INTERGENERATIONAL FUNDS IN THE PACIFIC

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Intergenerational funds are increasingly used worldwide to manage and preserve wealth for future generations. They are especially vital in the Pacific, considering that most countries rely heavily on finite natural resources and have limited opportunity for a diverse economy. Amongst the existing intergenerational funds, the treaty-based trust model, as exemplified by the Tuvalu Trust Fund, may provide the most stable and reliable regime for the trust's operation and management in the context of the Pacific countries. Most importantly, the treaty framework may sufficiently restrict the extent of the discretion and powers which governments may exercise over the fund, especially in terms of the freedom to alter the fund. Nevertheless, recent developments in the Pacific and elsewhere such as the Seychelles Conservation and Climate Adaptation Trust and the Intergenerational Trust Fund for the People of the Republic of Nauru have shifted away from the treaty-based fund model. Those structures potentially strike a balance between the benefits of the treaty model and the accommodation of specific political and social circumstances. Therefore, the most appropriate form for intergenerational funds is not only a legal but also a practical concern. Whatever model is applied, it should be contemplated within the unique context of the host country to suit its specific purposes and interests.

Les fonds fiduciaires intergénérationnels internationaux sont de plus en plus utilisés pour gérer et préserver les richesses pour les générations futures dans le monde entier.

Plus qu'ailleurs ces fonds sont particulièrement vitaux dans les États et Territoires insulaires du Pacifique, puisque la plupart d'entre eux restent tributaires de

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ressources naturelles limitées et d'une quasi-impossibilité de mettre en place une économie diversifiée.

Parmi les fonds intergénérationnels internationaux existants, s'inspirant du mode fonctionnement des trusts, le Fonds fiduciaire de Tuvalu, État insulaire du Pacifique, apparaît comme un cadre théorique stable et fiable transposable à d'autres petits États et Territoires insulaires du Pacifique dans le cadre de leur développement économique.

Le Tuvalu Trust Fund, créé en 1987 par un Traité international signé entre le Royaume-Uni, l'Australie et la Nouvelle-Zélande, est un fonds souverain international qui a pour finalité d'assurer à l'État de Tuvalu des revenus complémentaires suffisant pour couvrir les déficits de son budget national, soutenir le développement économique et d'aider le pays à acquérir une plus grande autonomie financière.

Le cadre conventionnel contraignant des Traités, présente l'avantage de limiter l'étendue des pouvoirs discrétionnaire des gouvernements des États bénéficiaires s'agissant notamment du quantum et à l'utilisation des fonds alloués.

Néanmoins, les récents développements observés dans ce domaine, tels que la mise en place du Fonds pour la conservation et l'adaptation au climat des Seychelles et le Fonds fiduciaire intergénérationnel pour le peuple de la République de Nauru, (the Seychelles Conservation and Climate Adaptation Trust and the Intergenerational Trust Fund for the People of the Republic of Nauru) montrent que ceux-ci reposent sur des modèles théoriques et pratiques éloignés des fonds fiduciaires internationaux d'origine purement conventionnelle.

Il n'en reste pas moins que ces nouvelles structures de financement international peuvent trouver un juste équilibre entre les avantages tirés d'un modèle strictement encadré reposant sur un Traité et ceux issus d'un modèle plus souple permettant une meilleure adaptation aux circonstances politiques et sociales spécifiques à chaque État bénéficiaire.

Les auteurs en concluent que quel que soit le modèle retenu le succès des Fonds fiduciaire intergénérationnels internationaux au profit des petits États et territoires insulaires, restera toujours conditionné par le contexte économique et social unique de chaque pays bénéficiaire

I INTRODUCTION

Intergenerational funds are of great interest to countries of the Pacific. New funds are created regularly and for an increasing range of objects. The purpose of this paper

is to complement the legal commentary which was begun in a paper published in the Journal of Pacific History[1] and also to update legal developments within the intergenerational trust area. It takes account of the work of the New Zealand Institute for Pacific Research and some fund developments which have occurred since the publication of that research.

The commentary in the Journal of Pacific History focused on the Tuvalu Trust Fund. Recent experience demonstrates that some evolution, away from the treaty-based trust fund model that the Tuvalu Trust Fund presents, has been necessary. Many variations of trust fund legal models have been used either when the treaty model is not available or when an alternative to the treaty model is more suited to the circumstances of the case.

In developing these matters, Part II provides a legal conceptualisation of intergenerational trust funds and distinguishes them from non-trust intergenerational funds; Part III and the Appendix present a tabulation of the key legal features of existing funds; Part IV discusses alternatives to the Tuvalu Trust Fund model and in particular the Norwegian Government Pension Fund, the Seychelles debt swap arrangement, and the Nauru Trust Fund; Part V reflects on the causes of variation from the Tuvalu Trust Fund model in the Pacific and what may encourage use of alternative models in future.

II LEGAL CONCEPTUALISATION OF INTERGENERATIONAL TRUST FUNDS

The conclusion of an earlier review of trust funds in the Pacific was that a trust fund established by a treaty, as exemplified by the Tuvalu Trust Fund, is the ideal model for intergenerational funds in the Pacific.[2] Since then, some new funding mechanisms have been introduced into the sphere of intergenerational funds. In Nauru, the Intergenerational Trust Fund for the People of the Republic of Nauru (Nauru Trust Fund) came into operation from 30 April 2016. In the same period, Seychelles successfully finalised its debt swap with Paris Club creditors to create income for its trust fund, instead of relying entirely on contributions from domestic revenue or overseas donations. These recent developments present structural alternatives for intergenerational funds in the Pacific.

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1 Tony Angelo, Brian Bell and Bayley Roylance "Intergenerational Trusts in the Pacific" (2016) 51(2) Journal of Pacific History 186.

2 See Angelo et al, above n 1. The Fund has distributed $107 million to the Government over 30 years with an average 5.1% real return.

The definition of intergenerational funds may vary, depending on the standpoint of the authors. For instance, in the New Zealand Institute for Pacific Research (NZIPR)'s 2016 report,[3] 'sovereign funds' is defined as a pool of assets which is managed and invested by national governments in order to achieve predetermined economic purposes.[4] The NZIPR report focused on the long-term economic purposes of the funds and classified them into five groups.[5] This classification excludes trusts which are not controlled by government and also those which are established for environmental protection. Further, from a legal perspective the classification of intergenerational funds should address not only purposes but also ownership and governance.

The core concept of a Common Law trust is that there be a settlor (donor) who transfers property to the trust (or trustees) and that there are trustees who hold the property to the purpose or object of the trust. Any such trustees are accountable to a third party (beneficiaries).[6] When an intergenerational fund is a trust, the ownership of the fund is split between the holder of the legal interest and holder of the beneficial interest; this has the potential to limit political inference by the government of the day.

The distinction made here between trust funds and other intergenerational funds is primarily on the basis that non-trust funds are owned and controlled by a state government. By contrast, while trust funds may be government managed, they are not solely government owned. Where held by the government, any distribution must accord with the beneficial interest in the trust fund. Where the government is the

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3 Aaron Drew *The Role of Sovereign Funds in Pacific Island Nations* (New Zealand Institute for Pacific Research, 9 November 2016) at 5.

4 At 7-8.

5 At 8. These purposes include (i) to stabilise the macro-economy, (ii) to preserve and transfer wealth across generations, (iii) to discharge pension liabilities, (iv) to support development plans, and (v) to curb the risks posed by foreign exchange reserves. For a definition of sovereign wealth funds, also see Abdullah Al-Hassan, Michael G Papaioannou, Martin Skancke and Cheng Chih Sung *Sovereign Wealth Funds: Aspects of Governance Structures and Investment Management* (IMF, Working Paper WP/13/231, 11 November 2013); International Working Group of Sovereign Wealth Funds *Sovereign Wealth Funds: Generally Accepted Principles and Practices "Santiago Principles"* <www.ifswf.org/sites/default/files/santiago principles_0_0.pdf> (October 2008) at 27; Will Devlin and Bill Brummitt "A Few Sovereigns More: The Rise of Sovereign Wealth Funds" (2007) 4 Economic Round-Up 119 <https://archive.treasury.gov.au/documents/1329/PDF/07_A_few_sovereigns_more_the_rise_of_sovereign_wealth_funds.pdf> at 120; and Andrew Ang "The Four Benchmarks of Sovereign Wealth Funds" (4 October 2010) Colombia Business School <https://www0.gsb.columbia.edu/faculty/aang/papers/The%20Four%20Benchmarks%20of%20Sovereign%20Wealth%20Funds.pdf> at 3.

6 There are trust funds established using offshore trust centres which operate a statutory arrangement called a trust. These trusts are not specially designed to deal with the concerns of a State intergenerational trust fund; that is to say their operation is not always transparent and a primary goal is often the avoidance of tax.

beneficiary of the fund, the trust fund must not be held by the government alone because the beneficiary and the trustee of the trust cannot be the same person. The trust fund should stand distinct from any other government account.

Simple fulfilment of the establishment requirements of the English Common Law trust creates a fiduciary relationship of the trustee to the beneficiary or to the trust purposes which serves to protect the trust property from misuse. This is achieved by the severe limitations placed on the ownership right of the trustee and corresponding consequences for all who deal with the trustee. Once the trust is established, the whole body of principles relating to, for instance, fair dealing, good faith, absence of conflict of interest, and beneficiary rights comes into play. There is therefore in most cases no need to spell out the fiduciary relationship of the trustee to the trust beneficiary or purpose. It is for this reason that a trust arrangement often focuses more on elements of the arrangement which derogate from the core principle[7] and why in non-trust arrangements, specific clauses are added to incorporate fiduciary (trust-like) duties.

III INTERGENERATIONAL FUNDS IN THE PACIFIC

A Overview

Although alternative models are available and have been used successfully in some other countries, trust funds remain popular and have been frequently used by Pacific nations. This Part considers the existing funds in the Pacific and assesses their structures and the mechanisms for accountability, integrity, and assurance. A tabulation of selected Pacific intergenerational funds is provided in the Appendix to this paper.

For an intergenerational fund, accountability is provided by the requirement for public reporting, the engagement of independent advisors, and the conduct of a regular annual financial audit. The control is typically by the beneficiaries.

In terms of integrity, there is a need to avoid conflicts of interest whether by trustees or government. It may be necessary in the interest of transparency and accountability and the successful operation of the fund for beneficiary and settlor representatives to be involved in the governance of the trust fund. Where that is so, it becomes important to have an independent voice within the governance structure.

Assurances can be given through the establishment of investment policies either in the founding documents or as a requirement of the management team. It is also

7 For instance, the inclusion of a specific limitation on trustee liabilities.

important to provide for a conditioned termination. It is contrary to the spirit of an intergenerational trust fund that the fund can be easily wound-up.

B Creation

A Common Law trust can be established without formality but for national funds with intergenerational purposes only formal arrangements are suitable. Such formality goes towards securing both the longevity and transparency of a trust fund. Whatever the form of its creation, an intergenerational trust gives the arrangement status and privileges within the beneficiary, and often within the settlor, countries.[8]

1 Parliamentary legislation

Parliamentary legislation is a very flexible way to create a trust. Subject to the provisions of any supreme constitution, a Parliament can provide for any content it deems desirable and adopt all the best practice features[9] in the legislation. Parliamentary legislation also has the advantage of publicity at the time of the creation and also at the time of any change, if amendment is required.

The termination of the trust is under the Parliament's control, regardless of what the legislation may say on the topic. That is a potential weakness of this system – a change of political will could defeat the original purposes of the trust.

If such a trust was placed within a constitutional setting, and had the status of a constitutional institution, that would give added security of being party of the supreme law. In a vulnerable state, the trust may be no less important or central to the country's governance than for instance an Ombudsman or a Leadership Code. In order to maintain the trust's constitutional protection and to limit political control, there might be a requirement for a qualified majority or special procedure to change the trust arrangements. The statute also should provide the trust with a legal personality separate from that of the government. As a consequence, the trust property will not be public money and therefore not subject to government budgeting systems or national appropriation requirements.

2 Subordinate legislation

Regulations provide a document that is public but one that is less secure than parliamentary legislation. Regulations are made and amended by executive action of which little or no notice may be given and in relation to which there may be no public

8 This is relevant to fiscal benefits in the country where trust funds are invested.

9 For the best practice features of a fund, see the "Santiago Principles", above n 5.

engagement.[10] The terms of the regulations however must be consistent with any empowering legislation.

3 Deed

To establish a trust by agreement or deed is a simple and relatively informal way to proceed. Any such agreement is subject to the law of its creation. All terms would need to be consistent with the governing legal system. Therefore, the trust would have to comply for instance with any rules against perpetuities[11] and the law on tax.[12]

A deed could be secret, as publicity is not of the essence of the deed's creation. This factor could be a critical weakness because transparency and accountability are two of a fund's most effective provisions to guard against abuse by trustees. A deed is not by nature a government document and therefore cannot create a legal person.[13] The deed system increases the vulnerability of the trust as the creators/settlors may amend it if they have a change of heart about the purpose or rules of the fund.

4 Treaty

The creation of trust by treaty, as exemplified by Tuvalu Trust Fund, is presented as an ideal model for the Pacific trusts for many reasons.

First, as a treaty would be subject to international law, there are relatively few legal constraints on the establishment and content of such an arrangement. All the best practice provisions could be included. Although the freedom from taxation cannot be granted by the treaty, the treaty may include undertakings by the parties about fiscal matters.[14] The treaty should be given domestic effect by domestic legislation, particularly in the country of the beneficiary.[15]

Second, although treaties may have a minimum degree of publicity, if a party's treaty-making process requires reference to parliament or to a parliamentary body,

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10 The Kiribati Revenue Equalization Reserve Fund is substantially controlled by regulations. It is a special fund under s 107 of the Constitution. It has a statutory base in the Public Finance (Control and Audit) Act 1976, and under that Act, the Public Finance (Revenue Equalisation Reserve Fund) Rules 1983 were made.

11 For example, see cl 20 of the Tokelau International Trust Fund Deed where the vesting period is stated to be within the limits of the Perpetuities Act 1964 (NZ).

12 Section CW 59B of the Income Tax Act 2007 (NZ) specifies that income arising from the Niue International Trust Fund or Tokelau International Trust Fund is "exempt income" for that Act's purposes.

13 The trust might however have been created as a corporation by other law devices such as a charitable trust, or a company limited by guarantee.

14 See for example, art 20 of the Tuvalu Trust Fund Treaty.

15 Tuvalu Trust Fund (Finance and Information) Act 1987.

there is the possibility for public debate and public awareness. The greater the number of states involved, the better it is for publicity. Public reporting to parties and to beneficiaries would ideally be incorporated as a requirement in the treaty.

Third, the treaty framework can ensure the sustainability and reliability of the trust fund. A trust established by a treaty may require the signatory states to first obtain approval from their competent authority before carrying out the formal proceedings to amend the treaty. In comparison, a trust fund established by a deed (or a memorandum of understanding) can be amended or revoked simply by a mutual agreement among the parties. Likewise the status of a trust fund established through a statute can be affected by a change of mind of the legislative body in the host country. Despite the fact that its establishment may be more time consuming than other models, a treaty can provide an intergenerational trust fund with the robustness necessary to accommodate its intergenerational nature.

Because the treaty system depends significantly on international political matters, political practicalities often prevent its use. The same concerns arise if there is a need to alter the treaty. If amendment is difficult and the winding-up of the trust fund is the alternative, that defeats the original purpose of the fund. As a result, many parties have settled for the creation of a trust by deed or legislation. It is most important that a robust but flexible system be established at the beginning. It helps if there is a limit on the matters on which all trustees must agree and on the matters can only be dealt with by amendment to the treaty.

5 Memorandum of understanding

Creation of a fund by a memorandum of understanding (MOU) was adopted by the governments of Australia and Nauru for Nauru's 2016 fund. This MOU seems to be a hybrid of deed and treaty. Given a similarity to a deed, the document carries some of the risks of a deed. The MOU is by nature a contractual arrangement and can be amended simply by consent of the parties. On the other hand, with no express provision on the governing law, it avoids complying with the legal requirements for a trust under any specific national law. Instead, it accommodates the flexibility of the funds created by treaty or legislation.

C Management and Organisation

The trustee should be a body corporate and hence have legal personality in its own right.[16] Such a body corporate would be operated by a Board of Directors (or a similar committee structure). Complementary state legislation can support the clear

16 Failing that, the owner will be the Directors. This should be less favoured because of the regular change of owners that it entails.

separation of the national property from the trust property. The trust must not be government money. This statutory segregation ensures that the trust funds are not available to creditors of the state.

1 Composition of the Board

An important matter to determine is the number of persons on the Board, and the size of the management or decision-making team. Because of the need for a good range of input, the number of Board members should not be less than three and if not three, five or seven. If the number is larger than this, there is the likelihood of redundancy and inefficiency. Also, if the Board has a large membership, there will be difficulties for convening and establishment of a quorum. The members of the Board should be appointed by the supporting countries and preferably with one member having international investment expertise. Donors of a significant sum could be entitled to have a member on the Board.[17] The term of a Board member's appointment is less critical, though some change perhaps at least every three to four years may be desirable to maintain a flow of ideas into the management. Trustees should be able to be removed in accordance with common conditions such as bankruptcy, or mental or physical incapacity. Except for those conditions, trustees should remain in office until replacements have been appointed.

The Chair of the Board should preferably be a full Board member.[18] As a full member, the Chair would have a deliberative vote, and a casting vote only in the event of division of views.

A Secretariat is essential to maintain the records, deal with correspondence and convene meetings. The number of meetings depends on the size of the Fund and its policy objectives.

In larger funds an investment sub-committee chaired by a Board member and serviced by the Secretariat is desirable to undertake the detailed management of the fund and make recommendations to the Board on investment. The Board should appoint an Investment Consultant to advise the sub-committee and the Board.

The liability of the members of the Board or of trustees is a question that often arises. One answer is that the trust should carry insurance to cover the liability of the trustees or the directors. A better system, given the purpose of the trust, is that each

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17 See for example, art 6(2)(c) in the Tuvalu Trust Fund Treaty and para 7(4) in the Nauru Trust Fund MOU.

18 The Chair of the Falekaupule Trust is not a trustee and has no voting rights (see cl 5 of the Falekaupule Trust Fund Deed); the Chair of the Tokelau Trust Fund is a trustee and has voting rights (see cl 3 of the Tokelau Trust Fund Deed).

trustee is personally responsible and therefore could take his or her own insurance or, if the person is a political appointee, the appointing body could provide any insurance that is deemed necessary.

2 Powers of the Board

The Board should have the ability to deal with all management issues. In the absence of consensus, a simple majority should be able to provide all operational decisions.

Finances are a more complicated matter. Issues can arise in respect to the investment policy, the nature and conditions of distribution, and the costs involved in the operation of the trust. The Board should delegate day-to-day investment decisions to appointed fund managers under the oversight of the investment sub-committee working to a statement of investment objectives and policy approved by the Board.

3 Resources

The resources for the trust fund may come in the form of gifts,[19] of soft-loans,[20] the diversion of aid (often additional to gifts or soft-loans, or instead of them), or as a result of a debt-swap arrangement.[21] The beneficiary government or philanthropists may also provide money for the fund. The donors are usually states but international agencies such as the United Nations Development Programme (UNDP) or the Asian Development Bank (ADB) are often involved. Frequently, external donors and national governments, as in the case of Tuvalu, provide funding on a dollar-for-dollar basis.

4 Investment policy

The investment policy set out in the founding documents may restrict the type of investment or investment decisions may be left to the Board. In the case of a limited policy, there may be instructions as to the placing of money, for instance, as term deposits with banks and/or in international investment funds. There could be indications on the currency of investments, on the markets or the nature of investment and stocks, or in physical stocks such as land. The typical pattern is to have balanced investments in bank deposits, bonds and equities. The particular nature of the investment will depend on the policy goals of the trust: whether to build

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19 See for example, Tuvalu Trust Fund Treaty's Annex.

20 See for example, the Preamble to the Falekaupule Trust Fund Deed and s 5 of the Tupe Fakana A Falekaupule Act 1999.

21 See below Part IV(B) regarding the Seychelles' Conservation and Climate Adaptation Trust.

up assets over an extended period of time, to provide early income support, or to provide a regular income flow.

5 Distribution policy

The Board may make decisions on the distribution from the Fund. Distribution can be immediate when a return has been achieved or there may be a stand-down period during which the capital of the trust will increase but after which distribution will proceed on a regular basis. In the case of any immediate distribution, the first requirement is often that the investment be inflation proofed against a cost-price index. Typically, this will be the cost-price index of the beneficiary country but in the instance of a very small country it may well be the cost-price index of the country of major investment. In some instances, the maintenance of real value also may be related to population.[22] If the population of the beneficiary country is increasing, the per capita value of the investments would need to be considered in order to maintain that real value over time.

Distributions may be compulsory. That is to say when there is income achieved after the maintenance of real value and recovery of the costs of the operation, the income must be distributed. In this case, the beneficiary may wish to take the distribution, have the distribution sum reinvested in the capital sum, or have the trust fund hold the distribution or portion of the distribution in a buffer account in order to ensure a balanced flow of income to the beneficiary over the years.[23] In some cases, beneficiaries may take the money but then place it under the management of the trust board so that interest is earned at the rate of the trust fund investment. Such money is not trust money and remains at the call of the beneficiary to withdraw or invest at any time.

6 Operational costs

The costs of the operation are the costs of a Secretariat, the costs of advisors, the costs associated with calling and running meetings, the costs of audit and the costs of annual reports. None of these in itself needs be substantial. Given the basically charitable nature of intergenerational trusts, the parties usually arrange to absorb these costs so that they are not a charge on the trust fund. If investment managers and monitors are involved, then the costs of their input are a charge on the return which they generate.

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22 See for example, the Niue International Trust Fund Deed, cl 12.

23 This is the practice in respect to the Tuvalu Trust Fund.

Where the costs are absorbed by various parties or donors, the trust would be left simply covering its own costs. Otherwise, as for a business entity, it would pay all the charges of its business at market rates. These could be significant if, for instance, the meetings of directors are in a distant place. There will be airfares and accommodation, and in some case the fees of professionals, Board members and the consultants involved. Where such outgoings are part of the system, a current bank account may be needed.

D Taxation

Taxation is a significant matter. For instance, in the case of Tuvalu, specific provision is made in the treaty for it. New Zealand as a treaty party legislated to provide for tax exemptions.[24] In Australia there is an administrative decision which gives a taxation benefit. In the case of the Tokelau Trust Fund, there are rules in Tokelau dealing with the tax exemption and in New Zealand there is specific provision in the Income Tax Act 2007.[25]

E Reporting Duties

Reporting is a necessary feature of any good trust fund. This provides for transparency of management and better accountability. There will be investment reports, annual reports and (as part of the annual reports), an auditor's statement. For the beneficiaries of the trust, it is expected that the reports and the data will be presented to the local legislative body and thus present the possibility for public knowledge of the operation of the trust.

F Termination

The termination of a trust needs to be provided for. Some trusts, are indicated to be perpetual. Others have a designated life either in terms of a minimum number of years before the trust may be wound up or, in the case of private deeds in countries where the perpetuity rule applies, the maximum time will be set to be within the perpetuity period.

At termination whether on request or otherwise, there needs to be clear direction as to how that will operate and whether the money should be returned to the donors or given to the beneficiary, or whether some other provision should be made.[26]

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24 Diplomatic Privileges (Tuvalu Trust Fund) Order 1987 (SR 1987/168).

25 The Income Tax Act 2007 (NZ), s CW 59B.

26 See for example the Tokelau International Trust Deed, cl 19 (the assets go to the beneficiaries), and the Nauru Trust Fund MOU, para 19 (includes distribution to contributors).

Some disincentive in relation to winding-up will be necessary if the intergenerational goal is to be respected. An arbitrary winding-up will defeat the trust purpose.

G Dispute Settlement

Disputes are always likely and litigation is a possibility even if a remote one. Litigation is undesirable given the goals of these trusts; ideally, alternative dispute resolution methods will be chosen. Such methods assist with securing the ongoing cooperation of all parties involved in the trust and may represent a less costly option for resolving any dispute. In the alternative dispute resolution process, there should first be consultation, then mediation if necessary, and finally arbitration. In respect of arbitration a set of rules must be provided in the establishment document or alternatively the document should designate an existing set of rules such as the arbitration laws of a given state.[27]

As a contrasting example, the Nauru Trust Fund does not allow for any external dispute resolution. Any dispute between Australia and Nauru must first be referred to the Fund's Committee (which comprises representatives from the contributors) for resolution. If the Committee fails to resolve the dispute, it can be resolved only by way of consultation between the two governments.[28]

IV ALTERNATIVES TO THE TUVALU TRUST FUND MODEL

The Tuvalu Trust Fund has done well and continues to do well and to inspire other countries in the Pacific. Those considering the establishment of an intergenerational fund do however give thought to alternatives to the Tuvalu Trust Fund model. Countries contemplating great new natural resource wealth (for example, from harvesting manganese nodules from the ocean floor) speak first of the Norwegian Government Pension Fund. Also to consider are the recent Seychelles debt swap agreement and the Nauru Trust Fund. This Part looks at in turn each of those three funds.

A Norwegian Government Pension Fund

Because it is a large producer of oil and gas,[29] Norway established a sovereign wealth fund under the Government Petroleum Fund Act to manage profits from its

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27 See for example the Falekaupule Trust Fund Deed, s 12 (refers to the Arbitration Act 1991 of Tuvalu).

28 Paragraph 20 of the Nauru Trust Fund MOU. It may be questioned whether such a contractual exclusion of a court's jurisdiction would be enforceable.

29 "Oil and Gas" Norwegian Government <www.regjeringen.no/en/topics/energy/oil-and-gas/id1003/>.

petroleum production.[30] In 2005, the fund underwent a major reform to accommodate the country's long term development purposes and its name was changed to the Government Pension Fund.[31] It is now the largest and the most successful sovereign wealth fund in the world with the value estimated at NOK 8,020 billion (approximately USD 1,000 billion) as of 30 June 2017.[32]

1 Organisation and governance structure

The Government Pension Fund comprises two separate sovereign wealth funds – the Government Pension Fund – Global (GPFG) and the Government Pension Fund – Norway (GPFN)[33] – distinguished by their sources of incomes and scale of investment. The GPFG receives the annual net cash flow from petroleum activities; the GPFN holds all the assets and liabilities of the National Insurance Scheme.[34] The GPFG is to invest globally; the GPFN's investment is limited to Norway and other Nordic countries.[35]

The GPFG is a wholly government controlled intergenerational fund. The Ministry of Finance holds it on behalf of the Norwegian people[36] and has the power to issue regulations on its organisation and operation.[37] In particular, the GPFG is deposited in a Norwegian krone account with the Norges Bank (Norway's Central

30 Benjamin J Richardson "Sovereign Wealth Funds and the Quest for Sustainability: Insights from Norway and New Zealand" (2011) 2 Nordic Journal of Commercial Law 1 at 5.

31 At 5.

32 Norges Bank Investment Management *Government Pension Fund Global Quarterly Report Q2/2017* (22 August 2017) at 4.

33 The Government Pension Fund Act 2005 (Norway) (English translation), s 2.

34 However, the GPFN has received no payments since the 1970s. See Gordon L Clark, Adam D Dixon and Ashby H B Monk *Sovereign Wealth Funds Legitimacy, Governance, and Global Power* (Princeton University Press, New Jersey, 2013) at 94 and Fact Sheet – Government Pension Fund of Norway (2 September 2014) Legislative Council of the Hong Kong Special Administrative Region of the Peoples' Republic of China <www.legco.gov.hk/research-publications/english/1314fsc50-government-pension-fund-of-norway-20140902-e.pdf> at 1.

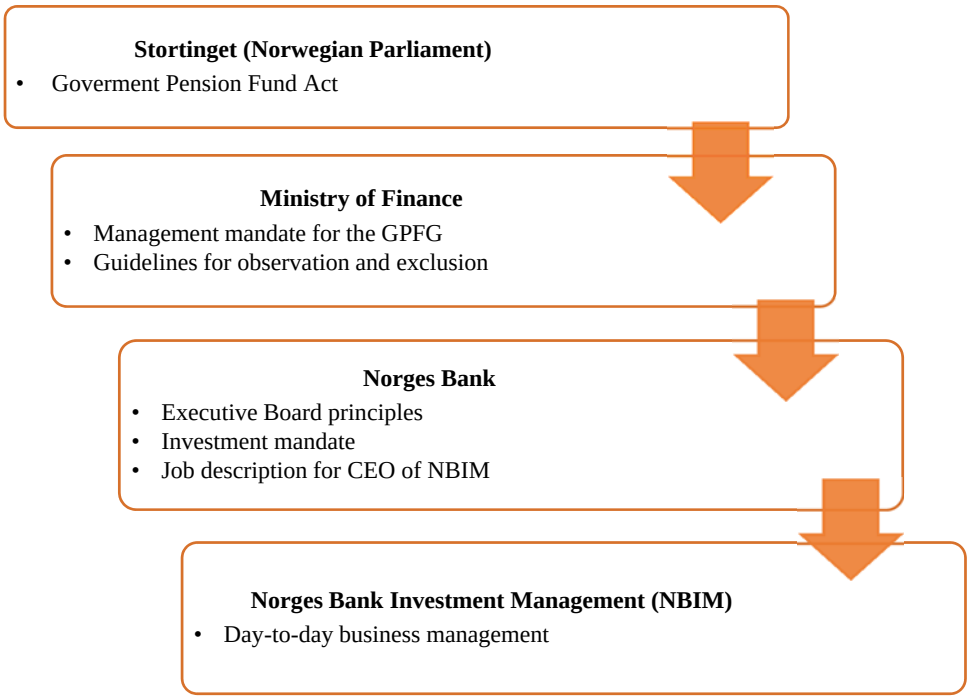
35 Richardson, above n 30, at 6. For the purpose of this paper, the analysis will focus on the organisation and operations of the GPFG which are more comparable to intergenerational trust funds.

36 The Government Pension Fund Act, s 2; also see Norges Bank Investment Management *Government Pension Fund Global Annual Report 2016* (28 February 2017) at 22 and "Profile: Government Pension Fund Global (Norway)" (July 2012) The Fletcher School – Tufts University <http://fletcher.tufts.edu/~/media/Fletcher/Microsites/swfi/pdfs/2012/profiles/Norway%20Fund%20Profile.pdf>

37 The Government Pension Fund Act, ss 2 and 7.

Bank) and its day-to-day business is managed by the Investment Management division of the Norges Bank (NBIM).[38]

GPFG Management Structure



Despite being globally commended for its transparency,[39] the GPFG does not have an independent board of trustees nor does it employ a chief executive officer or other employees. Staff who work for the GPFG are employees of the Norges Bank and are bound by the Bank's code of conduct and other policies.[40] Notwithstanding its close ties to the government, the GPFG maintains a separate governance and management structure. It also has extensive reporting and disclosure duties in order to maintain "the greatest possible transparency about the management within the limits, defined by responsible execution of the management assignment".[41]

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38 The Government Pension Fund Act, s 2 and the Management Mandate for the Government Pension Fund Global (8 November 2010, as amended) (English translation), s 1-1.

39 "4th Quarter 2016 LMTI Ratings" Sovereign Wealth Fund Institute <www.swfinstitute.org/statistics-research/4th-quarter-2016-lmti/>.

40 Clark et al, above n 34, at 87.

41 Management Mandate for the GPFG, s 1-1.

Accordingly, Norges Bank has to publish annual and quarterly reports on the Fund's accounts and portfolio.[42] The Ministry of Finance has to report annually to the Parliament on the details of the Fund's investment strategy, income and compliance with ethical standards.[43] Fund returns are published monthly.[44] In addition, reports and recommendations made by external parties are publicly available.[45]

2 Investment and distribution

The ultimate purpose of the Fund's investment strategy is to achieve the highest possible returns within the scope of criteria set by the Ministry of Finance.[46] Subject to conditions prescribed in the legislation, NBIM is entitled to make decisions on investment activities and exercise ownership rights over its assets, independently of the Ministry of Finance.[47] While its investment strategy has evolved over the time, one crucial feature of the investment strategy remains that its assets are not designated or restricted to any purpose or any person.[48] At the end of 2016, the GPFG maintained an investment portfolio of 60% in equities, 35-40% in fixed incomes and up to 5% in real estate.[49] To ensure the diversity and robustness of its investment activities, the GPFG's capital is spread across nearly 9,000 companies in 77 countries.[50]

Withdrawals from the GPFG are strictly controlled. Any withdrawal from the GPFG must be first approved by the Parliament and then transferred directly to the State budget.[51] The specific amount of the withdrawal is decided based on budget

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42 Khalid A Alsweilem, Angela Cummine, Malan Rietveld and Katherine Tweedie "Comparative Study of Sovereign Investor Models: Sovereign Fund Profiles" (April 2015) Projects at Harvard <https://projects.iq.harvard.edu/files/sovereignwealth/files/fund_profiles_final.pdf> at 72.

43 David Chambers, Elroy Dimson and Antti Ilmanen "The Norway Model" (2012) Journal of Portfolio Management 67 at 70.

44 At 70.

45 At 70.

46 Management Mandate for the GPFG, s 1-3(1).

47 Section 1-2(3).

48 Chambers et al, above n 43, at 69.

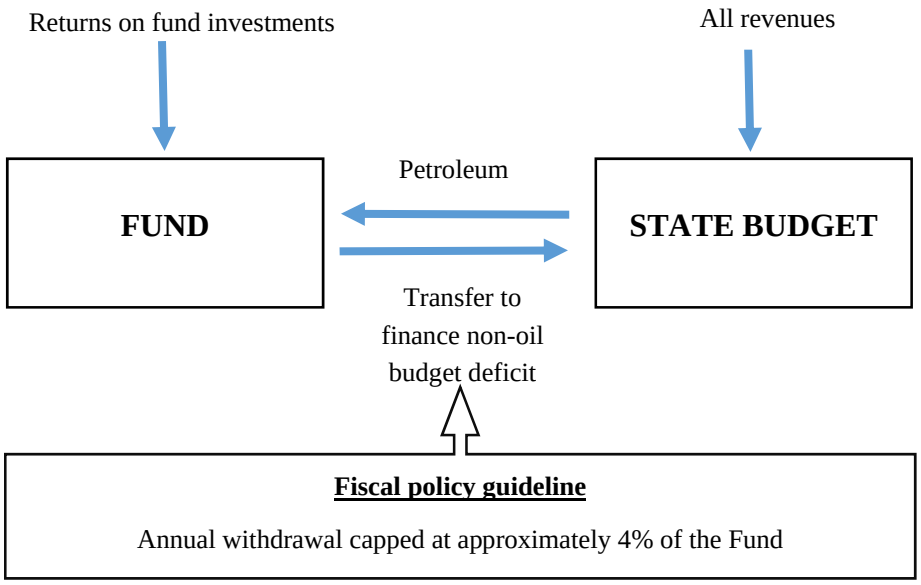
49 Norges Bank Investment Management *Government Pension Fund Global Annual Report 2016* (28 February 2017) at 23. From 2017, the unlisted real estate portfolio may reach 7% of the GPFG's investment portfolio.

50 "Investment" Norgest Bank Management Investment <www.nbim.no/en/investments/>.

51 Chambers et al, above n 43, at 69 and Government Pension Fund Act, s 5.

planning following prescribed fiscal policies.[52] As at 2017, annual withdrawal from the Fund is capped at approximately 4% of the Fund.[53]

Flows to and from the GPFG[54]



Despite its name, the GPFG is not accountable for pension payments or for any other liabilities.[55] This absence of specific and future liabilities, in addition to a predetermined limitation on withdrawals from the Fund, ensures that the GPFG is truly a long-term financial reserve for future generations.[56] It acts as a saving tool and a safeguard for the Norwegian economy even when the oil prices plummet or the petroleum reservoirs have been depleted.[57] The GPFG's capital has increased

52 Chambers et al, above n 43, at 69.

53 At 69.

54 At 69.

55 As explained by Clark et al, above n 34, at 87, notwithstanding s1 of Government Pension Fund Act, GFPG is not considered as a pension fund because it does not have any characteristics of a pension fund. It does not have designated beneficiaries, nor is it subject to fiduciary duties or a timeline to discharge its obligations.

56 Clark et al, above n 34, at 87.

57 Alsweilem et al, above n 42, at 74. In particular, s 8 of Government Pension Fund Act provides that the GPFG is "an instrument for ensuring that a reasonable portion of the country's petroleum wealth benefits future generations".

over time due to revenues from petroleum activities and returns from its investments.[58] Incomes from petroleum activities however are highly susceptible to the market price and may cause negative impacts on the whole economy. The GPFG prevents that risk by being the sole receiver of the petroleum revenues and allowing a predictable and stable amount to be paid into the State budget annually. Moreover, the GPFG may be used in the future to alleviate the financial pressure arising from an aging population.[59]

3 Applicability of the GPFG model to the Pacific

The success of the GPFG undoubtedly makes it an attractive model for any plan to establish and develop an intergenerational fund. However, it remains a significant challenge to replicate distinctive features of the GPFG, especially within the context of the Pacific.[60] Even before the oil discovery, Norway's economy, politics and society structure were well-developed.[61] This allowed the Norwegian government to institute a transparent and accountable organisation and management of its sovereign wealth fund.[62] Therefore, despite being solely government controlled, the GPFG not only maintains its internal corporate governance efficiently but also ensures external supervision by public agencies and the public.[63] Without government settings similar to those in Norway, this model inherently exposes an intergenerational fund to great risks because of the powers that the government has over the fund.

B Seychelles' Debt-for-Maritime-Conservation Swap

Seychelles' geographic and economic conditions are similar to those of many Pacific countries. It is a developing country with 99% of its territory (including its exclusive economic zone) covered in ocean.[64] As its economy is substantially dependent on fishing and tourism, the country is highly vulnerable to any change to the marine ecosystem. However, as a heavily indebted country, the Seychelles faces significant challenges to maintain sufficient financial resources to reduce its vulnerability and maintain its ecosystem. After a debt crisis in 2008, the total national

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58 At 74.

59 Clark et al, above n 34, at 94.

60 "How to not spend it" *The Economist* (United Kingdom, 24 September 2016) and Alsweilem et al, above n 42, at 77.

61 At 73.

62 At 73.

63 At 77.

64 Rob Weary "Rising Tides: Debt-for-Nature Swaps Let Impact Investors Finance Climate Resilience" Impact Alpha (16 June 2016) <http://impactalpha.com/rising-tides-debt-for-nature-swaps-let-impact-investors-finance-climate-resilience/>.

debt was up to 150% of GDP.[65] The external public debt component reached 95% of GDP (approximately USD 808 million) most of which was owed to Paris Club creditors.[66]

1 Implementation of debt-for-maritime conservation swap

(a) Negotiation and execution of the debt swap

The idea of a debt-for-maritime conservation swap was discussed first between The Nature Conservancy (TNC)[67] and Belize; it however did not result in an agreement. From 2011, the TNC, through its impact investment unit NatureVest, initiated negotiation with Seychelles on the design and structure of a debt conversion programme.[68] Further, the Nature Vest and Seychelles negotiated with creditors from the Paris Club to identify those who were willing to participate in the debt conversion arrangement.

An agreement on the debt conversion programme between Seychelles and the Nature Vest was finalised on 25 February 2015.[69] After that, the NatureVest raised

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65 Hajira Amla "Seychelles Buys Back $21 Million in Debt from Paris Club" Seychelles News Agency (9 March 2016) <www.seychellesnewsagency.com/articles/4751/Seychelles+buys+back++million+in+debt+from+Paris+Club>.

66 Amla, above n 65.

67 The TNC is a global not-for-profit organisation which aims to protect ecologically important land and water and to ensure the sustainable development. It has acted as an intermediary for debt-for-nature conversion arrangements in Belize, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Guatemala, Indonesia, Jamaica, Panama and Peru. Most of their debt-for-nature conversion arrangements focus on forestry protection. For further information about the TNC, see The Nature Conservatory "About Us" <www.nature.org/about-us/index.htm?intc=nature.tnav.about>, "Countries with TFCA Programs" USAID <www.usaid.gov/biodiversity/TFCA/programs-by-country>, and Pervaze A Sheikh "Debt-for-Nature Initiatives and the Tropical Forest Conservation Act: Status and Implementation" The National Agricultural Law Center (11 October 2006) < http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL31286.pdf> at 3.

68 "Case Study Seychelles Debt Conversion for Marine Conservation and Climate Adaptation" Convergence (March 2017) <https://assets.contentful.com/bbfdx7vx8x8r/2T3BuO4NzGmmAUIc2U0CCg/9ad14934a965c1ac1cfe58da01133449/Convergence__Seychelles_Debt_Conversion_for_Marine_Conservation_and_Climate_Adaptation_Case_Study__2017.pdf> at 2.

69 Ministry of Finance, Trade and Economic Planning, Republic of Seychelles "Government of Seychelles Debt Management Strategy: For the Years 2016 – 2018" Collaborative Africa Budget Reform Initiative (CABRI) (December 2015) <http://www.cabri-sbo.org/uploads/files/Documents/seychelles_2016_formulation_internal_debt_strategy_ministry_of_finance_comesa_sadc_english_.pdf> at 15.

USD 20.2 million to facilitate Seychelles' purchase of its debts.[70] Those funds were paid to the Seychelles Conservation and Climate Adaptation Trust (SeyCCAT).

(b) Structure of the debt swap

After receiving USD 20.2 million from the SeyCCAT, the Seychelles government bought back debts from the Belgian, French, Italian and British governments.[71] The debts were originally valued at USD 21.6 million but were sold at a discount of 6.5 cents on a dollar.[72]

At the same time, the Seychelles government issued two promissory notes to the SeyCCAT.[73] Under the first note, the government must repay an amount of USD 15.2 million to the SeyCCAT at 3% over 10 years. This will be a total of USD 17.7 million. For the second note, the government must repay USD 6.4 million at 3% over 20 years. This is USD 430,000 per year or USD 8.6 million in total.[74] An important benefit for the Seychelles government from this arrangement is that it can pay up to 68.5% of the USD 6.4 million loan in local currency. This payment method mitigates Seychelles' exposure to foreign currency risks in the future.

The SeyCCAT uses repayments from the government for three purposes: (i) to repay TNC the concessional loan, (ii) to fund ongoing conservation projects and (iii) to capitalise the endowment fund to ensure the continuity of the conservation and climate adaption programmes.[75] In particular, the SeyCCAT must repay USD 17.7 million received from the Seychelles government under the first promissory note to the TNC.[76] Out of USD 8.6 million received from the second promissory note, the SeyCCAT is required to make a total contribution of USD 5.6 million over 20 years to support marine conservation and climate adaptation programmes. The remaining of USD 3 million will be capitalised as an endowment fund for future conservation programmes by investing USD 150,000 per year with compounding interest of 7% over 20 years.

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70 Above n 68, at 3. The fund comprises the impact capital of USD 15.2 million given directly from NatureVest and a donation of USD 5 million from private organisations and individuals.

71 Above n 68, at 2.

72 At 3.

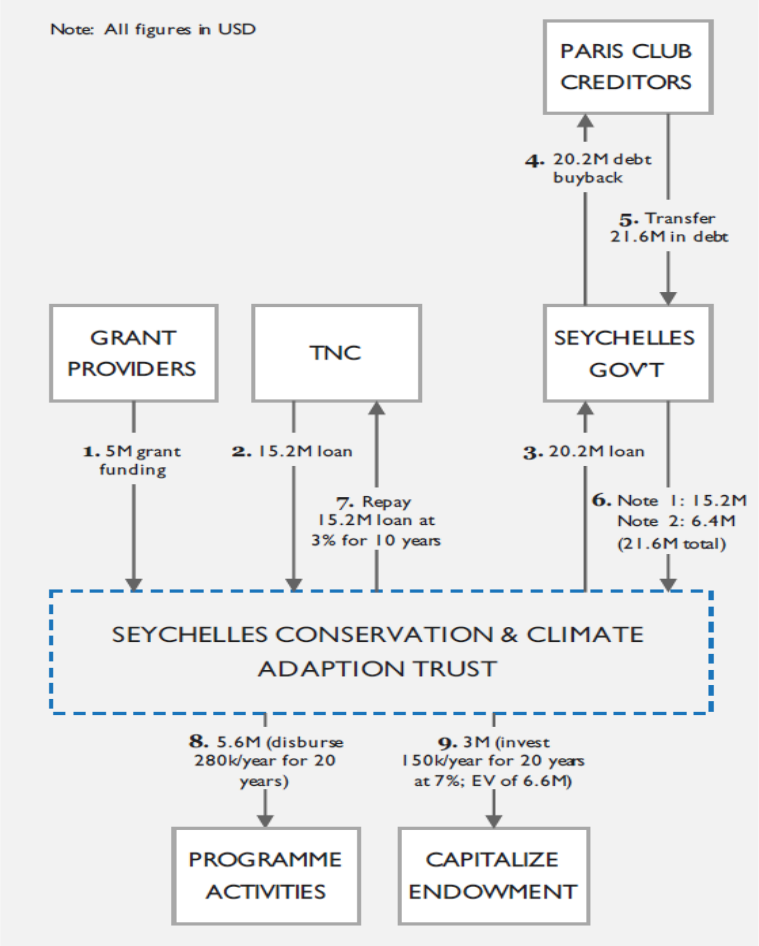
73 At 3.

74 At 3.

75 Weary, above n 64.

76 Above n 68, at 3.

Seychelles' Debt Conversion Programme[77]



2 *Seychelles' commitment to maritime conservation*

To receive the SeyCCAT's funding for conservation activities, the Seychelles government is required to comply with various requirements for maritime conservation and climate adaptation. Firstly, Seychelles commits to reserve 30% of its exclusive economic zone (approximately 400,000 square kilometres) as a Marine Protected Area (MPA) by the end of 2020.[78] The most biodiverse half of the MPA

77 At 4.

78 Ginger Strand "Sea Change" Nature Conservancy Magazine (December 2016/January 2017) <www.nature.org/magazine/archives/saving-seychelles.xml>.

constitutes Zone 1, where fishing and other industrial activities such as drilling, mining and extraction are prohibited.[79] Such activities can be conducted but under strict regulation and supervision in Zone 2, comprising the other half of the MPA.[80] The remaining 70% of Seychelles' exclusive economic zone is left open to other economic exploitation activities.[81] In addition, Seychelles must restore coral reef and mangrove forests, maintain sustainable tourism and fisheries, improve social resilience to climate change and ensure economic diversification.[82]

3 Conservation and Climate Adaptation Trust of Seychelles Act 2015

(a) Organisation and management of the SeyCCAT

The SeyCCAT is established as a corporate body under the Conservation and Climate Adaptation Trust of Seychelles Act 2015 (the SeyCCAT Act), which was enacted on 19 November 2015. It is a significant piece of legislation in the intergenerational trusts context as it is the domestic implementation of an international debt-swap arrangement.

The structure of the SeyCCAT is a replication of a Common Law trust within a civil law context. The SeyCCAT, though denominated a trust, is not a trust in the Common Law sense because the law of Seychelles, with its French Civil Code private law base, does not know the trust as an institution. However, many benefits of the trust system are retained in the SeyCCAT Act by way of the statutory incorporation of the trust as a body corporate with the Board acting as the trustee of the SeyCCAT. The fiduciary responsibilities of directors to the body corporate are present and statutorily imposed by s 16 of the SeyCCAT Act.

The SeyCCAT is managed and administered by the Board which comprises nine directors.[83] The primary control of the Board is with two ex officio directors nominated by the TNC and the Government of Seychelles. They have the power to decide the institutions from which the rest of directors must be appointed.[84] While the tenure of other directors is three years, the tenure of an ex officio director could

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79 Strand, above n 78.

80 Strand, above n 78.

81 Strand, above n 78.

82 Rebecca Pozzi Taubert "Seychelles Swaps Millions of Dollars in Debt in Exchange for Conserving its Ocean" Life Gate (8 April 2016) <www.lifegate.com/people/news/edward-mukiibi-soil>.

83 SeyCCAT Act, s 7.

84 Section 7(2)(b) and above n 68, at 4. These institutions are currently two local conservation NGOs in Seychelles, Seychelles Hospitality and Tourism Association, Seychelles Chamber of Commerce and Industry, Seychelles Minister of Finance, Seychelles Minister of Natural Resources, Seychelles Minister of Environment and the CEO of the Seychelles Island Development Corporation.

be unlimited.[85] A Board's meeting requires a quorum constituted by both ex officio Directors and five other directors.[86] The Board makes decisions based on the "special majority votes" rule which is satisfied by the affirmative votes of both ex officio directors and at least two-third of other directors. That means any decision of the SeyCCAT must be consented to by at least seven directors, including both ex officio directors. The directors are volunteers in the sense that they are unremunerated.[87]

The main power of the Board is to adopt, amend and repeal the SeyCCAT's agreements related to debt swap transactions, investment guidelines and operational manual.[88] In addition, the SeyCCAT can be dissolved by a Board resolution in the event of (i) the bankruptcy of the SeyCCAT, (ii) the revocation of tax exemption in a foreign jurisdiction, or (iii) the infeasibility to achieve the SeyCCAT's objectives.[89]

(b) Finances and account management of the SeyCCAT

The SeyCCAT is required, for each year of the receipt of debt-swap incomes,[90] to reserve at least 35% of the annual income for the Endowment Fund.[91] This fund will be invested by an internationally recognised investment manager which is selected through a tender process but subject to the special majority vote of the Board.[92] There is to be no drawing from the Endowment Fund within at least a 20 year period from 19 November 2015.[93] The remaining up to 75% of the annual income will be deposited in another account in accordance with the by-law or used in accordance with the rules provided in the SeyCCAT Act.[94] Unless otherwise

85 SeyCCAT Act, s 9(1).

86 Section 11(5).

87 Section 20. Nevertheless, there is provision for the payment of reasonable expenses of the directors.

88 Section 15(2).

89 Section 29(1).

90 According to the SeyCCAT Act, s 2, the debt swap incomes is not limited to the USD 21.6 million debt swap but also includes incomes from other debt swaps which may be conducted within the first 20 years of the SeyCCAT.

91 SeyCCAT Act, s 21(1).

92 Section 24(1).

93 Section 21(3).

94 Section 21(4).

permitted under regulations, the SeyCCAT has a ceiling on costs of 5% per annum of revenue.[95]

In all circumstances, the SeyCCAT's assets are segregated from the government's balance sheet.[96] Nevertheless, the SeyCCAT is, to a certain extent, subject to the supervision and monitoring of the Seychelles government. In particular, the Board must establish and submit an annual work plan to the Minister of Finance so that it will be presented to the National Assembly.[97] Moreover, the SeyCCAT's account must be audited and reported on by Auditor-General to the National Assembly under art 158 of the Constitution of Seychelles.[98] While the SeyCCAT has the power to lend, donate and borrow, such power is subject to the approval of the Minister of Finance.[99] On the one hand, this mechanism may impose a stringent statutory governance and reporting duty on the SeyCCAT and give more publicity to its activities and accounts. On the other hand, it may leave room for the Seychelles government to intervene in the SeyCCAT's operations.

In case the SeyCCAT is dissolved, all assets, other than those of the Endowment Fund, are to be distributed to non-government agencies whose purposes are similar to the objectives of the SeyCCAT.[100] There is no provision in the SeyCCAT Act for the winding-up of the Endowment Fund.

4 Applicability of Seychelles' debt-swap model to the Pacific

The debt swap arrangement in Seychelles evolves away from the funding models that have been used in the Pacific, and now stands as an alternative model of interest. It has ameliorated Seychelles' situation in respect of offshore loans and its vulnerability to climate change. At the same time, it reduces Seychelles' exposure to foreign currency risk from foreign borrowing.[101] It is estimated that Seychelles' debt service (including principal payments and scheduled interest) is reduced by USD 2

95 Section 6(3).

96 Section 21(6)

97 Section 25(1).

98 Section 27(2). Article 158 of the Seychelles' Constitution provides that the Auditor-General will audit all accounts of any statutory corporation (such as the SeyCCAT) and report the audit result to the National Assembly within 12 months from the end of the financial year. The report may identify any irregularity in the audited accounts if the Auditor-General deems necessary. Further, the President or the National Assembly has the right to request the Auditor-General to audit the SeyCCAT's accounts at any time for the purpose of public interest.

99 Section 6(1).

100 Section 29(2).

101 Ministry of Finance, Trade and Economic Planning, Republic of Seychelles, above n 69, at 15.

million per year.[102] The rest of the original offshore loan is circulated domestically for the protection of Seychelles' own environment.

As determined by the UNDP, the success of a debt-swap for the environment depends on whether, among other things, (i) the creditor country has foreign aid policies in favour of environmental protection; and (ii) the debtor country has a good diplomatic relationship with the creditor country.[103] These conditions are similar to those required for a successful trust creation by treaty such as in Tuvalu case.

Although the debt swap arrangement in Seychelles helped to relieve the country's debt burden, the relief value is relatively small.[104] The negotiation process tends to be lengthy, costly and complicated. It took Seychelles approximately three years to secure the debt swap agreement and the final value was significantly lower than the originally proposed value of USD 30 million.[105] Notwithstanding such tremendous financial and personal effort, there is no certainty of reaching an agreement to swap debts. Belize spent several years negotiating a debt-swap of USD 100 million with the TNC and failed to obtain an agreement.[106] Belize now is trying again to start negotiation on a debt-swap agreement.

C Nauru Trust Fund

1 Establishment of the Nauru Trust Fund

The Nauru Trust Fund was established under the Memorandum of Understanding between the Government of Australia and the Republic of Nauru (Nauru Trust Fund MOU).[107] It had been preceded by much discussion which had resulted in the Nauru Trust Fund Act 2012. The Act identifies the fund as a body corporate in Nauru. It was followed, to fulfil the needs of the MOU, by the International Organisations (Privileges and Immunities – Nauru Trust Fund) Regulation 2015 of the Commonwealth of Australia on 10 December 2015. With the enactment of the

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102 United Nations Development Programme (UNDP) "Debt for Nature" (17 January 2017) <www.undp.org/content/dam/sdfinance/doc/Debt%20for%20Nature%20Swaps%20_%20UNDP.pdf?download> at 1.

103 At 3.

104 At 4. The small value of debt relief seems to be a generic feature of debt for nature agreements in other countries.

105 Vibeka Mair "Innovative Sovereign Debt Deal Put Together to Help Seychelles' Marine Conservation" (5 March 2015) NatureVest <www.naturevesttnc.org/pdf/Seychelles%20Conservation.pdf>.

106 "Belize Now Needs Proposal It Passed Up" (30 November 2016) Breaking Belize News <www.Breakingbelizenews.Com/2016/11/30/Belize-Proposal-Passed/>.

107 The Nauru Trust Fund MOU, para 2(1). It was signed in Canberra on 6 November 2015, and came into force on 30 April 2016.

Regulation, the Nauru Trust Fund was declared, for Australian domestic law purposes, to be a body corporate with perpetual succession and substantial legal capacity.[108] In Australia, the Fund is exempt from currency and exchange restrictions and from income tax.[109]

The trust document, which is obviously something less than a treaty, is variously described in the Nauru Trust Fund MOU itself, as an "arrangement" reached between the two governments or as "undertakings" of the two governments. The word 'agreement' is not used and para 7 states that "[t]he MOU does not create legally binding obligations between the government of the Republic of Nauru and the government of Australia".[110] Any obligations that arise in respect of the Nauru Trust Fund MOU are obligations of the Fund and not of the government of Nauru or of Australia.[111]

The MOU is an arrangement entered into between solely Nauru and Australia. There is provision in the MOU for other parties to be involved as original parties to the Fund but that is expressed to be a matter for Nauru and that other party.[112] Subsequent contributors to the Fund must be approved by the governing body of the Fund.

The Nauru Trust Fund's purpose is "to provide a source of revenue to the Republic of Nauru post-2033, or at a time sooner as determined by the Committee, for investment in education, health, environment, and infrastructure" to "smooth out windfall income streams" and "replace all or part of supplement of questionable future revenue".[113]

No choice of law is provided in the document. It may be assumed, though not with a great deal of certainty, that it will be governed by Australian federal law given the presence of Australia as a party and the fact that the document is in English and signed in Canberra. Even if not relevant to the governments of Nauru and Australia,

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108 International Organisations (Privileges and Immunities – Nauru Trust Fund) Regulation 2015, reg 6.

109 Regulation 7.

110 Nevertheless, para 9(10) has the words "the responsibilities of any of the Original Parties … to contribute to the fund". Notwithstanding the absence of obligations the parties obviously have rights (eg those described in para 18 to withdraw the value of their contributions).

111 The Nauru Trust Fund MOU, para 7(1).

112 It is reported that Republic of China has an agreement with Nauru to be a party to the Nauru Trust Fund. See Roland Rajah "*Securing Sustainability Nauru's New Intergenerational Trust Fund and Beyond*" (Asian Development Bank, Issues In Pacific Development No. 1, March 2017) at 10.

113 The Nauru Trust Fund MOU, para 5(1). It footnotes the fact that at 2015 it was envisaged that this point would be reached when the principal value of the fund is AU$ 400 million.

the identification of the governing law is of significance. The Committee members have fiduciary duties in respect of the Fund. Equally, the custodian bank for the Fund established by contract with the Committee also fulfils its contractual duties as a fiduciary. Breach of those duties ultimately would be determined by the governing law.

2 Organisation and governance

The Nauru Trust Fund will be operated by the Committee made up of one member of each of the original parties (Nauru and Australia) and any party who has entered into an agreement with Nauru to become an original party to the Fund.[114] Members of the Committee will determine among themselves who will be the Chair of the Committee.[115] The quorum rule requires the presence of all members and the Committee's decisions are made by consensus.[116]

Paragraph 21 states that disputes between Australia and Nauru must be resolved first by the Committee and then by consultation among themselves. No dispute will be referred "to an individual, to a national court, to an international tribunal, or to any other person or entity for settlement".[117] However, it is unclear whether this dispute settlement framework applies to resolve disputes amongst the Committee members.

3 Finance and investment

Money is transferred to the Fund by the governments of Nauru and Australia. The capital and income of which would not be public money of Nauru. Instead, a Custodian Bank will be appointed by the Committee to hold custody of the Fund's money in accordance with the instructions of the Committee. In addition, the Custodian Bank must create sub-accounts to hold each original party's contributions and its corresponding income, revenues and expenses separately. The requirement of para 15 is that "all records and reports of the Fund returns clearly segregate and identify gross Income, management fees, and net Income".

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114 The Nauru Trust Fund MOU, para 7(2).

115 Paragraph 7(3) and (14).

116 Paragraph 7(2).

117 These express terms are clear; whether ultimately they will be sufficient to oust the jurisdiction of an appropriate court is a separate issue.

Distribution from the Fund would go into the Nauru Treasury Fund and then be dealt with in accordance with the constitutional provisions for the expenditure of Nauru money.[118]

The government of Australia may withdraw the then present market value of its contributions to the Fund and any undistributed income if it determines that the government of Nauru has "grossly failed" to use the income for the purposes of the Fund.[119] Nevertheless, both Australia and Nauru have the right to withdraw from the Fund by giving 90 days notice to the other party.

V DEPARTURES FROM THE TREATY-BASED TRUST FUND MODEL IN THE PACIFIC

Since the establishment of the Tuvalu Trust Fund by treaty in 1986, a large number of intergenerational trust funds have been established. It is meaningful to trace the lineage of these funds and to observe the degree of similarity between them. They are all very similar in terms of basic structure and the standard provisions. What is also striking is the number of instances where the wording of provisions is identical. This would indicate the value and the continued value of the model. For instance, there is a very close link in the structure and wording amongst the trust funds of Tuvalu, the Republic of Marshall Islands (RMI) and Nauru. This is more than simply a consequence of the nature of the legal method. The flow of clauses, often with identical headings, is Establishment, Purpose, Powers, Limitation of Liability, through to Amendments, Arbitration, Depositary, and Final Provisions. The Tuvalu Trust Fund's treaty has 29 clauses and covers 13 pages; the RMI and Nauru's documents have 25 and 22 clauses respectively and cover about 24 pages. The difference in length is accounted for primarily by added detail on management and investment. That detail itself is reminiscent of the management and investment protocols of the Tuvalu Trust Fund. In other words, the Tuvalu Trust Fund provides a broad template. Examples of this can be seen below:

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118 The Nauru Trust Fund Act 2012, s 7 and the Constitution, art 58.

119 The Nauru Trust Fund MOU, para 18(1).

	TUVALU	MARSHALL ISLANDS	NAURU
Power of the Fund	**Article 3** The Fund shall have all powers necessary for the fulfilment and achievement of its purpose.	**Article 4** The Fund shall have all powers necessary, consistent with this Agreement, to fulfil its purpose.	**Paragraph 6** The Fund will have all powers necessary, consistent with this MOU, to fulfil its purpose.
Legal Status, Privileges and Immunities	**Article 5** 1. To enable the Fund to carry out its purpose, each Party shall accord to the Fund, in its territory, the legal status, privileges and immunities set out in this Article.	**Article 6** 1. To enable the Fund to carry out its purpose, each Party shall accord to the Fund in its territory, the legal status, privileges and immunities set out in this Article.	**Paragraph 8** 1. To enable the Fund to carry out its purpose, any Original Partner that is a government will accord to the Fund in its territory, the legal status, privileges and immunities set out in this Paragraph.
	2. The Fund shall possess juridical personality and, in particular, capacity to: (a) contract; (b) acquire and dispose of immovable and movable property; and (c) institute legal proceedings.	2. The Fund shall possess juridical personality and in particular capacity to: (a) contract; (b) acquire and dispose of immovable and movable property; (c) institute legal proceedings; and (d) take other action to protect the Fund.	2. The Fund will possess juridical personality and in particular capacity to: (a) enter into contracts; (b) acquire and dispose of immovable and movable property; (c) institute legal proceedings; and (d) take other action to protect the Fund assets.
	3. The Fund shall be exempt from any exchange control regulations, restrictions or moratoria.	3. The Fund shall be exempt from any exchange control regulations, restrictions or moratoria.	3. The Fund will be exempt from any exchange control regulations, restrictions or moratoria.
	4. Within the scope of its official activities, the Fund, its property and assets shall be exempt from all direct taxation.	4. In accordance with section 216 of the Compact, as amended, within the scope of its official activities, the Fund, its property, and its assets shall be exempt from taxation.	4. The Fund, its property, and its assets will be exempt from income taxation.
Resources	**Article 8** 1. The resources of the Fund shall consist of: (a) initial contributions under Article 9; (b) additional contributions under Article 10; and (c) returns derived from the operations of or sums otherwise accruing to the Fund.	**Article 9** The resources of the Fund shall consist of all contributions to the Fund, from whatever sources, and all Income.	**Paragraph 9** 1. The resources of the Fund will consist of all contributions to the Fund, from whatever sources, and all Income.

	TUVALU	MARSHALL ISLANDS	NAURU
	2. The resources of the Fund shall be held in trust and administered by the Board and used only for the purpose of, and in accordance with, this Agreement.	2. The resources of the Fund shall be held in trust and administered by the Trust Fund Committee and used only for the purpose of, and in accordance with, this Agreement.	2. The resources of the Fund will be administered by the Committee and used only in accordance with this MOU, including the Investment Policy.

The variations are made to meet the particular needs of each fund.[120] A significant shift from the Tuvalu Trust Fund is displayed in the provisions on withdrawal, trustees and management in the RMI Trust Fund and the Nauru Trust Fund. There is a high correspondence between the RMI's and Nauru's models. This can be seen for instance in relation to the trustee (cl 11 in both documents), withdrawal (cls 21 and 18 in the RMI's and Nauru's documents respectively) and termination (cls 22 and 19 in the RMI's and Nauru's documents respectively).

For Pacific islands, the interest of the models utilised in Norway and Seychelles is not merely whether these models might be replicable or appropriate for use in the Pacific. In practical terms, Norway's GPFG and the Seychelles' debt swap programme bring to light matters which any proposed intergenerational fund needs to acknowledge and account for when departing from the treaty-based trust fund model.

Despite the treaty-based trust fund model best suiting a fund with intergenerational purposes, funds in the Pacific and elsewhere frequently have not followed that model. Many of the reasons for this trend stem from the practical context in which these funds operate. For example, because a treaty requires the agreement between at least two sovereign nations, the treaty mechanism is unavailable if a willing partner cannot be found or the government lacks capacity to enter into a treaty.[121] This obstacle does not arise for the sovereign wealth fund. As a governmental fund, its establishment and funding does not depend on an external third party. Conversely, adoption of the treaty-based trust fund model may be made more difficult by the requirement of a foreign government partner. Further, the

120 Equally, Tuvalu itself, in the case of the Falekaupule Trust Fund, adapted the treaty model to the deed system. More recently Tuvalu has further adapted the model in Regulations empowered by a local statute. Successive documents appear to have been informed by the practical experience of those that have preceded them. Sources of capital, future funding possibilities, the size of the initial capital, and the main purpose also have required changes in the detail of the operation of the funds.

121 Angelo et al, above n 1.

scrutiny[122] that treaty arrangements receive in some countries may leave governments reluctant to utilise such a model.

Notwithstanding this infrequent use of the treaty form, when an intergenerational trust fund is being contemplated, priority is often given to the possibility of establishing a fund by a treaty. For instance, the Tokelau International Trust Fund was initially prepared on the basis of a treaty arrangement which would have been between two states with the government of Tokelau as the beneficiary. For political reasons, the trust was established as a deed arrangement between the government of Tokelau and the government of New Zealand. The aspiration for a treaty, however, was not lost. In particular, cl 18 of the Tokelau trust deed provides for the continuation of the deed as a treaty when the political environment is appropriate for that purpose. Further, Tokelau may, when Tokelau will have the international capacity in its own right to enter into a treaty, request that the government of New Zealand enter into a treaty to take over the trust fund's operation. In 2004, these conditions would have been inserted with the change of status of Tokelau in mind.[123] Were Tokelau's colonial status to change to either that of a state in free association or of an independent state, it is likely that the Tokelau International Trust Fund would be governed by a treaty. Clause 18 also indicates that the treaty would be expected to have the same terms as those in the deed. Advantages from the intergenerational point of view of moving to the treaty would be that the trust fund could continue in perpetuity,[124] and that the treaty would incorporate the trust as a legal person. The arrangements would thus have enhanced formal status.

Similar considerations were contemplated at the establishment of the Niue International Trust Fund. There were several possibilities as to treaty partners: Niue, Australia, and New Zealand. In the end the political environment was not suitable, and as in the case of Tokelau, the trust fund was established by deed executed by the government of Niue on the one hand and the government of New Zealand on the other. There is provision in the Niue Trust Deed for conversion to a treaty system.

More recently in respect of the Nauru trust arrangements the intention, supported by the ADB, was that the trust fund be established by treaty. The necessary Nauru domestic law was drafted on the basis of complementing a treaty arrangement. In the course of negotiation, the Bill was changed to provide both for the possibility of a

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122 The Standing Order of the House of Representatives 2014 (NZ), so 397.

123 In 2006 and 2007, there were acts of self-determination; neither changed the status of Tokelau as a colony of New Zealand.

124 Instead of terminating at the latest on 1 January 2080 because of New Zealand perpetuity laws.

treaty-based trust and for one established by deed. The language in the Nauru Trust Fund Act is sufficiently broad to cover either eventuality.[125]

The long-term stability promised by a treaty-based trust fund can be a double-edged sword. The stability offered by a treaty also means rigidity in the face of changing circumstances.[126] Many of the existing treaty-based trusts address only questions of disestablishment and not the processes for renegotiation. This means that, taking the Tuvalu model as an example, it is assumed that there will be continuing goodwill, unchanging political objectives and unchanging economic conditions. Should circumstances change in ways unrecognised by the treaty drafters at the time of negotiation, the Tuvalu Trust Fund's operation could be hindered by its more inflexible provisions.

By comparison, it remains open, on legal principles, for the government of Norway to alter the foundational conditions of the Norwegian sovereign wealth funds in response to a change in circumstances. That would be simply a matter of internal law - the GPFG was created by an Act of the Parliament, so too can it be terminated or its fundamental structure shifted. This is a similar position to that of trust funds established using internal legislation or deed. Such funds can be altered by new legislation or amendment of the deed.

In addition to the concern about flexibility, there is concern about the influence that such a treaty-based trust fund can afford to a third party. A treaty partner should be capable of supporting the trust fund and meeting its obligations as trustee should it have such a role. There is however scope for a treaty partner to impose conditions beyond those designed to ensure intergenerational wealth preservation and macro-stabilisation. While the conditions imposed by a potential treaty partner can benefit a fund's development purposes, they also can involve achievement of other political objectives important to the settlor such as environmental protection, defence and security.

The RMI Trust Fund provides a hypothetical example of how including political objectives in a trust fund treaty may jeopardise the achievement of the trust fund's ultimate purpose. The RMI's macro-stabilisation fund was established pursuant to the Compact of Free Association between the United States of America (USA) and the Republic of the Marshall Islands which entered into force in 1986 (the Compact). The RMI Trust Fund's specific terms are set down in a separate agreement between those two states. Notably, the governance structure favours control by the USA. The

125 Section 4(1) of the Nauru Trust Fund Act 2012 provides that the Nauru Trust Fund establishing document is the agreement under which the Fund is established.

126 Drew, above n 3, at 37.

Fund is administered by a Trust Fund Committee which consists of at least three voting members appointed by USA and two voting members appointed by RMI. Reflecting its origins in the Compact, the Fund's agreement reinforces the political obligations that RMI owes to the USA. It provides:

> 1. The Government of the United States may withdraw the Present Market Value of its contributions to the Fund, and any undistributed Income therefrom:
>
> …
>
> (b) should the Government of the Marshall Islands:
>
> (1) fail to fulfill its obligations under the separate agreement regarding mutual security concluded pursuant to sections 321 and 323 of the Compact, as amended; or,
>
> (2) take any action which the Government of the United States determines, after appropriate consultation with the Government of the Republic of the Marshall Islands, to be incompatible with the Government of the United States' responsibility for security and defense matters in or relating to the Republic of the Marshall Islands, as set forth in such agreement(s).

This obligation secures more than the RMI Trust Fund's macro-stabilisation purpose. It secures the USA's political interests in the RMI. There is no guarantee that the Fund will be able to serve its macro-stabilisation purposes in return. The Fund is scheduled to make its first distribution in 2024, but poor Fund performance may mean that distribution will be less than expected or will not eventuate.[127] The Fund brings with it political obligation, possibly without real benefit. This can be contrasted with the sovereign wealth fund model where controls and influence are all internal to the state operating the fund.

The effects that a clause such as the one in the RMI Trust Fund agreement could have can be demonstrated hypothetically by reference to the United Nation's Treaty on Nuclear Arms. The RMI in 2017 followed the USA and refused to sign this

127 Giff Johnson "Compact 2024: What's ahead for Marshall Islands and FSM?" (2 December 2013) Pacific Institute of Public Policy <http://pacificpolicy.org/2013/12/compact-2024-whats-ahead-for-marshall-islands-and-fsm/>; Republic of Marshall Islands (RMI) – 2011 Article IV Consultation Concluding Statement of the IMF Mission (7 October 2011) International Monetary Fund <www.imf.org/en/News/Articles/2015/09/28/04/52/mcs100711#top>.

treaty.[128] According to the RMI's President, the Compact of Free Association with the USA, and the USA's rights to use Kwajalein arising from that Compact, were key considerations in the RMI's decision. If the RMI had signed the Treaty, it would have been open to the USA to treat that as an action incompatible with the USA's responsibility for security in defence. The USA then could have withdrawn its contributions from the Fund. Thus, the clause which makes the USA's contributions contingent on the RMI meeting particular political obligations means that the RMI Trust Fund could be significantly subject to the policy requirements of the USA government of the day.

Interestingly, as noted above, there are many similarities between the RMI agreement and the Nauru Trust Fund MOU. The similarities are such that the MOU appears closely modelled on the RMI agreement. The Nauru Trust Fund MOU does not oblige Nauru to act in accordance with Australian interests, but it does echo another aspect of the RMI Fund. Paragraph 18(1) provides:[129]

> The Government of Australia may withdraw the Present Market Value of its contributions to the Fund, and any undistributed Income in the event the Government of Australia determines, after consultation with the Government of the Republic of Nauru, that the Government of the Republic of Nauru grossly failed to use the Income for the purposes described in Paragraph 5 of this MOU.

There are two points that can be made about the near identical fund documents for the RMI and Nauru funds. The first is that the inclusion of external policy objectives is not a feature unique to treaty-based trust funds. In the Seychelles debt-swap situation, the proceeds of the funding arrangements go to the preservation of the conservation area. In return for the debt swap's benefits, the Seychelles government has accepted an obligation to improve its environmental protection and climate change adaptation. This arrangement shows that donor influence over the political objectives of the fund arise not from the legal structure, but rather from the source of the capital. In the case of RMI, the involvement of an ally, the USA, led to the imposition of diplomatic obligations. In the case of Seychelles, the involvement of a conservation agency resulted in the imposition of conservation objectives. The influence of the donors should not overshadow, therefore, the stability that comes from treaty-based trust funds. Such influence is not wholly attributable to the form of Fund's model.

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128 "Marshalls Still to Decide on UN Nuke Ban Treaty" (18 September 2017) RadioNZ <www.radionz.co.nz/international/pacific-news/339649/marshalls-still-to-decide-on-un-nuke-ban-treaty>.

129 The purposes referred to in para 5 are investments in education, health, environment and infrastructure as well as smoothing out windfall income streams and replacing future revenue.

The second point arising from the RMI and Nauru funds is that the funds arrangements highlight the importance of fund developers being attuned to the legal principles behind the active fund models. Any departure from the most legally secure model – the treaty-based trust fund – must acknowledge how that departure alters the fund's operation in law. The withdrawal clauses in the RMI and Nauru funds treat the trust fund model as insufficient to guarantee the proper use of the funds. However, the inclusion of such a clause risks losing the attachment of traditional trust law obligations and principles. By including such a clause, the agreement raises questions about whether it is, in fact, a trust fund. Essentially, the RMI and the Nauru trust funds are conditional. In principle, a settlor divests its interests in property once the property enters the trust. Yet, it remains open to the USA to regain property interests in the funds. The transfer of legal title to the trustees is undone. If the RMI and Nauru funds are not trust funds, those funds lose the benefit of the fiduciary duties that attach to such trusts by operation of law. Perhaps to compensate for this, the founding documents of both funds expressly set out the duties that do apply to those involved in the operation of the funds.

Overall, while legal principle has some influence on a fund's form, the practical circumstances of a government and the contributors to a fund is of more significance. Therefore, while trust funds based on models other than the treaty one can be successful, the developers of any fund with an intergenerational purpose must be attuned not only to local circumstances and needs but also to the effects – both legal and practical - of any departure from the treaty-based trust fund model.

VI CONCLUSION

From the point of view of legal principle, the intergenerational fund model offered by the Tuvalu Trust Fund represents the most stable and secure option. It preserves the interests towards which the Fund's purpose is directed. However, experience shows that what is politically necessary and viable does not always fit with this model. The emerging and alternative models presented by the funds in Norway, Seychelles and Nauru represent further options for Pacific funds. Although the most appropriate model will always depend on the nations and interests involved, care must be taken to ensure that the protections offered by the Tuvalu Trust Fund are not inadvertently lost when pursuing an alternative model.