Global Fund to Fight AIDS, Tuberculosis and Malaria: A New Legal and Conceptual Framework for Providing International Development Aid

Anna Triponel

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Cover Page Footnote
International Law; Commercial Law; Law
Global Fund to Fight AIDS, Tuberculosis and Malaria: A New Legal and Conceptual Framework for Providing International Development Aid

Anna Triponel†

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I. Introduction

Over the past decade, the development community has witnessed the unprecedented proliferation of innovative mechanisms designed to fund specific global issues.1 Usually initiated as partnerships between governments, intergovernmental organizations, the private sector, and civil society, these funding instruments address global public goods such as health, environment, and microfinance.2 The appearance of multilateral funding mechanisms on the international scene has changed the understanding of development.

There are several reasons for the appearance of multilateral funding mechanisms. First, given the urgency of achieving the Millennium Development Goals (MDGs),3 programs with a narrower mandate can act more quickly than other institutions and financing channels.4 The programs can thus concentrate their advocacy and funding efforts on one specific global target seen as particularly urgent.5 Second, the new century brought new ways of channeling aid that required integration into new funding structures.6 Third, unlike the traditional way of providing development aid, these programs seek “to realize the benefits of multi-stakeholder collaboration” by allowing increased participation of nontraditional actors such as civil society and the

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1 Various terms are used to describe these multiactor funding mechanisms, including “multisectoral global funds,” “multilateral financing mechanisms,” or “global programs and partnerships,” which is the term used by the World Bank.

2 A “global public good” is defined as an area that requires collective action to achieve results. See, e.g., DEV. CTR., ORG. FOR ECON. CO-OPERATION AND DEV., INTEGRATING GLOBAL PARTNERSHIP PROGRAMS WITH COUNTRY-LED NATIONAL PROGRAMS: SYNTHESIS OF FINDINGS AND RECOMMENDATIONS 4 (2006); see also PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION 22-23 (Inge Kaul et al. eds., 2003) (analyzing the concept of global public goods across different levels and sectors).


5 Id. at 2-3.

6 See HIGH LEVEL FORUM ON AID EFFECTIVENESS, PARIS DECLARATION ON AID EFFECTIVENESS 1(2005).
Beginning in 1971 with the Consultative Group on International Agricultural Research (a strategic alliance of countries, international and regional organizations, and private foundations working to achieve sustainable food security and reduce poverty in developing countries through scientific research), these multiactor programs have developed in a remarkable fashion over the past decade. Such programs are usually created as (i) "new entities with their own legal identity" or as (ii) "alliances with legally constituted financing arms." Examples include:

- The Global Environment Facility (the GEF), established in 1991 "to help developing countries fund projects and programs that protect the global environment";

- The Consultative Group to Assist the Poor, created by aid agencies and industry leaders in 1995 to help create permanent financial services for the poor on a large scale;

- The GAVI Alliance, created in 1999 as a public-private partnership focused on increasing children's access to vaccines in poor countries;

- The Education for All – Fast Track Initiative (EFA-FTI), created in 2002 "to ensure accelerated progress towards the MDG of universal primary education by 2015"; and

- The Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund or the Fund), created in 2002 as a partnership between governments, civil society, the private sector, and affected communities to dramatically

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7 Heimans, supra note 4, at 2.
9 Heimans, supra note 4, at 1.
increase resources to fight AIDS, tuberculosis, and malaria and to direct those resources to areas of greatest need.\textsuperscript{14}

Many other programs exist, focusing on different areas of global concern, including the Program on Fisheries, created in 2005 to strengthen governance of the world’s marine fisheries;\textsuperscript{15} Cities Alliance, created in 1999 as a “global coalition of cities and their development partners [to increase] successful approaches to poverty reduction,”\textsuperscript{16} and the Integrated Framework, which supports the least-developed countries in improving their trade capacity, mainstreaming trade into their development strategies and coordinating trade-related donor support.\textsuperscript{17}

The creation of new vehicles for development funding has also resulted in increased scrutiny of the ways these programs operate in order to draw lessons for the creation and management of subsequent programs. In effect, “the matter of . . . effective governance [of partnerships] and the manner in which they can be held to account is, equally, becoming a mainstream issue.”\textsuperscript{18} Partnerships face good governance issues such as “accountability, transparency, legitimacy, disclosure, participation, decision-making, grievance management and performance reporting.”\textsuperscript{19} Although work is underway to identify key good practice principles for these global programs and partnerships,\textsuperscript{20} “[m]any


\textsuperscript{15} Agriculture & Rural Development — Global Program on Fisheries (PROFISH), http://go.worldbank.org/0I0GPE15Y0 (last visited Oct. 20, 2009).

\textsuperscript{16} CITIES ALLIANCE, ABOUT CITIES ALLIANCE 1 (2009).


\textsuperscript{19} Id.; WORLD ECON. FORUM, DEVELOPMENT-DRIVEN PUBLIC-PRIVATE PARTNERSHIPS IN HEALTH 4 (2005).

\textsuperscript{20} Good practice guidance for Global Programs and Partnerships has recently been put in place by the World Bank and the Organization for Economic Co-operation and Development—Development Co-operation Directorate in collaboration with the partnerships themselves. See DEV. CTR., ORG. FOR ECON. CO-OPERATION AND DEV.,
partnerships operate either in a regulatory vacuum, or at a junction point of multiple regulatory regimes, or at best within relatively new, still immature, regulatory frameworks focused on partnerships." An analysis of the different structures of various global programs and partnerships can reveal key lessons for the identification and promotion of good practices in international governance and accountability.

This article presents the key innovative features of the Global Fund and discusses how its features adapted to changing circumstances. The Global Fund was created due to the urgency of combating three of the world’s most devastating diseases—AIDS, tuberculosis, and malaria. Its “advocates also believed that a new, unbureaucratic and lean financing agency was needed to tap the additional funds expected from donors to confront HIV/AIDS, and also tuberculosis and malaria.” Indeed, the Global Fund’s “structure resulted from the strong belief held by some of its founders that it should differ from and operate more effectively than existing bilateral and multilateral aid mechanisms.” This explains why the design of the Global Fund represents such a departure from existing financial or development institutions. The Global Fund’s innovative arrangements can be observed in particular when analyzing the Fund’s legal status; organizational arrangements; concessional financing modalities; and resource mobilization mechanisms.

II. Background

A. History

On July 23, 2000, leaders of the Group of Eight (G8) countries recognized that HIV/AIDS, tuberculosis, and malaria threatened to “reverse decades of development and to rob an entire generation of


21 Zadek & Radovich, supra note 18, at 7.


hope for a better future.”

The leaders of the 26th G8 Summit agreed to “implement an ambitious plan on infectious diseases, notably HIV/AIDS, malaria and tuberculosis.” The idea of a Global Fund was initiated during a special summit of the Organization of African Unity, where African leaders supported the proposal of then-United Nations (UN) Secretary General Kofi Annan for “the creation of a Global Fund, dedicated to the battle against HIV/AIDS and other infectious diseases.”

Secretary General Annan announced the creation of a “global HIV/AIDS and health fund to finance an urgent and expanded response to the epidemic” at the conclusion of the UN General Assembly Special Session on HIV/AIDS (June 2001) and welcomed pledges from donor nations and the private sector. During their July 2001 meeting in Genoa, the G8 countries expressed their determination “to make the Fund operational before the end of the year” and called on other countries and the private sector to also contribute to this fund.

A transitional working group (TWG) was subsequently created, comprised “of nearly 40 representatives of developing countries, donor countries, NGOs, the private sector, and the UN system,” to reflect on how the Fund was to be created. The TWG’s task was to “develop a new structure and working methods that [would] enable the Fund to spend resources most cost-

25 Id. ¶ 19.
26 “We support the creation of a Global AIDS Fund capitalized by the donor community to the tune of US $5-10 billion accessible to all affected countries to enhance operationalization of Action Plans, including accessing Anti-retroviral programs in favor of the populations of Africa.” African Summit on HIV/AIDS, Tuberculosis and Other Infectious Diseases, Abuja, Nig., Apr. 24-27, 2001, Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, ¶ 29, U.N. Doc. OAU/SPS/ABUJA/3.
effectively and in ways that produce measurable results.\textsuperscript{31} The TWG met three times between August and December 2001 and produced summary papers on governance, country processes, eligibility criteria, technical review, accountability, legal issues, and fiduciary arrangements, which were then integrated into the Global Fund’s framework document.\textsuperscript{32}

The Global Fund became officially operational after its board adopted the Fund’s framework document in January 2002.\textsuperscript{33} The board approved its first round of grants to thirty-one countries in April 2002.\textsuperscript{34}

B. Leading Principles

The Global Fund’s operations are guided by seven general principles.

1. Financial Instrument, Not Implementing Entity

"The Fund is a financial instrument, not an implementing entity."\textsuperscript{35} This is consistent with the Fund’s statement of purpose to “attract, manage and disburse additional resources” to fight HIV/AIDS, tuberculosis and malaria.\textsuperscript{36} The Fund therefore relies on other multilateral and bilateral organizations involved in health and development issues to implement projects with the funds


\textsuperscript{33} THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, FIRST BOARD MEETING REPORT 2 (2002) [hereinafter GLOBAL FUND’S FIRST BOARD MEETING]; see also THE GLOBAL FUND FRAMEWORK DOCUMENT, supra note 32.

\textsuperscript{34} U.S. GEN. ACCOUNTING OFFICE, THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS, AND MALARIA HAS BEEN ESTABLISHED BUT IT IS PREMATURE TO EVALUATE ITS EFFECTIVENESS 1-2 (2002).

\textsuperscript{35} THE GLOBAL FUND FRAMEWORK DOCUMENT, supra note 32, at 1.

\textsuperscript{36} Id.
received.\textsuperscript{37}

2. Programs Funded

The Global Fund “make[s] available and leverage[s] additional financial resources to combat HIV/AIDS, tuberculosis and malaria.”\textsuperscript{38} The Fund does this by actively seeking to “complement [programs] of other donors, and seeks to use its own grants to stimulate further investment by both donors and recipients.”\textsuperscript{39} Thus, the Global Fund only finances programs when its assistance “neither replace[s] nor reduce[s] other sources to fight AIDS, tuberculosis, and malaria.”\textsuperscript{40}

3. National Ownership

The Global Fund commits to “base its work on programs that reflect national ownership and respect country-led formulation and implementation processes.”\textsuperscript{41} Thus, selection for funding requires that programs show national ownership. The Global Fund requires “that all areas of society with a stake in public health be involved in the development process, including civil society and private sector.”\textsuperscript{42}

4. Fund Priorities

The Global Fund aims to “operate in a balanced manner in terms of different regions, diseases and interventions.”\textsuperscript{43} This means that the Fund gives priority to countries and regions with the greatest need and also to areas with emerging epidemics.\textsuperscript{44}

5. Integrated and Balanced Approach

The Fund seeks to “pursue an integrated and balanced

\textsuperscript{37} See, e.g., id.
\textsuperscript{38} Id.
\textsuperscript{40} Id.
\textsuperscript{41} THE GLOBAL FUND FRAMEWORK DOCUMENT, supra note 32, at 1.
\textsuperscript{42} How the Fund Works, supra note 39.
\textsuperscript{43} THE GLOBAL FUND FRAMEWORK DOCUMENT, supra note 32, at 1.
\textsuperscript{44} See id. at 9.
approach covering prevention, treatment, and care and support in
dealing with the three diseases." Thus, proposals to be funded
can include "both prevention and treatment based on locally
determined needs."  

6. Independent Review Process

The Global Fund "evaluate[s] proposals through independent
review processes." The governance of the Global Fund is
designed to ensure the independent evaluation of proposals by
experts in the area.

7. Simplified Grant-Making Process

The Global Fund seeks to "establish a simplified, rapid,
innovative" grant-making process and operate "in a transparent
and accountable manner." The Fund "require[s] comprehensive
plans for assessing programmatic accountability, including
monitoring, evaluation, and auditing," and "provide[s] incentives
to grant recipients to achieve more, faster, and better results." Moreover, the Fund allows the public to view all approved
proposals, signed grant agreements, and ongoing grantee reports.

III. An Innovative Legal Status

The choice of legal status for the Global Fund was at the heart
of the TWG discussions in 2001. The first decisions of the Fund's
creators involved choosing between a formal or informal
organization and determining which legal form would best suit the
Fund's needs. The decisions of the TWG, combined with
subsequent decisions, resulted in the development of a
groundbreaking legal status that is unique to the international legal
arena.

45 Id. at 2.
46 How the Fund Works, supra note 39.
47 THE GLOBAL FUND FRAMEWORK DOCUMENT, supra note 32, at 2.
48 Id.
49 Id. at 14-15.
A. Defining the Organizational Structure

Upon recommendations from a sub-working group, the TWG initially preferred to create an informal alliance using an existing international organization, which had been the structure used for the GEF and GAVI Alliance.

However, three main arguments informed the decision to establish the Fund as an independent legal entity. First, the Fund needed to be a legal entity in order “to enter into legally enforceable contracts in the ordinary course of business.” Second, an independent formal organization could help promote public confidence in the institution. Third, a formal status would enable the Fund to receive contributions from both public and private sources. Ultimately, the arguments that prevailed were that the Fund needed “autonomy” and an “ability to enter into robust collaborations with national and international partners.” Thus, the TWG recommended to the Global Fund’s first board meeting that “the Fund [be] provided with an independent legal personality of its own.”

51 USAID presented options at the first meeting of the TWG and a sub-working group chaired by Sweden presented recommendations during the second TWG meeting. See, e.g., The Global Fund to Fight AIDS, Tuberculosis and Malaria, First Meeting of the Transitional Working Group to Establish a Global Fund to Fight AIDS, Tuberculosis, and Malaria 4-5 (2001) [hereinafter First Meeting of the Transitional Working Group]; See also The Global Fund to Fight AIDS, Tuberculosis and Malaria, Second Meeting of the Transitional Working Group to Establish a Global Fund to Fight AIDS, Tuberculosis, and Malaria 4 (2001) [hereinafter Second Meeting of the Transitional Working Group].

52 See Second Meeting of the Transitional Working Group, supra note 51, at 4.

53 “Renting office space, acquiring equipment, securing telephone service, hiring staff etc. are examples of the normal housekeeping duties of the Fund that will require some legal status.” See First Meeting of the Transitional Working Group, supra note 51, at 5.

54 See Second Meeting of the Transitional Working Group, supra note 51, at 4.

55 See First Meeting of the Transitional Working Group, supra note 51, at 5.


B. Creation of a Private Foundation

The next step was to "explore which legal form would suit the needs of the Fund." During its first meeting on January 28–29, 2002, the Global Fund's board approved bylaws for the Fund, which provided that the Fund would take the legal form of a "non-profit foundation." The Fund was organized as a private entity to "balance the need to urgently get the Fund up and running and at the same time assure independent authority." The next step was "incorporating the Fund legally in Switzerland." Geneva was chosen as an appropriate location, due in part to its proximity to the World Health Organization (WHO) and the Joint United Nations Programme on HIV/AIDS (UNAIDS).

The Global Fund was incorporated as a nonprofit foundation under Swiss law on January 22, 2002 and registered in the Geneva Trade Register on January 24, 2002. It is "governed by [its] Bylaws and the applicable provisions of Swiss law" and "operates under the supervision of the Federal Supervisory Board for [f]oundations." With this incorporation, the Global Fund "acquired a legal personality under Swiss law." Since the Global Fund is a foundation under private law and fulfills the conditions of the European Convention on the Recognition of the Legal Personality of Non-Governmental Organizations, it is considered a non-governmental organization.
This European Convention requires signatory states to "recognize the legal personality [of this entity] as acquired within (the territory of) the party in which it has its statutory headquarters [i.e., Switzerland]."

In addition, the Fund, at its creation, benefited from certain privileges and immunities resulting from the agreements it signed with existing organizations, such as an administrative services agreement with the WHO and a trustee agreement with the World Bank. The Fund subsequently decided to discontinue the administrative services agreement with the WHO no later than December 31, 2008. Accordingly, on January 1, 2009, the Global Fund "became an autonomous, international financing institution with its own information technology platform, employment contracts, human resource policies, pension fund, health insurance scheme, grade and salary structure, payroll, accounting, procurement, security, travel, occupational health and other administrative services." A working group is currently examining ways of conferring diplomatic immunities, privileges and exemptions to the Fund's assets, including staff, outside

profit objective of international utility; 2) have been created through an act under the national law the Convention; 3) be effectively active in at least two States, 4) and have its statutory headquarters on the territory of one headquarters on the territory of this or another party." *Id.*

67 *Id.*

68 *Id.*

69 See Report on Legal Status Options, supra note 56, at 6 (stating that the administrative services agreement with WHO provided the Fund with "fiscal and legal protections" including benefits such as "VAT and personal tax exemptions, work permits, diplomatic privileges, and laissez-passer. . . ."); see Annex 6, supra note 63, at 3 (illustrating the advantages and disadvantages of the administrative services agreement with WHO).

70 See Annex 6, supra note 63, at 3 (discussing details on the advantages provided by the trustee agreement with the World Bank).


72 The Global Fund to Fight AIDS, Tuberculosis, and Malaria, Nineteenth Board Meeting: Executive Director's Report to the Board 27 (2009) [hereinafter Report of the Executive Director].
Switzerland and the United States. 73

C. Enhancing the Global Fund's Status

No sooner had the Global Fund acquired a separate legal entity status than the board mandated the secretariat to start exploring an enhanced legal status 74 due to the following reasons.

First, political momentum in 2001 was such that the Global Fund had been created quickly. Therefore, other options for independent legal entities had not been pursued at that time. 75

Second, in its joint bid with the WHO to locate the organization in Geneva, "the Swiss Government committed to providing the Global Fund with quasi-intergovernmental status which, at a minimum, would provide certain tax exemptions and other benefits similar to the privileges allowed other international organizations." 76

Finally, the experience of the Global Fund in its first months of existence demonstrated that an appropriate fiscal and legal status would improve operations. The Global Fund's board noted in particular the need to secure the privileges and immunities essential to protect the Fund; facilitate efficient and least-costly secretariat administration; and align staff contractual obligations to the independent needs of the Fund. 77 For example, as employees of WHO, the secretariat staff had a dual duty to serve the WHO and the Global Fund, creating confusion regarding their accountability in the event of a challenge to the Fund's activities. 78

73 See id. at 27-28.
74 In particular, the possibility of establishing quasi-intergovernmental status with greater autonomy was initially explored. See The Global Fund to Fight AIDS, Tuberculosis and Malaria. Report of the Third Board Meeting 31 (2002) [hereinafter Global Fund's Third Board Meeting] ("The possibility of the Swiss Government conferring Quasi-Intergovernmental Status on the Global Fund was explored by the Secretariat and presented as a viable solution for the Fund. This exploration was mandated by both the First and Second Board meetings.").
75 See Annex 6, supra note 63, at 2.
76 Report on Legal Status Options, supra note 56, at 2.
77 See, e.g., Report on Legal Status Options, supra note 56, at 3-4; see generally Global Fund's Third Board Meeting, supra note 74, at 31-32 (summarizing the advantages of establishing quasi-intergovernmental status).
78 See Report on Legal Status Options, supra note 56, at 4 (stating that "employees of the Secretariat have a duty to serve their employer, WHO, while also having a duty to serve the Global Fund as a private entity. The differing and distinct
In addition, the Global Fund's status as a foundation provided no protection for the Fund as an institution.  

Thus, subsequent to its creation as a private foundation, the board explored the following options for changing the Fund's legal status:

(1) Quasi-governmental organization,
(2) Intergovernmental organization,
(3) Specialized institution within the UN system,
(4) Retaining private foundation status but with expanded board immunities, and
(5) Grant of immunities and privileges equal to those granted to international organizations.

1. Quasi-Governmental Organization

Quasi-governmental organizations are international NGOs recognized by governments as having "partial or limited international legal personalities . . . which translates into the ability to conclude treaties under international law (treaty-making power)." The Swiss authorities have adopted this practice in the past to recognize the "evolution of international law and the development of international cooperation which implies an increased participation of actors of a private nature in international relations."

To attain the status of a quasi-governmental organization under Swiss law, an organization must meet five conditions:

[1] The organization must be a legal entity; [2] the structure of the organization must be close to that of an intergovernmental organization; [3] the majority of the mandates of WHO and the Global Fund create chronic conflicts of interest for Global Fund staff.');

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79 Id. at 6 ("maintaining the current status provides no protection for the Fund as an institution—it remains institutionally liable for any claims brought against it in Switzerland.").

80 ANNEX 6, supra note 63, at 10 ("Because of their content, these treaties are sometimes called 'agreements of a fiscal nature.'"). Both terms "quasi-governmental organization" and "quasi-intergovernmental organization" are used to describe these entities. Id.

81 Id. Similar agreements were entered into by Switzerland, such as those with the International Air Transport Association, the International Council of Airports (1997), and the International Society of Aeronautical Communication (1992). Id. at 10-11.
financing should come from states; [4] the functions of the organization should serve the public good; and [5] the Swiss should have an interest in hosting the organization. The Global Fund anticipated no difficulty in qualifying as a quasi-governmental organization. If the Global Fund decided to pursue this option, it was advised to follow the example of the Geneva International Centre for Humanitarian Demining, a Swiss foundation that “obtained a status [taking] into consideration the international tasks... assigned to it.” Following this precedent, an agreement could be reached with the Swiss government to extend immunities to the members of the Global Fund’s board while maintaining the civil servant status of the secretariat staff.

However, the governance and partnership committee did not recommend this option due to “higher employment costs” and “limited benefits” and immunities for board members, and the board subsequently decided not to pursue this option.

2. Intergovernmental Organization

An international organization has been defined as an “association of states, established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfill particular functions within the organization.” Such entities have also been termed intergovernmental organizations.

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82 Global Fund’s Third Board Meeting, supra note 74, at 31.
83 See id.
84 Annex 6, supra note 63, at 11 (stating that the agreement between the Federal Council and the Geneva International Centre for Humanitarian Demining provided for “the inviolability of the archives and documents of the [Geneva International Centre for Humanitarian Demining], as well as of the acts performed by its members in the fulfillment of their functions.”).
85 See id. at 20.
86 See id. at 4 (providing a table listing the advantages and disadvantages of the quasi-intergovernmental status for the board’s consideration and recommending against the option of the quasi-governmental organization).
89 See Annex 6, supra note 63, at 15 (stating that the 1969 “Vienna Convention is content to qualify international organizations as intergovernmental” and that this
According to the secretariat, the intergovernmental organization option would have offered the Global Fund "the greatest range and level of benefits." It would have permitted the establishment of a cost-effective administrative system, made accountabilities and responsibilities clear and transparent, provided the best platform for building robust collaborations with the UN and other development partners, provided full fiscal benefits for the institution and its individuals, and improved the Global Fund’s immunities.

Nevertheless, this option was ultimately rejected due to several disadvantages. First, there were concerns that the creation of a new intergovernmental organization "would result in redundant and costly processes and systems that would confound versus leverage well functioning international expertise and services." Second, the creation of an intergovernmental organization via a multilateral treaty was viewed as a cumbersome and lengthy process. All states participating in the Global Fund would have needed to approve the constituting document for this new intergovernmental organization in accordance with their constitutional procedures. There had been precedent to the contrary in that the establishment of the International Federation of Red Cross and Red Crescent Societies required merely a headquarters agreement with the Swiss government to be "considered as being the holder of the rights and obligations not only under Swiss, but also under international law." Nevertheless, this precedent was only possible because of the "specific place [this federation] occupies in international humanitarian relations." This international legal personality was "demonstrated notably in the conclusion of a large number of agreements which define the legal status in the contracting [s]tates

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90 REPORT ON LEGAL STATUS OPTIONS, supra note 56, at 6.
91 See id.
92 Id. at 7.
93 For example, this would imply a three-month referendum period in Switzerland. See ANNEX 6, supra note 63, at 19.
94 Id. at 13.
and which are authentic international treaties.”

However, the Global Fund could not follow this precedent because “it was created as a non-profit foundation ruled by its own statutes and by the articles 80 ff. of the Swiss Civil Code. Its legal personality is therefore anchored mainly, if not exclusively in Swiss internal law.” A multilateral treaty would therefore have been required to create an intergovernmental organization in the case of the Global Fund.

Third, because only states are parties to the constituting act of an intergovernmental organization, transforming the Global Fund into such an organization could have discriminated against the private sector. The proposed change could upset “the subtle balance established between the private and public sectors, notably as concerns the [f]oundation [b]oard of [d]irectors, which will become the [e]xecutive [b]oard of the new international organization to be created.” In particular, signatory states may not wish to be “on an equal footing, that is to say with the right to vote” with representatives of civil society and the private sector on the board.

Since the Global Fund was intended to be a new financing instrument with specific emphasis on including the private sector and civil society, the intergovernmental organization option was deemed too burdensome to pursue.

3. Specialized Institution within the United Nations System

The secretariat for the Global Fund also explored the option of organizing the Fund as a specialized institution within the UN system. This would have enabled the Fund’s staff to profit from a UN laissez-passer and the benefits and immunities of

95 Id.
96 Id.
97 Id. at 18.
98 Id.
99 See ANNEX 6, supra note 63, at 6.
specialized institutions. However, this option was quickly rejected because the creation of a specialized institution is at least as burdensome as creating a new intergovernmental organization. Furthermore, the Global Fund “was never intended to be part of the UN system.”

4. Expanded Board Privileges and Immunities

To remedy the disadvantages of the previous options, the Swiss authorities offered the Global Fund the option of expanding the board’s and the secretariat’s privileges and immunities in Switzerland. This would have allowed the Global Fund to remain a Swiss foundation with “immunities of jurisdiction in Switzerland for members of the board of the Global Fund,” immunity of jurisdiction for certain secretariat staff, and “international recognition of a status as an international NGO.”

Although the secretariat recommended this option because of the disadvantages of the other options, the board decided that this solution did not provide the Global Fund with enough protection.

5. Immunities and Privileges Equal to an International Organization

As none of the options explored suited the specific needs of the Fund, the “Swiss authorities came forward with a significant new proposal for the Global Fund [l]egal [s]tatus.” Switzerland offered to create a unique status for the Global Fund whereby the latter would remain a Swiss foundation and be accorded immunities and privileges in Switzerland equal to those granted to international organizations. This would be achieved solely through the conclusion of a headquarters agreement.

101 ANNEX 6, supra note 63, at 6.
102 See id.
103 Id.
104 See id. at 4 (detailing the benefits arising from this option).
105 Id. at 4-5.
106 ANNEX 6, supra note 63, at 6.
107 GLOBAL FUND’S FIFTH BOARD MEETING, supra note 87, at 33 (stating that the option of “adding immunities from jurisdiction for the Board and Secretariat to the current arrangement [is] not optimal.”).
108 Id. at 32.
This option would provide "increased legal protections for the Global Fund [s]ecretariat and its [b]oard and its assets." The headquarters agreement would also enable the Global Fund "to undertake a number of administrative changes which will make the organization more effective and efficient." Indeed, the headquarters agreement provided that the Global Fund, its assets, income and other property are tax exempt, and immune "from every form of legal process and enforcement" in the conduct of its business. In addition, board members and all Global Fund officials would enjoy certain privileges, including (a) "immunity from jurisdiction" for acts performed in the discharge of their duties, (b) "inviolability of all official papers, data storage media and documents," and (c) tax exemptions. The headquarters agreement would also continue to allow the equal participation of the private sector and other actors on the Global Fund’s governing bodies. As this option was "a substantial improvement over the proposed quasi-intergovernmental status in terms of immunities, privileges and costs" and "an important improvement over the current offer to extend immunities to the [b]oard and the prospect of seeking intergovernmental organization status," the Global Fund, during its fifth board meeting, asked the Swiss authorities to further examine this possibility.

On September 19, 2003, the "Swiss Federal Council took the decision of principle to grant to the Global Fund privileges and immunities similar to those of an international organization."
The Swiss authorities made this decision, the first of its kind in Switzerland, because they viewed strengthening the global fight against AIDS as especially important for Switzerland. During its eighth board meeting, the Global Fund authorized the signing of the headquarters agreement. The agreement between the Swiss Federal Council and the Global Fund, which determined the final legal status of the Global Fund in Switzerland, was finally signed on December 13, 2004.

Thus, the Global Fund remains a Swiss foundation and also benefits from privileges and immunities in Switzerland similar to those of an intergovernmental organization. This unique status is an intermediate step to the precedents of the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, which were fully assimilated into intergovernmental organizations through the conclusion of headquarter agreements. This new status designed for the Global Fund demonstrates the flexibility granted by Switzerland in creating original legal solutions to accommodate the special needs of such global instruments.

Although the privileges and immunities granted to the Global Fund were not intended by the Swiss authorities to extend outside Switzerland, certain states have subsequently recognized the Global Fund as a public international organization, enabling it to also benefit from privileges and immunities in other countries.

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117 See Global Fund’s Fifth Board Meeting, supra note 87, at 33.
118 See Global Fund’s Sixth Board Meeting, supra note 116, at 9 (referring to Swiss President Pascal Couchepin’s intervention at the UN Special Session on AIDS on 22 September 2003).
121 Privileges and Immunities, supra note 109.
122 See Global Fund’s Fifth Board Meeting, supra note 87, at 33 (“It was also clarified that this proposal did not provide immunities outside of Switzerland. Currently, WHO provided some degree of immunity for Secretariat staff in certain countries outside of Switzerland, however these immunities were not extended to the Fund itself or Board members.”).
123 On January 13, 2006, U.S. President Bush signed Executive Order 13395, designating the Global Fund as a public international organization, thereby entitling it
Nevertheless, this “designation of [the] Global Fund as a public international organization differs from the definition of public international organizations under other international law instruments.” Although the Global Fund does not satisfy all the requirements of an intergovernmental organization, its designation as such “expands the traditional definition” of a public international organization to include such entities that are not considered intergovernmental entities but are granted privileges and immunities by a sovereign government.

IV. Organizational Arrangements

A. Governance Arrangements

The creators of the Global Fund wanted a light-touch governance system that was accountable and transparent; supportive of country decision-making; technically sound; inclusive of all partners; and that minimized transaction costs and transferred resources rapidly. The current governance structure is laid out in the Global Fund’s framework document, bylaws and board operating procedures, which have frequently been...


124 JusCogens.net, supra note 123.

125 Id.

126 Governance papers were discussed during the three TWG meetings. A final governance paper was adopted by the TWG at its last meeting (13–14 December 2001) to be submitted to the Board. See, e.g., FIRST MEETING OF THE TRANSITIONAL WORKING GROUP, supra note 51, at 3; see also THIRD MEETING OF THE TRANSITIONAL WORKING GROUP, supra note 32, at 1.

127 See generally THE GLOBAL FUND FRAMEWORK DOCUMENT, supra note 32.

128 See generally GLOBAL FUND BYLAWS, supra note 59.

129 THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, BOARD OPERATING PROCEDURES (amended May 5, 2009).
revised to clarify outstanding governance issues. At the third board meeting, the decision was made to create temporary committees to work with specific terms of reference, “established on a temporary basis, to be briefly reviewed at every [b]oard meeting.” The four initial committees were: (1) Monitoring, evaluation, finance, and audit; (2) portfolio management and procurement; (3) resource mobilization; and (4) governance and partnership.

The Global Fund also entered into a trust agreement with the World Bank, which serves as trustee of the monies entrusted to the organization, and an administrative service agreement with the WHO. Professor Richard Feachem was appointed as the first executive director of the Global Fund.

B. Governance Structure

The Global Fund has both a country and a global level governance structure (Figure 1). The Fund relies on three mechanisms to develop proposals for Fund financing at the country level: (1) A country coordinating mechanism (CCM), (2) the principal recipient, and (3) a local fund agent. At the global level, the Fund’s constituent bodies include the board, partnership forum, chairpersons, secretariat, and the technical review panel. Finally, the World Bank, as trustee, plays a financial management role.

130 The fourth Board meeting, for example, adopted revisions to the effect that the chair and vice-chair would be elected for a period of two years, and the chair and vice-chair were given decision-making authority between Board meetings. See THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, REPORT OF THE FOURTH BOARD MEETING 12 (2003).

131 GLOBAL FUND’S THIRD BOARD MEETING, supra note 74, at 7.

132 Id. at 7-10.

133 See GLOBAL FUND’S FIRST BOARD MEETING, supra note 33, at 4.

134 See id.

135 See GLOBAL FUND’S THIRD BOARD MEETING, supra note 74, at 5.

136 See THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS, AND MALARIA, COUNTRY COORDINATING MECHANISM PRINCIPAL RECIPIENT—LOCAL FUND AGENT COMMUNICATIONS 4 (2008); see also GLOBAL FUND BYLAWS, supra note 59.

137 Id.

138 GLOBAL FUND BYLAWS, supra note 59, at art. 5.

139 WORLD BANK TRUSTEE FOR THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, TRUSTEE REPORT 1 (2004).
1. Recipient Country Structures

The creators of the Global Fund agreed that its structures should enhance local ownership and participatory decision-making. Thus, the Global Fund does not have a country-level presence, but relies instead on existing in-country mechanisms and contracts with in-country experts for independent advice.

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140 See First Meeting of the Transitional Working Group, supra note 51, at 3; see also Third Meeting of the Transitional Working Group supra note 32, at 3.

141 See The Global Fund to Fight AIDS, Tuberculosis and Malaria,
a. The Country Coordinating Mechanism

The CCM is a coordination and partnership mechanism that, ideally, should have already existed prior to the Global Fund. It includes "broad representation from governments, NGOs, civil society, multilateral and bilateral agencies and the private sector."

The CCM evaluates the submitted country proposals and channels one coordinated country proposal (CCP) to the Global Fund. The CCP is usually composed of an existing health sector plan and a request for funding for specific aspects of the plan. After grant approval, the CCM also oversees program implementation.

The novelty of the CCM is that it attempts to bring together, within one single structure, all actors working on AIDS, tuberculosis, and malaria at the country level. In addition, the Global Fund places particular emphasis on the inclusion of civil society and key affected populations. In this aspect, it "contrasts with the typical structure of the donor-recipient relationship in

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FIDUCIARY ARRANGEMENTS FOR GRANT RECIPIENTS 3 (2003) [hereinafter FIDUCIARY ARRANGEMENTS FOR GRANT RECIPIENTS].

142 See THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, GUIDELINES ON THE PURPOSE, STRUCTURE, COMPOSITION AND FUNDING OF COUNTRY COORDINATING MECHANISMS AND REQUIREMENTS FOR GRANT ELIGIBILITY 1 (2004), [hereinafter COUNTRY COORDINATING MECHANISMS].

143 THE GLOBAL FUND FRAMEWORK DOCUMENT, supra note 32, § 6-B1, at 5; see generally THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, THE GLOBAL FUND IMPLEMENTER SERIES: COUNTRY COORDINATING MECHANISMS OVERSIGHT PRACTICE 8-14 (2008) [hereinafter IMPLEMENTER SERIES: COUNTRY COORDINATING MECHANISMS OVERSIGHT PRACTICE] (discussing the different CCM models available and that the Global Fund is flexible in terms of which entities function as in-country structures).

144 THE GLOBAL FUND FRAMEWORK DOCUMENT, supra note 32, §§ 6-B6, -C1.

145 Each partner’s contribution must have specified outcomes, targets, and results as well as an indication of how these will be measured. The proposal also includes an indication of how funds will be disbursed to partners. Id. § 6-C2; see also id. § 6-D2 (stating that this plan is “submitted with budgets tied to specific partners”).

146 See COUNTRY COORDINATING MECHANISMS, supra note 142, at 1.

147 Id.

148 The Guidelines state that “[t]he membership of the CCM comprise a minimum of 40% representation of the nongovernment sectors such as NGOs/community-based organizations, people living with the diseases, key affected populations, religious/faith-based organizations, private sector, academic institutions.” Id. at 3-4.
organizations like the World Bank, which is focused almost exclusively on national governments and with the model used by the GEF, where governments develop and implement proposals in cooperation with international organizations... One issue up for debate is whether "multisectoral participation in Country Coordinating Mechanisms should be promoted or actually mandated and, if the latter, what percentages should be cited." The Global Fund currently recommends that at least 40% of the members represent non-government sectors. Despite the difficulties that can arise with such a structure (e.g., the burden created if the CCM did not exist before or the risk that the CCM will be dominated by one group), this country-level approach tends to be valued as a way "to bring all key national stakeholders together."  

b. Principal Recipients

A principal recipient is a "legally-constituted entity that can enter into a grant agreement with the Global Fund." The principal recipient is often a government ministry but can also be "a nongovernmental or faith-based organization, a private sector firm or foundation..." Principal recipients "are expected to be local stakeholders rather than United Nations agencies or other multilateral or bilateral development partners." Principal recipients are also required to join the CCM.

The principal recipients are selected by the CCM to be the lead implementers of the grants. They are responsible for program management and financially accountable for the Global Fund-

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149 Heimans, supra note 4, at 9.
151 See supra text accompanying note 143.
152 Heimans, supra note 4, at 9.
153 THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, GUIDELINES FOR PROPOSALS ROUND SEVEN 35 (2007) [hereinafter PROPOSALS ROUND SEVEN].
154 Id.
155 Id.
156 See FIDUCIARY ARRANGEMENTS FOR GRANT RECIPIENTS, supra note 141, at 3.
157 See PROPOSALS ROUND SEVEN, supra note 153, at 10.
financed program.\textsuperscript{158} Therefore, principal recipients carry out and oversee program implementation, report on results, and request additional disbursement of funds.\textsuperscript{159} In addition, they often disburse the grants from the Global Fund to subrecipients, who accomplish "much of the implementation work."\textsuperscript{160} The principal recipient then oversees the financial arrangements and prepares a plan for the annual audit of subrecipient activities under the grant.\textsuperscript{161}

\begin{center}
\textit{c. Local Fund Agents}
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Local fund agents are in-country experts selected by the Global Fund through a competitive bidding process.\textsuperscript{162} Usually, the Global Fund contracts one local fund agent per grant-receiving country.\textsuperscript{163}

The local fund agents are hired to assess whether the proposed principal recipients have the minimum capacity required to assume financial and program accountability for the grants.\textsuperscript{164} Once the grant has been disbursed, the local fund agent "provide[s] independent oversight and verification of program progress and financial accountability."\textsuperscript{165}

Grants from the Global Fund can cover a wide range of activities. The proposals may seek to prevent the spread of HIV/AIDS, tuberculosis, or malaria; treat people who are ill from these diseases; or provide care and support for affected people and communities by scaling up existing effective interventions or

\begin{footnotesize}
\begin{enumerate}
\item[158] See \textsc{Fiduciary Arrangements for Grant Recipients}, \textit{supra} note 141, at 3.
\item[159] See \textsc{Proposals Round Seven}, \textit{supra} note 153, at 35-36.
\item[160] Examples of sub-recipients include "academic/educational sector; government (including ministries of health as well as other ministries involved in a multi-sectoral response, such as education, agriculture, youth, information, etc.); non-governmental and community-based organizations; people living with HIV, tuberculosis, and/or malaria; the private sector; religious/faith-based organizations; and where no national recipient is available, upon justification multi-/bilateral development partners." \textit{Id.} at 36 n.3.
\item[161] See \textit{id.} at 36-37.
\item[163] \textit{Id.}
\item[164] \textit{Id.}
\item[165] \textsc{Fiduciary Arrangements for Grant Recipients}, \textit{supra} note 141, at 3.
\end{enumerate}
\end{footnotesize}
piloting new and innovative responses.\textsuperscript{166} Proposed activities may include efforts to improve the availability of health services; strengthen health systems and human resource capacity; promote behavior change; provide critical health products (such as antiretroviral therapy; drugs for tuberculosis, and anti-malarial drugs), or conduct operational research.\textsuperscript{167}

2. Global Fund Constituent Bodies

The CCMs submit their country’s proposals to the Global Fund’s constituent bodies where the proposals are assessed and approved.

\textit{a. Secretariat}

The secretariat\textsuperscript{168} is headed by an executive director who reports to the board on “the day-to-day management of the [f]oundation, and the specific duties and responsibilities assigned to him or her by the [f]oundation [b]oard.”\textsuperscript{169} The executive director selects the secretariat staff,\textsuperscript{170} who are responsible for receiving and reviewing “grant applications and negotiat[ing] and execut[ing] grant agreements; commission[ing] the [t]echnical [r]eview [p]anel and ensuring the independence of the review process; coordinat[ing] the preparation of issues papers and operational strategies for foundation board meetings . . . ; and oversee[ing] the monitoring and evaluation process.”\textsuperscript{171} The secretariat has grown significantly and had 456 full-time staff in March 2009, compared to 346 in March 2008.\textsuperscript{172}

In facilitating the application process, the secretariat receives proposals for funding from the CCM, ensures that all the required information is included in these proposals, and then forwards the proposals to the technical review panel.\textsuperscript{173}

\textsuperscript{166} See PROPOSALS ROUND SEVEN, supra note 153, at 18-39.
\textsuperscript{167} See id. at 31.
\textsuperscript{168} See GLOBAL FUND BYLAWS, supra note 59, art. 8.
\textsuperscript{169} Id. art. 8.1.
\textsuperscript{170} See id.
\textsuperscript{171} See id. art. 8.2.
\textsuperscript{172} See REPORT OF THE EXECUTIVE DIRECTOR, supra note 72, at 28.
\textsuperscript{173} See GLOBAL FUND BYLAWS, supra note 59, art. 8.2.
b. Technical Review Panel

"The [t]echnical [r]eview [p]anel is an independent and impartial team of scientific and programmatic experts appointed by the [f]oundation [b]oard . . . ."174 The members have "expertise in HIV/AIDS, tuberculosis, malaria and cross-cutting issues."175 Also, "balances in terms of gender, regional representation and a mix of sectoral experience are taken into consideration in the composition of the panel."176 The number of permanent members on the technical review panel has recently been expanded from thirty-five to forty persons in light of the increasing number of proposals the Fund considers and typically serve for a period of up to four rounds of funding.177 In addition, the technical review panel now has a second vice-chair.178

The technical review panel is responsible for "review[ing] eligible grant proposals for technical merit ([i.e.,] soundness of approach, feasibility and potential for sustainability)."179 The panel uses a set of proposal review criteria established by the board and recommends for funding only those CCP that reflect genuine, broad participation and ownership of all interested groups.180

c. Foundation Board

The Global Fund’s board "is the supreme governing body of the [f]oundation" and brings together a broad range of

174 Id. art. 9.
176 Id. at 18.
177 See THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, DECISION POINT MASTER LIST NINETEENTH BOARD MEETING 17 (2009) [hereinafter NINETEENTH BOARD MEETING]; see also id. at 18 (approving a number of individuals as permanent members of the technical review panel to serve up to four rounds of funding. The individuals appointed were “recommended by the Portfolio Committee and the Executive Director upon consideration of required technical expertise, as well as geographical distribution and gender balance.”).
178 TECHNICAL REVIEW PANEL, supra note 175, at 18.
179 Id.
180 PROPOSALS ROUND SEVEN, supra note 153, at 18-39.
stakeholders.\textsuperscript{181}

\textit{i. Composition of the Board}

The board consists of "twenty voting members and six nonvoting members."\textsuperscript{182} Voting members include "seven representatives from developing countries[,] eight representatives from donors [and] five representatives from civil society and the private sector."\textsuperscript{183}

During TWG discussions, it was agreed that the eight donor seats should be "comprised of either a single country or a group of like-minded or geographically linked countries who have combined to form a constituency."\textsuperscript{184} To determine the developing country constituencies, the six WHO regions (Africa, the Americas, Southeast Asia, Europe, Eastern Mediterranean, and Western Pacific) are used, with an additional representative from Africa.\textsuperscript{185} The five remaining seats include civil society representatives from developed and developing countries, a private foundation and a private sector representative, and a civil society representative who is living with HIV/AIDS or is from a community living with tuberculosis or malaria.\textsuperscript{186}

The nonvoting members include WHO, UNAIDS, the World Bank, a Swiss member, the executive director, and a member representing the "Partners Constituency."\textsuperscript{187} The recent addition of the member representing the "Partners Constituency" is intended to include key partners "whose mission is directly related to the Global Fund and who are not currently represented on the [b]oard."\textsuperscript{188} The founding members of the "Partners Constituency" are Stop TB Partnership, Roll Back Malaria and UNITAID, and any additional key partner can be considered by

\begin{footnotes}
\item[181] See \textit{GLOBAL FUND BYLAWS}, \textit{supra} note 59, art. 7.4.
\item[182] \textit{Id.} art. 7.1.
\item[183] \textit{Id.}
\item[184] \textit{THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, GUIDELINES ON CONSTITUENCY PROCESSES} 3 (2003) [hereinafter \textit{GUIDELINES ON CONSTITUENCY PROCESSES}]. \textit{See generally} \textit{THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, BOARD MEMBERS} (2009), for a list of the current Board members.
\item[185] See \textit{GLOBAL FUND BYLAWS}, \textit{supra} note 59, art. 7.1.
\item[186] \textit{Id.}
\item[187] \textit{See NINETEENTH BOARD MEETING}, \textit{supra} note 177, at 12.
\item[188] \textit{Id.}
\end{footnotes}
the board for inclusion in the "Partners Constituency." This new nonvoting member highlights the Fund's wish "to make the representation of the three diseases on the board more equitable" and in particular to increase representation of the malaria and tuberculosis constituencies.

Constituents have great flexibility in determining their own rules for representation. Each group determines a selection process for its representatives, assisted by guidelines issued by the Global Fund. For example, representative groups from the private sector and NGOs were consulted in the selection of representatives from those sectors. Each representative serves its constituency for two years, unless the board decides on another term. Each constituency may choose to have an alternate, who serves in place of a board member and is requested to designate a "communication focal point," who contributes to the process of information sharing and exchange within constituencies. Members of these constituencies can be included in delegations to the board, as long as the number does not exceed ten. It is recommended that constituencies arrive at board meetings with a

189 Id.
190 REPORT OF THE SEVENTEENTH BOARD MEETING, supra note 71, at 15.
191 See id. at 16.
192 See GLOBAL FUND BYLAWS, supra note 59, art. 7.2.
193 GUIDELINES ON CONSTITUENCY PROCESSES, supra note 184, at 1.
194 For example, "the Global Business Coalition on HIV/AIDS, Tuberculosis and Malaria arranged consultations on the election of the Private Sector Member, and the International Council of AIDS Service Organizations organized the election for the NGO positions." Id. at 3.
195 GLOBAL FUND BYLAWS, supra note 59, art. 7.2.
196 See THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, BOARD OPERATING PROCEDURES 2 (amended May 5, 2009) [hereinafter BOARD OPERATING PROCEDURES]; see also GUIDELINES ON CONSTITUENCY PROCESSES, supra note 176, at 7 (stating that "[f]or constituencies representing a broad range of interests (including diverse countries or organizations) it seems most effective if the alternate comes from a country/organization other than that of the Board Member") (emphasis in original).
197 See THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, GUIDELINES ON CONSTITUENCY PROCESS ANNEX 6, at 5 (2003). The Guidelines state that "it is useful if the Focal Point is close to the Board Member either as part of the same office or based in the same country. In any case, the main criterion should be access to a reliable communications infrastructure." (emphasis in original) Id. at 3; see also BOARD OPERATING PROCEDURES, supra note 196, at 4.
198 See also BOARD OPERATING PROCEDURES, supra note 196, at 2-3.
unanimous position on the issues to be discussed and the Global Fund suggests certain mechanisms to assist constituencies in reaching this consensus.\textsuperscript{199}

These elements are inspired by an earlier funding mechanism, the GEF. In the GEF, each constituency has significant ownership of its representation process and agrees on how to select its representative and alternate as well as how long the representative will serve on the GEF council, with a maximum of three years.\textsuperscript{200} The GEF secretariat similarly assists in the representation of constituencies in a light-handed manner.\textsuperscript{201} Similar to the Global Fund, the GEF constituting documents specify the regions for allocation of the developing country seats but not for the developed countries.\textsuperscript{202}

\textit{ii. Role, Responsibilities, and Decision-Making Process of the Board}

The board appoints board members and "set[s] policies and strategies for the [Fund]; set[s] operational guidelines, work plans, and budgets for the [s]ecretariat and the [t]echnical [r]eview [p]anel; make[s] funding decisions; selects and, if necessary, replaces the [e]xecutive [d]irector . . . and generally exercises all other powers required to carry out the purposes of the [Fund]."\textsuperscript{203}

The Global Fund's board decides by consensus.\textsuperscript{204} If the board and the chair, despite best efforts, cannot reach a consensus, any voting member may call for a vote.\textsuperscript{205} The voting process separates the voting members into two groups: one encompassing

\textsuperscript{199} \textit{Id.} at 4. Such mechanisms include preparing position papers to be discussed among the constituency, holding side meetings during other regional or international events, setting up conference calls, and holding constituency meetings before the board meetings. \textit{Id.}

\textsuperscript{200} \textsc{Global Env't Facility, Instrument for the Establishment of the Restructured Global Environment Facility} 13 (2004) [hereinafter \textsc{Global Env't Facility}].

\textsuperscript{201} For example, the GEF's Secretariat organizes constituency meetings before GEF Council meetings so that delegates are well informed of the issues and the decisions to be made.

\textsuperscript{202} See \textsc{Global Env't Facility}, supra note 200, at 36.

\textsuperscript{203} See \textsc{Global Fund Bylaws}, supra note 59, art. 7.4.

\textsuperscript{204} See \textit{id.} art. 7.6.

\textsuperscript{205} \textit{Id.}
the eight donor seats and the two private sector seats, and the other encompassing the seven developing country seats, the two NGO seats, and an NGO representative who lives with HIV/AIDS or is from a community living with tuberculosis or malaria (Figure 2).\footnote{Id. art. 7.6.} A decision can be made only if a majority of the two groups is present\footnote{Id. art. 7.7.} and requires a “two-thirds majority of those present of both” groups.\footnote{Id. art. 7.6.} Therefore, both the quorum and the voting process allow for equal representation of the donor and the developing country constituencies.

**Figure 2: The Voting Groups of the Global Fund Board**

The Global Fund’s decision-making process is inspired by the GEF council, which also relies on consensus as the preferred
process. The GEF's chairperson is charged with making "all practicable efforts" to obtain a consensus.\textsuperscript{209} If this appears impossible, any member of the GEF council may require a formal vote.\textsuperscript{210} The voting system on the GEF council is also divided into two groups and a decision requires "an affirmative vote representing both a 60% majority of the total number of participants and a 60% majority of the total contributions."\textsuperscript{211} This double-weighted majority system ensures that contributors to the GEF are accorded adequate importance in the decision-making process. This presents a major difference from the Global Fund, whose voting groups aim to ensure that all constituencies are equally represented on the vote.

Furthermore, the Global Fund's decision-making process gives the private sector, NGOs, and affected communities a real voice on the board and, therefore, on funding decisions. This is a clear departure from other concessional financing models, wherein aid recipients are encouraged to participate in discussions but are not entitled to vote during funding decisions. For example, although other constituencies are allowed to attend GEF council meetings,\textsuperscript{212} the GEF allows only governments from developing and developed countries to vote on funding decisions.\textsuperscript{213} Similarly, the International Development Association (IDA) invites representatives from borrower countries to attend discussions to "increase openness and help ensure that IDA's policies are responsive to country needs and circumstances."\textsuperscript{214}

\textsuperscript{209} \textit{GLOBAL ENV'T FACILITY}, supra note 200, at 17.

\textsuperscript{210} \textit{Id.} In practice however, neither the GEF nor the Global Fund tend to use their voting systems and have relied first and foremost on achieving consensus. See \textsc{Charles Streck, Global Public Policy Institute, The Network Structure of Global Environment Facility} 23 (2005).

\textsuperscript{211} \textit{GLOBAL ENV'T FACILITY}, supra note 200, at 18.

\textsuperscript{212} The GEF Council has an open door policy toward NGOs and representatives of civil society; however, these observers do not participate in decision-making. See Global Environment Facility, Council, http://www.gefweb.org/participants/council/council.html (last visited Oct. 20, 2009).

\textsuperscript{213} The GEF Council is made up of members representing thirty-two constituencies. There are sixteen members from developing countries, fourteen members from developed countries and two members from the countries of Central and Eastern Europe and the former Soviet Union. See \textit{GLOBAL ENV'T FACILITY}, supra note 200, at 13.

\textsuperscript{214} "[The] representatives [from] borrower countries have been invited to [attend discussions] since the IDA 13 [Negotiations which concluded in July 2002]."
IDA donors and borrower representatives have also consulted civil society representatives to gain additional insights from borrower countries; however, neither borrower countries nor civil society representatives can vote on IDA funding decisions. The EFA-FTI also encourages participation by actors working at the country level in its strategy committees, which makes decisions on the destination of trust fund monies, but only donor governments make funding decisions.

Therefore, although there is a trend toward actively including recipients and other constituencies on the governance bodies of international funding mechanisms, the Global Fund is unique in allowing other constituencies make funding decisions on an equal basis with donors. Thus, the organization of the Global Fund’s decision-making body represents a departure from previous models of cooperation.

d. Chair and Vice Chair

The board selects the chair and the vice-chair of the Global Fund from among its voting members. These two positions alternate every two years between the two voting groups: The donors and the private sector on the one hand, and developing countries, NGOs and affected communities on the other. Providing the developing country constituency with the opportunity to chair meetings represents another innovation that subsequently inspired other global programs, such as the EFA-FTI, which subsequently decided to allow the possibility of a developing country co-chair.

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216 See THE EDUC. PROGRAM DEV. FUND & THE CATALYTIC FUND, EDUCATION FOR ALL - FAST TRACK INITIATIVE FACT SHEET 1-2 (2008). The EFA-FTI has two trust funds, the Catalytic Fund and the Education Program Development Fund, which disburse funds to developing countries to finance their national education sector plans and capacity development. These funds are managed by strategy committees composed of donors who make the funding decisions. Id.

217 See GLOBAL FUND BYLAWS, supra note 59, art. 7.3.

218 Id.

219 The idea that the FTI steering committee could invite a developing country to chair the FTI Partnership in addition to the two donor co-chairs received strong support.
Elected for two-year terms, the chair and vice-chair play advocacy and fund raising roles and make urgent decisions on behalf of the board that the board can subsequently modify or reverse.220

e. Partnership Forum

The Global Fund’s partnership forum is “open to a wide range of stakeholders that actively support the [f]oundation’s objectives, including representatives of donors, multilateral development cooperation agencies, developed and developing countries, civil society, NGO and community based organizations, technical and research agencies, and the private sector.”221 This forum meets every twenty-four to thirty months.222

The Global Fund’s partnership forum aims to “provide persons and entities concerned about the prevention, care, treatment and eventual eradication of HIV/AIDS, tuberculosis and malaria, a forum to express their views on the [f]oundation’s policies and strategies.”223 To date, the Global Fund has held three partnership forums: The first in Bangkok (2004),224 the second in Durban (2006),225 and the third in Dakar (2008).226 The partnership forum has introduced certain novel elements to enhance Fund ownership. For example, all stakeholders can assist in the shaping of the discussions through an online discussion forum.227

See EDUCATION FOR ALL—FAST TRACK INITIATIVE, CAIRO PARTNERSHIP MEETING MINUTES 9 (2006).

220 See GLOBAL FUND BYLAWS, supra note 59, art. 7.3.

221 Id. art. 6.1.

222 See GLOBAL FUND BYLAWS, supra note 59, art. 6.3.

223 GLOBAL FUND BYLAWS, supra note 59, art. 6.1.

224 For more information on the Bangkok Forum of 2004, see THE GLOBAL FUND, FIRST BIENNIAL PARTNERSHIP FORUM REPORT 3 (2004).


3. Financial Structures

While the Global Fund was being organized, a World Bank presentation on fiduciary arrangements highlighted the importance of accountability in ensuring the financial integrity of the Fund.\textsuperscript{228} The presentation further emphasized that the trustee should play an active role and have close relations with the secretariat, as the World Bank’s experience with trust funds stressed that fiduciary responsibility must go beyond banking arrangements.\textsuperscript{229}

This was not, however, the role given to the World Bank in the final composition of the Global Fund’s governance and fund management structures. The board decided that the World Bank would hold the donor funds in trust and disburse them to national-level entities on instruction of the board.\textsuperscript{230} The Global Fund would retain principal responsibility for program accountability.\textsuperscript{231}

In addition, the World Bank collects, invests, and manages the donor funds, reports on the financial management of the Fund to Global Fund stakeholders, and is a signatory to the contribution agreements with each donor.\textsuperscript{232}

Thus, the World Bank’s role as trustee of the Global Fund represents a departure from prior practice. As an ex officio member, the World Bank lacks voting rights on the board and therefore cannot influence the direction of the funds.\textsuperscript{233} Once the board has decided on the fund recipients, the World Bank transfers the donor funds to an agreed third party or entity. The World Bank is not responsible for monitoring the grant recipients’ use of funds or supervising their activities. Instead, the recipient or executing entity is directly accountable to the Global Fund for the use of the funds.\textsuperscript{234}

\textsuperscript{228} See First Meeting of the Transitional Working Group, supra note 51, at 2.
\textsuperscript{229} Id.
\textsuperscript{230} See Global Fund’s First Board Meeting, supra note 33, at 4.
\textsuperscript{231} See id.
\textsuperscript{234} See Fiduciary Arrangements for Grant Recipients, supra note 141, at 3 (Figure 1 demonstrating the manner in which funds are disbursed by the World Bank as trustee to the country level and reporting is provided from the country level directly to the Global Fund’s constituent bodies).
Therefore, the World Bank performs limited services for the Global Fund, equivalent to those of a fiscal agent. The World Bank agreed to such a role because there was no other suitable agency through which to channel the trust funds, and also because the World Bank is a leading advocate in the fight against AIDS, tuberculosis, and malaria.\textsuperscript{235} However, the World Bank may be reluctant to agree to such a limited role for future global financing mechanisms because of high reputational risks, particularly when it has no role in the selection of recipients or the supervision of a recipient's use of resources.

V. Concessional Financing Modalities

A. Funding Proposals: Eligibility Criteria and Contents

The Global Fund considers proposals from all countries except high income countries. Nevertheless, the requirements for the funding proposals differ depending on the World Bank income classification of the applicant (Figure 3).\textsuperscript{236}

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\textsuperscript{235} In exceptional cases, the World Bank can act as fiscal agent. See \textit{WORLD BANK, TRUST FUND HANDBOOK} 3 (2004).

\textsuperscript{236} See \textit{THE GLOBAL FUND, GUIDELINES FOR PROPOSALS ROUND NINE} 56 (2008) (listing the countries belonging to the various World Bank income classifications) [hereinafter \textit{PROPOSALS ROUND NINE}].
Financing from the Global Fund must be in addition to, rather than in replacement of, existing efforts to combat HIV/AIDS, tuberculosis, and malaria.\footnote{See How the Fund Works, supra note 39.} The Fund encourages proposals that build upon existing systems for program implementation, financial reporting, procurement and supply management, and monitoring and evaluation.\footnote{See PROPOSALS ROUND SEVEN, supra note 153, at iv.} In particular, the Global Fund imposes a requirement that its total country support not exceed 65% of overall disease program need in lower-middle income countries and 35% in upper-middle income countries.\footnote{See PROPOSALS ROUND NINE, supra note 236, at 10.} This helps ensure that the Global Fund complements existing funding for these diseases. Examples of activities funded worldwide by the Global Fund include antiretroviral treatments for HIV; tuberculosis treatment under directly-observed treatment, short course; and
insecticide-treated bed nets distributed to protect families from malaria.240

B. Funding Modalities

The Global Fund disburses its funding in the form of “grants to public, private and non-governmental programs.”241 It provides money solely on a grant basis, without any obligation of repayment.

This differs from other financing vehicles, which allow both grants and loans. In the GEF, “possible non-grant modalities for concessional funding include concessional loans, guarantees (contingent grants), and equity participation.”242 Grants are the modality most used in the GEF, although contingent loans have proved useful in “renewable energy projects” as “[m]any businesses are willing to invest . . . if the public sector shares the risks.”243 The IDA also provides both grants and interest-free loans, called credits.244 IDA credits “have no interest charge and repayments are stretched over thirty-five to forty years, including a ten-year grace period.”245 The amount of funding spent on grants has risen considerably since the establishment of IDA, in amounts ranging from negligible to 18–20% during IDA13 (2002–2005) to 30% during IDA14 (2005–2008).246 Thus, IDA14 brought an

240 See THE GLOBAL FUND, PARTNERS IN IMPACT: RESULTS REPORT 7 (2007).
241 THE GLOBAL FUND FRAMEWORK DOCUMENT, supra note 32, § 4-e.
242 GLOBAL ENV’T FACILITY, FINANCING OF GEF PROJECTS 6-7 (1996).
243 “One example is the large solar PV and hydro hybrid grid-connected power plant of the Philippine utility, CEPALCO. In this case, a GEF-financed contingent loan is providing funds for the costs of the PV systems and the debt will be forgiven upon satisfactory completion of the project.” GLOBAL ENV’T FACILITY, FINANCING FOR RENEWABLE ENERGY 2 (2005) (stating that “a contingent loan has an interest rate and payment schedule similar to a traditional loan, but the loan would be forgiven if certain conditions are met.”).
245 Id.
246 During IDA13, IDA extended grant financing based on multiple criteria—to poorest countries, to debt-vulnerable poor countries, to post-conflict countries, and for HIV/AIDS and natural disasters. The overall grant share in total IDA lending for IDA13 was set at 18%–21%. The fact that the grant share during IDA14 was determined “endogenously” led to a higher percentage of IDA being used for grants. See INTERNATIONAL DEVELOPMENT ASSOCIATION, IMPLEMENTATION OF THE IDA14 GRANT ALLOCATION FRAMEWORK IN FY06: A STATUS REPORT 1-2 (2005).
increase in the use of grants, as IDA deputies agreed that “countries facing the toughest debt problems—most of them in Sub-Saharan Africa—will get all of their support in the form of grants, while less debt-burdened countries will receive IDA’s highly concessional long-term loans.”

C. Duration of Funding

Funding commitments from the Global Fund consist of an allocation of funds for the entire term of the proposal (up to five years) and a financial commitment for the initial two years. The grant may be renewed for an additional three years depending on performance and the availability of funds. The CCM submits a request to the Global Fund secretariat to request funding for the full grant period. This differs from other financing mechanisms, where the duration of the grant tends to match the duration of the replenishment. For example, IDA14, which was finalized in February 2005, finances projects over a three-year period until the next replenishment.

The Fund’s rules guiding the commencement and termination of grants have evolved to adapt to lessons learnt. Although the Fund seeks to disburse its funds rapidly upon approval of a grant, it has also recognized “the value of aligning disbursements with national cycles” and, accordingly, the board recently allowed the secretariat to set the starting date for grants up to eighteen months after board approval, taking into account alignment with national cycles and other donor-funded programs. In addition, the CCM can apply for continued funding for grants that are expiring under different conditions than those that would apply to new grant proposals. This system, known as the “rolling continuation

247 IDA14 Replenishment, supra note 215.
249 Id.
250 Id.
251 See IDA14 Replenishment, supra note 215.
252 NINETEENTH BOARD MEETING, supra note 177, at 20.
253 See THE GLOBAL FUND, DECISION POINT MASTER LIST FOURTEENTH BOARD MEETING 11 (2006) [hereinafter FOURTEENTH BOARD MEETING]. The board “may approve continued funding for grants through the Rolling Continuation Channel for up to
"channel," provides an opportunity for grants that have the potential to have a measurable impact on the burden of the relevant disease to continue without necessarily going through the more burdensome channel used for new grants.\(^{254}\)

**D. Fiduciary Arrangements for Grant Recipients**

As a financing mechanism, the Global Fund "needs certain fiduciary arrangements to ensure that grant proceeds are used for the intended purposes and results [are] achieved without imposing unnecessary new burdensome requirements on grant recipients."\(^{255}\) Therefore, the Global Fund "rel[ies] on local stakeholders at the country-level to implement programs and manage grant proceeds."\(^{256}\) When designing its fiduciary arrangements, the organization strives to reach a balance between three priorities: "[1] promot[ing] the rapid transfer of resources to assist target populations; [2] ensur[ing] that these resources are used accountably and achieve results; and [3] support[ing] ownership of country stakeholders and sustainable local organizational development."\(^{257}\) In this regard, all actors at the country-level play a certain role in financial reporting (Figure 4).\(^{258}\)

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\(^{254}\) See Fourteenth Board Meeting, supra note 253, at 10.

\(^{255}\) Fiduciary Arrangements for Grant Recipients, supra note 141, at 1; see also Comprehensive Funding Policy, supra note 253, at 1.

\(^{256}\) Fiduciary Arrangements for Grant Recipients, supra note 141, at 2.

\(^{257}\) Id. at 1.

\(^{258}\) See id. at 4.
The secretariat, through the local fund agent, initiates assessments of the principal recipient before the recipient receives funds from the World Bank as trustee.\(^{259}\) The local fund agent ensures that the principal recipient meets certain minimum capacities:

- A financial management system,
- Management and programmatic capacity,
- A monitoring and evaluation system, and
- Procurement and supply management structures.\(^{260}\)

Once the local fund agent provides the secretariat with a positive assessment of the principal recipient, the latter typically receives portions of the grant on a quarterly basis for the first year.

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\(^{259}\) See PROPOSALS ROUND SEVEN, supra note 153, at viii; see also supra section IV (B)(1)(c) (information on the local fund agents).

\(^{260}\) See PROPOSALS ROUND SEVEN, supra note 153, at 36; see also THE GLOBAL FUND, MONITORING AND EVALUATION TOOLKIT (2009) (citing assessment tools used by the local fund agents).
and subsequently on a semi-annual basis.\textsuperscript{261} The principal recipient must provide a certain number of reports to the local fund agents who then report back to the secretariat.

The principal recipient is responsible for five types of reports.

(i) Disbursements of tranches of the grant are linked to satisfactory disbursement requests and progress updates submitted by the principal recipient.\textsuperscript{262}

(ii) At the end of the fiscal year, "the [principal recipient] submits a Fiscal Year Progress Report to the Global Fund with consolidated programmatic and financial information for the program."\textsuperscript{263} The local fund agent reviews these progress reports and requests for disbursement of funds and advises the Global Fund on how much to disburse to the principal recipient.\textsuperscript{264}

(iii) The principal recipient also submits an audit report to the local fund agent who "advises the Global Fund on the appropriate response to any issues identified therein."\textsuperscript{265}

(iv) The Global Fund decides whether to continue funding beyond the first two years based on a request for continued funding from the CCM and a review of overall program performance and financial accountability from the principal recipients.\textsuperscript{266}

(v) At the end of the grant, the local fund agent assists the Global Fund with closure of the grant and the principal recipients submit completion reports for this purpose.\textsuperscript{267}

The Global Fund bases its renewal of funding on performance. Among 229 phase two renewals approved by the board in 2005–2007, 172 were signed with performance shown on major indicators.\textsuperscript{268} Because the countries themselves choose the

\textsuperscript{261} See \textit{Fiduciary Arrangements for Grant Recipients}, supra note 141, at 8.
\textsuperscript{262} \textit{Id.} at 8-9.
\textsuperscript{263} \textit{Id.} at 9.
\textsuperscript{264} \textit{Id.} at 9-10; \textit{see also supra} section IV (B)(1)(c) (information on the local fund agents).
\textsuperscript{265} \textit{Fiduciary Arrangements for Grant Recipients}, supra note 141, at 9.
\textsuperscript{266} \textit{See id.} at 10.
\textsuperscript{267} \textit{See also supra} section IV (B)(1)(c) (information on the local fund agents).
\textsuperscript{268} \textit{See The Global Fund, Special Consolidated Report of the Executive
indicators used to assess performance, this modality increases the degree of country ownership of projects. The Global Fund’s use of performance-based funding has helped confirm the importance of demonstrating performance as a rule for receiving grants in the international aid arena.

Thus, the fiduciary arrangements and funding modalities put into place by the Global Fund reflect the current international trend of moving towards performance-based funding, with a focus on country ownership.

VI. Mobilizing Resources

The manner in which the Global Fund has evolved with regard to mobilizing resources provides another example of how it integrates lessons learned from past experience. While it initially mobilized resources through ad hoc contributions, it has evolved to an ad hoc replenishment system in response to the limitations of the ad hoc contribution system.

The Global Fund was created to mobilize, allocate, and disburse resources to mitigate the impact of HIV/AIDS, tuberculosis, and malaria.\[269\]

Since its creation, nearly fifty countries as well as private foundations, corporations, and individuals have contributed significant resources to support the work of the Global Fund.\[270\] There has been a considerable increase in funding to the Global Fund since its creation (Figure 5).\[271\] As of March 31, 2009, $13.04 billion had been received in contributions and the World Bank had committed $10.48 billion for project grants, of which $7.40 billion has been disbursed.\[272\] Annual disbursement in 2008

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[269] See Global Fund Bylaws, supra note 59, art. 2.


reached $2.25 billion\textsuperscript{273} and the amount pledged exceeded $3.20 billion.\textsuperscript{274} The disbursements in 2008 increased 45% above those in 2007.\textsuperscript{275}

Figure 5: Cumulative Contributions and Pledges paid to the Global Fund in $ Billions

![Cumulative Contributions and Pledges graph]

The Global Fund contributes significantly to global international spending against HIV/AIDS, tuberculosis, and malaria.\textsuperscript{276} It is estimated that the Fund is the predominant international financer in the fight against malaria and tuberculosis, providing two-thirds of the total international funding for each.\textsuperscript{277}

\textsuperscript{273} See Report of the Executive Director, supra note 72, at 12.

\textsuperscript{274} See Report of the Seventeenth Board Meeting, supra note 71, at 3.

\textsuperscript{275} See Nineteenth Board Meeting: Trustee Report, supra note 272, at 2.


The Fund also ensures significant resources to combat HIV/AIDS, providing an estimated 25% of global resources.\textsuperscript{278}

Despite progress on increasingly available funding, the Global Fund’s biggest challenge is attracting the estimated resources necessary to combat these three diseases. The Fund estimates a funding gap of $4 billion to $5 billion for the period 2009-2010.\textsuperscript{279} UNAIDS, the Stop TB Partnership, and Roll Back Malaria estimated the total needs for these three diseases to be between $28 and $31 billion per year from 2008–2010.\textsuperscript{280} Given the urgent need to increase funding, the Global Fund has evolved from an ad hoc voluntary commitment system to one with regular replenishment meetings.\textsuperscript{281}


When the Global Fund was created, a system of ad hoc contributions was established for donors to contribute to the Fund.\textsuperscript{282} Countries would publicly declare contributions to the Global Fund. This voluntary contribution system would leave the size, timing, and duration of a contribution to the discretion of the donor.\textsuperscript{283}

The key advantages of this ad hoc system are three-fold:

- Donors have the opportunity to see the added value of the Global Fund’s approach before committing additional resources.\textsuperscript{284} This can “attract new donors who may otherwise have been wary about committing large sums to

\begin{thebibliography}{99}
\bibitem{278} \textit{Id}.
\bibitem{279} \textit{See Report of the Executive Director, supra} note 72, at 1.
\bibitem{282} \textit{See The Global Fund to Fight AIDS, Tuberculosis and Malaria, Sixth Board Meeting: Options Paper for a Comprehensive Policy for Approving and Funding Grant Obligations 2} (2003) [hereinafter Sixth Board Meeting Options Paper].
\bibitem{283} \textit{Id} at 3.
\bibitem{284} \textit{Id} at 4.
\end{thebibliography}
an untested scheme.\textsuperscript{285}

- The ad hoc system is the "most flexible, as resources can increase rapidly (particularly if funding needs are known, potentially generating demand for larger contributions)."\textsuperscript{286}

- This system facilitates the participation of the private sector and allows the "matching grant" concept, which may create a "virtuous cycle of increasing contributions."\textsuperscript{287}

Nevertheless, the Global Fund's board decided that a voluntary ad hoc contribution system was not best suited for a fund of such size and importance, due to the resulting "difficulty to plan the work of the Fund and to provide sustained and predictable support."\textsuperscript{288} The experience of the Fund highlighted the reality that the contribution size varied considerably between donors, while the timing of pledges frequently related to external events (such as summits of heads of state).\textsuperscript{289} Therefore, contributions were potentially smaller under the ad hoc system compared with a regular burden-shared pledging process.\textsuperscript{290} Furthermore, the duration of pledges varied considerably, although an emerging trend appeared to indicate that pledges increasingly covered a longer period of time.\textsuperscript{291}

Therefore, the ad hoc contribution system did not create predictable and sustainable financing that would permit longer-term financial planning for either the Global Fund or the recipients of funding.\textsuperscript{292} This drawback was combined with the fact that the ad hoc system resulted in large cash balances, since liquid assets are needed to back financial commitments to recipients.\textsuperscript{293} For


\textsuperscript{286} SIXTH BOARD MEETING OPTIONS PAPER, supra note 282, at 4-5.

\textsuperscript{287} Id. at 5.

\textsuperscript{288} CIVIL SOCIETY UPDATE, supra note 281, at 1.

\textsuperscript{289} See SIXTH BOARD MEETING OPTIONS PAPER, supra note 282, at 3.

\textsuperscript{290} See id. at 5.

\textsuperscript{291} See id. at 3.


\textsuperscript{293} SIXTH BOARD MEETING OPTIONS PAPER, supra note 282, at 4-5.
these reasons, the Global Fund decided to change its contribution system.\textsuperscript{294}

\textit{B. Establishment of the Replenishment System (2004)}

After extensive consultations with the World Bank and others, the secretariat presented four options to the Global Fund’s board in 2003 to resolve the issues that arose from an ad hoc funding system, including:

(i) A voluntary system based on periodic contributions;

(ii) A burden-shared system based on periodic contributions;

(iii) A burden-shared system based on ad hoc pledging; or

(iv) A voluntary system based on ad hoc pledging.\textsuperscript{295}

The board decided to implement a voluntary replenishment system for two main reasons. First, a replenishment system would allow a more predictable flow of funds.\textsuperscript{296} It would become easier to assess how much funding the Global Fund receives for a certain amount of years and therefore easier to plan disbursements to countries. Replenishment could also assert upward pressure on contributions.\textsuperscript{297} The Global Fund would still be able to use the "ad hoc resource channels, especially from non-government donors . . . [to] respond promptly to unplanned contingencies between structured replenishment processes."\textsuperscript{298} In addition, predictability would have trickle down effects, such as increased efficiency of the Fund’s liquidity management, as it would be able "to back commitments with instruments other than cash thereby reducing to a minimum idle cash balances."\textsuperscript{299}

Second, replenishment meetings provide a useful forum to discuss the activities of the Global Fund.\textsuperscript{300} Many current and potential donors had expressed the "need for a forum through which they [could] share and exchange views on the operations and effectiveness of the Fund when considering their future

\textsuperscript{294} See \textit{Civil Society Update}, supra note 281, at 1.

\textsuperscript{295} See \textit{Sixth Board Meeting Options Paper}, supra note 282, at 4.

\textsuperscript{296} See \textit{Civil Society Update}, supra note 281, at 1.

\textsuperscript{297} See \textit{Sixth Board Meeting Options Paper}, supra note 282, at 5.

\textsuperscript{298} \textit{Civil Society Update}, supra note 281, at 2.

\textsuperscript{299} \textit{Id}.

\textsuperscript{300} \textit{Id}. at 1; see also Replenishment Mechanism, \textit{supra} note 292.
contributions.” The replenishment system would thus provide a process through which donors could discuss areas of success and areas for improvement of the Global Fund as they consider its funding needs.

Once the board decided which resource mobilization modality to adopt, the Global Fund modified its comprehensive funding policy in 2004 to reflect this change. The revised policy states that “[r]esource-mobilization should use a periodic replenishment model on a voluntary basis for all public donors, complemented by additional ad hoc contributions for all donors, including new public donors, the private sector, and individuals.”

However, the board did not change two important aspects of resource mobilization during this revision. First, the system of contribution remains ad hoc: There are no burden sharing arrangements, wherein the Global Fund determines the source and size of contributions. Burden sharing mechanisms aim “to ensure adequate funding for the intended objectives” and a fairness of contributions among donors depending on their wealth. Instead, the Global Fund simply issues reports on how much will be needed to maintain present levels of funding and to increase funding for new grants. Donors are then “expected to meet a proportion of this estimate dependent on their GDP, though pledges are essentially made on a ‘goodwill’ basis.” Thus, the Global Fund’s decision not to use a burden sharing arrangement departs from previous replenishment systems such as the GEF and

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301 CIVIL SOCIETY UPDATE, supra note 281, at 1.
302 See GLOBAL FUND REPLENISHMENT, supra note 276, at 1.
304 COMPREHENSIVE FUNDING POLICY, supra note 253, at 1.
305 See id.
306 Id.; see also GLOBAL ENV’T FACILITY, MEETING ON THE THIRD REPLENISHMENT OF THE GEF TRUST FUND: BURDEN SHARING FOR THE THIRD GEF REPLENISHMENT 2 (2001) (explaining burden sharing from an organization that employs burden sharing arrangements) [hereinafter BURDEN SHARING].
308 COMPREHENSIVE FUNDING POLICY, supra note 253, at 2.
309 AVERT, supra note 285.
IDA, both of which have burden sharing modalities.\textsuperscript{310}

Second, since the Global Fund is designed as a multidonor trust fund, donors cannot earmark their contributions to the Global Fund for specific purposes.\textsuperscript{311} Countries and organizations cannot dictate where their money goes; the money contributed could be used for any purpose consistent with the overall goals of the Global Fund and in any country eligible for funding.\textsuperscript{312}

\textbf{C. The Replenishment Process}

The first replenishment consisted of three meetings. The first meeting was in March 2005 (hosted by the Swedish government); an interim meeting was held in June 2005 (hosted by the Italian government); and a final meeting was in September 2005 (hosted by the government of the United Kingdom).\textsuperscript{313} Then-UN Secretary General Kofi Annan chaired the Global Fund’s first replenishment and second replenishments (2005 and 2007, respectively) with the assistance of Vice-Chair Sven Sandström, former chairman of the tenth replenishment of the African Development Fund.\textsuperscript{314}

The first replenishment cycle aimed to address funding needs for calendar years 2006 and 2007, and additionally looked at the anticipated resource shortfalls for 2005.\textsuperscript{315} The secretariat assisted in the preparation of this replenishment process by preparing reports on the resource needs for the period of replenishment and the associated funding scenarios, and informed constituencies about the replenishment.\textsuperscript{316}

A mid-term review of the first replenishment took place in July 2006 in Durban, South Africa, where the Global Fund reviewed

\textsuperscript{310} See Burden Sharing, supra note 306, at 2; see also, Int’l Dev. Ass’n, The IDA Deputies: An Historical Perspective 1 (2001).


\textsuperscript{312} See Avert, supra note 285.


\textsuperscript{314} Id.; see also Global Fund Replenishment, supra note 276, at 2.

\textsuperscript{315} See First Replenishment: Chair’s Report, supra note 313, at 1, 19.

\textsuperscript{316} Id. at 11, 18-19.
the experience of the first replenishment to build on lessons learned when making future decisions.\textsuperscript{317}

The second replenishment for the period 2008–2010 held its first meeting in March 2007 in Norway which was attended by thirty-two delegations from donor countries, the private sector, civil society and UN partner organizations.\textsuperscript{318} The meeting discussed the results and impact of Global Fund activities, the funding status of the first replenishment, and the resource needs scenarios for the second replenishment.\textsuperscript{319} In September 2007, the second meeting was held in Berlin and provided, among other topics, an opportunity to discuss the launch of the new initiative "Debt2Health," whereby a creditor cancels a portion of a country's debt if such country invests a certain amount of money in a health program approved by the Global Fund.\textsuperscript{320}

A mid-term review of the second voluntary replenishment was held in Cáceres, Spain, in April 2009 and was attended by twenty-eight delegations and chaired by Sven Sandström.\textsuperscript{321} Donors agreed to carry out a third replenishment in 2010 "to provide funding for 2011 and beyond."\textsuperscript{322}

\textbf{D. Lessons From the First Replenishment (2005)}

During the midterm review in Durban, the Global Fund elaborated upon lessons learned from the first replenishment in

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\textsuperscript{318} See \textit{The Global Fund to Fight AIDS, Tuberculosis and Malaria, Sixteenth Board Meeting: The Second Global Fund Replenishment First Meeting Chair's Summary} 1 (2007) [hereinafter Sixteenth Board Meeting: Chair's Summary]; see also Replenishment Mechanism, supra note 292.

\textsuperscript{319} Sixteenth Board Meeting: Chair's Summary, supra note 318, at 2, 4; see also Replenishment Mechanism, supra note 292.

\textsuperscript{320} See \textit{Mid-Term Review Progress Report, supra note 270, at 9; see also Replenishment Mechanism, supra note 292.}

\textsuperscript{321} See \textit{Report of the Executive Director, supra note 72, at 12. See also The Global Fund to Fight AIDS, Tuberculosis and Malaria, Mid-Term Review of the Second Voluntary Replenishment List of Participants} 1 (2009), for a detailed list of participating delegations.

\textsuperscript{322} \textit{Report of the Executive Director, supra note 72, at 26.}
order to integrate them into the second replenishment.\textsuperscript{323}

There were three major points for improvement.\textsuperscript{324} First, in order for replenishments to be most effective, the Global Fund should "develop a long-term strategy and estimate the associated resource requirements. This would enable donors during the replenishment to respond to clearly-articulated proposals and advise the Global Fund on their feasibility from a financing perspective."\textsuperscript{325} Thus, in 2007, the Global Fund produced a four-year strategy to guide its work.\textsuperscript{326} To achieve the goal of ensuring predictable and sustainable funding on a significant scale for the Global Fund, participants in the midterm review suggested that a second replenishment should focus on three issues: Performance and results achieved, the board-approved strategy for the size of the Fund, and efforts to reach the target size.\textsuperscript{327}

Second, a longer replenishment period would enhance long-term predictability, reduce transaction costs, and provide greater security for long-term planning.\textsuperscript{328} Thus, it was recommended that the second replenishment last three years instead of two.\textsuperscript{329} This new schedule of replenishments accords with current international trends: GEF replenishments occur every four years\textsuperscript{330} and IDA replenishments occur every three years.\textsuperscript{331}

Third, two meetings within each replenishment should be sufficient instead of three.\textsuperscript{332} The Global Fund has benefited from adopting a tailor-made replenishment process intended to be "lighter than [the] replenishment processes for other international

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\item \textsuperscript{323} See 2006-2007 MID-TERM REVIEW: CHAIR'S SUMMARY, supra note 317, at 1.
\item \textsuperscript{324} See THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, TECHNICAL NOTES FOR THE MID-TERM REPLENISHMENT REVIEW 29 (2006) [hereinafter TECHNICAL NOTES FOR MID-TERM REVIEW].
\item \textsuperscript{325} Id.
\item \textsuperscript{326} See Global Fund Completes Four-Year Strategy, GLOBAL FUND NEWSL. (The Global Fund to Fight AIDS, Tuberculosis and Malaria, Geneva, Switz.), Apr. 2007.
\item \textsuperscript{327} See TECHNICAL NOTES FOR MID-TERM REVIEW, supra note 324, at 29.
\item \textsuperscript{328} See id.
\item \textsuperscript{329} See 2006-2007 MID-TERM REVIEW: CHAIR'S SUMMARY, supra note 317, at 3.
\item \textsuperscript{330} See GLOBAL ENV'T FACILITY, INVESTING IN OUR PLANET: GEF ANNUAL REPORT 2006-07, at 5 (2007) [hereinafter GEF ANNUAL REPORT 2006-07].
\item \textsuperscript{331} See IDA Replenishments, supra note 214.
\item \textsuperscript{332} See generally TECHNICAL NOTES FOR MID-TERM REVIEW, supra note 324, at 29 (discussing the Global Fund replenishment process).
\end{itemize}
\end{footnotesize}
In comparison, the last IDA replenishment consisted of five meetings, while the third GEF replenishment consisted of seven meetings. With three meetings over six months resulting in a ten-page final report, the Global Fund’s replenishment process appears to be more efficient at reducing transaction costs.

After its first replenishment, the Global Fund also noted that replenishments could indeed contribute to increasing resources. Although not solely attributed to the replenishment modality, the Global Fund noted an increase of funds after the first replenishment: A total of about $3.7 billion was pledged for 2006 and 2007, compared to a total of $2.9 billion for 2004-2005 and $1.9 billion for 2002-2003. The second replenishment meetings reported total pledges of $6.3 billion for the Global Fund and additional received contributions of $3.4 billion. Therefore, a total of $9.7 billion remained available after the second replenishment to meet the Global Fund’s needs in the next three years (2008-2010). This was welcomed as a significant increase in resources and ensured that the Global Fund would have resources to both approve the continuation of ongoing projects over the next three years (at an estimated cost of $6.0 billion as of March 2009) and launch new programs. In sum, from 2004-2005 to 2006-2007, when the replenishment system was

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333 Id. at 29.
334 See IDA14 Replenishment, supra note 215.
335 See Global Environment Facility, Joint Summaries - Replenishment, http://www.gefweb.org/Replenishment/Joint_Summaries/joint_summaries.html (last visited Oct. 20, 2009) for a list of all seven meeting places and access to each meeting's summary.
336 See TECHNICAL NOTES FOR MID-TERM REVIEW, supra note 324, at 29.
337 See GLOBAL FUND REPLENISHMENT, supra note 276, at 1.
established, pledges and contributions have increased by 49%.341

E. Lessons From Other Replenishment Systems

The money raised by the Global Fund during its first replenishment ($3.7 billion for 2006 and 2007) is comparable to the financing of the GEF.342 In July 2006, thirty-two donor countries pledged $3.13 billion to the fourth GEF replenishment (GEF–4), which was to fund operations for four years, between 2006 and 2010.343 However, the IDA replenishments are significantly larger than the Global Fund’s replenishments; under IDA14 in 2005, approximately $33 billion was made available from forty donor countries to the world’s eighty-one poorest countries to be disbursed over the next three years.344

Thus, the Global Fund can learn from other replenishment systems like GEF and IDA, in particular, by investigating how other international funding mechanisms have solved the accumulation of liquidity issue.345 One key lesson in this regard is that such funding mechanisms not only relied on regular replenishments, but also established the use of promissory notes.346


342 See First Replenishment Third Meeting Communiqué, supra note 338, at 2.


Promissory notes enable donors to commit money without making a cash payment at the time of commitment. Because commitments to recipient countries can only be signed on the basis of cash or promissory notes, the use of such instruments reduces the quantity of cash carried by a funding entity. Therefore, promissory notes have the advantage of reducing fund liquidity while allowing the World Bank to enter into grant agreements with recipients on this basis.

Promissory note usage is customary in the GEF and IDA and accounts for the majority of donor contributions. Due to these institutions’ multiyear replenishment cycles, the use of promissory notes enables all donors, even those who cannot commit money on a multiyear basis, to provide money de facto each year to the fund, even if the payment is considered made from the date the promissory notes are given. An instrument of commitment given to the trustee after each replenishment delineates how the payment of the contribution will be made. The encashment schedule is the same for all donors to each funding mechanism. The GEF has four encashments per year for the next ten years. Thus, the encashment of promissory notes for one replenishment will overlap with the encashment of promissory notes for subsequent replenishments. The IDA mechanism is similar, with a basic encashment schedule set out over six to nine years.

These examples and an independent study of the Global Fund’s comprehensive funding policy, conducted by PriceWaterhouseCoopers in 2005, encouraged the replacement of cash contributions with promissory notes within the Global Fund to bring about a gradual reduction of its cash balance. The Global Fund has decided that it “shall consider as assets for the

348 See Sixth Board Meeting Options Paper, supra note 282, at 7.
351 See Voluntary Replenishment 2005: Technical Note 3, supra note 346, at 4 (calculating that if the Fund continues to be financed by mainly cash contributions, then the Global Fund’s investment pool will grow, to about $5 billion by the end of 2007, whereas it would diminish to less than $2 billion by the end of 2007 if 85% of contributions were paid by promissory notes that were encashed over three years).
purposes of entering into grant agreements, both cash and promissory notes.352 The independent assessment conducted in 2005, however, determined that only 10% of contributions were made by promissory notes, while the rest were made in cash.353 Furthermore, only two donors (France and the United Kingdom) used promissory notes to contribute to the Global Fund.354 Therefore, to change this figure, the Global Fund took advantage of the replenishment conferences to issue a technical note calling for an increased use of promissory notes after the September 2005 replenishment conference.355 Nonetheless, the use of promissory notes for the Global Fund has been far less widespread compared to the GEF or IDA.356

In the future, the Global Fund may adopt other replenishment mechanisms, such as the advance contribution scheme, which allows financing mechanisms such as the GEF and IDA to start using resources before the replenishment becomes effective.357 Not all governments participate in the replenishment discussions at the same time since they have different budget cycles. Furthermore, some states require more time for advocacy within governments. Therefore, the advance contribution scheme allows a certain amount of the money to be secured, even if the negotiations subsequently fail.

In addition, in order to ensure that all donors share in the fight to eradicate HIV/AIDS, tuberculosis, and malaria, the Global Fund may wish to adopt procedures such as burden sharing mechanisms. Burden sharing allows the GEF and IDA, for example, to request a certain amount of funding from each donor government, based on each country’s wealth. This system aims to ensure adequate funding for the intended objective.358 Although a burden sharing system has been recommended by various actors for the Global

352 COMPREHENSIVE FUNDING POLICY, supra note 253, at 1.
356 See FOURTEENTH BOARD MEETING: TRUSTEE REPORT, supra note 354, at 5.
357 See GLOBAL ENV’T FACILITY, supra note 200, at 28-29.
358 See BURDEN SHARING, supra note 306, at 2, for more information about burden sharing systems.
Fund, it has not been used to date.\textsuperscript{359}

In addition, just as the Global Fund learned from other international funding mechanisms, other global programs recognized the importance of predictability of funding and a forum to discuss donor specific issues. For example, the EFA-FTI recently created an expanded catalytic fund to provide longer-term and more predictable funding than initially envisioned for education programs in developing countries. Furthermore, the increased prevalence of donor technical meetings within the EFA-FTI demonstrates that organizations in the education field also recognized the importance of a forum to discuss funding issues among donors.

\textbf{VII. Conclusion}

The Global Fund to Fight AIDS, Tuberculosis and Malaria can demonstrate several results on the ground in combating HIV/AIDS, malaria, and tuberculosis. Around 1.1 million people have begun antiretroviral treatment through Global Fund supported programs; nearly 30 million insecticide-treated bed nets have been distributed to prevent malaria; and 2.8 million cases of tuberculosis have been treated under directly observed therapy, short-course, the internationally approved control strategy. In the course of its operations, the Global Fund has introduced many original elements to the broader debate on the design of global financing mechanisms. The Global Fund's unique legal structure demonstrates that the international arena can respond to urgent global issues with flexibility and innovative thinking. Although many of these novel elements are in response to the Global Fund's specific needs, they have a wide-reaching impact, not only on other partnerships, but more broadly on emerging good practice concerning the management of development aid.

The Global Fund integrates the realization that the inclusion of all interested stakeholders is best accomplished by building collaboration into the actual governance structure. Although it is accepted good practice in the development community to consult with local stakeholders, the Global Fund takes this a step further.

\textsuperscript{359} But see \textit{The Global Fund to Fight AIDS, Tuberculosis and Malaria, Second Replenishment Mid-Term Review Chair's Summary} 6 (2009) (proposing that The Fund discuss burden sharing at the next meeting).
and involves local stakeholders in all of its governance bodies. At both the global and country levels, the Fund encourages governments to work with representatives of civil society, the private sector, and communities living with the diseases. This enables the emergence of a consensus in Global Fund operations that reflects views from each constituency, especially as each group has a say in the matters at hand. Furthermore, NGOs are given decision-making powers equal to those given to donor governments. This unprecedented principle shows a groundbreaking way of involving recipients of aid. Donors are no longer the sole decision makers.

The Global Fund’s strengths can also be its weaknesses. Ensuring a true representation of all developing countries is challenging and becomes a crucial issue if the representatives are to decide on behalf of their delegation. Special care needs to be taken to ensure that the board members discuss the issues at hand with their constituency group and act on behalf of this group. In addition, while the light-touch assistance provided by the Global Fund in the selection of board representatives and the CCM enables an increased ownership, it can also lead to a lack of transparency in the selection process.

Not only did the Global Fund introduce pioneering concepts at its creation, it has also managed to create mechanisms to adapt to lessons learned from experience. The realization that a financing mechanism of such magnitude required fund predictability and a forum for debate led to the establishment of a replenishment system in 2005. The benefits of these replenishment conferences are evident: they resulted in the creation of a long-term strategy needed to guide the work of the Global Fund, enabled a forum for debating certain issues, and resulted in an increase in funding. Another example is the creation of the Early Alert and Response System in August 2005 in response to the need for a systematic monitoring of grant implementation by stakeholders at all levels. This system enables the organization to identify as early as possible any potential problems in the use of resources.

In addition, the Global Fund has sought to build on the results of a five-year evaluation which focused on the period between 2002 and 2006 to restructure its governance arrangements. In particular, as a result of this evaluation, the Global Fund’s board has sought to increasingly focus on strategic issues and to delegate
operational issues to committees of the board and the secretariat.

Evaluations of the Global Fund highlight both successes and shortcomings, but its significant impact in establishing a new legal mechanism for organizing the delivery of international development aid cannot be underestimated. The Global Fund provides a new legal and conceptual framework for delivering concessional financing which can guide the creation of future funding modalities.

**Abbreviations**

CCM—coordinating country mechanism  
CCP—coordinated country proposal  
EFA-FTI—Education for All-Fast Track Initiative  
G8—Group of Eight  
GEF—Global Environment Facility  
MDG—Millennium Development Goal  
NGO—nongovernmental organization  
TWG—transitional working group  
UN—United Nations  
UNAIDS—Joint United Nations Programme on HIV/AIDS  
WHO—World Health Organization  
USAID—United States Agency for International Development