that the fund is to operate solely through an account, then the trust fund possesses no legal personality. Nonetheless, even in such cases, the account persists as an entity despite its lack of personality. Its status may be sought in three particular fields: a) in the institutional law of the trustee, in whose name it is subsumed, given that it will be subject to its operational policies and procedures; b) the treaty relations between the donors that established it, where a treaty was in fact involved, and; c) in the overall trust relationship between donors, trustee and beneficiaries, for whom the trust fund account represents a legal entity, despite the fact that as regards third parties the account is not distinguishable from the legal person of the trustee, whether the World Bank, UN, or other.<sup>179</sup> This conferral of a very limited legal personality for merely practical purposes was usually implicit in the past, but is increasingly written into contemporary trust instruments.<sup>180</sup>

Where a principal organ of the UN sets up a trust fund in the form of a subsidiary organ under the leadership of a distinct body, such as the Trust Fund for Victims of Torture,<sup>181</sup> the account and the trust are distinct in terms of personality from their administrator. This is not clear in the body of resolution 36/151, albeit paragraph 1(c) of said resolution designates the UN Secretary-General as administrator of the Fund, which itself is subject to the UN’s Financial Regulations.<sup>182</sup> There are numerous provisions in the UN’s Financial Regulations that stipulate, mostly indirectly, that emphasize this

---

176. UK-IBRD Administration Agreement concerning the Multi-Donor Trust Fund Agreement for the Extractive Industries Transparency Initiative (T.F. 053509, Aug. 19, 2004) (available at: <https://www.worldbank.org/en/programs/eitimdtf>).

177. Instrument to Establish the Multilateral Debt Relief Initiative-I Trust, §, ¶ 3(a), Nov. 23, 2005, IBRD Decision 13588-(05/99) MDRI, sec. 1, par. (3)(a) of which states that “[t]he operations and transactions of the Trust shall be conducted through an account.” In accordance with sec. IV, par. (1)(c)(i), the establishment of accounts is to be made in the name of the IMF, which thereafter shall assume the form of accounts of the IMF. *Id.* at §4(1)(c)(i).

178. U.N. Secretary-General, Financial Regulations and Rules of the United Nations, U.N. Doc. ST/SGB/2003/7 (May 9, 2003).

179. G.A. Res. 36/151, United Nations Voluntary Fund for Victims of Torture (Dec. 16, 1981).

180. Paragraph eleven of the 2008 Decision of the COP to the 1997 Kyoto Protocol confers upon the Adaptation Fund Board “such legal capacity as [is] necessary for the discharge of its functions with regard to direct access by eligible Parties and implementing and executing entities . . . in particular legal capacity to enter into contractual agreements and to receive project, activity and programme proposals directly and to process them . . . as appropriate . . .” Conference of the Parties, *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its fourth session*, ¶ 11, U.N. Doc. FCCC/KP/CMP/2008/11/Add.2 (Mar. 19, 2009).

181. G.A. Res. 36/151, United Nations Voluntary Fund for Victims of Torture (Dec. 16, 1981).

182. *See id.*

distinction. For example, Regulation 4.18 stipulates that the income derived from investment of fund assets shall be credited to the fund in question, whereas Regulation 4.19 states that investments derived from the Working Capital of the UN shall be credited as miscellaneous income.<sup>183</sup> Whereas the UN undertakes all transactions pertaining to the account under its own name, the trust fund as an entity enjoys separate personality as stipulated in its mandate.<sup>184</sup> For obvious practical purposes, the members of the governing bodies of such trusts will not engage in private or public transactions, but instead undertake political functions on behalf of the trust they represent. In all other cases, the intention to implement such a distinction should be clearly read in the respective instrument. The 2005 Agreement for the Administration of the Multilateral Investment Fund (MIF) II is silent on any legal personality of the Fund and Article III(2) obliges the Inter-American Development Bank (IDB) to set up accounts and administer them.<sup>185</sup> Article VII of the Agreement, however, provides that “in the contracts it signs in administering the resources of the Fund and carrying out its operations, and in all other Fund-related documents, the Bank shall indicate clearly that it is acting as the Administrator of the Fund”.<sup>186</sup> In this provision there must be read an intention to endow the MIF with some degree of international legal personality on account of two reasons: a) because the MIF was established on the basis of a multilateral treaty, the 2005 Agreement establishing the MIF II, Article II of which requires member States to submit instruments of acceptance and contribution; b) moreover, the Fund is governed by a Donors’ Committee, which is responsible for “the final approval of all proposals for operations of the Fund”.<sup>187</sup> It is thus evident that trust accounts are not always devoid of legal personality, but one should examine their mandate and legal basis and seek to ascertain the establishment of a governing body that is distinct from the trustee. Moreover, one must also examine particular provisions in the enabling instrument that pertain to the distinctiveness of the trust from the personality of the trustee.

#### *A. The Contractual Powers of Trust Funds*

This section aims to assess the competence of trust funds to conclude agreements in their own name with third parties and assume responsibility thereof, whether in the form of a treaty, a contract governed by the law of a particular country, or by means of non-binding accords. It is taken for granted that trust fund accounts lacking any legal personality whatsoever are incapable of entering into agreements solely in their own name. In such cases the trustee will contract on behalf of the trust account and the trust account will appear on the contract, but only so that it is known to the contracting parties that

---

183. U. N. Secretary-General, Financial Regulations and Rules of the United Nations, U.N. Doc. ST/SGB/2003/7 (May 9, 2003).

184. Indirectly confirmed by reference to Reg 4.18 of the UN Financial Rules and Regulations.

185. Agreement Establishing the Multilateral Investment Fund II, art. III(2), Apr. 9, 2005, Inter-American Dev. Bank.

186. *Id.* at art. IV(1).

187. *Id.* at art. IV(2). This result is confirmed by the Letters of Agreement entered into between the IDB and the MIF’s beneficiaries, in which the IDB clearly stipulates that it is only acting as administrator of the Fund. See IDB, Jamaica Agri-Stakeholders Association Ltd Letter of Agreement, IDB Doc. LEGIII/JA-673923-06 (July 3, 2006); IDB, Jamaica Hotel and Tourist Association Letter of Agreement, IDB Doc. LEGIII/JA-850321-06 (Feb. 13, 2007).

potential liability burdens the assets of the trust account only and not the assets of the trustee or of other entities.<sup>188</sup>

On the other side of the spectrum, trust funds organised as intergovernmental organisations will be deemed competent to enter into all of the aforementioned agreements, unless their constitutive instruments prohibit them from so doing.<sup>189</sup> If said instrument is silent, it will be in the remit of the trust fund's implied powers to conclude treaties and other agreements in the pursuit of its objectives.

The competence, whether explicit or implicit, to enter into agreements is a very strong determinant of an entity's legal personality. We have already observed the complex web of relationships belying the GEF, but this author does not agree with the contention that the GEF does not possess any legal personality. The 1994 Instrument for the Restructured Global Environmental Facility has, as has already been explained, the attributes of a treaty.<sup>190</sup> Moreover, unlike its predecessor, it is not grounded in the World Bank and is composed of an organisational structure that resembles a typical IO, albeit it is clear from the intentions of the parties that it is not of this nature.<sup>191</sup> Nonetheless, in their sixth meeting in 1994 the parties establishing the GEF agreed that it should possess "such legal capacity as is necessary for the exercise of its functions and the protection of its interests, in particular the capacity to enter into contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings in defence of its interests."<sup>192</sup>

Moreover, the GEF was endowed with such privileges and immunities as are necessary for the discharge of its functions under Decision VI/16.<sup>193</sup> There is clear evidence, therefore, that this entity possesses a wide degree of international legal personality, but it is not obvious from the text of the Decision whether, apart from private contracts, it may also enter into treaties with States and IOs. The simple answer to this question would be negative because of the GEF's lack of governmental or intergovernmental status. This, however, does not deprive it from the possibility of concluding agreements with said entities that are governed by international law. An examination of the contractual practices of the GEF, as far as this is possible, reveals that the GEF relies on its trustee, its implementing agents, as well as its executing agents for the conclusion of agreements with States and private entities;<sup>194</sup> the former would have the status of treaties, whereas the latter would not. Where an international development bank is responsible as trustee for the conclusion of loan and guarantee agreements on

---

188. Bantekas, *supra* note 2, at 261.

189. *Id.* at 238.

190. See Werksman, *supra* note 167, at 58.

191. *Id.* at 56–57.

192. U.N. Environment Programme, *Report of the Sixth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Dec. VI/16, U.N. Doc. UNEP/OzL.Pro.6/7 (Oct. 10, 1994).

193. *Id.*

194. Int'l Bank for Reconstruction & Dev. [IBRD], *Global Environment Facility Trust Fund Grant Agreement Implementation of the Strategic Action Plan for the Red Sea and Gulf of Aden*, Grant No. T.F. 021707 (Mar. 21, 1999); Asian Development Bank, *Financing Agreement (Land Improvement Project)*, Loan No. 2245/2246(SF)-UZB (Aug. 21, 2008) (in which the ADB acts as executing agent of the GEF in respect of a grant awarded to Uzbekistan) (available at <http://www.adb.org/Documents/Legal-Agreements/UZB/37536/37536-UZB-FA1.pdf>).

behalf of the trust fund, it is the institutional law and practice of that bank which is pertinent in assessing the formalities of contract and applicable law.<sup>195</sup> The IBRD and IDA themselves subject their loan and credit arrangements with State entities<sup>196</sup> to public international law,<sup>197</sup> subject to very minor and specific exceptions in respect of necessarily local matters such as the creation of sureties. On the other hand, the European Investment Bank (EIB) subjects its arrangements with States to a given national law.<sup>198</sup> The contractual practice of the GEF suggests further, as is reasonable, that it is not only the grant agreements that are entered into by the trustee and other implementing agents, but also all project agreements.<sup>199</sup> This is obviously done as a result of cost-effectiveness considerations.

Where the entire gamut of the contractual transactions of a trust fund are performed by its trustee, the applicable law and terms of said contracts are most commonly predicated on the trustee's institutional requirements and internal by-laws.<sup>200</sup> The United Nations, for example, in its contractual relations with private entities (e.g. contractors) appends thereto as an integral part its General Conditions of Contract, with particular variations in respect of contracts for construction,<sup>201</sup> the provision of goods,<sup>202</sup> consultancies and others. This instrument is rather favourable for the UN. The applicable law in respect of individual contracts is a matter for negotiation between the parties and as a result it is not stipulated in the General Conditions, which do, however, oblige the parties to settle their disputes through an arbitral mechanism, should other amicable means fail.<sup>203</sup> The practice of the IBRD is somewhat different and section 1.02 of the revised 2017 General Conditions for Loans stresses that “[i]f any provision of any Legal Agreement is inconsistent with a

---

195. Bantekas, *supra* note 2, at 238.

196. The IBRD typically enters into loan and guarantee agreements with borrowing States, upon which these States assume full responsibility for carrying out the project in respect of which the funds were borrowed. Where the direct borrower is a private entity the Bank will enter into a Guarantee Agreement with the government of the relevant member State.

197. IBRD, *General Conditions Applicable to Loan and Guarantee Agreements*, § 10.01 (Jan. 1, 1985), <https://ppfdocuments.azureedge.net/3973.pdf> (in accordance with which the Agreement expressly prevails over any domestic law to the contrary); IBRD, *General Conditions for Loans*, § 8.01 (July 1, 2005, as amended through Oct. 16, 2006), <https://ppfdocuments.azureedge.net/3954.pdf>; Int'l Dev. Ass'n [IDA], *General Conditions Applicable to Development Credit Arrangements*, § 10.01 (Jan. 1, 1985, as amended Dec. 2, 1997), <https://ppfdocuments.azureedge.net/3978.pdf>. These General Conditions, much like those of the UN, constitute integral components of subsequent agreements with recipient States and are implicitly binding on the parties. See Development Credit Agreement (Management of the Petroleum Economy Project), IDA-Chad, Mar. 20, 2000, Credit No. 3316 CD. The same is true of section 7.01 of the Bank's Loan Regulations (1956), which expressly exclude the application of all or any municipal law in contracts between the Bank and a borrower. IBRD, *Loan Regulations*, § 7.01 (June 15, 1956).

198. Hugo J. Hahn, *Agreements for the Provision of Credit and Financial Guarantees by States under Public International Law*, in CREDIT AND GUARANTEE FINANCING TRANSFER OF TECHNOLOGY 6 (C.C.A. Voskuil, Z. Parać, J.A. Wade eds., Martinus Nijhof 1987).

199. IBRD, *Project Agreement (Klaipeda Geothermal Demonstration Project)*, Grant No. T.F.028313 (June 28, 1996).

200. Bantekas, *supra* note 2, at 238.

201. U.N. DEV. PROGRAMME, *Special Conditions for Construction Works*, <http://www.ci.undp.org/ptd/pdf/specon.pdf> (last visited Jan. 21, 2021).

202. See U.N. Procurement Division, *Contracts for the Provision of Goods* (Apr. 2012) (available at [https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/general\\_condition\\_goods.pdf](https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/general_condition_goods.pdf)).

203. *Id.* at § 16.2.

provision of these General Conditions, the provisions of the Legal Agreement shall govern.”<sup>204</sup> This affirms that in the IBRD’s legal relationships with third parties there are situations whereby its institutional law is by no means imperative, whereas with respect to others, the Bank’s institutional law is a *sine qua non* of the transaction. The latter is true, at least, with regard to the Bank’s consent in setting up and administering trust funds.

The UN Legal Counsel has made it clear that the organisation can incur liabilities of a private nature, particularly where they arise from transactions arising from contracts, purchase orders, leases and other agreements.<sup>205</sup> Equally, therefore, the choice of forum and *lex arbitri* is a matter to be settled by agreement between the parties. The governing law of private contracts entered into between IOs and private entities is usually designated by reference to the law of the seat of the IO, particularly where the private party’s operations lie therein.<sup>206</sup> Conversely, where the performance of the contract is to be undertaken in a territory other than the seat of the organisation, especially where these are of a small scale not involving significant resources, said contracts will be governed by the national law of the country where the service is provided.<sup>207</sup> Loan agreements with private entities entered into by the IBRD and the IMF are governed either by the law of the place of the loan or by the law on whose territory the private contracting banks are incorporated, or by the law of the State of New York.<sup>208</sup> One should also exercise caution when ascribing to a particular transaction the characterization of contract, in the sense of an agreement encompassing both consideration and acceptance, as is the case with the IMF’s stand-by-arrangements, which are not considered in any way as entailing a contractual relationship.<sup>209</sup> Amerasinghe is of the view that agreements between international

204. Revised IBRD and IDA General Conditions (2017) (available at: <http://documents1.worldbank.org/curated/en/577851500256855740/pdf/GCs-Board-paper-June-22-Final-with-Annexes-06232017.pdf>).

205. Office of Legal Affairs, *Payment of Settlement Claims—Liabilities of a Private Law Nature—Procedures for Settlement—Budget Considerations*, 2001 U.N. Jurid. Y.B. 381, 384–85.

206. C. WILFRED JENKS, *THE PROPER LAW OF INTERNATIONAL ORGANISATIONS* 171 (1962).

207. Bantekas, *supra* note 2, at 239.

208. IMF, *Policy on Enlarged Access: Borrowing Agreement with the Saudi Arabian Monetary Agency*, art. 11(a), IMF Decision 6843 (81/75) (May 6, 1981) (cited in PHILLIPE SANDS & PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* 462 (5th ed. 2001)). In such cases the World Bank Group may well trigger its privilege of immunity from suit by invoking it before the court. However, great reluctance is applied in invoking immunity. By way of example, an action against the IMF for failure to pay the amount due under any note or coupon may be brought before the federal courts of New York, England or Geneva. The IMF agreed in that case to waive its immunity from suit and execution. *See also* GOLD, *supra* note 124, at 69.

209. Under Art XXX(b) of the IMF Articles of Agreement, a stand-by-arrangement is defined as “a decision of the Fund by which a member is assured that it will be able to make purchases from the General Resources Account in accordance with the terms of the decision during a specified period and up to a specified amount.” Articles of Agreement of the IMF, Art. XXX, § b, July 22, 1944, amended Jan. 26, 2016. It is clear that Art. XXX(b) only refers to the Fund’s decision and not the letter of intent that is required of the petitioning State in which it sets forth the objectives and policies that will make up the financial program for which assistance is sought. To clarify that stand-by-agreements are not in fact contracts, the IMF adopted two distinct decisions. Decision No. 2603-(68/132), Sept. 20, 1968, *reprinted in* SELECTED DECISIONS OF THE INTERNATIONAL MONETARY FUND (7th. issue, 1975); Decision No. 6056-(79/38), Mar. 2, 1979, *reprinted in* SELECTED DECISIONS OF THE INTERNATIONAL MONETARY FUND (10th. issue, 1983). Paragraph 7 of the 1968 Decision stated that “in view of the character of stand-by-arrangements, language having a contractual flavour will be avoided in stand-by-documents.” *See generally* Joseph Gold, *The Legal Character of the Fund’s Stand-by-Arrangements and Why it Matters*, in INTERNATIONAL MONETARY FUND PAMPHLET SERIES NO. 35 (1980). In the wake of the 2008 global financial crisis the IMF adopted numerous decisions regarding stand-by-agreements with member States.

financial institutions, such as the IBRD, EBRD, ADB and others, with private parties that are predicated on another loan or guarantee agreement with the private parties' respective States should be seen as governed by international law.<sup>210</sup> He rests his hypothesis on the international law provisions in the loan agreements "or by implication resulting from association".<sup>211</sup> Although the relevant sections of the Bank's Loan Regulations and General Conditions of Loans clearly exclude the applicability of municipal law, this is only true where the municipal law does not serve to negate the provisions in the loan agreement. Thus, the parties may validly agree that particular parts of the contract be subjected to a given domestic law, under condition that it does not in any way negate any of the rights or obligations stipulated in the loan agreement.

As a result of the aforementioned analysis it is no accident that trust funds, whether they possess legal personality or not, usually interact with other international actors, both public and private, through memoranda of understanding ("MoU").<sup>212</sup> Elsewhere we examined the potential binding character of some MoU on account of the obligations they raised and the language used thereto.<sup>213</sup> These cases, however, represent the exception and since the trustees or executing agents of trust funds usually conclude all the practical agreements necessary for their operations, trust funds employ MoU for purposes that are more political than legal.<sup>214</sup> Thus, they are used to promote cooperation between themselves and the private sector, as well as between other international organisations and States. This is particularly useful in respect of trust funds whose constitutive instrument relies on the active participation of the private sector and the formation of public-private partnerships, such as the Global Fund.

#### *B. The Performance of Quasi-Judicial Functions by Trust Funds*

There is no legal impediment as to why trust funds cannot exercise a judicial function, partially or wholly, as long as this is clearly mandated in their respective constitutive instruments. So far, we have examined small trust funds established to serve international judicial institutions, but in this section we shall focus on the judicial nature of those trusts endowed with some legal personality and which are empowered to assess complaints and appeals lodged by contracting entities, or interested third parties, as well as provide judicial pronouncements on matters falling within their jurisdiction. The Global Fund, for example, operates an internal appeals mechanism ("IAM") and has promulgated a set of Rules to govern these appeals proceedings.<sup>215</sup> The mechanism is designed to hear appeals from persons representing rejected proposals with a view to reconsideration.

210. AMERASINGHE, *supra* note 96, at 388–89. The EBRD does not distinguish between States and non-State entities in its contractual arrangements with borrowers and as a result has no hesitation to institute a uniform and consistent application of public international law as the governing law of its contracts with all borrowers. John W. Head, *Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks*, 90 AM. J. INT'L L. 214, 230 (1996).

211. AMERASINGHE, *supra* note 96, at 388–89.

212. *See, e.g.*, Memorandum of Understanding between UNAIDS and the Global Fund for AIDS, TB and Malaria (Jan. 22, 2003), the purpose of which is to foster mutual collaboration.

213. *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 20 (2000).

214. Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT. ORG 495, 501.

215. *Rules Governing Internal Appeal Mechanism*, GLOB. FUND, <https://www.int/hdp/publications/13i.pdf?ua=1> (last visited Jan. 24, 2021).

Although the members of the IAM come from the Global Fund's participating organisations, they are to act independently.<sup>216</sup> Similarly, the Multi Donor Trust Fund for Aceh and Nias (Indonesian Tsunami) has established a mechanism for receiving complaints relating to corruption, fraud and misuse of recovery and reconstruction funds and has adopted guidelines for the purposes of its internal investigations.<sup>217</sup> These complaints may be received in confidence even from persons that have no contractual or other relationship with the trust fund. In the same manner, the CEO of the GEF set up an independent post of Conflict Resolution Commissioner, whose role is to work directly with member States and agencies to help resolve disputes and address complaints and other issues of importance to GEF operations.<sup>218</sup> The *locus standi*, therefore, in respect of these internal procedures is not necessarily of a *numerus clausus* nature.

On the other hand, the Compensation Fund for Iraq established by the UN Security Council does not exercise a judicial function.<sup>219</sup> Its existence serves to give effect to the awards of the Compensation Commission, which itself possesses judicial attributes. The author is not aware of other trust funds that exercise a sole judicial function and in practice, even if the Security Council were to set up a judicial institution it would most probably opt for a dual model; i.e., a trust fund in the form of an account and a distinct judicial institution. We have, nonetheless, identified the existence of a true judicial body emanating from within a trust fund agreement with the aim of identifying beneficiaries from the fund's assets. This concerns the Marshall Islands Claims Tribunal (otherwise Nuclear Claims Tribunal), founded under Article II(6)(c) of the US-Marshall Islands Agreement for the Implementation of Section 177 of their respective Compact of Free Association, which effectively set up the Marshall Islands Nuclear Claims Fund.<sup>220</sup> That the tribunal is a true and independent judicial organ is expressly stated in Article IV(1)(b) of the Implementation Agreement, its governing law being that of the Marshall Islands, including local traditional (customary) law, as well as relevant international law and in the absence of either, US law.<sup>221</sup> In reality, the Nuclear Claims Tribunal has no problem relying significantly on US statute and case law.<sup>222</sup> Its decisions have concerned both class actions<sup>223</sup> as well as individual injury compensation claims.

216. GLOB. FUND, *Rules Governing Internal Appeals Mechanism*, <https://www.who.int/hdp/publications/13i.pdf?ua=1> (last visited Jan. 31, 2021).

217. See generally *Indonesia: News flash multi donor fund*, RELIEFWEB (Apr. 6, 2006), <https://reliefweb.int/report/indonesia/indonesia-news-flash-multi-donor-fund>.

218. *Conflict Resolution Commissioner*, GEF, <https://www.thegef.org/conflict-resolution> (last visited Jan. 23, 2021).

219. S.C. Res. 692 (May 20, 1991).

220. Agreement for the Implementation of Section 177 of the Compact of Free Association, U.S.-Marsh. Is., art. II, § 6(c), June 25, 1983, KAV 4575. This is also true in respect of the Ilois Trust Fund set up by agreement between the UK and Mauritius in order to compensate natives of the Chagos Archipelago that were forcibly moved to Mauritius by the UK government. Accordingly, the Board of the Fund was vested with authority to identify and compensate beneficiaries.

221. Agreement for the Implementation of Section 177 of the Compact of Free Association, U.S.-Marsh. Is., art. IV, §§ 1(b), (3), June 25, 1983, KAV 4575.

222. For example, *In Re Matter of the People of Enewetak et al.*, NCT Judgment No. 23-0902 (Aug. 3, 2003), where the NCT makes extensive use of US case law, *inter alia*.

223. *Id.*; *In Re Matter of the People of Bikini, et al.*, NCT Judgment No. 23-04134 (Mar. 5, 2001); *In Re Matter of the People of Utrik, et al.*, NCT Judgment No. 23-06103 (Dec. 15, 2006); *In Re Matter of Alabs of Rongelap, et al.*, NCT Judgment No. 2302440 (Apr. 17, 2007).

An exceptional example of a trust fund set up to administer a judicial function is that set up on the basis of the 1976 Agreement for the Establishment of a European Laying-Up Fund for Inland Waterway Vessels.<sup>224</sup> The purpose of the Agreement was to prevent excess freight capacity accumulating in the inland waterways of the Rhine and Moselle basins by compensating carriers operating therein in return for the voluntary withdrawal of their vessels during certain periods.<sup>225</sup> This was to be achieved through the establishment of a Fund and the creation of a Fund Tribunal, which was empowered to give preliminary rulings at the request of the national courts of the Fund's EC member States and also of Switzerland (a party to the Fund Agreement) concerning the interpretation of the Agreement or the Fund's Statute.<sup>226</sup> The decisions of the Tribunal were to be deemed binding and directly applicable in all EC member States, in accordance with Article 39 of the Statute. The Court of Justice of the European Union (CJEU, earlier known as European Court of Justice ("ECJ")) found that although the Community was empowered to enter into agreements of this nature with Switzerland because they fell within the ambit of its common transport policy,<sup>227</sup> the EC member States to the Agreement had acted *ultra vires* in allotting such powers to themselves and to the Fund that were expressly reserved solely for the Community and its institutions. Equally, the exclusion of an EC member State, namely Ireland, rendered the Fund's structure and decision-making procedure incompatible with EC law.<sup>228</sup>

### C. Implied Powers of Trust Funds

There are instances of trust funds being set up on the basis of the implied powers inherent in the organ within the organisation that established them.<sup>229</sup> In this section we are interested in the implied powers of trust funds themselves. This concept is more commonly associated in the legal literature with the powers of international organisations, but we shall employ it in this context to interpret the residual competencies of trust funds. To begin, two considerations are significant: a) implied powers are those that are sought beyond the explicit wording of the constitutive instrument; b) said powers, if found to

---

224. *Opinion 1/76 of the Court of Justice*, CVCE 1, 4 (2012), [https://www.cvce.eu/content/publication/1999/1/1/647c7bb7-b64a-49b8-b328-b72dc4f11cf5/publishable\\_en.pdf](https://www.cvce.eu/content/publication/1999/1/1/647c7bb7-b64a-49b8-b328-b72dc4f11cf5/publishable_en.pdf).

225. *Id.*

226. *Id.* at 7.

227. *Opinion 1/76 on Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels* (Apr. 26, 1977), 99 ILR 269, 284–85.

228. *Id.* at 286–87.

229. See also N. D. White, *Accountability and Democracy within the United Nations: A Legal Perspective*, 13 INT'L REL. 1, 15 (1999), who argues that the concept of implied powers covers all those powers necessary to achieve the objectives of the organisation; D. SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY* 64 (1st ed. 1999). The Office of the UN Legal Counsel noted that Article 22 of the UN Charter certainly authorises the Assembly to establish subsidiary organs, presumably even in the aforementioned manner involving subsequent adoption by one principal organ to the detriment of another. Thus, the UN Legal Counsel concluded that "as a consequence of the adoption of General Assembly resolution 3019, the Fund ceased to be a trust fund of the Secretary-General and becomes a Fund under the authority of the General Assembly with an intergovernmental governing body, having its own financial regulations and rules . . . [and as a result] became a subsidiary organ of the Assembly similar to other Funds having intergovernmental supervisory bodies, such as UNICEF, the Capital Development Fund and the United Nations Special Fund". 1979 U.N. JURID. Y.B. 172 (1979), Sales No. E. 82.V.1.

exist, can only provide legal effects vis-à-vis those entities that are themselves bound by the trust's constitutive instrument.

Trust funds established by the UN Security Council must undoubtedly be viewed as being endowed with significant authority, particularly where they are entrusted with powers as opposed to functions. Council resolution 692, following the conclusion of the Iraq-Kuwait conflict, set up a Compensation Commission ("UNCC") and a Compensation Fund, which was to be replenished through the sale of Iraqi oil royalties.<sup>230</sup> Both entities came under the direction of a Governing Council, which was granted significant latitude, deciding that "the requirement for Iraqi contributions will apply in the manner prescribed by the Governing Council with respect to all Iraqi petroleum and petroleum products . . . [further requesting] that all States and international organisations cooperate with the decisions of the Governing Council . . ." <sup>231</sup>

From the wording of the resolution the Compensation Fund and the Commission are two distinct entities under a common leadership and although the aforementioned extract from the resolution refers to the mandate of the Commission, it also encompasses the Fund because the mandate is addressed to the Governing Council and not the Commission.<sup>232</sup> The Governing Council subsequently adopted a decision by which it imposed particular obligations on Iraqi proceeds and sale of petroleum, as well as the means of payment into the Fund and an escrow account and obliged neighbouring States to provide customs documentations as to the volume and value of Iraqi shipments. Similar requirements were addressed to private entities.<sup>233</sup> It also proceeded to ask the Security Council to immunise all Iraqi petroleum exports in transit from attachment and seizure, as well as immunize the Compensation Fund and the new escrow account.<sup>234</sup> These actions are not described *per se* in Resolution 692 but are clearly essential in the fulfilment of the Governing Council's mandate, as well as others relating to the functions of the Fund.<sup>235</sup>

Other trust funds established by Security Council resolution have been granted only a very small amount of powers and the wording of their respective resolutions renders very difficult a broad interpretation, if at all any, of implied powers.<sup>236</sup> Implied powers are also present in trust funds established by other UN principal organs, such as the Trust Fund for the financing of the UN Angola Verification Mission, adopted by resolution of the General Assembly.<sup>237</sup> Therein, the trustee was authorised to take all necessary action to ensure the efficiency and economy of the mission. Given the binding nature of the Assembly's resolutions regarding budgetary matters within the UN system, the exercise of implied

230. *Repertoire of the Practice of the Security Council*, UN 568, 671, [https://www.un.org/en/sc/repertoire/89-92/Chapter%208/MIDDLE%20EAST/item%2022\\_Iraq-Kuwait\\_.pdf](https://www.un.org/en/sc/repertoire/89-92/Chapter%208/MIDDLE%20EAST/item%2022_Iraq-Kuwait_.pdf) (last visited Jan. 24, 2021).

231. *Id.* at 662.

232. *Id.* at 668.

233. United Nations Climate Change Decision regarding Arrangements for Ensuring Payments to the Compensation Fund, at 2–3, U.N. Doc. S/AC.26/1991/6 (Oct. 23, 1991).

234. *Id.* at 3–4.

235. Particularly, United Nations Climate Change Decision on Guiding Principles regarding Priority of Payment and Payment Mechanism, U.N. Doc. S/AC.26/Dec.17 (Mar. 24, 1994); United Nations Climate Change Decision on Provisional Rules for Claims Procedures, U.N. Doc. S/AC.26/1992/10 (June 26 1992).

236. *See* S.C. Res. 1177 establishing the UN Trust Fund for the Delimitation and Demarcation of the Border between Eritrea and Ethiopia, at para. 8 (June 26, 1998).

237. G.A. Res. 43/231 (Feb. 16, 1989).

fiscal powers, as a result of the aforementioned mandate, is significant, even if limited in scope. Equally, international financial institutions administering trust funds or trust accounts may validly entrust to the internal managers of said trusts a range of implied powers. The IMF's Instrument for a Framework Administered Account for Technical Assistance Activities states in section 8 that "[s]ubject to approval, the [trust account's] managing director is authorised (i) to make all arrangements, including establishment of accounts in the name of the Fund, as he deems necessary to carry out the operations of the Framework Account; and (ii) to take all other measures he deems necessary to implement the provisions of this Instrument."<sup>238</sup> Given that participating States must approve the arrangements stipulated in the Instrument before being bound to contribute or apply for grants, the account possesses significant powers.

The instruments surveyed in this section may be interpreted as generating implied powers that produce legal effects vis-à-vis implicated States, IOs and private entities. Implied powers may, however, also encompass competences that do not produce legal effects, such as the freedom to solicit contributions from potential donors.

#### i. Enforcement Powers and Collective Action against the Fund

The following two sections will examine two distinct but inter-related mechanisms. The first concerns the ability of the trustee and of the trusts' executive organs to enforce compliance vis-à-vis defaulting parties, whereas the second discusses the existence of possible group action against the trust or the trustee in respect of their broader obligations to the stakeholders of the financed project. With regard to the first issue under consideration, it will become clear that adherence to the practice of intergovernmental organisations' enforcement powers against defaulting member States is highly problematic when applied to trust funds on the basis of the trusts' strictly voluntary nature; nonetheless, some convergence is increasingly visible. With respect to the World Bank's responsibility against its wider community of stakeholders we shall be focusing on the possibility of bringing a collective action against the World Bank as trustee before its Inspection Panel. The operation of trust funds has not so far implicated the jurisdiction of the Inspection Panel and it is hoped that this section will provide a theoretical insight as to its potential application.

#### ii. Enforcement Powers of the Trustee and the Trust's Executive Organ

It is fair to say that agreements between equal partners in both domestic and international law do not as a rule provide for particular rules of enforcement because this would require the appointment of an authority with a view to assessing infractions (this is hardly cost-effective); it would also entail from the outset a sense of mistrust between the parties. Thus, in their vast majority, the preferred method for resolving non-compliance with the terms of an agreement in international law is through the stipulation of a dispute settlement mechanism.<sup>239</sup> Given its standard insertion in all agreements it raises no friction

238. Decision No. 10942-(95/33) (Apr. 3, 1995, as amended in 2019) (available at: [https://www.imf.org/external/SelectedDecisions/Description.aspx?decision=10942-\(95/33\)](https://www.imf.org/external/SelectedDecisions/Description.aspx?decision=10942-(95/33))).

239. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm) (last visited Jan. 24, 2021).

between the parties and does not require the appointment of an overseeing entity. Certainly, international society knows of multiple treaty arrangements whereby an enforcement mechanism is established for non-compliant and recalcitrant States; a good example is the enforcement authority of the UN Security Council through the mandatory nature of its resolutions and its capacity to secure compliance.<sup>240</sup> While the Security Council may, in contrast to the usual enforcement powers of international organisations, adopt forceful measures against a State that has committed an act of aggression, the typical function of enforcement powers pertinent to international organisations includes expulsion of their members for failure to pay their arrears and other contractual obligations, although this is rare and is employed sparingly.<sup>241</sup> Moreover, States may be expelled, or stringent conditions imposed on them, where they are deemed to have persistently committed gross violations of human rights.<sup>242</sup> Equally, a member State may find itself precluded from exercising particular rights that would otherwise pertain by reason of membership.<sup>243</sup>

With respect to international trust funds, the status of participants as donors necessarily limits the need for an enforcement mechanism. The existence of such a mechanism may be viewed by prospective donors as not only a contractualisation of pledges (which they may find undesirable), which are not binding in nature,<sup>244</sup> but also as a compulsion to what is otherwise an act of purely voluntary expression. Even if the parties agreed to the incorporation of enforcement powers against a donor for failure to make his contribution—following a binding agreement with the trustee—these would serve no meaningful purpose since the worst possible outcome for the donor would be his exclusion from further contributions! The futility of enforcement action is further reinforced by the fact that donors to a trust are only liable up to the amount of their contribution.<sup>245</sup> Thus, in order for the exercise of enforcement powers to have any real effect, they must regulate asymmetrical legal relationships, or relationships between equal partners but in situations where the expulsion or exclusion of a partner is not without financial or other

---

240. *See generally id.*

241. *See generally* KONSTANTINOS MAGLIVERAS, EXCLUSION FROM PARTICIPATION IN INTERNATIONAL ORGANISATIONS: THE LAW AND PRACTICE BEHIND MEMBER STATES' EXPULSION AND SUSPENSION OF MEMBERSHIP (Springer 1999).

242. In 1999, for example, Burma (Myanmar) was expelled from the International Labour Organization for its sustained and pervasive use of forced labour. *See* International Labour Organization Governing Body Resolution on Measures, including action under Article 33 of the Constitution of the International Labour Organization, to secure compliance by the Government of Myanmar with the recommendations of the Commission of Inquiry established to examine the observance of the Forced Labour Convention, 1930 (No. 29), International Labour Office Doc. GB 276/6 (Nov. 1999).

243. Thus, the Third Amendment to the IMF Articles of Agreement provided for the suspension of voting and other related rights of members that did not live up to their obligations under the Agreement.

244. *See* Rep. of the S.C., at 4–5, U.N. Doc. A/57332 (2002); UN Secretary-General, Establishment and Management of Trust Funds, at ¶ 26, U.N. Doc. ST/SGB/188 (Mar. 1, 1982); The Instrument for the Restructured Global Environmental Facility (GEF) of March 2008, Annex C, 2(b), states that in cases of qualified instruments of commitment, the donor State “undertakes to exercise its best efforts to obtain legislative approval for the full amount of its contribution by the [agreed] payments date”; J. E. Archibald, *Pledges of Voluntary Contributions to the United Nations by Member States: Establishing and Enforcing Legal Obligations*, 36 GEO. WASH. INT'L L.R. 317, 317–18, 329 (2004). Archibald rightly comments that with regard to unpaid voluntary contributions, the UN does not invoke Art. 19 of the UN Charter. *Id.* at 325–26.

245. *See generally* Rebecca Lee, *The Evolution of the Modern International Trust: Developments and Challenges*, 103 IOWA L. REV. 2069 (2018).

consequences.<sup>246</sup> Hence, expulsion of members to a trust fund is possible even if it is not expressly stipulated by the terms of the trust agreement on the basis of general principles of international institutional law, although it is rare in practice and should not materialise as a means of last resort.<sup>247</sup> For an act of expulsion or restriction of the rights of the party to take effect, a fundamental and persistent violation of the terms of the agreement must have taken place and all calls for obeisance must have been ignored. The ensuing executive decision must be adopted by the fund's executive organ either by consensus or by a majority representing at least two-thirds of the parties thereto.

Very few trust instruments provide their executive bodies with enforcement powers against trust members. Exceptionally, Article 9(2)(a) of the Prototype Carbon Fund authorises the trustee to remove ineligible participants from the Fund, following approval of a two-thirds majority of the votes of the Fund.<sup>248</sup> In the absence of an enforcement mechanism in the trust agreement or its terms of reference, it is queried whether the adoption of enforcement measures may be justified by reference to the constitutional, or other, instruments of the trustee. In the case of the World Bank acting as trustee, save for the termination of the trust fund through a unilateral act (and only where stipulated in the trust agreement), the Bank cannot rely on its Articles of Agreement, and particularly Article VI(2), in order to suspend a donor to the trust fund.<sup>249</sup> This is clearly so because the Bank's Articles of Agreement refer to obligations and rights accruing between the parties thereto and are not susceptible to extra-contractual legal effects.<sup>250</sup> This is different from the requirement that the operations of trust funds must comply with the relevant operational policies of the Bank and its Articles of Agreement, which refers solely to compliance with respect to substantive rules.<sup>251</sup> The enforcement powers of the Bank are related to procedural norms, which the parties to a trust fund will certainly not accept. This author is of the view that the IMF's surveillance powers under Article IV(3)(b) of its Articles of Agreement are applicable to those trust funds created on the basis of the Fund's executive board decisions.<sup>252</sup> This conclusion is justified where the IMF's trust facilities pertain to the obligations of the borrowing States under Article IV(1) of its Articles of Agreement by which they adhere to sustain and implement conditions necessary for financial and economic stability and to assure orderly exchange arrangements and promote a stable system of exchange rates. Given that the principal objective of these trust funds is to tackle economic stability and growth through the elimination of poverty,

---

246. *Id.*

247. It certainly is a plausible measure of last resort in the context of trust funds organised as intergovernmental organisations, as is the case with Art. 31 of the Agreement Establishing the Common Fund for Commodities, which stipulates the possibility of membership suspension.

248. Sophie Smyth, *The Prototype Carbon Fund: A New Departure in International Trusts and Securities Law*, 5 SUSTAINABLE DEV. L. & POLY 28, 29 (2005).

249. *Article VI: Withdrawal and Suspension of Membership: Suspension of Operations*, WORLD BANK 1, 15 (June 27, 2012), <http://pubdocs.worldbank.org/en/722361541184234501/IBRDArticlesOfAgreement-English.pdf>.

250. *See generally International Bank for Reconstruction and Development: Articles of Agreement*, WORLD BANK (June 27, 2012), <http://pubdocs.worldbank.org/en/722361541184234501/IBRDArticlesOfAgreement-English.pdf>.

251. *See generally* Articles of Agreement of the IBRD, art. 4, Dec. 27, 1945, 2 U.N.T.S. 134, 146.

252. *See generally* Articles of Agreement of the IMF, art. 4, § 3(b), 2 U.N.T.S. 39.

underdevelopment, export, and exchange rate imbalances, etc., the IMF's surveillance powers extend to the operations of borrowers of trust funds. Article IV(3)(b) underpins the Fund's authority as follows: "[T]he Fund shall exercise firm surveillance over the exchange rate policies of members, and shall adopt specific principles for the guidance of all members with respect to those policies."<sup>253</sup>

In recent decades the IMF has in practice extended the scope of its narrowly worded surveillance authority over members' exchange rate policies to cover also financial stability and financial sector policies.<sup>254</sup> We have already determined that the trust funds established and managed by the IMF do not have a contractual nature<sup>255</sup> and as a result the IMF's surveillance powers are applicable over States that make use of them. If their nature was contractual, the IMF would not possess surveillance powers.

Certainly, however, the loss of voting rights must be viewed as inherent in a party's failure to pay its arrears or financial contribution, but this result must be confirmed by the body exercising the trust's decision-making authority. Obviously, the trustee is at liberty to employ his inherent trust powers, which must necessarily exist, in order to force the beneficiaries to comply with their obligations once they have signed their grant agreement with the trust. Some of these powers are implicit by their very contractual stipulation, such as disqualification from future grant arrangements, discontinuation of the grant itself, particularly where this is paid in tranches and others. Moreover, the mandate of the trust also entails extra-contractual powers on the part of the trustee. The legal basis of these implied powers is justly derived from the trust structure itself and the fiduciary role of the trustee therein. To the extent that these powers are absolutely necessary in order for the trustee to accomplish his mandate and which do not, at the same time, conflict with the trust agreement, their characterisation as implied powers is well justified. Were the UN Security Council to set up a trust fund as a subsidiary organ thereto, that fund would be able to exercise its conferred powers in the same way as the Council and demand from UN member States full obeisance—assuming the Council conferred powers and not merely functions. In this case, the enforcement powers of the Council would be conferred on the body of the trust, albeit exercisable by the trustee and the governing body of the trust.

### iii. Collective Action against the World Bank as Trustee before the Bank's Inspection Panel

Where any of the entities making up the World Bank Group act as trustees (but more essentially the IBRD and IDA),<sup>256</sup> or otherwise partake in the implementation of the

---

253. *Id.*

254. The principles of surveillance were elaborated by IMF. *See* Surveillance over Exchange Rate Policies, Decision No. 5392-(77/63) (Apr. 29, 1977); *see also* LASTRA, *supra* note 130, at 399.

255. As far as the relationship between the IMF as trustee and the borrowers is concerned, this 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. In order to decipher the precise legal nature of this relationship one has to assess the practice of the Fund.

256. The resolution setting up the Inspection Panel does not encompass other World Bank entities. In a request against the IFC in 1996, in which the affected group asked the Panel to investigate alleged irregularities, the case was not eventually investigated by the Panel through lack of jurisdiction. Ultimately, through an ad hoc

operations of a trust fund established under international law, the jurisdiction of the Inspection Panel of the World Bank comes into play. This jurisdiction is not obvious in the wording of the relevant resolution as it omits any reference to trusts.<sup>257</sup> Paragraph 12 of the Resolution setting up the Inspection Panel states that:

The Panel shall receive requests for inspection presented to it by an affected party in the territory of the borrower which is not a single individual (i.e. a community of persons such as an organisation, association, society or other grouping of individuals) or by the local representative of such party or by another representative . . . The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal, and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect. In view of the institutional responsibilities of the Executive Directors in the observance by the Bank of its operational policies and procedures, an Executive Director may in special cases of serious alleged violations of such policies and procedures ask the Panel for an investigation . . .<sup>258</sup>

The jurisdiction of the Panel may be triggered by an application of an affected community, which neatly corresponds to the types of beneficiaries envisaged in trust funds ( i.e., through class or category). These communities need not necessarily be direct beneficiaries of the fund, but may constitute groups simply affected by the operations of the trust. The main obstacle in triggering the jurisdiction of the Inspection Panel is demonstrating in every case that the trust fund under consideration is financed by the Bank.<sup>259</sup> The relevant paragraph does not require that the Bank finance the entirety of a project for it to fall within the Panel's jurisdiction; thus, partial financing, or co-financing, will suffice.<sup>260</sup> As shown by this article the Bank typically contributes also to the financing of the vast majority of trust fund projects in which it acts as trustee, as was the case for example with the Chad-Cameroon Pipeline Project and the funds established for the purposes of that operation.<sup>261</sup> The same is also true with respect to the International Reconstruction Fund for Iraq (IRFI). As a result, it is fair to assume that with respect to the operations of trusts in which the Bank is a trustee with even a partial financial

---

arrangement, the Bank's senior management established the office of Compliance Advisor/Ombudsman (CAO) with jurisdiction over IFC and MIGA-financed projects. See J. D. Hair, et al., *Pangue 'Hydroelectric Project: An Independent Review of the International Finance Corporation's Compliance with Applicable World Bank Group Environmental and Social Requirements* (World Bank Group Apr. 4, 1997).

257. Int'l Bank for Reconstruction & Dev. Res. 93-10; Int'l Dev. Ass'n Res. 93-6, *The World Bank Inspection Panel* (Sept. 22, 1993).

258. In a 1996 Review of the Resolution Establishing the Inspection Panel and Clarification of Certain Aspects of the Resolution (Oct. 17, 1996), the word "project" in the 1993 Resolution was found to possess "the same meaning as it generally has in the Bank's practice, and includes projects under consideration by Bank management, as well as projects already approved by the Executive Directors".

259. See INSPECTION PANEL, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL 10 YEARS ON, at 18 (2003).

260. INSPECTION PANEL, THE INSPECTION PANEL: ACCOUNTABILITY AT THE WORLD BANK 107 (2018).

261. See generally WORLD BANK & INT'L FIN. CORP., *Chad-Cameroon Petroleum Development and Pipeline Project*, Report No: 36569-TD (Dec. 2006).

contribution the requirement that the project be financed by the Bank is satisfied and thus the Panel may exercise its authority. What remains uncertain is whether the mere undertaking of the function of trustee without any form of additional financing qualifies the affected communities and additionally gives them *locus standi* to lodge a complaint with the Panel. On the basis of the Panel's jurisprudence it is competent to entertain claims pertinent to both project lending and development policy lending,<sup>262</sup> but these are hardly akin to a mere trustee function that is of a purely administrative nature.

From a literal reading of paragraph 12 it is clearly evident that the sentence contained in brackets is not meant to add further situations to the Bank's own failure to comply with its policies; rather, it refers to such failures when committed by the Bank's borrowers, but only in respect of loan agreements. Disbursement (otherwise known as "grant") agreements would thus not qualify, as they are not loan agreements.<sup>263</sup> However, trust funds that envisage the possibility of loan agreements in which the Bank makes no financial contribution would certainly fall within the Panel's jurisdiction. A literal interpretation of paragraph 12 does not support the argument that mere trusteeship can trigger the jurisdiction of the Panel.<sup>264</sup> Nonetheless, it would be grossly unjust for the Panel to deny the eligibility of such requests, given that the engagement of the trustee in respect of trust funds in which the trustee possesses significant decision-making authority is more significant politically than the trust funds' financial component.<sup>265</sup> At this point in time the ethical justification of this argument (including its basis in notions of justice) is stronger than its normative counterpart.

As regards the failure of the Bank and the borrower to adhere to the Bank's operational policies, it has already been established that in practice the Bank's model trustee agreements with donors stipulate conformity with these policies and are thus an integral part of all trust and donor agreements. Were the claimants, however, to argue that the Bank, as trustee, failed to comply with the trust's terms of reference, or its contractual undertakings with the donors and the beneficiaries (through the grant agreements), albeit while in full compliance with its institutional policies, then the jurisdiction of the Panel could not be triggered because these agreements are outside the scope of paragraph 12.<sup>266</sup> In such cases the affected communities can only seek civil remedies on the basis of their grant agreements with the Bank and certainly not as third parties to the agreements between the donors and the trustee. Obviously, the best possible outcome that an affected community may realistically expect from a claim before the Inspection Panel is an Executive Board decision by which the project is either discontinued or which forces the

---

262. In respect of development policy lending (formerly known as structural adjustment operations), see the *Bangladesh Jute Sector Adjustment Credit* case, Panel Report and Recommendation, at para. 9 (Mar. 14, 1997); and the *Papua New Guinea Governance Promotion Adjustment Loan* case, Inspection Panel and Recommendation (Jan. 1, 2002).

263. IBRD Res. 93-10; Int'l Dev. Ass'n Res. 93-6, *The World Bank Inspection Panel* (Sept. 22, 1993).

264. See IBRD Res. 93-10; Int'l Dev. Ass'n Res. 93-6, *The World Bank Inspection Panel* (Sept. 22, 1993).

265. This point has not received any attention in the relevant literature but is supported by at least one other commentator. See S. Schlemmer-Schulte, *The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights*, 6 HUM. RTS. BRIEF 1 (1999) (noting that "Bank actions as trustee of the Global Environmental Facility and other trust funds are implicitly subject to the Panel's jurisdiction.").

266. See IBRD Res. 93-10; Int'l Dev. Ass'n Res. 93-6, *The World Bank Inspection Panel* (Sept. 22, 1993).

borrower to complete the project, albeit under strict adherence to the Bank's policies and procedures.

## VII. CONCLUSION

It is evident that trust funds are mushrooming in the everyday practice of the World Bank. Not only is it achieving one of its primary purposes by taking on the role of trustee, but at the same time it is making considerable profit from such a function. The Bank, overall, shows little interest in the legal personality of the trusts it is administering; rather, its key interest lies in its contractual relationship with the creators and donors of trusts, as well as its liabilities and duties therefrom. The legal form and personality of each fund has taken shape as a result of ad hoc or long-term considerations, particularly on the basis of the capital growth of each fund. Such legal personality varies from mere bank accounts in private banks to fully-fledged inter-governmental organisations. Just like UN trust funds, their World Bank counterparts have generally developed on the basis of the internal constitution of the trustee, but the size of each fund dictates their corporate governance structure.<sup>267</sup> Although corporate governance is beyond the scope of this article, it suffices to say that the more elaborate such governance is, more complexity and transaction costs belie its operations. Given that trust funds are set up to disburse funds to their intended beneficiaries, it is not in their interest to increase their overall transaction costs.

This article has shown that there is no single legal personality that fits all trust funds, whether administered by the World Bank or other inter-governmental trustees. Even so, current practice clearly suggests that trustees and donors have become entrepreneurial when deciding the form and nature of a trust. Private international law, taxes and liabilities, are as important if not more than international law considerations. The growth of transnational law may, in time, help to place trust funds in that sphere of regulation, which in turn would render trusts both public and private actors, subject to industry rules and processes.<sup>268</sup>

---

267. Bantekas, *supra* note 2, at 224.

268. See Ilias Bantekas, *The Contractualization of Public International Law*, INT'L J.L.C. (forthcoming 2021).