CHAPTER 13

Multilateral Development Banks as Agents of Private Contract

*Ilias Bantekas**

Abstract

This article shows how and in what manner international financial institutions (IFIs) and multilateral development banks (MDBs) have complemented their public international law character with the extensive use of private (contract) law for the purpose of attracting and disbursing funds. The following analysis contains selective examples of such innovative contractual practices by a number of IFIs, i.e., the legal framework of intergovernmental trust funds, the contractual relationships with private donors, donor commitments by public donors, and the extensive use of memoranda of understanding (MoU). Finally, the constitutional, democratic, and human rights implications of the use of MoUs in the case of the Greek sovereign debt crisis are highlighted. This brief case study sheds light on the possible normative implications of the use of private (contract) law as a substitute for more traditional treaties.

1 Introduction

A radical transformation has taken international law by surprise since the late 1990s, if not earlier. During the Cold War inter-state relations were not only formal, but quintessentially formalistic. This meant that because relatively few concrete international rules existed, states were very cautious about what they "said" or did, in order to avoid being bound to prior conduct, whether in the form of binding unilateral acts or conduct seen as entailing *opinio juris*, and thus leading to participation in the formation of custom. No wonder, then, that treaties involved a grand ceremonial dimension, with senior government officials attending signature events. Nowadays, with some exceptions, there is very little interest in such things. The regulation of state conduct is much

* Professor of Transnational Law, Hamad bin Khalifa University (Qatar Foundation) College of Law and Adjunct Professor, Georgetown University, Edmund A Walsh School of Foreign Service, ibantekas@hbku.edu.qa.

 | DOI:10.1163/9789004460010_014

more comprehensive, but not through solemn treaties and customary international law. It is sometimes forgotten that treaties and custom are not sources of international law as such.[1] Rather, obligations are sources of international law, whether for one or more states, and such obligations can be contained in treaties and custom. Hence, treaties and custom are the vehicles for the expression of mutual obligations, the governing law of which is general international law.[2] In this sense, states may just as well exchange these two obligation-bearing vehicles with new vehicles; and, indeed, they have. This author is not aware of any concrete studies with empirical evidence about the contractual practices of states, but anecdotal evidence suggests that save for matters of a constitutional/global nature, such as the prohibition of torture, most other matters are regulated through less grandiose and much less flexible legal forms.

As this article will demonstrate, MDBs, particularly the International Bank for Reconstruction and Development (IBRD), as well as IFIs, such as the International Monetary Fund (IMF), effectively engineered a variety of mechanisms by which they could invite, hold, invest, and finance funds provided to them without any real liability to states, markets, investors, and intended beneficiaries. Some of these took the form of trusts, lacking the contractual or trustee obligations typically associated with trusts; or by requiring borrowing states to borrow under private terms and wholly outside their constitutional frameworks. As a result, sovereign debt management, liquidity and guarantees to states by IFIs or MDBs[3] have been transformed from a transaction between two or more public actors predicated on public (international) law, to an agreement based on private law and subject to the jurisdiction of arbitral tribunals or the courts of a neutral state. The governing law of such agreements is seldom international law, but typically English law.[4] This author has elsewhere expressed the opinion that while reliance on private law has several positive effects, in the manner it is being employed by IFIs and investors almost always leads to the loss of economic and fiscal self-determination.[5] This article attempts to merely show how and in what manner international development

1 See e.g. Tomuschat 2018, 185–204.

2 This is in accordance with Art 2(1)(a) Vienna Convention on the Law of Treaties 1968 (VCLT).

3 IFIs and MDBs are not synonymous. Rather, MDBs are a subcategory of IFIs. The IMF is not a development bank and not part of the World Bank Group although it is frequently mentioned in this paper.

4 By way of illustration, the insertion of English law clauses in sovereign debt instruments (including bonds, borrowing agreements and others) is now common practice. In fact, the financing document is now modeled around boilerplate, standardized, instruments produced by the London Loan Market Association. See Schwarcz 2017.

5 See Bantekas, Vivien 2016.

banks have shed their public international law character in favor of private (contract) law.

To understand why the "public" has been eroded from "international law" it is important to have an overview of the broader context. Since at least the mid-1980s, although certainly from the early 1970s, a period known as "monetarism", financial markets became the key vehicle of growth for liberal democracies.[6] From 1940 to the late 1960s, the U.S. reversed its Great Depression with high volumes of manufacturing, which led to universal employment, which in turn culminated in high volumes of consumerism and so-called "growth". It was during this time that growth was measured in quantitative terms on the basis of gross domestic product (GDP). GDP was the measure of success and prosperity of nations in accordance with liberal economists at the time, who must have assumed that growth can be perpetual.[7] The global oil crisis of the early 1970s clearly showed that continuous growth was a fallacy, but instead of turning to a different model of development, manufacturing-based growth was replaced with financial markets-based growth. This latter model spectacularly crashed at least twice, once in the early 1990s and again around 2007–08, largely as a result of the absence of even rudimentary regulation of the financial sector and private markets.[8] GDP-based growth and scare mongering by the financial markets that there is no alternative model to growth-based economics is key to understanding many of the political decisions of modern times, such as climate change politics, as well as the privatization of services that are fundamental to the enjoyment of basic human rights.

It was only natural that in such an environment IFIs would be bound by the choices dictated by their creators. When states decided to de-regulate financial markets and transnational corporations (TNCs), they implicitly (but very much consciously) agreed to confer a significant part of state affairs to the financial sector; specifically, elements of economic and fiscal policy. Markets not only generate money, but more importantly generate much needed liquidity required for the sustenance and survival of states themselves. If a private financial institution is the sole supplier of liquidity to a state, it can very much dictate the terms for the provision of such liquidity, which in turn impacts on the borrowing state's fiscal and economic policies.[9] Moreover, if the lender can dictate a state's fiscal policy, by implication it can also impose its preferred

6 See Chrystal 1990.

7 Pilling 2018.

8 Varoufakis 2015, Bantekas 2012, *Wealth and Growth-based Policies have Augmented Global Poverty and Eroded Human Rights: A Return to Human-Centred Thinking.*

9 See Lienau 2008.

form of agreement. This will naturally be a contract or even an agreement lacking the qualities of contracts if it satisfies the interests of the lender. In fact, such contractual arrangements are not averse to national governments. A private contract, or a MoU, need not (always) go through various rounds of parliamentary scrutiny; can be subjected to confidentiality demands; bypass strict constitutional guarantees; hide elements of corruption or bribery and; in any event, governments can claim to their electorates that the form of agreement is not as important as the terms of the agreement themselves.

Given that liquidity was and is provided by financial markets, in conjunction with IFIs, it is only natural that IFIs could not dictate contractual forms that were antithetical to the interests of their founding states and private financial markets, which are at the heart of liberal democracies' growth-based policies. Although it may seem that the World Bank Group, particularly the IBRD, as well as the IFM, were promoting contractual forms that borrowing states were bound to follow, the reality is rather different. It is now well documented that entrepreneurial lawyers in top international law firms engineered many of the contractual terms and forms associated with sovereign lending,[10] as well as that the political protagonists of the Washington Consensus were responsible for the mass privatizations imposed or suggested by the IMF on developing states in exchange for liquidity and aid. Behind these political protagonists one naturally finds all those TNCs eager to take over for a mere pittance badly managed, but overly lucrative state monopolies, as well as negotiate zero tax policies in exchange for their "investment".[11]

10 At the behest of some of the biggest law firms, several courts have been convinced to construe the *pari passu* clause in bonds and loan agreements in a manner that allows holdout creditors to sue the sovereign debtor even if all other creditors have agreed on a restructure of the debt. *See NML Capital, Ltd. et al. v. The Republic of Argentina*, 699 F. 3d 246 (2d Cir. 2012). The U.S. Court of Appeals effectively held that because of Argentina's debt restructuring it was not technically bankrupt, in which case there would be a ranking of its debt. As a result, the *pari passu* clause in its sovereign bonds entailed that Argentina could not (even through an IMF-backed debt restructuring process) arbitrarily prioritize its super-majority creditors to the detriment of the unsecured creditors.

11 See Bantekas 2021, *The Linkages Between Business and Human Rights and their Underlying Causes*, 118; see also Bantekas 2021, *The Emerging UN Business and Human Rights Treaty and its Codification of International Norms*, 12.

2 A Brief Note on the Interface between Global Administrative Law and Transnational Law

This paper subscribes to the idea that in the absence of detailed regulation in founding treaties or other instruments, international organizations (IOs) have established their own processes and mechanisms by which to fulfil their mandates. Such processes and mechanisms are based on their implied powers and as a result it is now firmly accepted that a global administrative law (GAL) exists by which to apply and enforce international law.[12] The more complex an organization becomes, so too its web of internal and external processes will become and it will generate more and more detailed regulation, whether in the form of internal by-laws as well as instruments through which to contract with third entities.

Transnational law only slightly overlaps with GAL and particularly with the means and modalities of contracting with third entities. Transnational law should be viewed as a sphere of regulation that is distinct from the spheres of domestic law(s) and public international law and is broader than the set of universes that exist within it. Domestic law is a vertical system of regulation where rules are made by the state. International law, on the other hand, consists of a horizontal system of regulation that is based on state consent. Transnational law is different from its other two counterparts. It makes no hierarchical distinction between its various participants (i.e. between states and private entities) and all are conferred equal legal status and standing to create industry-wide rules through consent-based self-regulation. Of course, it is acknowledged that some participants are much more influential than others and such power may dictate the exercise, boundaries, and outcomes of self-regulation, but this is no different to the myth of sovereign equality of states under international law. An illustrative example may be offered by the various standards adopted by the transnational construction industry.[13] Self-regulation that produces rules internal to an industry may (although not necessarily) culminate in its replication in domestic law, as either an acknowledged – albeit unwritten – business custom or a fully-fledged written law. What is important is that the authority to self-regulate and the 'rules' emanating therefrom (*lex*

12 See the pioneering works of Cassese 2005, 37; Kingsbury, Krisch and Stewart 2005, 15.

13 The construction industry's FIDIC rules are distinguished threefold as follows: construction contracts per se (red book); plant and design-build (yellow book) and; EPC turnkey contracts (silver book). See Bantekas 2009, *The Private Dimension of the International Customary Nature of Commercial Arbitration*, 449.

mercatoria)[14] is part of a wider process that has become a new *sphere* comprising many disparate self-regulations and even more "rules".[15]

IOs and particularly IFIs transact with third entities on a frequent basis, but this does not mean that they do so exclusively in the sphere of transnational law. IFIs may well, in certain cases, want to attach all possible formalities to an agreement with a state and thus endow said agreement with the attributes of a traditional treaty. In other cases, many of which are described in this article, such formality may be viewed as inefficient and commercially harmful. Given that IFIs manage significant funds and operate (even to a limited degree) as commercial banks (e.g. when they agree to a commission in the management of funds), they must compete with other private and public actors for their "livelihoods". If their competitors operate in a sphere that is largely unregulated and where industry rules apply, then IFIs have little choice but to operate there too (for specific purposes at least).

In equal measure, IFIs are cautious about how they transact with third entities. Where the third entity in question is in a dire financial situation IFIs may impose any terms that are beneficial to themselves, in a manner that would resemble an adhesion contract under domestic law. GAL allows the IFI to make the pertinent choice and although the treaty form is used, it is hardly prevalent or consistent.[16]

14 The ultimate validation of *lex mercatoria* rests on the fact that not all legal orders are created by the nation state and accordingly that private orders of regulation can create law. Teubner 1997, *Global Bukowina: Legal Pluralism in the World Society,* in: Teubner (ed) 1997, *Global Law without a State*, 15.

15 See Bantekas 2021, *The Contractualization of Public International Law and its Impact on the Rule of Law,* 2.

16 By way of illustration, although loan facilities issued by the IMF may be described as treaties under certain circumstances, they are typically provided as stand-by-arrangements. These are regulated under Art XXX(b) of the IMF's Articles of Agreement, with the IMF having consistently described them as non-contractual in nature. In order to clarify that stand-by-agreements are not in fact contracts the IMF adopted two distinct decisions: Decision No 2603-(68/132) 20 Sep 1968 and Decision No 6056-(79/38) 2 March 1979. In particular, para 7 of the 1968 Decision stated that "in view of the character of stand-by-arrangements, language having a contractual flavour will be avoided in stand-by-documents". See generally: Gold 1980.

3 Multilateral Development Banks as Trustees of Member State Funds

One ingenious way of attracting financing by states is the intergovernmental trust model. The donor-trustee relationship is established through agreement, but this is a *sui generis* agreement that excludes, for example, the element of bargain or consideration and in which, typically, the trustee endeavors to assume as few obligations as possible.[17] Given the sovereign and public international law nature of most donors (states) and trustees (typically IOs),[18] one would expect the agreement setting out this relationship to be recorded in the form of a traditional treaty; this is, in fact, quite rare, although it will not be uncommon for MDBs to enter into treaties with states in respect of other matters. It is not uncommon for the trust agreement to take the form of an MoU[19] – which, in general terms, is intended as an agreement lacking consideration or an intention to create a legal relationship[20] – or other agreement, many times lacking the binding nature of contracts. A contract, as a matter of general principles, is a binding agreement that is the product of an offer, an acceptance, and an intention to be bound. Common law jurisdictions further require consideration (effectively a bargain or benefit for each party), whereas civil law jurisdictions typically require a good or legal cause (so-called *causa*).[21]

17 This is, of course, not surprising for the World Bank. See Krever 2011, 287, who traces the rule of law discourse in the Bank to show its narrow understanding of the rule of law and distancing from concrete human rights obligations.

18 See Bantekas 2020, *The Legal Personality of World Bank Funds under International Law*, 101–143.

19 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.

20 This is not always the case, however. In Case C-258/14, *Eugenia Florescu and Others* v *Casa Jude¸teana˘ de Pensii Sibiu and Others*, Judgment of the Court (Grand Chamber) of 13 June 2017, EU:C:2017:448, para 36, the CJEU came to the conclusion that MoU concluded under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under art 267(1)(b) TFEU, and hence susceptible to interpretation by the Court. Moreover, in Joined Cases C-8-10/15P, *Ledra Advertising Ltd and Others v. European Commission and European Central Bank*, EU:C:2016:701, where the CJEU held that where the EC Commission is involved in the signing of MoU within the framework of the European Stability Mechanism it is acting within the sphere of EU law. Therefore, it is bound to refrain from MoU that are inconsistent with EU law, including the EU Charter of Fundamental Rights.

21 See Art 2.1.1 UNIDROIT Principles of International Commercial Contracts (2010). See also Smits 2017, 41–63.

Apart from the initial act of appointment of a trustee, a future donor may wish to participate in the trust arrangement, whether by simply depositing an amount of money in the trust account, by concluding a bilateral agreement with the trustee for the same purpose, or by acceding to the original trust agreement. In all of these cases we find a convergence of consent, since even the mere deposit of funds in an account must meet the approval of the trustee, which is manifested by the maintenance of the funds in the trust account, or their subsequent withdrawal for disbursement purposes. The donors to a particular intergovernmental trust may turn out to be numerous and not all endowed with the same amount of international legal personality, thus involving, besides states, IOs, physical persons, multinational corporations, and legal persons with limited international legal personality. It is obvious that a traditional treaty would not constitute the appropriate arrangement for all these actors, thus necessitating a series of distinct legal transactions by the trustee with each individual entity. In such cases, some contractual arrangements will possess a private law character, without, however, detracting from the international legal nature of the trust.[22]

In accordance with its operational policies, the World Bank, when acting as a trustee, enters into framework agreements with its donors.[23] Under said policies, donors are required to enter into an additional Trust Fund Administration Agreement (TFAA) on the basis of which the Bank recovers its costs to manage and administer the trust fund.[24] The elaborate mechanism by which the above agreements are drafted, signed and implemented, as well as the absence of any "lighter" – non-binding – alternative, suggests that the intention of the World Bank is to conclude binding agreements with contributing states, private entities and IOs. In fact, the Bank, where possible, enters into standard binding agreements with all donors to a particular trust fund in order to harmonize results and reduce cost.[25] The Bank's Standard Provisions applicable to each

22 No doubt, in order to avoid a series of individually negotiated transactions, a single instrument may be used by the trustee, which may or may not have a binding character. Instruments of commitment (IOCs) are common to the work of conferences of states parties (COP) to multilateral treaties, as well as large inter-governmental funds such as GEF. See Churchill and Ulfstein 2000, 623.; equally: Weiss 2014, 83. See also: Bantekas 2009, *United Nations Employment Law and the Causes for the UN's Failed Female Senior Appointments Record*, 225.

23 IBRD Operational Policy (OP) 14.40 on Trust Funds, Art 1 and Bank Policy (BP) 14.40, "on Trust Funds" Art 1.

24 Ibid., Arts 7–8.

25 Agreement between the UK and IBRD/IDA for the ASEM-EU Asian Financial Crisis Response Fund (TF 020147) of 29 June 1998; Agreement between Denmark and IBRD/IDA for the ASEM-EU Asian Financial Crisis Response Fund (10 Nov 1998).

trust fund are expressly stated in each Letter of Agreement as forming an integral part thereof.[26] That the parties intend to create a binding legal relationship is manifested by the language employed in these instruments. For example, in the Agreement between the EC Commission and the World Bank for the ASEM Trust Fund of 23 December 1998, it is stated in the relevant part: "We are pleased to confirm the intention of the Commission to make available to the World Bank the sum of […]". Equally, "the contribution shall be used for the purposes […]" and "the Commission shall deposit […]", whereas "the Bank shall make available to the competent bodies of the EC, upon request, all relevant information […]".[27] Such agreements are of a binding but *sui generis* nature.

It is suggested that there is no indication in the text that they are meant to be treaties and none make reference to a governing law, although many do provide reference to modalities for dispute resolution.[28] For example, the TFAA between the Tunisian Ministry of Development and the IBRD to finance the Marseilles Center for Mediterranean Integration Multi-Donor Trust Fund[29] states in Annex 1, article 9, that in the event of dispute the Permanent Court of Arbitration (PCA) would assume jurisdiction. The fact that article 9.1 therefore refers to the PCA's Optional Rules for Arbitration Between International Organizations and States, however, does not alter the conclusion on the nature of the TFAA. The Optional Rules do not as a rule serve to define whether the underlying referral agreements are a treaty or otherwise. Even so, article 33(1) of the Optional Rules expressly states that:

> In resolving the dispute, the arbitral tribunal shall apply the rules of the organization concerned and the law applicable to any agreement or relationship between the parties, and, where appropriate, the general principles governing the law of international organizations and the rules of general international law.

The TFAA in question, as is the case with all TFAAs this author has seen, contains Standard Provisions that serve the purpose of a governing law and in any event, the World Bank's operational policies on trusts and other matters will fill any remaining gaps. What is clear is that the Bank and its TFAA donor states desire to retain their public international and sovereign nature, while at the

26 Ibid.

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

28 See Bantekas 2021, *Effective Management of International Aid through Inter-governmental Trust Funds*

29 TF071415 (2013).

same time entering into a binding agreement that is not a traditional treaty. The TFAA contains all the elements of a contract, while not being grounded in the law of any jurisdiction.

It is also common practice, although by no means universal, for donors to conclude an MoU with the potential trustee and recipient states.[30] The purpose of these instruments is not to set up the trust fund or agree on the terms of the donation/contribution, but rather to "record the intention of the parties to enter into appropriate agreements in due course". This was expressly mentioned in the various identical MoUs between the Netherlands, on the one hand, and Indonesia and the World Bank, on the other, regarding the Establishment of a Multi-Donor Trust Fund following the catastrophic effects of the 2004 earthquake and tsunami.[31] Eventually, given that the World Bank was appointed trustee to the Multi Donor Fund (MDF) for Indonesia, contribution agreements were entered into with each one of the state donors in the form of treaties. Because the Bank's policy is to treat all donors equally, whereby as a result agreements must be "substantially the same", disagreement arose among the various departments in the Bank as to whether "substantially the same" means word-for-word identical, or whether a request by a donor state that did not alter the obligations of the agreement could in fact be accommodated.[32] Disagreement arose in connection with a formal cap on administrative costs, the designation of terrorism therein, and the conclusion of an expiration date for the agreement. In connection with the terrorism language, for example, one donor was content with the definition, but because it imposed a condition on the funds, the MDF was forced to amend its Standard Provisions. This, however, meant that a subsequent agreement had to be reached on this issue anew with all the donors.[33]

Finally, accession to Donor Agreements is possible through an appropriate provision in the General Agreement – where applicable – or each individual agreement. Article 3 of the Donor Agreement for the Establishment of an Anti-Corruption Activities Fund, concluded between Norway and the Inter-American Development Bank (IDB), states that the Fund shall accept contributions from any donor through the subscription of a Letter of Adherence to the Donor Agreement.[34] Arrangements may potentially become complicated

30 See Kellerman, 107.

31 Adopted on 25 April 2005.

32 *Review of Post-Crisis Multi-Donor Trust Funds* (February 2007) 51.

33 Ibid.

34 The Agreement is attached to IDB Doc CC-6146 (26 February 2007).

where new contributors include, besides states and IOs, also private entities.[35] In this case, since the Donor Agreement in question is a traditional treaty, it is not possible for the private entity to accede to this instrument. Therefore, it must be assumed that the trustee will enter into a new agreement with the private donor under the terms of a private agreement, whether in the form of a contract or other. In this case, it is assumed that since any entity can contribute funds, then agreements with private entities may be accomplished in the form of private contracts or agreements lacking the attributes of contracts.

4 Multilateral Development Banks as Agents of Private Donors

Private parties must, like states, contract with the trustee, rather than the trust fund, in respect of any of their transactions with trust funds or other mechanisms set up by MDBs. Such agreements, whether in the form of contracts, or agreements lacking the attributes of contracts,[36] will be governed by the law chosen by the parties.[37] Given that contracts must be "substantially the same" so as to ensure equality of treatment of the contracting entities, the governing law will be different in the trustee's agreements with the private donors; this is most likely to be the law of the seat of the trustee, but where the contract is to be performed in a third territory, the applicable law may well be the law of that country.[38] This is certainly a matter of choice between the parties and subject to the general principle of party autonomy. Generally, although state donors will face administrative costs in setting up the trust fund, this is not the case with private parties. Indeed, the contractual terms for the latter are far simpler since the constitutional formalities relating to treaty making for states are absent in the case of private parties. Nonetheless, any liability that may possibly accrue from such a relationship will burden the private entity on account of its lack of privileges and immunities,[39] in contrast to the World Bank or

35 Private entities typically enter the picture at the procurement phase and are subject to several layers of regulation. See Williams-Elegbe 2017, Chapter 3.

36 For example, agreements involving offer, acceptance and intention to be bound, but without the element of consideration, are considered contracts in civil law jurisdictions but not (generally speaking) under English law. This is a very complex issue in English law and there exist a long list of exceptions. See Peel 2007, 3–150; von Mehren 1959, 1009.

37 See Mann 1959, 34.; Morlino 2019, 261.

38 Delaume 1997.

39 It is usual for trustees to be mandated by the donors to enter into arrangements with the private entity in order to provide it with tax deductibility allowances in respect of its donation. See Art 27(a)(1)(2) of the Global Fund for AIDS Framework Document. Otherwise, the relevant financial or operational regulations clearly stipulate that no

the UN, for example, which is endowed with such protections. The privileges and immunities may be waived by contract and in any event are inapplicable where a state is acting as *fiscus* (i.e. in a commercial capacity).[40] The privileges and immunities of IOs are typically negotiated in advance and are embodied in the organization's founding charter, headquarters (HQ) agreement with the host state, the host state's law, as well as customary international law.[41]

Obviously, in its mutual relationship with the private party, the trustee will be an equal contractual partner. Private entities may, where applicable, be entitled to simply transfer or deposit money in a trust fund without the requirement of a written agreement. All that may be needed is a letter of notification to the trustee that the money has been deposited. In this case, since the private entity is not a state, its acts cannot be assimilated to a unilateral act – with or without legal obligation. The legal nature of these types of acts will be determined on the basis of the applicable banking and contract law governing a particular transaction.[42] Whether they entail, however, an intention to create a binding legal relationship is a matter of construction of the agreement in question.[43]

It is not unusual for private parties to wish to make a contribution without the formality of a binding agreement. The adoption of non-binding private instruments should not be excluded where the institutional rules of the trustee either allow, or omit reference to, such informal arrangements. The World Bank's policies generally exclude the possibility of such agreements,[44]

---

special advantages or benefits should accrue to private donors, such as Art 6 of the World Bank's OP 14.40. Equally, s 2.13 *et seq* of the World Bank Trust Fund Hand-Book, IBRD Doc 17304 (April 1997) warns the Bank, when acting as trustee, to avoid providing any benefits to private investors that would give rise to a conflict of interest or a distortion of its procurement rules.

40 See Art 17 of the UN Convention on Jurisdictional Immunities of States and their Property. O'Keefe and Tams 2013, 284.

41 Okeke 2018, 265–81.

42 This is a complex issue that is not susceptible to generalizations. The Court of First Instance (CFI) of the EU has long confirmed that the law of EU member states is not applicable to public contracts granted by entities set-up by the EU Council of the EU. Case T-411/06, *Sogelma – Societá generale lavori manutenzioni appalti Srl v European Agency for Reconstruction* (*AER*), ECLI:EU:T:2008:419, para 115. The CFI argued that such a principle was applicable, unless otherwise provided, to any international organization in the EU.

43 The requirement of an intention to be bound should not be conflated by the existence of an offer and acceptance. Either of these may simply be made in the form of an invitation to treat, or there might well be significant dissensus between what is offered and what is actually accepted. Dissensus does not allow the creation of a contract. See note 21, Smits 63–89.

44 In 2016 an updated standardized Administration Agreement template with sixteen of the World Bank's largest donors who provide 90 per cent of IBRD/IDA trust fund

whereas the other United Nations Specialized Agencies that administer trust funds have taken a varied approach to the legal modalities of private contributions.[45] The legal nature of the agreement will also depend on the type of contribution made. It is common for private contributors, particularly those in a specific industry, to donate in-kind, rather than cash. In 2003, the pharmaceutical corporation Novartis agreed to provide Tuberculosis medicine for the treatment of 500,000 sufferers over a period of five years. This undertaking was consummated through an MoU and not a formally binding contract. The medicines were delivered to the Global Drug Facility (GDF) of the Stop Tuberculosis Partnership for use in programs supported by the Global Fund against AIDS, Tuberculosis and Malaria.[46]

5 The Persistent Problem of Donor Commitments

Consistent state practice in the field of international donor conferences clearly demonstrates that a pledge should not be given the same meaning as that of a promise (in the form of a unilateral act) that otherwise may, but does not always, constitute a binding expression of will by the promising state.[47] Rather, the legal nature of a pledge is anything but a binding promise.[48] In fact, the

---

resources was adopted, including standard provisions on disclosure of information and communication on fiduciary issues. This was supplemented with a series of notes on governance arrangements in trust funds, preferencing arrangements, donor reporting, managing trust funds for results, and indicative budgets. See: Guidance Note on Governance Models: An Overview and Proposed Approaches, <http://bit.ly/GovernanceGuidance>, last accessed: 1 February 2022.

45 Art 18 of the UN Secretary-General's Guidelines on Cooperation between the UN and the Business Community (17 July 2000) envisages five types of partnership arrangements. Of interest in this connection is para (a) dealing with direct contributions, whereby it is advised that this be accommodated through a trust fund or special account agreement with the partner subject to the applicable Rules and Regulations of the UN.

46 IFPMA, Partnerships to Build Healthier Societies in the Developing World (September 2006), 37.

47 This distinction is not made by the ILC Rapporteur, V R Cedeno, in his Report on Unilateral Acts of States, UN Doc A/CN.4/486 (5 March 1998), para 91ff.

48 This is not very different from the treatment of promises in domestic contract law, where generally a binding offer is distinguished from a mere invitation to treat (which does not amount to a binding offer). Advertising-related cases, which involve an alleged unilateral act (by the seller) provide significant evidence to this effect. See the English leading case of *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 and *Fisher v Bell*, (1961) 1 QB 394. The position in the US is similar. *Lefkowitz v Great Minneapolis Surplus Store*, 86 NW 2d 689 (Minn 1957). Equally in the civil law tradition, albeit more cautious. See s 145 of the German Bürgerliches Gesetzbuch (BGB) [Civil Code] and the Federal Supreme Court

only binding act of the potential donor is the act of contribution itself, which materialises with the actual transfer of funds or goods to the recipient collecting entity. It is only at the moment of receipt or deposit that the donor is bound to honour the transaction. A pledge, on the other hand, is merely considered an expression of intent to provide a voluntary contribution of funds.[49] In international law, therefore, it constitutes solely a non-binding announcement of an intended contribution,[50] unless it is expressed, of course, under the form and content of a binding agreement.[51] There does exist an intermediate category between pledging and contribution though; it is that of commitment, which consists in the creation of a legal, contractual obligation between the donor and recipient entity, and which specifies the committed amount.

In order to avoid hosting donor conferences in which the outcome is the mere making of pledges that do not translate into concrete cash contributions, it became evident that the culmination of a conference must involve binding commitments. Paragraph 29 of the United Nations Secretary-General's Bulletin[52] aims exactly to remedy this lacuna by requiring a degree of formality concerning pledges. At this stage it is also worth noting that only a portion of the funds committed and collected as a result of donor conferences is earmarked for trust funds. Depending on the experience of the trustee in the administration of funds and his powers of influence, as well as on the basis of the mandate received by the creators of the trust fund, the trustee may well attempt to set up a particular legal mechanism by which to turn pledges into concrete commitments. To a large degree, the World Bank has managed to

---

(BGH) judgment in NJW (1980) 1388, which held that the display of goods in a window is not an offer but merely an invitation to make an offer.

49 The matter is not beyond contention in domestic law. In the US, for example, there is sharp disagreement between two distinct camps. The first asserts that pledges made to charitable organizations should not be treated any different to ordinary principles of contract formation, arguing that unless agreed otherwise such pledges are invitations to treat or unenforceable promises. *Maryland Nat'l Bank v. United Jewish Appeal Fed'n of Greater Washington, Inc.*, 407 A2d 1130, 1136 (Md 1979). The other camp argues that such pledges should be enforced on public policy grounds and the philanthropic purposes underlying charities. See *Jewish Fed'n of Cent. N.J. v. Barondess*, 560 A2d 1353, 1354 (NJ Super Ct Law Div 1989); see also *Salsbury v. Nw. Bell Tel. Co.*, 221 NW2d 609, 613 (Iowa 1974).

50 See Archibald 2004, 329. Archibald rightly comments that with regard to unpaid voluntary contributions, the UN does not invoke Art 19 of the UN Charter, at 325–26.

51 See also Silvestre and Martha 2014, 263. The issue has not received any particular treatment in general international law, nor in the expert work on unilateral acts of the UN International Law Commission (ILC). See Eckart 2012.

52 UN Secretary-General's Bulletin on the Establishment of Trust Funds, UN Doc ST/SGB/188 (1 March 1982).

standardize and streamline this process, but only in respect of particular trust funds. A typical example is the Global Environment Facility (GEF), whereby donors must sign an Instrument of Commitment, which constitutes a binding agreement subject to ratification by national parliaments. The trustee has established the same type of binding commitment in respect of the various replenishments required to keep the GEF alive.[53]

6 The Rise of Memoranda of Understanding

Given that both the United Nations and its Specialized Agencies do not generally require a treaty format for concluding trustee (administration) or donor agreements – in fact, the relevant Financial Regulations do not stipulate the two as separate contracts – it is not surprising that several MoUs have appeared in this respect. There is no single general definition of MoU,[54] but in general terms they constitute agreements lacking the binding nature of contracts, thus effectively missing the parties' intention to be bound by the terms of the agreement.[55] No doubt, just because the parties label an agreement an MoU does not necessarily entail that the agreement in question is not framed in binding terms. If this is in fact the case, the MoU will be deemed binding and therefore assume the qualities of a contract.[56]

Typical examples, albeit not as trust agreements, are the MoU between the conference of parties (COP) of the Convention to Combat Desertification and the International Fund for Agricultural Development (IFAD)[57] regarding the

53 The Instrument for the Revitalized Global Environmental Facility (GEF) of March 2008, Annex C.

54 Even so, an excellent definition is provided by the UN Treaty Handbook [in the Glossary section] as follows: "The term memorandum of understanding (M.O.U.) is often used to denote a less formal international instrument than a typical treaty or international agreement. It often sets out operational arrangements under a framework international agreement. It is also used for the regulation of technical or detailed matters. An M.O.U. typically consists of a single instrument and is entered into among States and/or international organizations".

55 Markakis 2018, Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu, 643.

56 The ICJ pointed out in *Qatar v Bahrain* (Maritime Delimitation and Territorial Questions between Qatar and Bahrain), (2001) ICJ Rep 40, that the characterization of an MoU as a treaty will depend on its actual terms, the inclusion of actual commitments and the particular circumstances (eg Ministerial level signatures as opposed to directors).

57 The practice of most COP confirms that because they must interact with other actors they must be assumed to possess some, at least, legal personality. COP to environmental treaties regularly, for example, adopt decisions by which they appoint a third entity

Modalities and Administrative Operations between the Global Fund,[58] as well as the MoU between the COP to the Biological Diversity Convention and the GEF regarding the Institutional Structure Operating the Financial Mechanism of the Convention.[59] The GEF and IFAD serve as financing mechanisms for the purposes of these conventions and not as trustees. Their role is to finance part or all of the projects decided by the COP to these conventions, as long as these decisions are consistent with the respective constitutional instruments of IFAD[60] and the GEF.[61] In the case of the COP-GEF MoU, one may obviously argue that the choice of this instrument is necessarily dictated by the fact that neither of the two entities possesses sufficient legal personality[62] such that would enable them to conclude a treaty, or other binding agreement.[63] In any event, while the parties to such MoU are generally presumed to have intended to desist from assuming any binding obligations, the non-binding character of these instruments may, nonetheless, be questioned on several grounds.

---

as a trustee to a financing mechanism stipulated under their founding treaty followed thereafter by the conclusion of an MoU with the designated trustee. See UN Doc UNEP/CBD/COP/1, Decision1/2, para 2 and UN Doc UNEP/CBD/COP/2/19, Decision II/6, para 1. MoU between the COP to the Convention on Biological Diversity (CBD) and the Council of the Global Environmental Fund (GEF), UN Doc UNEP/CBD/COP/3/38, Decision III/8; see also the MoU between COP to the Convention to Combat Desertification (CCD) and the International Fund for Agricultural Development (IFAD) regarding the Modalities and Administrative Operations of the Global Mechanism, UN Doc ICCD/COP(3)/10 (30 August 1999), Annex I.

58 Art 2. The MoU is attached as Annex I in Doc UNEP/CBD/COP/3/10 (11 October 1996).

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

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

61 The Restructured GEF Instrument is reproduced in (1994) 33 ILM 1273, as subsequently amended in March 2008, para 2. Para 3 stipulates also "that the agreed incremental costs of other relevant activities under Agenda 21 that may be agreed by the Council shall also be eligible for funding insofar as they achieve global environmental benefits by protecting the global environment in the focal areas".

62 See Bantekas 2020, *The Legal Personality of World Bank Funds under International Law*, 101–143.

63 Matz 2005, 265; 285.

Firstly, and in respect to trust agreements established by MoU, the trustee is appointed as the account holder (where applicable) and administrator of the trust fund and its assets. This in itself entails a reciprocal obligation and moreover the trustee owes particular duties to the donors, which can hardly be assumed on a non-binding basis. As most of these duties stem from widespread practice in the field of international law trust funds, it is not out of the question to posit that they have become part of customary international law between States and trustees, and as such are binding and not merely voluntary. Moreover, the trustee owes some fiduciary duties to the beneficiaries once these have been designated.[64] It would thus be unreasonable for the trustee and the donors to appoint the trustee without either of these entities owing any obligations to the beneficiaries at any stage of the trust process.

In practice, the vast majority of commentators argues that despite the relevant MoU, the GEF is not legally bound by decisions of the COP.[65] Although the intention of the parties entering into such MoU should be respected, the very content of such instruments necessarily entails a plethora of binding obligations, whether implicitly by the very function of the trustee's role or as a result of customary international law. Perhaps, therefore, the best way of approaching the normative character of such agreements is article-by-article. Alternatively, it may be argued that the parties to an MoU establishing a trust relationship are aware of and accept the binding duties arising from such a relationship and thus the role of the MoU is to emphasize the non-binding character of all the other aspects of this relationship. It should be noted, of course, that the parties to the aforementioned MoU are not states in their vast majority but IOs. Moreover, it is true, as already explained, that the intergovernmental status of others, such as the GEF, may be in doubt. Nonetheless, it is undeniable that these institutions enjoy at least some international legal personality, and even if they are unable to enter into treaties as quasi-intergovernmental organizations, they are competent to conclude contracts under domestic law.[66] The MoU route, therefore, does not have to be the only option. Overall, the

64 See Bantekas 2011, 224; 231; equally Bantekas 2021, *The Contractual and Transnational Nature of Sovereign Donor-Trustee International Aid Contributions*, (forthcoming).

65 In fact, the COP to the CBD, in its first review of GEF effectiveness as the CBD's financial mechanism expressed discontent with the GEF's level of compliance. See note 63, Matz, 285–86.

66 The private law of the host state will dictate the terms of an entity's competence, typically through the civil code. Civil codes distinguish between physical persons and legal persons. See e.g. Bantekas and Al-Ahmed 2022, Qatari Law of Contracts, chp 4. In addition, the legal personality of trust entities, will be set out in their HQ agreements, although this will not depart from the relevant provisions of the civil code.

problematic nature of MoUs serving as administration agreements is limited to a small number of cases that do not generally involve state entities.

7 Memoranda of Understanding Adopted by International Financial Institutions in the Greek Sovereign Debt Crisis: Constitutional, Democratic and Human Rights Considerations

A particular type of MoU that has emerged in the post-2008 financial crisis era concerns the role of IFIs, such as the IMF, in the provision of liquidity to distressed sovereigns. Sovereign financing is typically achieved through syndicated and bonded loans. In syndicated loans, a number of banks pool financial resources in favor of a single borrowing state, not only in order to diversify the risk but also because a single bank may not have sufficient resources.[67] The lenders (or holders of the loan) may subsequently sell their portion of the loan to the secondary market, whether through novation or assignment. In novation, the initial financing contract is terminated and a new contract between the new novator and novatee state is established. Similar arrangements are made in the case of assignment. The exposure of banks involved in syndicated loans to severe non-performance necessitated a change in the financing of states. This came about through the process of bonded loans. There are two types of bond issuance, namely direct placement through an auction, and indirect placement by means of an international issuance. It is in respect of the latter that investment banks play a key role because the loan possesses an international character and banks possess the attributes of foreign investors protected under bilateral investment treaties (BITs).[68]

Debt relief under IMF initiatives has been supplied either by the Paris Club or through other forms of debt restructuring. Since the adoption of the Poverty Reduction and Growth Facility, the Paris Club has offered better debt restructuring to countries eligible under the Heavily Indebted Poor Countries (HIPC) Initiative than to non-HIPC countries. Participating creditor countries and the debtor country usually sign an Agreed Minute at the end of a negotiation session. This is not a legally binding document but merely a recommendation by the heads of delegations of participating creditor countries to their governments to sign a bilateral agreement implementing the debt treatment. When there are only a few creditors concerned, the Paris Club agreement is

67 See Mugasha 2007, 88–91.

68 See Megliani 2018, *Private Loans to Sovereign Borrowers*, in: Bantekas and Lumina (eds) 2018, *Sovereign Debt and Human Rights*, 74–76.

exchanged through mail between the Chair of the Paris Club and the government of the debtor country and is called "terms of reference". In some cases, the multilateral debt agreement is implemented (in addition) through an MoU. As regards non-Paris Club creditors, they typically enter into bilateral agreements with debtor states, either under the HIPC Initiative or independently of it. Numerous bilateral agreements have been concluded in this manner, whether as treaties or MoUs.[69]

As this section will go on to show, IFIs should be cautious about their use of MoUs in light of the manner these have been employed by the IMF and the European Central Bank (ECB), whereby the aim was to bypass constitutional procedures for transposing agreements into the domestic legal order.[70] This section intends to highlight the arbitrary and largely adhesive nature of such agreements and so emphasize the importance of prudence by IFIs. In the case of modern post-2010 Greece, since entering into its "bail out" agreements in 2010, a supervisory authority known as the "Troika" and composed of the EU (Commission), the ECB, the IMF, and later the European Stability Mechanism (ESM) was imposed by Greece's multilateral creditors.[71] Given that the bulk of the conditionalities were contained in MoUs, the aim of which was to render any issues arising therefrom inadmissible from local or international courts,[72] the authority of the "Troika" was exceptionally broad and in practice could sanction any policy or law, even if not directly related to the Greek debt-restructuring plan. In order to secure implementation of these conditionalities, it was necessary to bypass constitutional requirements. According to article

69 See IMF, HIPC Initiative: [Report on the] Status of Non-Paris Club Official Bilateral Credit Participation (10 Oct 2007) 7–11. The IMF and the Paris Club have identified several legal impediments to debt relief agreements. Among these one may note: a) impediments arising where central banks are the holders of the debt; b) those cases where some creditors have argued that the mandate of specialized agencies holding guaranteed claims does not allow them to provide debt relief at HIPC Initiative terms; c) sale of HIPC claims to private investors, which increases the likelihood of litigation. Id, IMF HIPC Report, 12–13.

70 See Bantekas 2021, *The Contractualisation of Fiscal and Parliamentary Sovereignty: Towards a Private International Finance Architecture?*, (forthcoming).

71 Bilateral creditors in the troika are represented and coordinated by the EC Commission – on the basis of an Inter-creditor agreement concluded among themselves on 8 May 2010 – whereas the IMF represents itself. The text of the Consolidated version of the Inter-creditor agreement is available at: <http://www.irishstatutebook.ie/eli/2010/act/7/schedule/1/enacted/en/html>, accessed: 17 August 2022.

72 It was only in Case C-258/14, *Eugenia Florescu and Others* v *Casa Jude¸teana˘ de Pensii Sibiu and Others*, Judgment of the Court (Grand Chamber) of 13 June 2017, EU:C:2017:448, para 36, that the CJEU came to the conclusion that MoU concluded under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under art 267(1)(b) TFEU, and hence susceptible to interpretation by the Court.

36(2) of the Greek Constitution, international agreements must be ratified by an implementing law adopted by the plenary of Parliament. International agreements require a qualified majority of three fifths of the deputies in accordance with article 28(2) of the Constitution.[73] The Loan Agreement of 8 May 2010 (as amended by a subsequent agreement of 12 December 2012), however, was not even distributed to Parliament, nor was it publicly discussed, including the severe austerity measures contained therein. In fact, in a document entitled "Statement on the support to Greece by Euro area Members States" of 11 April 2010,[74] it was announced that the Euro Area Member States, together with the ECB and the IMF, were prepared to provide a loan to Greece and that the terms of the loan had "already been agreed". This demonstrates that none of the parties involved had any intention of respecting the procedures of the Greek Constitution or to comply with even elementary requirements of transparency.[75]

Moreover, article 1(4) of Law 3845/2010 granted the Finance Minister authority to negotiate and sign the texts of all pertinent loan and financing agreements (including treaties, contracts and MoUs). Although it was required under the Constitution that all such agreements be subject to parliamentary ratification, this never happened. Five days after its adoption, article 1(9) of Law 3847/2010 modified article 1(4) of Law 3845 by stipulating that the term "ratification" [by parliament] is replaced by "discussion and information". Moreover, all pertinent agreements (irrespective of their legal nature) were declared as producing legal effect upon their signature by the Finance Minister.[76] Hence, articles 28 and 36 of the Constitution were effectively abolished by a mere legislative amendment. What is more, Law 3845 included two of the three MoUs as mere annexes, relegating them to the status of "programme plan".[77]

---

73 See Judgment No 668/2012 (20 February 2012), para 29, decided by the Plenary of the Greek Conseil d'Etat (ΣτΕ), the majority of whose members agreed with such an interpretation of Art 28(2).

74 Law no 3845/2010, Annex II.

75 See principles 28–32 of the UN Guiding Principles on Foreign Debt and Human Rights, UN Doc A/HRC/20/23 (10 April 2011), which render transparency a cardinal principle.

76 Case C-258/14, *Eugenia Florescu and Others* v *Casa Judeţeana˘ de Pensii Sibiu and Others*, Judgment of the Court (Grand Chamber) of 13 June 2017, EU:C:2017:448, para 41. See Markakis 2018, Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu, 643.

77 Greek Parliament 2015, Debt Committee on the Truth of the Public Debt, 'Preliminary Report', 48–49. Available at: <http://cadtm.org/IMG/pdf/Report.pdf>, accessed: 17 August 2022.

In the context of the Greek sovereign debt crisis, the use of MoUs were clearly intended to produce binding legal consequences. It was evident to both parties that one party (the Greek state) was distressed and hence willing to bypass its constitutional arrangements under which a sovereign parliament could discuss and approve the loans and attendant austerity measures. That the measures in the MoUs gave rise to grossly disproportionate rights and obligations was beyond doubt and, unlike other agreements between sovereigns, access to a fair dispute resolution mechanism was effectively dispelled.[78] It is important that the deployment of informal agreements like MoUs by IFIs respects parliamentary sovereignty as in this manner such agreements will command legitimacy and respect.

8 Conclusion

IFIs play a significant role in the global financial architecture and the pursuit of development. In doing so, they must, by necessity, develop instruments by which to transact with their direct stakeholders. They must compete for scarce funding not only among their creators and member states, but also from third parties, private donors, and others. This process requires flexibility and a significant degree of entrepreneurship. MDBs in their role as trustees of assets have bypassed traditional channels of transacting. This is a fascinating development that while flexible and adaptable to the needs of other stakeholders, is not without its share of consequences. Agreements in the form of contracts may be governed by a foreign substantive law,[79] or disputes submitted to commercial arbitration. MDBs may agree to waive their jurisdictional immunities or otherwise agree to perilous promises by donors on the basis of informal instruments, such as MoU or other types of written commitments. By doing so, they become agents of contract and in the process, they must become effective contract managers in the same manner that law firms or in-house legal departments undertake the same role on behalf of their principals or clients. This is not necessarily a negative development. MDBs are now competing – and this will intensify in the future – with a number of non-governmental entities for the best possible developmental use of donor funding. In equal measure, despite Sustainable Development Goal (SDG) pledges, the public and private nature of the funding is not always clear, nor is the degree to which aid is

78 See Bantekas 2018, 52–80; equally, Bantekas 2020, *The Rise of International Commercial Courts: The Astana International Financial Center Court*, 1.

79 See Bantekas 2021, *The Globalisation of English Contract Law: Three Salient Illustrations*, 130.

currently tied. This means that MDBs must strive to prove that they constitute the best possible mechanisms for receiving, managing, and ultimately disbursing developmental funds to appropriate recipients. This can only be achieved by competing not only as better managers but as more creative and adaptable lawyers.

The mix of contractual practices analyzed in this article is hardly exhaustive. It serves as an illustration of what is out there and how this is different from the types of transactions typically associated with creatures of international law. Trust funds and MDBs have proven to be resourceful and adaptable to the changing market forces. Their continued success will be measured not only by how they employ and operate various forms of agreements (whether MoU, contracts, treaties, or others), but crucially also by the legitimacy of the contents and processes underlying these agreements. It is also important that, whatever the form of agreement, MDBs focus on the developmental goals as well as fundamental human rights underlying these agreements. This is important because the practice of BITs as well as that of IMF-led programs has sadly lost sight of both development and human rights.[80]

References

Archibald J E, *Pledges of Voluntary Contributions to the United Nations by Member States: Establishing and Enforcing Legal Obligations*, (2004) 36 Geo Wash Int'l LR 317, 317–18, 329.

Bantekas I, *The Private Dimension of the International Customary Nature of Commercial Arbitration*, (2009) 25 Journal of International Arbitration 449.

Bantekas I, *United Nations Employment Law and the Causes for the UN's Failed Female Senior Appointments Record*, (2009) 6 International Organizations Law Review 225.

Bantekas I, *The Emergence of the Intergovernmental Trust in International Law*, (2011) 81 British Yearbook of International Law 224, 231.

Bantekas I, *Wealth and Growth-based Policies have Augmented Global Poverty and Eroded Human Rights: A Return to Human-Centred Thinking*, (2012) 1 International Human Rights Law Review 30.

Bantekas I and Vivien R, *The Odiousness of the Greek Debt in Light of the Findings of the Greek Debt Truth Committee*, (2016) 22 European Law Journal 539.

80 See Bantekas 2020, *The Human Rights and Development Dimension of Foreign Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws*, 339.

Bantekas I, *A Human Rights-Based Arbitral Tribunal for Sovereign Debt*, (2018) 29 American Review of International Arbitration 52–80.

Bantekas I, *The Rise of International Commercial Courts: The Astana International Financial Center Court*, (2020) 33 Pace International Law Review 1.

Bantekas I, *The Human Rights and Development Dimension of Foreign Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws*, (2020) 31 Florida Journal of International Law 339.

Bantekas I, *The Legal Personality of World Bank Funds under International Law*, (2020) 56 Tulsa Law Review 101–143.

Bantekas I, *The Emerging UN Business and Human Rights Treaty and its Codification of International Norms*, (2021) 12 George Mason International Law Journal 1–43.

Bantekas I, *The Linkages Between Business and Human Rights and their Underlying Causes*, (2021) 43 Human Rights Quarterly 118.

Bantekas I, *The Globalisation of English Contract Law: Three Salient Illustrations*, (2021) 137 Law Quarterly Review 130.

Bantekas I, *The Contractualization of Public International Law and its Impact on the Rule of Law*, (2021) International Journal of Law in Context 1.

Bantekas I, *The Contractual and Transnational Nature of Sovereign Donor-Trustee International Aid Contributions*, (2021) 49 Syracuse Journal of International Law and Commerce (forthcoming).

Bantekas I, *Effective Management of International Aid through Inter-governmental Trust Funds*, (2021) 10 Loyola Chicago International Law Review 1.

Bantekas I, *The Contractualisation of Fiscal and Parliamentary Sovereignty: Towards a Private International Finance Architecture?*, (2021) 10 Global Constitutionalism 1.

Bantekas I and Al-Ahmed A, *Qatari Law of Contracts*, (Cambridge University Press 2022).

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256, (1961).

Cassese S, *Administrative Law without the State? The Challenge of Global Regulation*, (2005) 37 NYU J Int'l L & Pol 663.

Cedeno V R, *Unilateral Acts of States*, UN Doc A/CN.4/486, (5 March 1998).

Chrystal A, *Monetarism*, (Edward Elgar 1990).

Churchill R and Ulfstein G, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law*, (2000) 94 AJIL 623.

Delaume G, *Proper Law of State Contracts Revisited,* (1997) 12 ICSID Review Foreign Investment Law Journal 1.

Eckart C, *Promises of States in International Law*, (Hart 2012).

Fisher v Bell, (1961).

Gold J, *The Legal Character of the Fund's Stand-by-Arrangements and Why it Matters*, (IMF Pamphlet Series No 35, 1980).

Greek Conseil d'Etat, *Judgment No 668/2012, para 29, decided by the Plenary of the Greek Conseil d'Etat* (*ΣτΕ*), (20 February 2012).

International Bank for Reconstruction and Development (IBRD), *Bank Policy* (*BP*) *14.40, on Trust Funds,* 1997 <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/932661468162558092/op-bp-14-40-trust-funds-with-supporting-documents>, accessed 15 April 2021.

International Bank for Reconstruction and Development (IBRD), *Operational Policy* (*OP*) *14,40 on Trust Fund*, 1997 <http://web.worldbank.org/archive/website01541/WEB/0__C-150.HTM>, accessed 15 April 2021.

International Fund for Agricultural Development (IFAD), *Lending Policies and Criteria, adopted by IFAD Governing Council on 14 Dec 1978* (as recently amended by Res 106/XXI), (12 Feb 1998).

International Monetary Fund (IMF), *Decision No 2603-(68/132)*, (20 Sep 1968).

International Monetary Fund (IMF), *Decision No 6056-(79/38)*, (2 March 1979).

International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts*, (2010).

Jewish Fed'n of Cent. N.J. v. Barondess, 560 A2d 1353, 1354 (NJ Super Ct Law Div 1989).

Kellerman M, *The Proliferation of Multilateral Development Banks*, (2019) 14 Review of International Organizations 107.

Kingsbury B, Krisch N and Stewart R B, *The Emergence of Global Administrative Law*, (2005) 68 Law and Contemporary Problems 15.

Krever T, *The Legal Turn in Later Development Theory: The Rule of Law and the World Bank's Development Model*, (2011) 52 Harvard International Law Journal 287.

Ledra Advertising Ltd and Others v. European Commission and European Central Bank, EU:C:2016:701, (2016).

Lefkowitz v. Great Minneapolis Surplus Store, 86 NW 2d 689 (Minn 1957).

Lienau O, *Who is the "Sovereign" in Sovereign Debt? Reinterpreting a Rule-of-Law Framework from the Early Twentieth Century*, (2008) 33 Yale J Int'l L 63.

Mann F A, *The Proper Law of Contracts Concluded by International Persons*, (1959) 35 British Yearbook of International Law 34.

Markakis M, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu*, (2018) 55 Common Market Law Review 643.

Maryland Nat'l Bank v. United Jewish Appeal Fed'n of Greater Washington, Inc., 407 A2d 1130, 1136 (Md 1979).

Matz N, *Financial Institutions between Effectiveness and Legitimacy: A Legal Analysis of the World Bank, Global Environmental Facility and Prototype Carbon Fund*, (2005) 5 Int'l Environmental Agreements 265, 285.

Megliani M, *Private Loans to Sovereign Borrowers*. In: I Bantekas, C Lumina (eds), *Sovereign Debt and Human Rights*, (Oxford University Press 2018) 69, 74–76.

Mehren v. AT, *Civil law Analogues to Consideration: An Exercise in Comparative Analysis*, (1959) 72(4) Harvard Law Review 1009.

Morlino E, *Procurement by International Organizations: A Global Administrative Law Approach*, (Cambridge University Press 2019) 261.

Mugasha A, *The Law of Multi-Bank Financing*, (Oxford University Press 2007) 88–91.

NML Capital, Ltd. et al. v. The Republic of Argentina, 699 F. 3d 246 (2d Cir. 2012).

Norwegian Agency for Development Cooperation (NORAD), *Review of Post-Crisis Multi-Donor Trust Funds*, (February 2007) 51.

O'Keefe R, Tams CJ, *The United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary*, (Oxford University Press, 2013), 284.

Okeke E C, *Jurisdictional Immunities of States and International Organizations*, (Cambridge University Press, 2018) 265–81.

Peel E, *Treitel: The Law of Contract,* (Oxford University Press, 12th edn 2007) 3–150.

Pilling D, *The Growth Delusion: The Wealth and Well-Being of Nations*, (Bloomsbury 2018).

Qatar v. Bahrain (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain*), (2001).

Salsbury v. Nw. Bell Tel. Co., 221 NW2d 609, 613 (Iowa 1974).

Schwarcz S, *Sovereign Debt Restructuring and English Governing Law*, (2017) 12 Brooklyn J Corp Fin Comm L 1.

Smits J, *Contract Law: A Comparative Introduction*, (2nd ed Edward Elgar 2017) 41–63.

Silvestre R and Martha R J S, *The Financial Obligation in International Law*, (OUP 2014) 263.

Teubner G, *Global Bukowina: Legal Pluralism in the World Society*, In: Teubner G (ed), *Global Law without a State*, (Dartmouth, 1997), 15.

Tomuschat C, *General International Law: A New Source of International Law?*, In: Pissillo Mazzeschi R, de Sena P (eds), *Global Justice, Human Rights and the Modernisation of International Law*, (Springer 2018) 185–204.

United Nations, *Secretary-General's Bulletin on the Establishment of Trust Funds* (UN Doc ST/SGB/188), (1 March 1982).

United Nations, *UN Doc UNEP/CBD/COP/1/8, Decision1/2, para 2*, (6 October 1994).

United Nations, *UN Doc UNEP/CBD/COP/2/19, Decision II/6, para 1*, (30 November 1995).

United Nations, *UN Doc UNEP/CBD/COP/3/10*, (11 October 1996).

United Nations, *UN Doc UNEP/CBD/COP/3/38, Decision III/8*, (11 February 1997).

United Nations, *UN Doc ICCD/COP(3)/10*, (30 August 1999).

United Nations, *UN Secretary-General's Guidelines on Cooperation between the UN and the Business Community*, (17 July 2000).

United Nations, *UN Convention on Jurisdictional Immunities of States and their Property*, (2 December 2004).

United Nations, *UN Guiding Principles on Foreign Debt and Human Rights, UN Doc A/HRC/20/23*, (10 April 2011).

Varoufakis Y, *The Global Minotaur: America, Europe and the Future of the Global Economy*, (2015).

Weiss E B, *Voluntary Commitments as Emerging Instruments in International Environmental Law*, (2014) 44 Environmental Law and Policy 83.

Williams-Elegbe S, *Public Procurement and Multilateral Development Banks* (Hart 2017).