



Report of the Governance and Partnership Committee

ANNEX 6

Update on Legal Status for the Global Fund

Outline: At its 3rd meeting in October 2002, the Board asked the Secretariat to continue to explore an agreement with the Swiss Government to grant the Global Fund quasi-intergovernmental status and to report on the impact of such a change in status for the Global Fund.

At the 4th Board meeting, the Global Fund Board asked the Secretariat to pursue the discussion with the Swiss authorities which would provide the Global Fund with those privileges and immunities necessary to fulfill its mandate and to ensure that the Global Fund's administration is at least as efficient as and not more costly than under the current arrangement.

A report was distributed to the Board which described the pros and cons of three legal status options: 1) current arrangement, 2) Quasi-Intergovernmental, 3) Intergovernmental. The report was not presented or discussed at the Board meeting due to time constraints. The Governance and Partnership Committee has agreed to review this issue further and to present its findings and recommendations at the next Board meeting in June 2003.

This document presents an updated report on these options, incorporating further findings resulting from consultations with:

Dr. Mathias-Charles Krafft, former Ambassador and Honorary Professor at the Law School of the University of Lausanne, ¹
Ms. Evelyn Gerber, Head of the Legal Division of diplomatic and consular Law,
Mr. Tom Topping, Legal Counsel, WHO
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It reviews the organizational principles, priorities and pressures driving the exploration of optional legal statuses and defines the legal, financial and personnel advantages and disadvantages of each option. The document also contains a transitional option offered by the Swiss Authorities.

¹ Legal opinion on the modifications which should be made to the legal status of the Global Fund in view of the transformation of the Fund into an intergovernmental organization - Annex 6.1

² Legal Opinion on the liability of the Foundation and the personal liability of its bodies members - Annex 6.3

Part 1: Introduction and Background

Organizational Principles and Priorities of the Global Fund

1. The Global Fund was founded as an independent Swiss foundation, with the mandate of creating an innovative, efficient and effective financing mechanism, which would enable and speed country responses to the three diseases. The Board gave priority to the autonomy of the Fund and to its ability to pursue a dynamic collaboration with national and international partners. This requires administrative arrangements that are efficient and cost-effective to enable the Global Fund to take rapid and responsible action in line with its mandate and a legal status, which provides the necessary privileges and immunities.

Historical Perspective

2. During the discussions of the Transitional Working Group (TWG) in 2001, the core group on legal issues explored several options for organizing the Global Fund as a legal entity. Balancing the urgent need to get the Fund up and running and, at the same time, assure independent authority, the TWG decided to organize the Fund as a private entity, rather than as a treaty-based international or intergovernmental organization or as part of an existing UN body. In discussions on the choice of location, several countries (France, Belgium, South Africa and Switzerland) were asked to outline the benefits they would provide to the Global Fund if it was organized as a private entity within their jurisdiction.

3. To make Geneva an attractive choice for the Global Fund, WHO and the Swiss Government submitted a combined proposal, in which each promised to provide the following benefits: (1) the WHO committed to house the Secretariat, and provide administrative services through a unit dedicated solely to the support of the Global Fund, while respecting Secretariat autonomy; and (2) 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.

4. The first promise concerning WHO has been fulfilled, although some difficulties have arisen from this administrative relationship. The second commitment, the granting of quasi-intergovernmental status, is unresolved. However, taking into consideration the studies already done, this option, with its current features, is not the best solution for the Global Fund as compared with the privileges and immunities currently granted to the Global Fund.

5. In order to highlight the different options which may be envisaged, along with their related advantages and disadvantages, it is necessary to summarize the current situation.

Part 2: Current situation

1. The Global Fund is a private foundation under Swiss law incorporated pursuant to a public deed dated 22 January, 2002 and registered in the Geneva Trade Register on 24 January, 2002.
2. According to the Bylaws, the bodies of the Foundation are (i) the Partnership Forum (ii) the Board, (iii) the Secretariat, (iv) the Technical Review Panel and (v) the Auditing Body. The last still needs to be appointed.
3. The Global Fund has concluded two agreements :
 - a. the Administrative Services Agreement (ASA) with the WHO, and
 - b. the Trustee Agreement with the World Bank
4. Advantages and Disadvantages of the current situation

Advantages of the current situation	Disadvantages of the current situation
<p>From the status as a Swiss foundation:</p> <p>a. Exemption from income tax for the foundation</p> <p>From the Administrative Service Agreement (ASA) with the WHO:</p> <p>a. Privileges and immunities granted to the Secretariat staff as employees of WHO working for the Global Fund;</p> <p>b. In Switzerland, legal immunity, tax exemption, participation in the UN pension fund, exemption from social security costs, and a C- permit for spouses wishing to work in Switzerland.</p> <p>c. Official travel privileges and immunities in a broad range of countries for Secretariat staff, as employees of WHO carrying out work for the Global Fund³;</p> <p>d. Legal "protection" by the WHO, whereby contracts between the Global Fund/WHO and other parties (such as the LFA framework contract) are not subject to national jurisdiction;</p> <p>e. Privileges and immunities in respect to the assets of the Secretariat held in trust by the WHO, whereby assets of the Global Fund held in trust by the WHO are subject to the privileges and immunities of the WHO.</p> <p>From the Trustee Agreement with the World Bank:</p> <p>Privileges and immunities, whereby, according to Article 4 of the Trustee Agreement, the privileges and immunities of the World Bank "shall apply to the property, assets, archives, income operations and transactions of the Global Fund's "Trust Fund".</p>	<p>From the status as a Swiss Foundation:</p> <p>a. Liability of the Foundation according to Swiss law : see legal opinion attached (Annex 6.3)</p> <p>b. Liability of the members of its bodies , the TRP, Board, Partnership Forum (except for the Secretariat) (see Annex 6. 3)</p> <p>From the Administrative Services Agreement with WHO:</p> <p>a. Dual authority for the Executive Director and Secretariat staff. For example, the Executive Director is a member of the WHO staff AND is appointed by the Foundation Board. Is the Global Fund's Executive Director accountable to the Global Fund Board or to the Director General of WHO ?⁴</p> <p>b. Administrative confusion and delays between the organizations in human resources, contracting and accounting and claims transactions</p>

³ immunity from legal process in respect of acts committed as part of their official functions (amongst other protections) as well as a right to a UN laissez-passer which facilitates access and the granting of visas

⁴ These principal issues are detailed in Annex 6.2

Part 3: Other Options

1. The following options for legal status have been explored together with the Federal Department of Foreign Affairs in Annex 6.1 .

2. Quasi-governmental Organization

a. A quasi-governmental organization would provide the Global Fund with the following advantages and disadvantages, as they relate to fiscal, legal and employment considerations:

Advantages	Disadvantages
Remains as a private Swiss Foundation, with added independence from WHO	No benefits or immunities for Board members when in session in Switzerland
Exemption for foreign staff from income and VAT taxes and from Swiss “foreigner work rules.”	A significant percentage of the Secretariat must be separated from the WHO and employed directly by the Foundation, thus losing important immunities and exemptions offered by the WHO, including: <ul style="list-style-type: none"> a. a loss of immunities from jurisdiction in Switzerland b. for foreign staff, a loss of exemption from Swiss social insurance c. for Swiss staff, a loss of income tax exemptions d. a change to B work permits for spouses (subjecting the spouses to certain controls) e. loss of the UN laissez passer and privileges and protections outside of Switzerland
Exemption from direct and indirect tax (VAT) through the fiscal agreement to be signed with the Swiss Federal Council.	Increased tax burden for all staff (an estimated USD 1,081, 296), to be borne by the Global Fund to assure staff would not lose benefits and would remain on equal benefit footing with their UN colleagues
International recognition through the conclusion of an international agreement.	

b. Due to higher employment costs and limited benefits, this option is not recommended.

3. Expansion of Board Immunities in Switzerland under the current situation

a. This solution provides for the same structures and features as the current situation but adds the following benefits:

- i. immunities of jurisdiction in Switzerland for members of the Board of the Global Fund who do not have privileges and immunities and could fear being brought before a Swiss court by third parties for actions which they have performed in their capacity as members of the Foundation Board,
- ii. the Secretariat staff will still be employed by the WHO; however it could be envisaged that certain staff members be detached from the WHO and appointed directly by the Foundation and for whom an immunity of

jurisdiction could be requested from the Swiss government. This solution possesses the merit of partially remedying the problem of duality with the WHO, as mentioned above, however creating two categories of personnel. It should also be mentioned that the immunities of the latter category would be limited to the territory of Switzerland and any other country that could accord privileges and immunities to the Global Fund;

iii. international recognition of a status as an international NGO through the agreement with Switzerland.

b. To effect this added protection, an agreement would be concluded between the Swiss Federal Council and the Global Fund.

4.. Intergovernmental Organization

a. Intergovernmental status for the Global Fund must be created by an international treaty between subjects of international law, either countries or international organizations (for example, the WHO)⁵.

Advantages	Disadvantages
Optimal degree of independence	Private sector and NGO members of the current Board would not be able to be party to the treaty creating the IO, but may be given the right to vote and to fully participate in the Global Fund Board and Governance Decisions
Privileges and immunities of members of the Board as normally accorded to country representatives	Burdensome procedure (up to two years).
Status as international civil servants with all privileges and immunities in Switzerland for the Secretariat staff as they currently have with WHO.	No UN laissez passer nor benefits and immunities for the staff, as accorded to specialized institutions, such as the WHO, when travelling outside of Switzerland, unless acquired for the Global Fund through other arrangements (as mentioned below)
International recognition through the conclusion of an international agreement.	Need to enter into host agreements with each of the countries in which immunities and protections for its staff are needed.
Staff costs not significantly different than the under the current arrangement with the WHO (might even be slightly less), provided that the Global Fund staff could opt to remain in the UN pension plan	

⁵ See legal opinion from Mathias - Charles Krafft.

According to internal law, the Global Fund in its present status would not qualify for an agreement with the Swiss government, such as that provided to the International Federation of the Red Cross and Red Crescent Societies, which did not require treaties to initiate their international status. The transformation of the Global Fund into an intergovernmental organization would require the conclusion of a multilateral treaty. The conclusion of a headquarter agreement between the future IO and the host State is relatively easy in Switzerland.

5. Specialized institution within the United Nations system

- a. In addition to the benefits described under the solution of an IO, the staff shall profit from a UN laissez passer and the benefits of the Convention concerning benefits and immunities of specialized institutions.
- b. However the disadvantages (among others, the difficulties noted in creating a specialized institution) are the same as for an IO, with the added burden of obtaining the status as a specialized organization. Furthermore, the fact that the Global Fund was never intended to be part of the UN System speaks for rejecting this solution.

6. Considering the facts as outlined above, only the solutions presented under Part 3, paragraph 3 (current status with expanded immunities in Switzerland for Board members) and Part 3, paragraph 4 (Intergovernmental Organization) can be taken under consideration. However, the option cited under 3 requires significant and tangible changes to the existing Global Fund/WHO Administrative Agreement to provide greater independent authority and higher administrative efficiency.

Part 4: Conclusions – Proposed recommendations

1. The Committee recommends that the Board:
 1. Request the Secretariat to pursue negotiations with the Swiss authorities for expanded Board member immunities as well as staff Secretariat immunities in Switzerland, and present a draft agreement between the Global Fund and the Swiss authorities for approval at the October meeting.
 2. Request the Secretariat to work closely with WHO to record key areas of concern and identify mutually agreed and tangible solutions to improve the functioning of the Administrative Services Agreement to ensure greater administrative efficiencies and independent authority for decisions and actions for the Global Fund.
 3. Request the Secretariat to continue to clarify the implications of moving to the status of an Intergovernmental Organization, including how to ensure a strong governance role for the private sector, NGOs and civil society that meets the Global Fund's commitment to the public-private partnership.

Legal opinion

on the modifications which should be made to the legal status
of the Global Fund (The Global Fund to fight AIDS,
Tuberculosis and Malaria) in view of the transformation
of the Fund into an intergovernmental organization

by

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Lausanne, April 2003

PART A

Review of the current legal status of the Global Fund

1. The Global Fund is constituted as a foundation under Swiss law in the sense of articles 80 ff. of the Swiss Civil Code (cf. Art. 1 of the Bylaws). It was registered in the "Registre du commerce" of Geneva on 24 January 2002. With this, it acquired a legal personality under Swiss law. In virtue of art. 2 of its Bylaws, the Fund has as its purpose "to collect, administer and distribute resources through a new partnership between the private and public sectors".

This "new partnership" is reflected in particular by the composition of the management and administrative organs of the Fund. Thus, for example, according to art. 10 of the Bylaws, the Foundation Board is composed of 18 members with voting rights and 5 members without voting rights. The distribution of the members with voting rights is not only characterized by the fact that the Foundation Board includes not only representatives of States (developing countries and donor States), but also representatives of the civil society and the private sector.

2. As a foundation under private law, the Global Fund must be considered as a non-governmental international organization in the sense of the European Convention on the Recognition of the Legal Personality of Non-Governmental Organizations, which was signed in Strasbourg on 24 April 1986 and which entered into force in Switzerland on 1 January 1991⁶. Its article 1 states that the said Convention is applicable to associations and foundations fulfilling the following conditions:

- a. have a non-profit objective of international utility;
- b. have been created through an act under the national law of a State party to the Convention;
- c. be effectively active in at least two States, and
- d. have its statutory headquarters on the territory of one party and its physical headquarters on the territory of this or another party.

This Convention is open for signature to the member States of the Council of Europe and for the participation of other States invited by the ministers of this organization. Up to now, it has only been ratified by a limited number of States. Its principal purpose is to require member States to recognize the legal personality and qualification of a non-governmental international organization, as acquired within (the territory of) the party in which it has its statutory headquarters.

3. On 24 May 2002, the Global Fund concluded an agreement with the World Health Organization (WHO), with the title "Administrative Services Agreement". This agreement, subject in principle to Swiss law, foresees putting the necessary administrative services ("the Fund Secretariat") at the disposal of the Fund. One of the results of this Agreement is to enable the staff of the Foundation to benefit from the privileges and immunities given to members of the WHO Secretariat, as defined in the Agreement concluded between the Swiss Federal Council and the World Health

⁶ Recueil systématique du droit fédérale suisse (RS) 0.192.11

Organization to determine the legal status of this organization⁷ and the implementing statute thereto⁸, agreements which were concluded on 21 August 1948. Another result is to allow to the staff of the Fund the application of the Convention of 21 November 1947 on Privileges and Immunities of Specialized Institutions, insofar, of course, that it has been ratified by the State in which the staff travels⁹.

4. On 23 May 2002, the Global Fund also concluded an agreement with the International Bank for Reconstruction and Development (World Bank) in view of establishing a trust fund (Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria). It is up to the World Bank to administer the "Trust Fund", a financial mechanism destined to receive contributions from States, in particular. According to art.5, par.3 of the Bylaws of the Global Fund, all funds received by the Foundation are to be kept in trust in an account opened with the World Bank, and this in order to protect the assets of the Foundation and to facilitate their management. The World Bank accepted to act as trustee of the assets received and distributed by the Foundation.

The agreement concluded with the World Bank includes a provision relative to the applicable privileges and immunities, particularly as concerns the assets and (financial) operations of the Trust Fund. Point 4 has the following content:

"It is the intention of the parties that the privileges and immunities accorded to the World Bank under the Articles of Agreement shall apply to the property, assets, archives, income, operations and transactions of the Trust Fund, and that the World Bank shall, as legal owner thereof, hold the funds, assets and receipts that constitute the Trust Fund in accordance with the terms of this Agreement."

The Statutes of the World Bank, which entered into force for Switzerland on 29 May 1992¹⁰, contain an article VII which enumerates the privileges and immunities from which the World Bank benefits in order to be able fulfill the functions with which it has been entrusted¹¹.

Within the context of our study, it is interesting to note the provision which figures under cipher 6 of the Agreement, in the terms of which: "Nothing in this Agreement, or in the provision by the World Bank of the services referred herein, shall impair the status of the Global Fund as an independent organization existing under Swiss law, solely responsible for its own decisions and actions".

Finally, it is important to note that the Agreement contains a provision, cipher 11, for the settlement of disagreements:

⁷ RS 0.192.120.281

⁸ RS 0.192.120.281.1.

⁹ In order to be complete, one should also mention the headquarters agreements that the WHO has concluded with different countries

¹⁰ RS 0.979.2

¹¹ It concerns particularly the immunity from legal jurisdiction under certain conditions, the nonseizability of the Bank's assets, the inviolability of the archives and fiscal immunities

"Any dispute between the parties hereto relating to the interpretation or execution of this Agreement will, unless amicably settled, be subject to conciliation. In the event of the failure of the latter, the dispute will be settled by arbitration. The arbitration will be conducted in accordance with the modalities to be agreed upon by the parties or, in the absence of an agreement, with the Rules of UNCITRAL. The parties will accept the arbitrage award as final."

Contrary to the Agreement concluded with the WHO, the Agreement signed on 23 May 2003 does not refer to any specific internal law (in this case, Swiss law). It will be up to us, in examining the legal status which could be given to the Global Fund, to come back to the question of the legal nature of the Agreement establishing the Trust Fund, this in the light of the points raised above and, in particular, of the clause referring to the rules of arbitration of the CNUDC (UNCITRAL).

Part B

A new legal status for the Global Fund?

1, According to the documents in our possession, it would appear that the Swiss government has not made a "formal" promise as concerns the attribution of a specific legal status which would permit it to execute even more efficiently the tasks assigned by the Bylaws. It would appear however that the discussions within the Foundation Board of Directors during the year 2002 were particularly concerned with a "quasi-intergovernmental" status, or, if one refers to the working hypothesis formulated by the Federal Department of Foreign Affairs (FDFA), with a "quasi-governmental organization" status.

It is a question of what?

2. Taking into account 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, the Swiss authorities have adopted these last years a practice which translates into the recognition of international non-governmental organizations¹² as partial or limited international legal personalities, and which translates into the ability to conclude treaties under international law (treaty-making power). Because of their content, these treaties are sometimes called "agreements of a fiscal nature". It is this type of agreement which was, for example, at the center of the discussions which took place on 4 October 2002 between the Executive Director of the Fund, Dr. Richard Feachem and his colleagues, on one hand, and Ms. Evelyne Gerber, Head of the Division of Diplomatic and Consular Law, on the other.

¹² in the sense of the European Convention cited in Part A, cipher 2, above

In this context, one may mention the agreements concluded by the Federal Council with the International Air Transport Association (IATA)¹³, with the International Council of Airports in 1997¹⁴ and with the International Society of Aeronautical Communication (ISAC) in 1992¹⁵. These agreements were concluded on the basis of a Federal decree, of 30 September 1955, currently being revised, on the conclusion and modification of agreements with international organizations in view of determining their legal status in Switzerland¹⁶.

3. The agreement concluded on 1 November 2000 between the Federal Council and the International Olympic Committee (IOC) to determine its status in Switzerland¹⁷ deserves special mention¹⁸. An association under Swiss law in the sense of articles 60 ff. of the Swiss Civil Code, the IOC gained recognition by the Federal Council of "elements of an international legal personality", which permitted the Swiss government to conclude with it an agreement under international law, giving it certain facilities particularly in the fiscal sphere and in legislation limiting the number of foreigners allowed to work in Switzerland.

4. The Statutes of the International Committee of the Red Cross (ICRC) and of the International Federation of Red Cross and Red Crescent Societies in Switzerland must be treated separately. The Federal Council concluded authentic headquarters agreements¹⁹ with them, which accord these two institutions the status of a "functional" international legal personality and which assimilates them to intergovernmental organizations, and giving them the privileges and immunities normally allowed such organizations in Switzerland.

5. Finally, this year the Federal Council concluded an agreement with the Geneva International Centre for Humanitarian Demining in Geneva, which shows some interesting particularities. Created as a foundation under Swiss law, the Centre obtained a status which takes into consideration the international tasks which have been assigned to it by the States which are parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction, signed in Ottawa on 18 September 1997. The agreement draws its inspiration partly from the provisions of the agreement concluded with the International Olympic Committee (IOC), but goes further in the sense that it foresees the inviolability of the archives and documents of the Centre, of the acts performed by the President and the members of the Foundation Board of Directors and the Executive Director, as well as by the employees of the Centre, in the fulfillment of their functions.

This agreement is not based on the Federal decree of 30 September 1955, already cited under cipher 2 above, but on article 47a, paragraph 3, of the Federal law of 23 March

¹³ RS 0.192.122.748

¹⁴ RS 0.192.122.749

¹⁵ RS 0.192.122.784

¹⁶ RS 192.12

¹⁷ RS 0.192.122.415.1

¹⁸ read on this subject: [Franck Latty](#), *Le Comité international olympique et le droit international*, Editions Montchrestien, Paris 2001

¹⁹ The agreement with the ICRC was concluded on 19 March 1993 (RS 192.122.50) and with the Federation on 29 November 1996 (RS 0.192.122.51)

1962 on the procedure of the Federal assembly, as well as on the format, the publication and the entry into force of legislative acts (Law on the Relationship Between the Councils)²⁰, said provision authorizing the Federal Council alone, that is to say without the approval of Parliament, to conclude certain treaties considered to have "minor consequences".

Part C

Have the conditions for the conclusion of a headquarters agreement with the Global Fund been fulfilled?

In its advisory opinion of 11 April 1949 in the case "Compensation for damages suffered in the service of the United Nations"²¹, the International Court of Justice in The Hague had the opportunity to note that, in a general manner, "the legal subjects, in a legal system, are not necessarily identical as concerns their nature or the extent of their rights; and that their nature is dependent on the needs of the community". The Court continued, in declaring the following:

"The development of international law, in the course of its history, was influenced by the requirements of international life and the progressive increase of the collective activity of States has already given rise to examples of actions on an international level by certain entities which are not States. This development led in June 1945 to the creation of an international organization, the objectives and principles of which are described in the Charter of the United Nations. In order to attain these objectives, it is indispensable that the Organization have an international personality"

As Professor Paul Reuter has noted, " the legal personality in a specific legal structure is only the expression of the acknowledged qualification of any organization whatsoever to place its activities or a part thereof on the level of that structure and to be the holder of rights and obligations thereof"²². The determining element of the international personality is that certain functions having been entrusted to said organism require that its activity be situated on the level of international, law²³.

2. In the case of the International Federation of Red Cross and Red Crescent Societies, the Swiss government was able to conclude a headquarters agreement in which the international legal personality and the legal qualification in Switzerland of the

²⁰ RS 171.11

²¹ ICJ Compendium 1949, p. 174, in particular p. 178

²² Paul Reuter, La personnalité juridique internationale du Comité internationale de la Croix-Rouge, in: Etudes et essais sur le droit internationale humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet, Geneva-The Hague, 1984, p. 785

²³ Paul Reuter, op.cit., p. 786

Federation is recognized "for the purposes of the present agreement"²⁴. In doing this, the Federal Council has formally recognized that insofar necessary to fulfill the functions which have been assigned to it by the international community²⁵, the Federation should be considered as being the holder of the rights and obligations not only under Swiss, but also under international law.

As an association under Swiss law in the sense of article 60 ff. of the Swiss Civil Code, the Federation profits additionally from a "functional" international legal personality, as demonstrated notably in the conclusion of a large number of agreements which define the legal status in the contracting States and which are authentic international treaties. There is no doubt that the Federation plays a major role in the humanitarian field. It is composed of national societies of the Red Cross and the Red Crescent, which have been recognized by their national governments, as well as by the ICRC, and which have been accepted by the General Assembly of the International Federation. These national Societies, which are exercising an activity more in the public than in the private sector, are auxiliaries of the authorities.

In addition, it is necessary to note that the International Federation is one of the components of the International Red Cross and the Red Crescent Movement, which includes moreover the ICRC and the national Societies of the Red Cross and the Red Crescent. The importance of the Federation's role is underlined by the fact that it has received permanent observer status at the General Assembly of the United Nations, which particularly took into account the specific place it occupies in international humanitarian relations.

In taking into account all these different elements, the Federal Council was able to assimilate the Federation to an inter-governmental association²⁶.

3. The situation of the Global Fund is, in this respect, quite different. While the International Federation of Red Cross and Red Crescent Societies is defined in article 1 of its Statutes as "an institution with a legal personality and ruled by its own statutes which define its rights and obligations" and as "a component of the International Red Cross and Red Crescent Movement", the Global Fund 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.

It is true that the World Bank has concluded - as we have read²⁷ - an agreement with the Global Fund, and not with the WHO, in view of the establishment of a trust fund. This agreement takes care to underline, in cipher 6, the characteristic of an "independent organization" of the Fund, in spite of the important links which continue

²⁴ Article 1 of the agreement concluded on 29 November 1996

²⁵ cf. in particular article 81, paragraph 3, of the additional Protocol to the Geneva Convention relative to the Protection of Civilian Persons in Times of War of 12 August 1949 (Protocol I), adopted in Geneva on 8 June 1977; RS 0.518.521. This provision requires the contracting parties and the parties in conflict to facilitate, as much as possible, the aid provided to the victims of conflicts by the Red Cross and Red Crescent societies.

²⁶ cf also, part B, cipher 4, above

²⁷ cf. part A, cipher 4, above

to exist with the WHO. It contains, in addition, a clause for resolving disputes which refers to conciliation and arbitration, that is to say, two means of resolution of disputes between States which are enumerated in article 33 of the Charter of the United Nations.

We therefore have no difficulty to give the Global Fund recognition of a nascent international legal personality, or, in the words of the Federal Council in its agreement with the IOC, "elements of an international legal personality"²⁸, particularly insofar as the Global Fund will have to resort more and more to instruments which are offered by an international personality²⁹ and in particular to the ability to conclude agreements under international law. According to Professor Paul Reuter, the ability to conclude agreements subject to international public law is the "touchstone" of an international legal personality³⁰.

If, on one hand, we thus can admit that the Global Fund has the legal qualification to conclude an agreement with the Federal Council to determine its status in Switzerland, on the other hand, we do not see any possibility at this stage of development of the said Fund to contemplate negotiations in view of the conclusion of an authentic headquarters agreement, that is to say an agreement including the whole of the privileges and immunities recognized in an intergovernmental organization.

As we have noted³¹, the World Bank has, of course concluded an agreement with the Fund which sanctioned the "independent organization" of the Fund. But this latter has concluded an "administrative agreement" with the WHO, which puts the accent on the fact that the Fund is constituted as a foundation under Swiss law (cipher7):

"Nothing in this Agreement, or in the provision of the administrative services referred to herein, will impair the status of the Global Fund as an independent Foundation under Swiss law, which is solely responsible for its own decisions and actions."

At least on the administrative level, the ties to the WHO remain strong and the anchoring point remains Swiss law. Other options, than that of the conclusion of a headquarters agreement, must therefore be examined.

On the Swiss internal level, the Federal decree of 30 September 1955, as already cited³², has been interpreted in a liberal manner in order to allow the Federal Council to conclude certain agreements of limited impact, that is to say, foreseeing only fiscal privileges for non-governmental organizations having a predominantly intergovernmental character. We have also been able to ascertain that in order to conclude an agreement with the Geneva International Centre for Humanitarian

²⁸ cf. part B, cipher 3, above

²⁹ cf. the reference to the advisory opinion of the International Court of Justice contained in cipher 1 above

³⁰ Op.cit. (note 17) p. 791

³¹ cf. cipher 3 above

³² cf. part B, cipher 2, above

Demining, the Federal Council had recourse to another legal base, that of internal law³³.

Before formulating any propositions concerning the possible options, it is time to move on to the central theme of our paper, that is to say the transformation of the Global Fund into an intergovernmental organization and the problems created by the existence of a "partnership between the private and public sectors" (art. 2 of the Bylaws)

Part D

Conditions and consequences of the transformation of the Global Fund into an intergovernmental organization.

1. On a general level, it is necessary to remember the fact that the Vienna Convention on the Law of Treaties is content to qualify international organizations as intergovernmental³⁴. Said Convention conveys the traditional approach according to which only States can be represented in organizations, their will only to be voiced by delegates designated by their respective governments³⁵. Constituting treaties of international organizations are thus open to States. It cannot be otherwise from the moment that States adopt these treaties. However, nothing forbids them to open international organizations to other entities, for example, to entities not under State control³⁶.

It is on the level of the participation in organs of international organization that the distinction between States and other entities will show itself. In a general manner, only the States which are party to the constituting charter of the international organization can benefit from the status as members of the organization; other entities being only associates or observers. Of course, nothing hinders the States, parties to the said charter and members with full rights, to accord to associate members a status as favorable as that which is accorded to these States. Most often, the States wish to maintain control of the organization which they founded and thus hesitate to treat associate members on an equal footing in giving them, for example, the right to vote in the principal organ of the organization (Executive Council). Political considerations and reasons of efficiency lead to varied solutions as concerns the representation of full member States and associate members in the organs of the international organization. In each case, it is necessary to establish a balance which fairly takes into account the rights and responsibilities of each.

As for the observers, they have more limited rights and generally cannot participate in the activities of the organization, except when they are directly concerned³⁷.

³³ cf. part B, cipher 5, above

³⁴ Vienna Convention on the Law of Treaties of 23 May 1969, article 2, paragraph 1, letter c

³⁵ cf. Patrick Daillier / Alain Pellet, *Droit international public*, 7^e édition, Librairie générale de droit et de jurisprudence, Paris 2002, page 585

³⁶ cf. Patrick Daillier / Alain Pellet, *op. cit.*, loc. cit.

³⁷ cf. Patrick Daillier / Alain Pellet, *op. cit.*, page 586

2. As an example, let us cite the Statutes of the World Tourism Organization (WTO), which resulted from the transformation of the International Union of Official Tourism Organizations into an international organization of the intergovernmental type.³⁸ According to the message of 2 June 1975 of the Federal Council addressed to the Federal Assembly concerning the Statutes of the WTO³⁹, the WTO is the successor to the aforementioned International Union. Herewith the reasons⁴⁰:

"The transformation [.....] into an intergovernmental organization was judged necessary for a number of reasons. The number of international tourists has increased tenfold since the creation of the International Union of Official Tourism Organizations (IUOTO) and the number of States, participating in the exchange of tourism has continued to increase. Simultaneously, in the majority of tourism-oriented countries, the authorities had constantly taken steps to promote tourism activities. The increasing interdependence of such activities on an international level and the strengthening of State influence on tourism, led the United Nations (UN) and other intergovernmental organizations to subordinately concern themselves with tourism problems. The IUOTO was thus forced to work more and more closely with intergovernmental organizations. Its private character imposed limits on its efforts to harmonize international tourism activities....."

Created in 1947 and headquartered in Geneva as an organization profiting from a legal personality in conformity with articles 60 ff. of the Swiss Civil Code⁴¹ the IUOTO was transformed into an intergovernmental organization through the revision of its Statutes, as decided by an extraordinary General Assembly of the Union and as approved by the delegates so empowered by their governments.

In the message of 2 June cited above, the Federal Council does not dissimulate the difficulties on a legal level of the operation⁴²:

"On one hand, the IUOTO, as what as then a private organization, did not have the authority to transform itself into an intergovernmental organization, nor to establish standards under international public law. On the other hand, the government representatives of the Assembly were not qualified to revise the Statutes of

³⁸ Article 1 of the Statutes of the OMT; RS 0.935.21

³⁹ Federal Bulletin of the Swiss Confederation (FB) 1975, volume II, page 158 ff.

⁴⁰ FB 1975, volume II, pages 158 to 159

⁴¹ FB 1975, volume II, pages 159 and 160

⁴² FB 1975, volume II, page 162

the IUOTO, the States as such not being members....."

Finally, the Statutes of the WTO entered into force 2 January 1975, after having been ratified by 51 countries. The constituting Assembly of the WTO took place on 12 May 1975 in Madrid. It was on this occasion that the decision was taken that the new organization would commence its activities at the beginning of 1976.

According to the new Statutes (art. 4 ff.), only sovereign States can become full members of the WTO⁴³. The new Organization also accepts in its organs "associate members" and "affiliate members" without the right to vote. Territories which are not responsible for their external relations can become associate members. International organizations, intergovernmental or not, as well as commercial associations and associations and companies having tourism activities can become affiliate members. Contrary to associate members, which are represented in the General Assembly and the Executive Council, affiliate members only have a status as simple observers.

3. It is evident that the experiences made in the transformation of the IUOTO into an intergovernmental organization cannot be transferred without changes to the particular situation of the Global Fund, for the simple reason that this latter already has States amongst the members of its Foundation Board of Directors⁴⁴. One point however appears clear to us: an intergovernmental organization owes its existence to the conclusion of a multi-lateral treaty, also called the constituting act of the organization⁴⁵. This constituting treaty can be a new treaty or a treaty which revises a previous treaty and which foresees, for example, a modification of the legal personality of the previous organization. In the first case, which is the only one of interest to us, the procedure for elaboration is that generally applicable to multi-national treaties, within the framework of an international conference.

The initiative for calling for such a conference may come from one State, for example the headquarters State of the future organization, a group of interested States, or an already existing international organization, such as the WHO in the case concerning us.⁴⁶ Such a conference would have as its mission the elaboration and adoption of an international treaty, the constituting charter of the new international organization, and which will thereafter be submitted for approval to the member States invited to become members of this organization. An appropriate representation of the private sector should be assured during the activity of the international conference

⁴³ FB 1975, volume III, page 165

⁴⁴ cf. article 10 of the Bylaws of the Global Fund

⁴⁵ cf. Patrick Daillier / Alain Pellet, op. cit. (footnote 30), page 279. The Vienna Convention on the Law of Treaties, already cited under cipher 1 above, specifies in its article 5 that the said Convention is applicable to any treaty which is the constituent act of an international organization. See also article 1, letter a, of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character: " wherein the expression «international organization» is defined as an association of States which has been constituted by treaty, endowed with a constitution and common organs, and possessing a distinct legal status different from that of its member States.

⁴⁶ cf. Patrick Daillier / Alain Pellet, op. cit. pages 580 to 581

4. One of the characteristics of the Global Fund and its current structure is the establishment of a "new partnership with the public and private sectors"⁴⁷, which is demonstrated by the creation of an organ such as "the Partnership Forum" and by the composition of the management and administrative organs of the Foundation. The structure of a "classic" international organization generally includes a plenary organ (General Assembly), a restricted organ (Executive Council) and a Secretariat. The two first-mentioned organs are composed of government representatives, with the well-known exception of the International Labor Organization, which does not have an exclusively intergovernmental organ, and which is characterized by its "tripartite"⁴⁸ nature.

One must thus ask oneself if the transformation of the Global Fund into an intergovernmental organization would not lead to upsetting the subtle balance established between the private and public sectors, notably as concerns the Foundation Board of Directors, which will become the Executive Board of the new international organization to be created. Will the States, parties to the constituting act of the latter, be willing to accept, if the case arises, on an equal footing, that is to say with the right to vote, representatives of the civil society and the private sector in the restricted organ (Executive Board) to be set up?

Whatever the case, the transformation of the Global Fund into an intergovernmental organization will first require an eminently political decision by the Foundation Board of Directors, which is the supreme organ of the Foundation⁴⁹. It will most likely lead to a readjustment of the respective roles of the private and public sectors, taking into consideration that only States will be parties to the constituting act of the organization, which will be, it is useful to recall, an international treaty in the sense of article 2, paragraph 1, letter a, of the Vienna Convention on the Law of Treaties⁵⁰. Of course, nothing would hinder the government delegates, responsible for elaborating and adopting the Bylaws of the future organization, to reserve an appropriate place for the private sector in the principal organs, for example, by giving the right to vote to representatives of the civil society and the private sector, as is actually the case in article 10, paragraph 3 (The Voting Members Consist of:) of the Foundation Bylaws. In parallel with the principal organs, subsidiary organs could defend the interests of partners not having a governmental character⁵¹. Establishing this new "balance" will be a long and difficult task.

⁴⁷ It is interesting to note that the English text of Article 2 begins by mentioning the public sector and does not speak of a "partnership: "through a new public-private foundation"

⁴⁸ Government and non-governmental delegates equally share the seats in the organs of the ILO. the second category includes representatives of the professional organizations and unions which exist in each member State.

⁴⁹ cf. article 13 of the Foundation Bylaws. The Board of Directors of the Foundation " shall possess the highest and most extensive authority concerning the administration of the Foundation" paragraph 1). In addition, it has the authority to make any subsequent modification to the Bylaws (paragraph 2)

⁵⁰ cf. footnote 29 above. This provisions foresees that the expression "treaty" is defined as "an international agreement concluded in writing between States and governed by international law".

⁵¹ Certain agreements concluded in the field of telecommunication could be a source of inspiration. We can mention the Constitution of the International Telecommunications Union (RS 0.184.01), the structure of which includes different Sectors (Radio Communication Sector, Standardisation of Telecommunications Sector, Development of Telecommunications Sector), or the Agreement Relative to the International Organisation for Telecommunication by Satellite (INTELSAT), concluded in Washington on 20 August 1971 (RS 0.784.601), which differentiates between the "Parties" to the

Finally, one should not forget that the amendment of a multinational treaty is complex not only on the level of international law, but also in respect to the requirements of the internal legal structures of the party States⁵².

5. On a practical level, the documents which have been submitted to the Global Fund up to now by the Federal Department of Foreign Affairs (FDFA) make mention a time of at least two years for the transformation of the Global Fund into an intergovernmental organization. This estimate seems reasonable to us, even though somewhat optimistic.

In a first step, the Board of Directors has to reach a decision by consensus⁵³, that the creation of an intergovernmental organization will be favorable to the realization of the goals as defined in article 2 of the Global Fund's Bylaws. Following this, a committee of legal experts would have to be established under the aegis of the WHO or the Global Fund (?). It would have as its task to develop a project of the constituting act of the future international organization.

In a second step, the project shall be submitted to the Board of Directors for approval and for a decision on who shall convoke the conference to adopt the approved text (WHO, the headquarters country, i.e. Switzerland ?). In parallel, a headquarters agreement should be worked out, taking into account the uncertainty of the choice of which country would finally welcome the new international organization, even if the proximity of the WHO would be a serious trump for maintaining the headquarters in Geneva.

Once the constituting act (multilateral treaty) is adopted, it should be approved by the interested States in accordance with their respective constitutional procedures, as concerns Switzerland with the probable requirement of a three-month referendum period.

Part E

Conclusions, including some proposals

1. The GF is constituted as a foundation under Swiss law. It also must be considered as a non-governmental international organization in the sense of the European Convention on the Recognition of the Legal Personality of Non-governmental International Organizations (Strasbourg, 24 April 1986).
2. The characteristics of the Global Fund, its structure and its specific tasks, allow the admission that the Fund, which has its principal anchorage in Swiss internal law, can lay claim to a "nascent," "derived" or "functional" international legal

Agreement and the "Signatories", term which designates a Party or a telecommunications organism designated by a Party which has signed the Operations Agreement.

⁵² cf. article 15, paragraph 3, of the Foundation Statutes

⁵³ cf. article 40 of the Vienna Convention on the Law of Treaties as cited in footnote 29, above. Read also: Paul Reuter, Introduction au droit des traités, Presse universitaire de France, Paris 1985, pages 113 ff.

personality, permitting it to contemplate the conclusion of an agreement within international law with the Swiss Federal Council (Treaty-making power) to determine its legal status in this country. The activities of public interest with which it has been entrusted imply of necessity that its activities also take place on the level of international law.

3. Nevertheless, the recognition of such a international legal personality is not sufficient at this stage of the Fund's development to authorize the conclusion of an authentic headquarters agreement, that is to say, an agreement containing the totality of the privileges and immunities normally accorded an intergovernmental organization. Other formulas which take into consideration, in particular, the privileged links that the Fund has with the WHO, must be examined.
4. In the short term, we propose that the Fund examines with the competent Swiss authorities the possibility of concluding an agreement similar to the one recently concluded with the Geneva International Centre for Humanitarian Demining. This agreement has the advantage of foreseeing immunities which could be extended to the members of the Foundation Board. In addition, as the staff of the Secretariat of the Fund have an obvious interest in maintaining their status as civil servants of the WHO, it would also be in the Fund's interest to revise its relations with the WHO in the sense of a greater transparency in order to better highlight the requirements for independence and autonomy which are characteristic of the Fund.. The "administrative" agreement of 24 May 2002 could, for example, be "separated" from Swiss law to fall within the province of the international legal structure.
5. In the long term, nothing stands in the way of the competent organs of the Fund to consider the interest and the possibility of transforming the Fund into an intergovernmental organization. This however is a task of long duration (at least two years for its realization), the difficulties of which are not to be underestimated.

Challenges arising from the different legal status of the Global Fund and of the Global Fund Secretariat

Introduction: To date, much discussion has occurred around the functioning of the administrative relationship between the Global Fund and WHO. Little of that discussion has focused on the different legal status of the Global Fund and of the Secretariat and the impact that difference has on how the two entities are able to function. The Administrative Services Agreement was designed to address the impact of that difference as best as possible, but there remain important problems where satisfactory solutions have not yet been found, and where activities and relationships need to be specially structured.

Background: A solution is needed to address a fundamental quandary: answering to WHO authority to gain privileges and immunities, while answering to the Global Fund Board's authority to lead and manage the Global Fund. This brief is provided to invite discussion about this important problem and build Governance and Partnership Committee understanding of a core issue underlying many of the inter-organization difficulties experienced to date.

The advantages of WHO privileges and immunities

WHO's privileges and immunities, including tax benefits, apply to WHO and to its staff carrying out functions of the Organization. They are not available to the Global Fund or its activities as such. Consequently, the staff of the Global Fund Secretariat are all WHO staff and the ASA provides that in carrying out their activities, they do so as a WHO activity *on behalf of the Global Fund*. This situation has some obvious advantages:

- If a staff member were to apply for a visa as an employee of the Global Fund, that person would be subject to whatever restrictions apply to private persons. If the same person applies as a WHO staff member, they are entitled to special treatment under international law.
- If an act is carried out in the name of the Fund, the act and that person performing the act are subject to national court jurisdiction. If the same act is carried out as a WHO act, WHO's privileges and immunities may protect that act and the person from being brought before national courts. It is for this reason that contracts are signed whenever possible as contracts concluded by WHO.⁵⁴

The problem of dual authority

⁵⁴ Having said that, the Global Fund has commissioned a legal analysis of the position of the Fund under Swiss law. The opinion is expressed in effect that the Fund will be bound under Swiss law for acts committed by WHO on its behalf, thereby suggesting that the Fund can nevertheless be brought before Swiss courts for acts of WHO, even though WHO (and the Global Fund Secretariat provided by WHO) should not be. Whether this will be the result if an actual case were to arise, and whether this same approach could be generalised to other countries is open to debate.

This structural anomaly – the Global Fund as a private entity and the Global Fund Secretariat as part of an international organization – presents various issues of overlapping or dual authority. For example:

- While Professor Feachem is a WHO staff member and Executive Director of the Secretariat, he was also appointed by the Board of Directors of the Global Fund as Executive Director of the Global Fund. As ED of the Global Fund he has executive authorities and he, in turn, is able to delegate some of those authorities to members of his staff.
- Thus the Executive Director and the Secretariat staff, may be assigned tasks by the Board through its bylaws, and held accountable by the Foundation Board for carrying out those duties, yet as WHO employees they are accountable to WHO (and in principle have a constitutional obligation not to follow instructions of any outside entity). The ASA tries to address this issue by providing that the individual acts to be performed by the Global Fund Secretariat *are obligations of WHO* to the Global Fund pursuant to the terms of the ASA (i.e. not as employees of the Fund), thus trying to minimize the instances in which unavoidable overlaps of authority might exist.

Notwithstanding the ASA, there are nevertheless situations in which it is difficult to avoid the consequences of the hybrid situation. For example,

- Since the Trust Fund of the Global Fund is situated in the World Bank, and is the subject of an agreement directly between the World Bank and the Global Fund itself, the grant agreement between the Global Fund and a country cannot be agreed upon by the WHO-based Global Fund Secretariat. Rather, it requires an agreement between the Principle Recipient(s) in the country concerned and the Global Fund itself. Thus, when the ED signs the agreement, it is an act of the Fund, and he signs it on the instructions of the Board of Directors, notwithstanding the fact that he is a WHO employee. Nevertheless, as an act of the Fund itself, the grant agreement is not protected by WHO's privileges and immunities.
- If WHO, at some point in the future, becomes a PR, can the ED and members of the Secretariat, while employees of WHO, oversee the WHO as a PR through the Global Fund's contracted LFA? On the same note, current LFA contracts are concluded as "WHO acting for the Fund". Is it acceptable that WHO be both the PR and also a party to the LFA contract designed to oversee their performance?
- It may well arise that if the GF wants to engage the services of an entity (e.g., as an LFA or as an external auditor), which as explained previously would be through a contract concluded by WHO for the GF, that entity may decline to provide those services because of a pre-existing relationship with WHO which is felt to create a conflict of interest.
- When making a decision or concluding a contract that is felt to be in the best interest of the Global Fund but nevertheless conflicts with a principle or policy of WHO, to which authority is the ED accountable - the Foundation Board or the Director General of WHO?

Conclusion

The structural problem and its business impact illustrated in this note are direct consequences of securing an arrangement with WHO that provides GF Secretariat staff with the privileges and immunities needed for carrying out its activities. The Governance committee is exploring ways in which such privileges and immunities might be granted through other channels that would obviate the need for this arrangement, such as a change in the legal status of the Fund. However, even if such changes were agreed to immediately, a change of status – particularly to a fully independent IGO - will take time. In the meanwhile, it is important that the Governance Committee and the Global Fund Board be aware of the underlying nature of the problem – in order that some form of legally satisfactory solution can be found.