

## COLLECTIVE ACTION FOR DEVELOPMENT FINANCE

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### ABSTRACT

Recent development challenges highlight a pressing need to re-evaluate whether the post-World War II behemoths of international development finance are up to the tasks being demanded of them today. These challenges include both the problems to be addressed (climate change, HIV/AIDS, and abject poverty among them) and a change in attitude about the desired modalities for addressing them (financing via inclusive, participatory, partnerships rather than intergovernmental organizational fiat).

The institutions that dominate the current order, the United Nations ("U.N.") and the World Bank, have undergone a crisis of legitimacy. The U.N., though originally charged with protecting the global welfare, has not played a central role in the design and financial administration of the more recent innovations in development finance, such as carbon finance, microfinance, and public-private financing initiatives. Instead, it has ceded primary responsibility for innovative international development financing to the World Bank. However the World Bank, tasked with the responsibility of being the developing world's primary source of multilateral development finance, struggles with the inherently

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schizophrenic nature of its role as a development institution on the one hand, and a bank on the other. Repeatedly, its banking id prevails, too often to the detriment of the development agenda.

Recognizing these inadequacies, the world's development aid donors are engaged in an ongoing quest to find alternatives to these institutions. This quest takes the form of setting up numerous funds narrowly tailored to finance specific, narrowly-defined needs. Examples of these funds include the Global Environment Trust Fund ("GEF") and the Global Fund to Fight HIV Aids, Malaria and Tuberculosis. The Climate Change Fund, proposed in the December 2009 Copenhagen Accord (and recently renamed the Green Climate Fund), is poised to follow this approach.

This ad hoc special-purpose fund approach is reactive and lacks a coherent, unifying vision of how to meet today's development challenges. The funds that have been created fill a need but are a fragmented, sub-optimal response to that need. They suffer from several deficits, ranging from governance gaps and lacunae in accountability, to uncertain status in the international political and legal order. These deficits generate new risks and costs for the international aid architecture.

In this Article, I argue that the time has come to redesign the interrelationship between these special-purpose funds and the U.N. and the World Bank so that these funds operate in sync with, rather than as bypasses to, those institutions. I propose that this redesign occur in two stages. In the immediate term, I argue that the contributions that the special-fund phenomenon makes to the design of international development finance should be strengthened by addressing the governance and other deficits apparent in these funds' structures. Efforts to strengthen these funds should be informed by an understanding of the task at hand, drawn from principles of principal-agent and accountability theory, as applied to third party financing arrangements. In the longer term, I argue, the popularity of these special purpose funds as a form of collective finance points to a need to re-design key aspects of the way the U.N. and the World Bank do business so that those institutions can serve as effective facilitators and vehicles of such finance, rather than as pillars of an out-dated model that has to be circumvented. In furtherance of these arguments, I make some preliminary suggestions for the kind of short-term and long-term changes I advocate.

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## 1. INTRODUCTION

Recent development challenges highlight a pressing need to re-evaluate whether the post-World War II behemoths of international development finance are up to the tasks being demanded of them today. These challenges include both the problems to be addressed (climate change, HIV/AIDS and poverty among them) and a change in attitude about the desired modalities for addressing them (financing via inclusive, participatory partnerships rather than intergovernmental organization fiat).

The institutions that dominate the current order, the U.N.<sup>1</sup> and the World Bank,<sup>2</sup> as they presently operate, have undergone a

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<sup>1</sup> The U.N. is a source of economic and technical assistance for underdeveloped countries. See Pierre de Senarclens, *The United Nations as a Social and Economic Regulator*, in REGULATING GLOBALIZATION: CRITICAL APPROACHES TO GLOBAL GOVERNANCE 8, 9 (Pierre de Senarclens & Ali Kazancigil eds., 2007) (detailing the role of the U.N. system as “the symbol of international community,” “an essential forum for multilateral diplomacy,” and “a source of economic and technical assistance for numerous” developing countries). Although “[t]he maintenance of peace was the main objective for the foundation of the United Nations organization,” its founders believed that governments could not achieve international security without “strong international cooperation aimed at promoting economic progress and social welfare,” goals reflected in Article 55 of the United Nations Charter. *Id.* at 10. Various UN-related organizations, such as the United Nations Development Programme (“UNDP”), the Food and Agriculture Organization (“FAO”), the World Food Programme (“WFP”), and the World Health Organization (“WHO”) provide development assistance. See J. SAMUEL BARKIN, INTERNATIONAL ORGANIZATION: THEORIES AND INSTITUTIONS 107 (2006) (detailing the role of international organizations in development). Of these, the U.N. entity that is most directly focused on development is UNDP. *Id.* (stating that the UNDP’s “remit is to provide technical assistance to developing countries” and that it “is most directly focused on development assistance per se”).

<sup>2</sup> The term “World Bank” is commonly used to refer to the institution set up in 1944, on the heels of World War II, as the International Bank for Reconstruction and Development (“IBRD”) for the purpose of making loans to member countries at below market rates. See John W. Head, *Law and Policy in International Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks*, 17 KAN. J.L. & PUB. POL’Y 194, 196–97 (2007) (describing the early development of the World Bank). Its loans were initially directed at the reconstruction of post-war Europe but are now exclusively directed at development for developing county members. *Id.* (detailing the funds used by multilateral development banks (“MDBs”), like the IBRD and the International Development Association (“IDA”), to aid economic development in certain

crisis of legitimacy.<sup>3</sup> The U.N., though originally charged with protecting the global welfare, has not played a central role in the design and financial administration of the more recent innovations in development finance, such as carbon finance, microfinance, and public-private financing initiatives. Instead, it has ceded primary responsibility for those aspects of innovative international development financing to the World Bank. The World Bank, on

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countries). IBRD has since been joined by four additional institutions: (1) the International Finance Corporation (“IFC”), which lends to the private sector; (2) the International Development Association (“IDA”), which make interest-free loans to the poorest countries of the world; (3) the Multilateral Investment Guaranty Agency (“MIGA”), which issues guarantees to the private sector against certain development country risks; and (4) the International Center for the Settlement of Investment Disputes (“ICSID”), an arbitrating body. See INT’L BANK FOR RECONSTRUCTION AND DEV., INFORMATION STATEMENT 47 (2010), available at <http://treasury.worldbank.org/cmd/pdf/InformationStatement.PDF> (describing the IFC, IDA, and MIGA as “affiliated” with the IRBD). In this Article, the term “World Bank” will be used to apply interchangeably to IBRD or IDA whether acting separately or together. See *id.* at 78–82 (noting that the IDA has no separate staff but is run wholly by IBRD).

<sup>3</sup> See Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT’L ORG. 699, 723 (1999) (noting that the World Bank’s worldview has translated into a record of development failures); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29 (2005) (noting NGOs’ views that the World Bank lacks accountability by not having to answer to those whom its policies affect). The World Bank has been vilified by both aid skeptics, and pro-aid, anti-globalization protestors. See Jonathan R. Pincus & Jeffrey A. Winters, *Preface to REINVENTING THE WORLD BANK*, at viii (Jonathan R. Pincus & Jeffrey A. Winters eds., 2002) [hereinafter Pincus and Winters, *Preface*] (posing common questions concerning the Bank’s operational capacity and whether it is the appropriate vehicle for its aid endeavors). Aid skeptics, opposed to government generally, denounce the Bank as usurping reliance on private markets. Jonathan R. Pincus & Jeffrey A. Winters, *Reinventing the World Bank*, in REINVENTING THE WORLD BANK 1, 2 (Jonathan R. Pincus & Jeffrey A. Winters eds., 2002) [hereinafter Pincus & Winters, *Reinventing the World Bank*] (discussing how the perception that the integration of global capital markets undermined the rationale of public sector development lending contributed to the general disappointment in the institution). Pro-aid, anti-globalization protestors, on the other hand, denounce the Bank as being captive to the corporate interests of its more powerful members. *Id.* Additionally, the “Fifty Years is Enough” campaign surfaced around the fiftieth year of the Bank’s founding. See 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (Kevin Danaher ed., 1994) (compiling various viewpoints of multiple groups opposing the World Bank for both political and economic reasons). For additional discussion, see de Senarclens, *supra* note 1, at 26–35 (citing the “crisis in the legitimacy and accountability” of the U.N. system); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1506 (2006) (noting the trepidation of many national officials and citizens over assigning responsibility for important domains to an “ineffectual” U.N.).

the other hand, though tasked with the responsibility of being the developing world's primary source of multilateral development finance, struggles with the inherently schizophrenic nature of its role as a development institution on the one hand, and a bank on the other. Repeatedly, its banking id prevails, too often to the detriment of the development agenda. For these reasons, there has been little public support for imposing new or expanded mandates on these institutions.<sup>4</sup> Recognizing this reality, the world's development aid donors are engaged in an ongoing quest to find alternatives to these institutions.

This quest takes the form of setting up numerous funds narrowly tailored to finance specific, narrowly-defined needs. Examples of these funds include the GEF and the Global Fund to Fight AIDS, Malaria and Tuberculosis. The Climate Change Fund, proposed by the participants in the 15th Conference of the Parties of the United Nations Framework Convention on Climate Change ("UNFCCC") (also known as the Copenhagen Summit),<sup>5</sup> and recently renamed the Green Climate Fund,<sup>6</sup> is poised to follow this approach. The developed countries that participated in the Copenhagen Summit promised to collectively provide \$30 billion in annual support over the near term (2010-2012) to finance this fund and financial resources of \$100 billion a year by 2020.<sup>7</sup> The

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<sup>4</sup> See Helen V. Milner, *Why Multilateralism? Foreign Aid and Domestic Principal-Agent Problems*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, 107, 110 (Darren G. Hawkins et al. eds., 2006) (noting the strong influence public sentiment has on member countries' support for international organizations).

<sup>5</sup> For more information on the Copenhagen Accord, see generally David Hunter, *Implications of the Copenhagen Accord for Global Climate Governance*, 10 SUSTAINABLE DEV. L. & POL'Y 4 (2010) (concluding that while better than nothing, the Copenhagen Accord will not motivate the world's leaders to prioritize long-term climate goals over short-term political needs).

<sup>6</sup> See PEW CTR. ON GLOBAL CLIMATE CHANGE, SIXTEENTH SESSION OF THE CONFERENCE OF THE PARTIES TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE AND SIXTH SESSION OF THE MEETING OF THE PARTIES TO THE KYOTO PROTOCOL, [hereinafter PEW CANCUN SUMMARY] available at <http://www.pewclimate.org/international/cancun-climate-conference-cop16-summary> (recounting the discussions at Cancún including the articulated goals, and future measures to be taken). The fund was renamed at the Sixteenth Session of the Conference of the Parties in Cancún in December 2010, at which time participants strengthened their financial commitments to the new fund and agreed on implementation mechanisms for financing. *Id.*

<sup>7</sup> See U.N. Framework Convention on Climate Change [UNFCCC] Draft Dec. -/CP.16 ¶ 95, [hereinafter Cancún Accord], available at [http://unfccc.int/files/meetings/cop\\_16/application/pdf/cop16\\_lca.pdf](http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf) (detailing the general funding structure resulting from the Copenhagen Summit).

financing is expected to come from a wide variety of sources, both public and private, as well as bilateral and multilateral.<sup>8</sup> The participants agreed, however, that the World Bank will serve as interim trustee of the fund for the first three years.<sup>9</sup>

This phenomenon of creating new funds to address special needs in developing countries, epitomized by the decision of the Copenhagen and Cancún Summit participants, reflects a seismic change in international development finance and is a byproduct of globalization.<sup>10</sup> Ushered in by the end of the Cold War, globalization gives rise to both a need and a desire for countries and their citizens to collaborate together across sovereign boundaries in unprecedented ways.<sup>11</sup> The global problems it has spawned are too big for any single country to address alone. They demand a collective response.<sup>12</sup> Moreover, the easing of fears of a Communist world takeover allows for inter-governmental

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<sup>8</sup> *Id.* ¶ 99. See Hunter, *supra* note 5, at 11 (stating further that while funds are supposed to come from this variety of sources, the institutional structure for delivering such finance has “yet to be determined”).

<sup>9</sup> Cancún Accord, *supra* note 7, ¶ 107. See also PEW CANCUN SUMMARY, *supra* note 6, at 4 (stating that three years after the fund begins operations, the World Bank as interim trustee will be subject to a review). A Transitional Committee was also established to design the fund which will report to the Seventeenth Session of the Conference of the Parties in December 2011. Cancún Accord, *supra* note 7, ¶ 109.

<sup>10</sup> For the purposes of this Article, I take “globalization” to connote an increased interdependence and interaction among countries and their citizens—both as between developed and developing countries, and between developed countries *inter se*—that began with the end of the Cold War and the subsequent rise in opportunities for greater transnational activity. See Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528, 1529 (2008) (reviewing RAWI ABDELAL, *CAPTIAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE* (2007); JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* (2007); SASKIA SASSEN, *TERRITORY, AUTHORITY RIGHTS FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006); JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* (2006)) (noting the end of the Cold War as a formation point for a pro-market consensus in the discussion of economic globalization).

<sup>11</sup> See JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* 277–78 (2006) (reiterating that the Cold War necessitated collaboration between nations for development responsibility); Howse, *supra* note 10, at 1529 (discussing the dynamic struggle between right and left governmental policies at the close of the Cold War).

<sup>12</sup> See Esty, *supra* note 3, at 1493 (recognizing that national governments cannot singularly address the problems associated with globalization and must work collaboratively for the most effective response).

collaboration in addressing longstanding needs in developing countries.<sup>13</sup>

This increased need for extensive collective financing, when coupled with a loss of confidence in the established institutions charged with the primary responsibilities for collective development finance, presents a conundrum. How should donors willing to pool their funds to address global and other problems in developing countries proceed when they have lost faith in the institutions that handle such financing? This is the question I examine in this Article.

I analyze this conundrum from the point of view of: what will it take to create collective financing efforts that optimize the likelihood that monies pooled by donors for a collective purpose will be applied to that purpose? This focus is not intended, however, to ignore or neglect the fact that the question of overarching importance is whether these financing efforts provide meaningful development assistance to their third-party beneficiaries—the citizens of the developing countries that these collective financing efforts are created to serve. But I take the view that the development effectiveness of these efforts and the efficiency, equity, transparency, and accountability with which they disperse their resources are inextricably intertwined. Taking measures to lower the agency costs and raise the accountability by which these efforts discharge their goals is not an exercise which takes place independent of the ultimate beneficiaries of these efforts. It requires their involvement and ownership of the process and that involvement and ownership is a crucial step in these efforts achieving their goals.

As it currently operates, I maintain that the ad hoc special-purpose fund approach is reactive and lacks a coherent, unifying vision of how to meet today's development challenges. The funds that have been created fill a need, but they are a fragmented, sub-

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<sup>13</sup> See *How We Classify Countries*, WORLD BANK, <http://data.worldbank.org/about/country-classifications> (last visited Aug. 16, 2010) (noting that the World Bank classifies countries with a Gross National Income per capita under \$12,196 as "developing"). See also JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* 290 (2005) (discussing calculations for international development through collaboration among World Bank member nations); Howse, *supra* note 10, at 1541 (citing JOSEPH STIGLITZ, *MAKING GLOBALIZATION WORK*, *supra* note 11)) (recognizing that these needs, in addition to global problems, include the needs borne of conflict and abject poverty).

optimal response to that need. They suffer from several deficits ranging from governance gaps and lacunae in accountability to uncertain status in the international political and legal order—deficits that generate new risks and costs for the international aid architecture. Therefore, I claim that we need a new approach.

I base my claim on an analysis of the agency costs,<sup>14</sup> accountability gaps, and other shortcomings that inhere in three major global special purpose funds that precede the Green Climate Fund and which will likely serve as precedents for it—the Global Environment Facility Trust Fund (“the GEF Trust Fund”), the Education For All Fast Track Initiative Catalytic Trust Fund (“the Education Fund”) and the Global Fund to Fight AIDS, Tuberculosis and Malaria (“the Global Fund”). I show how these three funds take two distinct approaches to limiting donors’ reliance on the World Bank or U.N. to effectuate these funds’ mandates and why, for differing reasons, neither approach offers an optimal mechanism for setting up a collective financing initiative.

In advocating for a new approach, I aim for a solution that will enable special-purpose funds to operate in sync with—rather than as bypasses to—those institutions. I propose that change be considered in two stages. In the immediate term, I argue that the contributions that special purpose funds make to international development should be strengthened by addressing the

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<sup>14</sup> The term “agency costs” refers to the losses and costs donors incur when they convey funds to an intermediary for the benefit of a developing country and the World Bank or U.N. then engages in undesired independent action or does nothing at all. “Agency costs” also refer to the costs donors incur monitoring the intermediary. See Darren G. Hawkins et al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS*, 3, 9 (Darren G. Hawkins et al. eds., 2006) (noting that “[p]rincipals incur agency losses or costs when agents engage in undesired independent action or when they themselves expend resources to contract with or monitor and control those agents”). “Agency costs” is also a term in law and economics scholarship on third-party financing arrangements. See Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 636–37 (2004).

[I]n economic rather than legal parlance, agency problems are caused by the impossibility of complete contracting when one party (the agent) has discretionary and unobservable decision-making authority that affects the wealth of another party . . . . [U]nless there is a perfect correlation between the agent’s effort and the project’s observable profits . . . it will be difficult for the principal to prevent shirking by the agent . . . . The losses to the parties that stem from such a misalignment of interests are called agency costs.

*Id.* (internal citations omitted).

governance and other deficits that arise in these funds' structures. I maintain that efforts to strengthen these funds should be informed by an understanding of the task at hand, drawn from principles of principal-agent theory<sup>15</sup> and accountability theory,<sup>16</sup> as applied to third-party financing arrangements. In the longer term, I argue that the popularity of these special purpose funds as a form of collective finance points to a need to redesign key aspects of the way the U.N. and the World Bank do business. If such reform occurs, those institutions can serve as effective facilitators and vehicles of collective finance rather than as pillars of an outdated model that has to be circumvented. In support of my argument, I make preliminary suggestions for the kind of short-term and long-term changes that I believe are warranted.

To date, the theoretical underpinnings of these special purpose funds and their implications for the international legal order have been neglected. This neglect occurs even though these funds give rise to the same issues of legitimacy and accountability as the World Bank and U.N., about which there is an extensive literature.<sup>17</sup> Thus, this Article fills a gap in the legal scholarship on international development finance. Furthermore, as billions of dollars pass annually from the developed world to the developing world through these initiatives,<sup>18</sup> and the Green Climate Fund

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<sup>15</sup> See Milner, *supra* note 4, at 10 (exploring "variations in the pattern of multilateral aid giving over time and across countries using this principal-agent theory of multilateral allocation"); Barnett and Finnemore, *supra* note 3, at 705 (describing the principal-agent theory and its application to analyzing the autonomy of international organizations).

<sup>16</sup> See Grant & Keohane, *supra* note 3, at 41 (discussing the role of accountability mechanisms in relation to various actors in global politics and the various conditions necessary for accountability).

<sup>17</sup> See JOHN W. HEAD, LOSING THE GLOBAL DEVELOPMENT WAR 49-62 (2008) (detailing the origins and consequences of the global economic organizations' role in the "Global Development War"); Pincus & Winters, *Preface*, *supra* note 3, at vii-x (prefacing academic responses to the "reinvention" of the World Bank to better serve poor nations); NGAIRE WOODS, THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS 22-38 (2006) (discussing a brief history of the World Bank and the IMF); de Senarclens, *supra* note 1, at 9 (discussing the social and economic regulatory role of the United Nations); BARKIN, *supra* note 1, at 105-06 (arguing that "[t]he World Bank, as a regime, has been criticized from both efficiency and legitimacy perspectives").

<sup>18</sup> WORLD BANK, A MANAGEMENT FRAMEWORK FOR WORLD BANK ADMINISTERED TRUST FUNDS at i, World Bank Doc. 41063 (2007) [hereinafter WB TRUST FUNDS MANAGEMENT FRAMEWORK], available at [http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2007/11/01/000020439\\_20071101164945/Rendered/PDF/410630R200710198.pdf](http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2007/11/01/000020439_20071101164945/Rendered/PDF/410630R200710198.pdf) (stating that over \$4.4 billion worth of

gears up to expand this form of finance to an unprecedented level,<sup>19</sup> discussing the elements of an optimal collective financing approach brings a theoretical optic to bear on an important policy goal.

Two starting premises underpin my argument. First, regardless of whether one believes that the developed world has a moral or ethical obligation to provide development assistance to the developing world,<sup>20</sup> all can agree on the importance of having an infrastructure that maximizes the likelihood that the provided assistance will reach its intended beneficiaries. Second, I proceed on the basis that providing the optimal airtight delivery mechanism falls squarely within the remit of the international legal order.<sup>21</sup> All of development's stakeholders rely on the legal order

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disbursements under trust funds were managed by the World Bank Group in 2002). Ilias Bantekas' recent monograph is one isolated, useful and timely exception to this neglect. ILIAS BANTEKAS, *TRUST FUNDS UNDER INTERNATIONAL LAW: TRUSTEE OBLIGATIONS OF THE UNITED NATIONS AND INTERNATIONAL DEVELOPMENT BANKS* (2009).

<sup>19</sup> Cancún Accord, *supra* note 7, ¶ 8-10 (establishing the Green Climate Fund, which called for signing nations to significantly increase their contributions aimed at reducing worldwide greenhouse gas emissions).

<sup>20</sup> For discourse in favor of such a moral or ethical obligation, see AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 8-10 (1999) (advancing the norms, values and principles associated with development); PETER SINGER, *PRACTICAL ETHICS* 218-46 (2d ed. 1979) (arguing that developed countries have an ethical obligation to assist developing countries). For the contrary view, see ROBERT J. BARRO, *GETTING IT RIGHT: MARKETS AND CHOICE IN A FREE SOCIETY* (1996) (emphasizing the role of markets over governments or assistance as the engine of economic growth and development). Support for the existence of a moral imperative to provide aid does not preclude recognizing that many other motivations also drive aid. See Milner, *supra* note 4, at 108 (noting that the literature on donor motivation points to two main motivations for aid: "the satisfaction of recipient needs or of donor political goals" with donor interests being the dominant motive). Furthermore, this support does note that aid has a checkered history and can have detrimental effects. See generally DAMBISA MOYO, *DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA* (2009) (arguing that aid to African nations is counter-productive and proposing alternatives such as microfinance and revised property laws). Others argue forcefully that development aid is essential to global economic stability, pointing out that developing countries face challenges they cannot handle on their own. See PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* (2007) (arguing that if failed states are ever to be helped, the G8 will have to adopt preferential trade policies, new laws against corruption, new international charters, and carefully calibrated military interventions); SACHS, *supra* note 13, at 56-66 ("[E]ight major categories of problems can cause an economy to stagnate or decline.").

to provide the infrastructure within which development finance occurs.

This Article is organized as follows. Section 2.1 shows the expanding range of needs that collective finance efforts meet and the approaches on which donors rely to provide such finance. I show how two competing models have emerged from donors' efforts to find alternatives to the World Bank and the U.N. Section 2.2 details the parameters of these models. The first model is a trust fund set up under the auspices of the World Bank. This model's donor-friendly governance structure allows the donors to take charge of allocating the fund's assets. I refer to this model as a "Quasi-Entity Fund". The other model consists of a stand-alone fund set up as a legal entity under a national law regime. I refer to this model as a "National Law Entity". I show how both models rely on the World Bank and the U.N. to perform certain functions but differ from an approach that gives those institutions additional funds directly with broad discretion to address additional causes as they see fit.

Section 3 critiques these models. I argue that the theoretical logic of the Quasi-Entity Fund fails due to the extent of the model's continued dependency on the World Bank. I show how this dependency causes such funds to be dominated by the World Bank's lending agenda<sup>22</sup> rather than by the agenda of the donors

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<sup>21</sup> I refer here to the coordinating role of the legal order. See e.g., Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19-72 (David M. Trubek & Alvaro Santos eds., 2006) (arguing that "[l]egal institutions and ideas have a dynamic, or dialectical, or constitutive relationship to economic activity").

<sup>22</sup> Pincus & Winters, *Reinventing the World Bank*, *supra* note 3, at 24 (describing the highly centralized nature of the World Bank and how a voluntary surrender of control is unlikely); WOODS, *supra* note 17, at 212 ("Each member government, and the IMF and World Bank, must balance private initiatives with public purpose, weighing competing priorities and making decisions which create winners and losers."); BARKIN, *supra* note 1, at 137 (discussing how developing countries are receiving greater decisional power in international organizations, though this change is "concentrated in a small group of big and influential developing countries, led by China and India"); STAFF OF S. COMM. ON FOREIGN RELATIONS, 111TH CONG., REP. ON THE INTERNATIONAL FINANCIAL INSTITUTIONS: A CALL FOR CHANGE (Comm. Print Mar. 10, 2010) [hereinafter Senate Committee Report] available at [http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fforeign.senate.gov%2Freports%2Fdownload%2F%3Fid%3D92182c41-3b05-45f8-99d9-59d3034485f2&ei=UHxxTOvsGML\\_lgfGsdixDw&usq=AFQjCNEqYLyrsnMsBD4z4Ifpm5I1SebOKA](http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBIQFjAA&url=http%3A%2F%2Fforeign.senate.gov%2Freports%2Fdownload%2F%3Fid%3D92182c41-3b05-45f8-99d9-59d3034485f2&ei=UHxxTOvsGML_lgfGsdixDw&usq=AFQjCNEqYLyrsnMsBD4z4Ifpm5I1SebOKA); Galit Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 AM. J. INT'L L. 647, 682 (2009) (discussing how the decision

who created the fund, or the agenda of the fund's beneficiaries—a result this model was specifically designed to avoid. I further show that the model's governance structure as currently conceived gives rise to several significant gaps in accountability<sup>23</sup> with potentially negative outcomes for all stakeholders.

I argue that the theoretical logic of the National Law Entity has promise. It succeeds in avoiding some of the agency costs that donors would incur if they put these resources under the direct control of the U.N. or the World Bank. The flexibility of its structure allows for greater input from beneficiary countries than occurs under the governance structures of those institutions. I maintain, however, that this model is not a complete answer to the need for improved mechanisms for collective finance. To date, this model has depended on existing institutions agreeing to cooperate with the National Law Entities in discrete but essential ways. As these entities increase in size and scope, however, and begin to look like competitors of existing institutions, donors cannot count on that cooperation being indefinitely available. Further, I point out that although donors may be committed to providing financial assistance for a particular purpose, they may not want to commit to the degree of responsibility and expense involved in this model. Lastly, I show that since special interest funds do not have legal status and capacity under international law, they may face obstacles that prevent them from operating optimally.

Section 4 sounds a call for change. The new collective finance models are symptoms of a larger issue that needs a long-term solution; specifically, that the institutions charged with primary responsibility for international development finance are not the kind of institutions the international community needs or wants anymore. Any redesign of the interrelationship between the phenomenon of these special-purpose funds, the U.N. and the World Bank, however, will have to be tackled on a two-track basis: (1) a long-term solution with a new vision compatible with the new

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making process of the World Bank affected its decision not to adopt a human rights policy).

<sup>23</sup> These gaps include, but are not limited to, fiscal accountability, defined by Grant and Keohane as the "mechanism through which funding agencies can demand reports from, and ultimately sanction, agencies that are recipients of funding." Grant and Keohane, *supra* note 3, at 36. Grant and Keohane note that this form of accountability is particularly important for "organizations such as the United Nations and the World Bank, which rely on government appropriations to fund substantial parts of their activities." *Id.*

world order, and (2) a more immediate solution comprised of various changes to make special purpose funds more effective in the interim. I make some preliminary suggestions for the kind of short-term and long-term changes advocated.

The long-term approach must inevitably entail an overhaul of the way in which the U.N. and the World Bank address the needs that special purpose funds serve. The more immediate approach, focused on making special purpose funds work better, would involve several incremental but cumulative changes to the existing models. I propose that these include creating a new institution—an international development fund manager—the sole function of which would be to provide the financial management services required for collective financing. I also suggest expanding the range of options upon which donors can draw to create autonomous collective financing efforts for development in both domestic and international law.

In conclusion, my aim in filling the gap in legal scholarship on collective financing initiatives for development is to stimulate debate about the best way to create a framework for collective financing that meets the needs of the new world order, better serves the interests of all of development's stakeholders, and facilitates the delivery of funds to the purposes and people that depend upon them.

## 2. THE COLLECTIVE FINANCE CHALLENGE

### 2.1. *Part I of the Collective Finance Challenge*

#### 2.1.1. *An Exponential Growth in Demand*

Globalization<sup>24</sup> generates a significant demand for collective financing for development. Critical global issues—including climate change, infectious diseases and financial crises—emerge as byproducts of globalization<sup>25</sup> and are especially acute in developing countries. Developing countries lack the resources to address these issues, but a failure to act puts the whole world in

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<sup>24</sup> See BARKIN, *supra* note 1, at 7 (discussing globalization in the realm of international governance); Howse, *supra* note 10, at 1529 (reviewing various claims about the origins and theoretical end of globalization).

<sup>25</sup> See Esty, *supra* note 3, at 1500 (noting that globalization gives rise to a point of interconnectedness as unintended consequences of policy choices, e.g., the open borders of free trade and “free travel create an exposure to the spread of disease, requiring a commitment to coordinated policy response”).

jeopardy.<sup>26</sup> Moreover, no single donor country can alleviate these issues alone.<sup>27</sup> Accordingly, global problems create a need for extensive collective financing and a dynamic pooling of up-to-date knowledge on treatments, causes, effects, and cures.<sup>28</sup>

Globalization has also spurred collective financing in other aspects of development aid. At the start of the new millennium, globalization's contribution to new levels of prosperity in the developed world generated a more magnanimous and egalitarian approach to development.<sup>29</sup> This led to a highly public commitment on the part of donor countries to "eradicate" extreme poverty by 2015 and to work "in partnership" with local governments and non-government entities to do so. This commitment was memorialized in the Millennium Development Goals ("MDGs").<sup>30</sup> The end of the Cold War, which sparked the process of globalization,<sup>31</sup> also facilitated a norm of cooperation among donor countries in the aid effort. For example, this norm is

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<sup>26</sup> *Id.* at 1495-96 (discussing the benefits of global governance and adherence to a set of roles that are embodied in administrative law).

<sup>27</sup> See generally, Jeremy Heimans, *Multifactor Global Funds: New Tools to Address Urgent Global Problems 1* (UN Univ. World Inst. For Dev. Econ. Research, Research Paper No. 2004/47, 2004), available at [http://www.wider.unu.edu/publications/working-papers/research-papers/2004/en\\_GB/rp2004-047/\\_files/78091745868055742/default/rp2004-047.pdf](http://www.wider.unu.edu/publications/working-papers/research-papers/2004/en_GB/rp2004-047/_files/78091745868055742/default/rp2004-047.pdf) (considering how desirable multifactor global funds are for resource allocation and arguing that they promise to mobilize more public and private resources).

<sup>28</sup> See Esty, *supra* note 3, at 1500-01 (noting that supranational policymaking, of which one can view multilateral aid as a subset, can be advisable for many reasons, including the fact that "[m]any policy problems have multiple dimensions, making response strategies that draw on both decentralized and centralized information optimal").

<sup>29</sup> SACHS, *supra* note 13, at 211-13 (listing the eight goals and eighteen targets of the Millennium Development Goals).

<sup>30</sup> At the United Nations Millennium Summit, representatives of most of the world's governments and its leading development institutions gathered at the Millennium Assembly of the United Nations to agree upon priorities for development aid for the new millennium, and agreed upon eight goals, the "Millennium Development Goals," the eighth of which expressly acknowledged the importance of achieving development through partnerships. Millennium Declaration G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

<sup>31</sup> See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 42 (2004) (opining that "[a]s the bipolar state system of the Cold War disappeared and nonstate, sub-state, and supranational actors rode the tide of globalization, pundits and many scholars began heralding the era of complex, multilevel, global governance, tied together by networks").

reflected in the Paris Declaration on Aid Harmonization, in which donor countries agreed to harmonize their approaches to aid.<sup>32</sup>

In addition to generating and facilitating an increased need for collective financing, globalization also brings new donors (and new recipients) into the international development fold. These new actors consist most notably of non-governmental organizations ("NGOs"), whose explosive growth is generally attributed to globalization.<sup>33</sup> Numerous NGOs are now extensively involved in development as implementers of programs,<sup>34</sup> as consultants to and observers of policy dialogues, and as watchdogs over countries' aid commitments.<sup>35</sup> Other new actors include foundations that are significant development aid donors, such as the Gates Foundation and the Soros Foundation,<sup>36</sup> and for-profit entities, such as pharmaceutical companies engaged with donor governments in subsidized arrangements to produce

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<sup>32</sup> See, e.g., Paris Declaration on Aid Effectiveness: Ownership, Harmonization, Alignment, Results and Mutual Accountability (Mar. 2, 2005), available at <http://www.oecd.org/dataoecd/11/41/34428351.pdf>. Later, in 2008, participating countries and organizations agreed to the Accra Agenda for Action, which was also non-binding. Accra Agenda for Action, available at <http://www.oecd.org/dataoecd/11/41/34428351.pdf>.

<sup>33</sup> Commentators also point to the role of the internet in facilitating NGOs' communication as a contributing factor in NGOs' growth, with the internet being seen as one of the cornerstones of globalization. See Jessica T. Mathews, *Power Shift*, 76 FOREIGN AFF. 50, 51-67 (1997) (noting that the end of the Cold War brought a novel redistribution of power among states, markets and civil society, spurred on by the computer and telecommunications revolution); Peter J. Spiro, *Accounting for NGOs*, 3 Chi. J. Int'l L. 161 (2002) (observing that the advent of globalization has empowered NGOs).

<sup>34</sup> See LAWRENCE ZIRING ET AL., THE UNITED NATIONS: INTERNATIONAL ORGANIZATION AND WORLD POLITICS 82-83 (4th ed. 2005) (discussing the role of NGOs in development policy decisions and the implementation of social and economic development programs).

<sup>35</sup> See *id.* at 82 (noting that the advice and support of NGOs can be crucial to the overall coordination of development programs); Milner, *supra* note 4, at 120 (describing how NGO endorsement and evaluation of aid programs facilitates the strength and success of development programs).

<sup>36</sup> The Bill and Melinda Gates Foundation gave a combined total of over \$2.28 billion to global development and health programs in 2008. See BILL & MELINDA GATES FOUND., 2008 ANNUAL REPORT 23 (2008), available at <http://www.gatesfoundation.org/annualreport/2008/Documents/2008-annual-report.pdf>. The same year, the Soros Foundations reported over \$77 million in international initiatives. See SOROS FOUND., 2008 NETWORK REPORT 88 (2008), available at [http://www.soros.org/resources/articles\\_publications/publications/ar08\\_20090720/ar08\\_20090911.pdf](http://www.soros.org/resources/articles_publications/publications/ar08_20090720/ar08_20090911.pdf).

the medications and vaccines that developing countries need.<sup>37</sup> The combination of all these factors has led to an exponential increase over the last fifteen years in the number of collective financing efforts created to address global problems and other development needs.<sup>38</sup> The Green Climate Fund is poised to become one more.

The programs and activities that these existing efforts finance are as diverse as the world they serve. They address global problems and critical development needs. They also include efforts to pilot innovative forms of financing to address these needs, such as microfinance and carbon finance.<sup>39</sup> These efforts,

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<sup>37</sup> See, e.g., *Innovative Partnership*, GLOBAL ALLIANCE FOR VACCINES AND IMMUNIZATION ("GAVI"), [http://www.gavialliance.org/about/in\\_partnership/index.php](http://www.gavialliance.org/about/in_partnership/index.php) (last visited July 27, 2010) (representing a global partnership, whose members include "governments, private sector philanthropists . . . the financial community, developed and developing country vaccine manufacturers [and] research and technical institutes," dedicated to providing immunizations to children worldwide); *Why IFFIm?*, International Financing Facility for Immunizations ("IFFIm"), <http://www.iff-immunisation.org> (last visited July 27, 2010) (raising over \$3 billion in funds for GAVI's immunization programs). Many other kinds of corporations are also part of collective development aid initiatives, such as efforts to combat climate change and child health. See, e.g., *Prototype Carbon Fund*, WORLD BANK CARBON FINANCE UNIT, <http://wbcarbonfinance.org/Router.cfm?Page=PCF> (last visited July 28, 2010) (partnering several Japanese utility companies and other private companies with six governments acting collectively to reduce greenhouse gas emissions).

<sup>38</sup> Reports of the rapid increase in the World Bank's involvement, as the preeminent international development entity, evidence the growing importance of this form of financing. See BARKIN, *supra* note 1, at 103 ("The World Bank is the world's premier development lending institution."). The exponential growth of this financing is well documented by the World Bank. See, e.g., WORLD BANK OPERATIONS EVALUATION DEPT., THE WORLD BANK'S APPROACH TO GLOBAL PROGRAMS: AN INDEPENDENT EVALUATION, PHASE 1 REPORT para. 3.13, at 14 (2002) [hereinafter OED PHASE I REPORT], available at [http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/F97A9075E643981785256C0700753005/\\$file/GPPP.pdf](http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/F97A9075E643981785256C0700753005/$file/GPPP.pdf) (noting that the World Bank's portfolio of funds for such programs increased from \$383 million in 1997 to \$515 million in 2001); see also WB TRUST FUNDS MANAGEMENT FRAMEWORK, *supra* note 18, para. 1.02, at 1 (noting that the World Bank administers funds for programs financed by over 290 different donors, including both governments and private sector (nonprofit and for-profit) entities). See generally BANTEKAS, *supra* note 18, at 132 (noting the World Bank's practice of establishing funds after a natural disasters and other large scale emergencies to address the emergency); Sophie Smyth, *World Bank Grants in a Changed World Order: How Do We Referee this New Paradigm?*, 30 U. PA. J. INT'L L. 483, 518-26 (2008) (detailing the grants the World Bank issues from trust funds, IDA resources and the World Bank's net income).

<sup>39</sup> See *Afghanistan Reconstruction Trust Fund*, WORLD BANK, [http://siteresources.worldbank.org/INTAFGHANISTAN/Resources/Afghanista-n-Reconstructional-Trust-Fund/ARTF\\_information.pdf](http://siteresources.worldbank.org/INTAFGHANISTAN/Resources/Afghanista-n-Reconstructional-Trust-Fund/ARTF_information.pdf) (follow "ARTF

respectively, make funds available to new recipients and expand the pool of available financing. In size, they range from a few hundred thousand dollars to several billion dollars.<sup>40</sup> In the aggregate, these efforts play a vital role in helping narrow the eternal gap<sup>41</sup> between the size of the developing world's needs and the size of developed countries' development aid budgets.

### 2.1.2. Agency Costs and Collective Finance

The rapid growth and current prevalence of collective financing shows a strong commitment to collective financing but masks the fact that the international legal framework for this financing fails to provide an adequate means for curbing agency costs; the bugaboo of the kind of third party financing arrangements that these collective efforts involve.<sup>42</sup> A closer look

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Information" hyperlink) (last visited July 27, 2010) (providing post-conflict reconstruction assistance through joint efforts between the World Bank and the Afghani government); *About Cities Alliance*, CITIES ALLIANCE, <http://www.citiesalliance.org/ca/about-cities-alliance> (last visited July 27, 2010) (creating a global coalition of cities working together to reduce poverty and eradicate slum conditions); *About Us*, CONSULTATIVE GROUP TO ASSIST THE POOR ("CGAP"), <http://www.cgap.org/p/site/c/aboutus/> (last visited Mar. 2, 2011) (increasing access to finance for poor populations); *Carbon Finance at the World Bank*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/EXTCARBONFINANCE/0,,menuPK:4125909~pagePK:64168427~piPK:64168435~theSitePK:4125853,00.html> (last visited Mar. 18, 2011) (program piloted the purchase of greenhouse gas emission reductions for projects in developing countries); CARIBBEAN CATASTROPHIC RISK INSURANCE FACILITY, <http://www.ccrif.org> (last visited July 27, 2010) (allowing Caribbean governments to purchase natural disaster insurance at low prices); *Community Development Carbon Fund*, WORLD BANK, <http://go.worldbank.org/QNLHGWLPS0> (last visited July 27, 2010) (providing carbon financing to poorer areas in the world). In addition to these global initiatives discussed, see, for example, smaller initiatives such as the Critical Ecosystem Partnership Fund and the International Coral Reef Initiative, which are funded by a combination of NGOs, governments, and intergovernmental organizations. See *About CEPF*, CRITICAL ECOSYSTEM PARTNERSHIP FUND, [http://www.cepf.net/about\\_cepf/Pages/default.aspx](http://www.cepf.net/about_cepf/Pages/default.aspx) (last visited July 27, 2010) (providing grants to NGOs and private sector partners to protect critical ecosystems); *ICRI at a Glance*, INTERNATIONAL CORAL REEF INITIATIVE, <http://www.icriforum.org/about-icri> (last visited July 27, 2010) (preserving coral reefs and related ecosystems).

<sup>40</sup> See WB TRUST FUNDS MANAGEMENT FRAMEWORK, *supra* note 18, para. 2, at i (outlining the variability in size of trust funds and discussing the steady growth of overall trust fund disbursements in recent years).

<sup>41</sup> See SACHS, *supra* note 13, at 273, 283 (discussing a five-part poverty reduction strategy and listing donors supporting the U.N. Millennium Project).

<sup>42</sup> See Sitkoff, *supra* note 14, at 636-38 (arguing that agency costs are a product of post-contractual asymmetric information).

at the tasks involved in creating and running a collective financing effort illustrates the challenges these efforts present, both at the practical and theoretical level.

#### 2.1.2.1. *The Source of Agency Costs*

The creation of a new collective financing effort requires both financial administration and development-focused activities,<sup>43</sup> two tasks that require different capacities. Financial administration is a banking task that does not require development expertise. In order for a group of donors to pool their resources in a central fund to finance the provision of assistance to developing countries, they must either appoint one of their group or retain a third party to serve as the financial administrator of the funding pool.<sup>44</sup> Financial administration expertise is required to administer the donors' pool of funds. For example, someone must be responsible for collecting donors' contributions, investing them pending their disbursement, disbursing them in accordance with the donors' instructions, and reporting regularly to donors on their use.<sup>45</sup> In undertaking these functions, the financial administrator is generally regarded as having undertaken certain fiduciary duties to the donors.<sup>46</sup>

Traditionally, donor countries do not manage each others' funds.<sup>47</sup> Instead, they generally use a third party to serve as a

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<sup>43</sup> See Sophie Smyth, *A Practical Guide to Creating a Collective Financing Effort to Save the World: The Global Environment Facility Experience*, 22 GEO. INT'L ENVTL. L. REV. 29, 35-36 (2009) (discussing the choices parties have to make when creating a collective financing initiative).

<sup>44</sup> See *id.* at 97 (discussing how the structure of successful collective finance necessitates the appointment of a financial manager to facilitate the collective financing efforts of donors).

<sup>45</sup> See *id.* (describing the responsibilities for the financial manager of a collective fund).

<sup>46</sup> See BANTEKAS, *supra* note 18, at 27 (noting that under international law, trusts give rise to relationships that are more akin to contractual relationships than to the relationships based on fiduciary duties drawn from the common law of trusts, but that the common law principles of trust still provides useful analogies that can be drawn upon). See generally Joseph Gold, *Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles*, 72 AM. J. INT'L L. 856, 860-65 (1978) (noting, for example, that the duty of loyalty prohibiting the fund manager from investing the donors' assets in securities owned or controlled by the fund manager applies to intergovernmental trusts).

<sup>47</sup> As part of their new commitment to harmonize aid approaches, some donor governments manage the aid funds of others, pursuant to collective approaches. See generally Paris Declaration on Aid Effectiveness, *supra* note 32; Accra Agenda for Action, *supra* note 32 (increasing joint efforts to direct

financial manager for a new development effort.<sup>48</sup> Donor countries are likely to seek an intergovernmental organization to act as a third party. While commercial banks could also serve this role, they are more expensive<sup>49</sup> and carry a liquidity risk. Moreover, they are likely unfamiliar with the idiosyncrasies of the governmental aid appropriations processes, which augurs in favor of having an intergovernmental entity perform these functions.<sup>50</sup>

The development task involved in a collective financing effort is distinct from the financial housekeeping involved in managing a fund's financial resources. It consists of designing, appraising, executing, supervising and monitoring programs and projects intended to produce the results for which donors provide resources.<sup>51</sup> The development task requires extensive development expertise and, depending on the scale of the activities involved, will likely engage multiple layers of intermediaries, including international and regional intergovernmental organizations, bilateral government aid agencies, developing country government agencies and NGOs.<sup>52</sup>

Both the financial administration task and the development task necessitate reliance on third parties as intermediaries, or middlemen, and thereby give rise to agency cost concerns. Faced with tasks that donor countries cannot perform themselves, they

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involvement of donor countries in delivering and managing aid); Norwegian Agency for Development Cooperation, NORDIC PLUS: PRACTICAL GUIDE TO DELEGATED COOPERATION, Annex 2 at 31 (2006), available at <http://www.norad.no/en/Tools+and+publications/Publications/Publication+Page?key=109585> (providing an overview of the financial management requirements of the Nordic Plus donors to increase aid effectiveness).

<sup>48</sup> See BANTEKAS, *supra* note 18, at 6-7 (describing an international trust fund in which the trustee, independent and distinct from the donor, manages the funds for the benefit of the beneficiary country).

<sup>49</sup> Although the World Bank charges a trust administration fee, it is set at a below-market rate. See WB TRUST FUNDS MANAGEMENT FRAMEWORK, *supra* note 18, at 42 (discussing the World Bank's standard fees).

<sup>50</sup> See Smyth, *supra* note 43, at 33 (noting that managing a collective financing effort "demands an affinity with the idiosyncratic, at times arcane, appropriations processes of national governments" and international institutions).

<sup>51</sup> See e.g., *Project Cycle*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20120731~menuPK:41390~pagePK:41367~piPK:51533~theSitePK:40941,00.html> (last visited Mar. 2, 2011) (detailing the World Bank's process for administering loans "to low and middle-income countries to support development").

<sup>52</sup> See Milner, *supra* note 4, at 115 (noting that foreign aid, "[l]ike all public spending, it involves long chains of delegation").

must choose either to (i) engage an existing entity or entities to perform those tasks, including, if necessary, amending such entities to equip them to serve, (ii) create a new entity or entities of their own design, or (iii) adopt a hybrid approach that uses selected aspects of existing entities but sets up a new mechanism to perform the functions that donors do not want the existing entity to perform.<sup>53</sup> Donors' key concern is to find a mechanism that maximizes the likelihood that their resources will be used for the purposes for which they are making them available. This is the Holy Grail of any third-party financing arrangement.<sup>54</sup>

#### 2.1.2.2. Agency Costs and Principal-Agent Theory

Situating the donors' quest in the language of principal-agent theory, as articulated and applied to international development finance by Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney,<sup>55</sup> the key aspect of agency costs that

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<sup>53</sup> See *id.* at 114–22 (analyzing the conditions under which donor countries will opt to provide multilateral rather than bilateral aid); Esty, *supra* note 3, at 1510 (“National governments must contract for decision-making authority to be lodged at the supranational level. Nation-states will tend to engage in such delegation when they believe that it is in their best interest to do so, based on potential gains . . . in responding to collective action problems.”).

<sup>54</sup> See Mona M. Lyne et al., *Who Delegates? Alternative Models of Principals in Development Aid*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 41, 43–44 (Darren G. Hawkins et al. eds., 2006) (proposing methods to determine whether and how well international organizations comply with the instructions of their principals). While I recognize that the donors' ultimate goal is, of course, for a development result to be achieved (such as the containment of HIV/AIDS, global environmental degradation, or the attainment of universal primary education), assessing the development effectiveness of these funds, which requires a development analysis rather than a legal analysis, is beyond the scope of this Article's inquiry. Concerns have been raised about the fragmentation of aid resulting from creating multiple special purpose funds. See Shampa Biswas, *W(h)ither the Nation-state? National and State Identity in the Face of Fragmentation and Globalisation*, 16 GLOBAL SOC'Y 175, 177, 194 (2002). But these concerns must be weighed against the fact that special purpose funds generate a support for aid efforts that would not otherwise exist. See Heimans, *supra* note 27, at 11–13 (arguing that multi-actor global funds are magnets for additional funding and are created under the expectation that they will be able to mobilize additional resources that could not be raised through existing national or international financing channels).

<sup>55</sup> See Darren G. Hawkins et al., *Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 3, 4–8 (Darren G. Hawkins et al. eds., 2006) [hereinafter Hawkins et al., *Delegation Under Anarchy*] (arguing that principal-agent theory views international organizations as the agents of the principal member states which create them, and finds that the rules governing such

concerns development aid donors is *agency slack*. Agency slack refers to independent action by the agent—the entity or entities to which donors entrust their pooled resources—that is undesired by the donors.<sup>56</sup> In searching for an effective financing vehicle, therefore, donors are looking to minimize the likelihood of, and opportunity for, the occurrence of slack.<sup>57</sup>

Slack may occur in two primary forms: “*shirking*, when an agent minimizes the effort it exerts on its principal’s behalf, and *slippage*, when an agent shifts policy away from its principal’s preferred outcome and towards its own preferences.”<sup>58</sup> Principals generally use one or more of three standard mechanisms to control agency slack.<sup>59</sup> The first method requires crafting the principal-agent relationship as a rule-based delegation by the principal to the agent, thereby limiting the agent’s discretion. The second method involves the establishment of *ex post* monitoring and reporting requirements.<sup>60</sup> The third requires principals to select agents with preferences similar to their own, agents who are, therefore, naturally inclined to act as the principal would if it were implementing the task itself.<sup>61</sup> A principal may also structure the agency relationship so as to rely on internal checks and balances in the agent institution.<sup>62</sup> Lastly, a principal may use carrots and

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organizations are member governments’ efforts to limit opportunities for international organizations to stray from their core mandate).

<sup>56</sup> *Id.* at 8. See also Lyne et al., *supra* note 54, at 43–44 (providing recommendations in response to agency slack).

<sup>57</sup> See Hawkins et al., *Delegation Under Anarchy*, *supra* note 55, at 8 (defining “agency slack”).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 30 (noting the different ways principals sanction agents and principals’ tendency to impose more extensive rules and monitoring arrangements where an agent’s preferences are unknown).

<sup>60</sup> Ex post monitoring and reporting requirements may take the form of direct monitoring of the agent by the principal to identify malfeasance (*police patrols*) or they may rely upon affected parties outside the agency relationship to bring evidence of slack to the principal’s attention (*fire alarms*). *Id.* at 28.

<sup>61</sup> *Id.* at 28–29.

<sup>62</sup> For example, the principal may ask one department in the agent institution to assume responsibility for the development task involved in a collective financing effort but a different department to furnish the principal with financial reports on the fund, so that some internal check occurs within the agent institution. A principal may also empower more than one agent in order to induce competition between them, thereby increasing work productivity to the benefit of the principal. *Id.* at 29–30 (discussing the checks and balances approach).

sticks—budgetary reductions when the agent disappoints, and expansions when the agent completes a desired action.<sup>63</sup> Where a principal doubts that any of these mechanisms or a combination thereof will adequately address agency slack, the principal may appoint a new agent rather than relying on one of the pre-existing options.<sup>64</sup>

When applied to collective development finance, principal-agent theory frames donor countries' options in stark relief. As Hawkins, Lake, Nielson, and Tierney note, "[i]n 'hiring' an agent, a principal can create one of its own, thereby constructing from 'scratch' an organization of her own design, or choose from among a pool of existing entities willing to serve as the agent."<sup>65</sup> Creating a new agent is costly, but likely to produce an agent closer to the preferences and purposes of the principal (here donor principals).<sup>66</sup> Choosing an existing agent, on the other hand, avoids the start-up costs, but the principals may be unable to find an ideal agent that perfectly mirrors their preferences and is optimally designed to perform the appointed task. Realization of this problem becomes particularly likely when delegating to an intergovernmental organization, as there are a limited number of such organizations to choose from.<sup>67</sup>

### 2.1.3. *Curbing the Agency Costs*

In applying the principal-agent theory to donors' quest for a collective financing vehicle, one might think that the most obvious choices among existing entities to serve as donors' agents would be the World Bank and the United Nations, the intergovernmental behemoths of collective financing for development.<sup>68</sup> In fact, however, the story of collective finance for development is a story

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<sup>63</sup> See *id.* at 30 (discussing the carrot-and-stick approach to mitigating the effects of agency slack).

<sup>64</sup> See *id.* at 31 (noting that since control mechanisms are costly and imperfect, it's impossible to fully control all agents and therefore to completely avoid slack).

<sup>65</sup> *Id.* at 25.

<sup>66</sup> See *id.* (weighing the advantages and disadvantages of creating an agent from scratch as opposed to hiring an existing agent).

<sup>67</sup> See *id.* at 19, 26 ("Given a finite pool of possible agents and positive costs of creating new agents, however, the 'exogenous' traits of agents are likely to matter . . .").

<sup>68</sup> See *supra* notes 2–3 (describing functions, policies, and reactions to the World Bank and the U.N.).

of an ongoing quest to find alternatives to these behemoths as agents.

### 2.1.3.1. *Disillusion with Traditional Approaches*

Skepticism about the efficacy of the U.N. and the World Bank precludes either from being regarded as an “ideal agent” to address post-globalization challenges. The causes of this skepticism are multi-faceted, and have resulted in donor governments—or more accurately the citizens of those governments<sup>69</sup>—opposing increased funding for those institutions to assume new mandates.<sup>70</sup> Moreover, recipient governments, eager for greater input in development efforts, increasingly express a similar opposition.<sup>71</sup>

Skepticism about the World Bank stems largely from a concern that, at an operational level, the Bank’s driving force is to make loans, and that this lending imperative permeates and dominates the Bank’s relationship with its borrowing member countries.<sup>72</sup>

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<sup>69</sup> See Milner, *supra* note 4, at 110 (discussing domestic politics and the problems that arise when the donor government and its public differ in interests, as well as how this affects multilateral aid).

<sup>70</sup> See Heimans, *supra* note 27, at 1 (discussing the desirability of multi-actor global funds as “instruments for international financial mobilization, resource allocation and as a form of experimentation in global governance”).

<sup>71</sup> See UN *Climate Change Talks in Cancun Agree a Deal*, BBC NEWS, Dec. 11, 2010, 7:44 ET), <http://www.bbc.co.uk/news/science-environment-11975470> (discussing developed countries’ insistence that the World Bank be a trustee, while other countries were negotiating for a different approach); John M. Broder, *Climate Talks End with Modest Deal on Emissions*, N.Y. TIMES, Dec. 11, 2010, <http://www.nytimes.com/2010/12/12/science/earth/12climate.html> (noting countries’ reluctance to combine many climate change finance efforts under the U.N.).

<sup>72</sup> See Bruce Rich, *The World Bank under James Wolfensohn*, in *REINVENTING THE WORLD BANK* 26 (Jonathan R. Pincus & Jeffrey A. Winters eds., 2002) (giving an overview of former World Bank president James Wolfensohn’s failed efforts to “change the institution’s embedded internal culture from one of loan approval—in which staff were rewarded above all for pushing money”); see also Pincus & Winters, *Reinventing the World Bank*, *supra* note 3, at 22 (noting that the Bank’s incentive structure, which emphasizes new lending and volume over project quality and supervision, has played a role in the lack of development effectiveness of Bank projects); see Sarfaty, *supra* note 22, at 668 (noting that the Bank’s incentive system emphasizes lending targets rather than results on the ground); Senate Committee Report, *supra* note 22, at 4 (noting that the World Bank, like all of the international financial institutions (“IFIs”), “suffer[s] from a ‘pressure-to-lend’ culture that places more emphasis on signing project agreements and getting loans out the door than on actually improving the development level of the borrowing country”).

The force of this lending imperative gives rise to a loss of confidence in the Bank. Although the Bank was originally created to fund post-World War II reconstruction, in the ensuing sixty plus years, its supporters have come to expect it to serve as much more than a well-oiled banking machine.<sup>73</sup> That hope, that the World Bank will be something more—a knowledge bank, a social reformer, an economic advisor, or a voice for the poor—is frequently dashed in the face of findings that the Bank’s internal culture emphasizes getting loans out the door over assuming any of these roles.<sup>74</sup> Repeatedly, these additional development goals end up in irreconcilable tension with the Bank’s desire to make loans.<sup>75</sup> Notwithstanding a wealth of Bank rhetoric to the contrary, when the Bank assumes any of these additional mandates they appear to become subsumed by and subservient to the Bank’s loan approval culture.<sup>76</sup>

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<sup>73</sup> See generally, Devesh Kapur, *The Changing Anatomy of Governance of the World Bank*, in REINVENTING THE WORLD BANK (Jonathan R. Pincus & Jeffrey A. Winters eds. 2002) (discussing the disempowerment of poorer countries in the international arena and the failure of governance structures to effect change); see Pincus & Winters, *Reinventing the World Bank*, *supra* note 3, at 20 (noting that “[a]n institution that is at heart a development bank makes for a rather unlikely ‘voice for the poor’: we would not expect the former to mount a political challenge to the status quo nor the latter to raise money cheaply on the international capital markets” as the World Bank does).

<sup>74</sup> See Pincus & Winters, *Reinventing the World Bank*, *supra* note 3, at 13–15, 20 (noting that the Bank’s rhetoric of acting in partnership actually results in the World Bank calling the shots because it is not a representative organization comprised of people or local communities, but countries).

<sup>75</sup> For example, in a meeting of senior Bank managers with then-President James Wolfensohn in 1996, one manager noted that the Bank has to choose between being a merchant bank whose clients are the governments of the developing countries to which it lends—a relationship in which there is no place for the environment, women in development, poverty alleviation and similar priorities—or being a development bank whose clients are the citizens of the borrowing countries, and who deals with borrowing country governments as agencies with whom the Bank works in order to meet its clients’ needs. See Rich, *supra* note 72, at 52.

<sup>76</sup> See Pincus & Winters, *Preface*, *supra* note 3, at viii (describing the World Bank as a “political organization, keenly aware of the image it projects” and noting that the “World Bank staff . . . account[s] for a surprisingly large share of the published materials on the topic of the World Bank and World Bank reform”); Pincus & Winters, *Reinventing the World Bank*, *supra* note 3, at 14–15 (noting that the Bank’s efforts to transform itself from a development bank into a development agency began in the 1970s when its public pronouncements reflected a significant change in its conception of how the development process should be promoted). Those pronouncements indicated that the Bank no longer saw it as sufficient to transfer capital to viable projects. Instead, development was also seen as

The Bank's pressure-to-lend culture is reinforced by skewed incentives for the staff responsible for the Bank's lending operations who are on the front lines of the Bank's interactions with its borrowing member countries. Evidence suggests that inadequate account is taken of the development effectiveness and sustainability of the projects and programs for which Bank loans are made.<sup>77</sup>

The U.N. is also ill-suited to take on the task of managing new collective financing efforts. As documented by Pierre de Senarclens,<sup>78</sup> structural problems have hampered the U.N.'s effectiveness in social and economic matters since its creation, due in part to its founders' lack of a common vision on the mechanisms and strategies necessary to accomplish its economic progress and social welfare ideals.<sup>79</sup> Its highly fragmented system of agencies, programs, and funds has diluted the effectiveness of any one of

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encompassing a sustained increase in a country's capacity to satisfy social preferences. According to Pincus and Winters, the Bank's embrace of this broader concept of development widened the gap between its rhetoric concerning its mission and its actual performance. *Id.* at 15.

<sup>77</sup> See Rich, *supra* note 72, at 26 (detailing Wolfensohn's changes which actually strengthened made the Bank's accommodation of its corporate and governmental clients and weakened the existing internal mechanisms for control—all of which decreased development effectiveness). In support of this claim, Rich points to the conclusions of an internal Bank review entity called the Quality Assurance Group, which, in 1997, conducted a year-long study of 150 projects and concluded that systemic weakness in the Bank's assessment of borrowing governments' commitment to a project, local capacity, and the more general risks in project implementation had their roots in a Bank culture which generates pressure to lend. *Id.* at 43 (citing World Bank Quality Assurance Group Portfolio Improvement Program, Reviews of Sector Portfolios and Lending Instruments: A Synthesis Draft Internal Report (April 22, 1997)). Further, Rich notes that a sub-report to that 1997 synthesis report—which indicated that only 19% of the Bank's technical assistance projects were performing satisfactorily—concluded that this poor performance resulted from the fact that staff view technical assistance loans as a second-class activity because they do not compare in size and importance to other resource flows and because doing technical assistance work does not gain a staff member recognition from Bank management. See also WOODS, *supra* note 17, at 207, 211 (noting that there are few if any incentives for Bank staff to ensure that the Bank's projects and policies are sustained beyond the short-term lending period, and that the incentives for Bank staff need rewriting); see HEAD, *supra* note 17, at 57 (describing a strong criticism of the World Bank's staffing policies for not appropriately rewarding performance, while utilizing inappropriate promotion criteria).

<sup>78</sup> See de Senarclens, *supra* note 1 (detailing a plethora of problems that have constrained the U.N.).

<sup>79</sup> See *id.* at 26–35 (discussing how structural problems and lack of a unified vision have led to U.N. failure in solving certain social and economic problems).

them and has led to many of them being very poorly funded.<sup>80</sup> Repeated efforts to achieve greater coherence have failed and lack of support for the institution is widespread, not only on the part of the United States (which has denounced the U.N. as an ossified structure) but also on the part of other major powers.<sup>81</sup> This negative image makes the U.N. a poor contender for spearheading new collective financing initiatives despite the fact that its original mandate, Article 55 of the U.N. Charter, contemplated the U.N. taking a leadership role in global development.<sup>82</sup>

### 2.1.3.2. A Search for Alternatives

Consistent with principal-agent theory, the logical response for a group of donors acting as a collective principal<sup>83</sup> who are dissatisfied with an existing agent's capacity or suitability for carrying out their agenda would be to create a new agent, if necessary, constructing from "scratch" an organization of the donors' own design.<sup>84</sup> But the difficulties of garnering support for new initiatives, coupled with the limitations of the international legal order, constrain what donors can do. Often, at the formative stage of a new initiative, broad support may be tentative and uncertain, making donors reluctant to invest in a whole new structure and apparatus. Further, the international legal order has traditionally discouraged the proliferation, and therefore the

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<sup>80</sup> See *id.* at 25, 28 (discussing how the involvement of many nations has added further confusion to many of the problems the U.N. has been charged with solving).

<sup>81</sup> See *id.* at 25-28 (asserting that "Western governments have regularly complained" about U.N. repeat agendas and inefficiency).

<sup>82</sup> See generally U.N. Charter ch. IX, art. 55, available at <http://www.un.org/en/documents/charter/chapter9.shtml> (describing the international economic and social goals, as well as the purposes, of the U.N.).

<sup>83</sup> Principals, like a group of donor countries, which have more than one actor individually or collectively delegating to the same agent are referred to in principal-agent theory as *complex principals*. See Lyne et al., *supra* note 54, at 42. In complex principal situations where a group of actors designs and has authority over a common contract and, having decided amongst themselves, negotiates a contract with an agent, the complex principal is referred to as a *collective principal*. *Id.* at 44. A group of donors setting up a collective financing effort to be administered and implemented by one or more third parties would constitute a collective principal.

<sup>84</sup> See Hawkins et al., *Delegation Under Anarchy*, *supra* note 55, at 25 (arguing that a principal can choose to create its own agent, and while costly, this can lead to an agent whose existence and goals more clearly align with that of the principal).

creation, of new international organizations,<sup>85</sup> although this norm is shifting.<sup>86</sup> For these reasons, collective financing efforts for development have generally not been created as new entities under international law. Instead, the overwhelming norm over the last several years has been for donors to use a new tool—a hybrid approach, whereby they use those aspects of the World Bank and the U.N. that seem useful but set up a different entity to perform the functions that they do not want those institutions to perform (or to have the exclusive right to perform).

This hybrid approach may take one of two distinct legal forms, which co-exist as competing models. The most common form of the hybrid approach, the Quasi-Entity Fund, involves setting up the collective financing effort under the auspices of the World Bank.<sup>87</sup> The other form of the hybrid, the National Law Entity, involves setting up the new collective financing effort as a legal

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<sup>85</sup> See BANTEKAS, *supra* note 18, at 133 (discussing contributing nations and their potential use of trust accounts); Niels M. Blokker, *Proliferation of International Organizations: An Exploratory Introduction in PROLIFERATION OF INTERNATIONAL ORGANIZATIONS: LEGAL ISSUES 14-15* (Niels M. Blokker & Henry G. Schermers eds., 2001) (noting that the majority of analysts emphasize the disadvantages of proliferation); Jose Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT'L L. 324, 324-47 (2006) (discussing the progression of international organizations). Critics of proliferation cite problems of coordination, different interests and inefficiency. See Blokker, *supra*, at 14 (discussing legal issues pertaining to the United Nations); C.W. Jenks, *Co-Ordination a New Problem in International Organization*, 77 *Recueil des Cours* (1950) p. 135-271; C. Wilfred Jenks, *Some Structural Dilemmas of World Organization*, 3 GA J. INT'L & COMP. L. 1, 1-13 (1973) (describing structural problems of international organizations). Some criticism of proliferation is based on a lack of support for international organizations generally. See Alvarez, *supra*, at 343-45 (describing the growing awareness among developing countries that international organizations have not leveled the playing field between developed and undeveloped countries, making the value of international organizations as "neutral" venues questionable).

<sup>86</sup> The trend is shifting towards supporting proliferation. Alvarez, *supra* note 85, at 343 (discussing the troubling future of the international organization). See generally Joel Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470 (1997) (noting the potential for organizations to increase transactional gains, decrease losses and costs, notwithstanding problems of overlapping, competition and conflicting interests).

<sup>87</sup> See BANTEKAS, *supra* note 18, at 26 (noting that the World Bank is the leading trustee of humanitarian projects funded by states). The World Bank's dominant role in this area tracks a broader trend towards the increased dominance of the World Bank and the correlated fading relevance of UN entities in setting the international development agenda. See de Senarclens, *supra* note 1, at 27 (noting that the World Bank and the International Monetary Fund, as the most resource-rich multilateral aid institutions, increasingly "call the tune").

entity under national law and then having that entity contract out specific financial management and development tasks to the World Bank and the U.N., among others. Both forms of the hybrid reflect standard mechanisms for controlling agency slack but also include their own unique twist. The Quasi-Entity Fund involves the donors heavily in fund governance as a way for donors to exercise control over their agent (the World Bank). The National Law Entity approximates the creation of a customized agent for the principal's purposes but retains ties with pre-existing agents (the World Bank and the UN) in certain respects.

## *2.2. Part II of the Collective Finance Challenge*

### *2.2.1. The Emergence of a New Approach: Two New Models*

The potential of both forms of the hybrid approach to constrain agency slack<sup>88</sup> depends on whether they enable donors to retain greater control over their contributions than they retained under the traditional approach.

#### *2.2.1.1. The Quasi-Entity Fund*

Within the hybrid model, donors create a new collective financing effort under the auspices of the World Bank as a separate fund dedicated to a specific development purpose. The financing effort will often be a discrete part of a broader collaborative effort to tackle an identified need in a coordinated way. For example, the GEF Trust Fund is the financing arm of the GEF—a collaboration that involves 182 countries that have undertaken a joint approach to addressing global environmental issues.<sup>89</sup> Similarly, the Education Fund is the financing arm of the Education for All Fast

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<sup>88</sup> This article's focus is on the potential for both forms of the hybrid approach to minimize agency costs. Evaluating the extent to which these models quantifiably minimize agency costs would require an empirical analysis of data that is beyond this article's scope. Nonetheless, meaningful deductions can be made as to the potential of these models to promote the likelihood that donors' fund goals will be honored to the fullest extent feasible, by analyzing how these models address perverse incentives and other challenges posed by the operating environment.

<sup>89</sup> See *What is the GEF?*, GLOBAL ENVIRONMENT FACILITY ("GEF"), <http://www.thegef.org/gef/whatisgef> (last visited Mar. 18, 2011) (providing a description and a brief history of the GEF).

Track Initiative, a broad-based partnership of donor and recipient countries that aims to achieve universal primary education.<sup>90</sup>

This separate fund has a specific governance structure that gives donors an ongoing role in allocating the fund's assets.<sup>91</sup> The donors and the World Bank characterize these Quasi-Entity Funds as World Bank trust funds and the World Bank as their trustee.<sup>92</sup> In its trustee capacity, the Bank manages the Quasi-Entity Fund's financial resources and keeps them separate from the Bank's regular resources, disbursing them in accordance with donors' allocation choices.<sup>93</sup> The Bank is also involved in developing the funds, including proposing, supervising and monitoring fund-financed projects, although it usually shares these tasks with other entities rather than exercising exclusive control.<sup>94</sup>

#### 2.2.1.1.1. *The Origin of the Quasi-Entity Fund*

The GEF Trust Fund pioneered the Quasi-Entity Fund model. It is a multi-billion dollar Fund created in 1994 to provide financial support to developing countries for projects designed to protect the environment.<sup>95</sup> Its structure grew out of donors' (internally conflicting) desires to avail themselves of the World Bank's capacity to manage the Fund while simultaneously preventing the World Bank from exercising complete control over it.

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<sup>90</sup> See *About FTI, EDUCATION FOR ALL*, <http://www.educationfastrack.org/about-fti> (last visited Mar. 18, 2011) (describing the Fast Track Initiative).

<sup>91</sup> These World Bank Quasi Entity Funds are to be distinguished from the programs and funds set up under the U.N., which together constitute the mainstay of the U.N.'s development arm (some, such as UNDP, began as U.N. Trust Funds and subsequently reorganized into more formal entities). See de Senarclens, *supra* note 1, at 11 (describing the organization of the various U.N. commissions and programs). The U.N.'s mix of funds and programs reflect how the UN has always done business in the international development arena. In contrast, these World Bank Quasi Entity Funds are an add-on to the World Bank's core business of issuing loans. See WOODS, *supra* note 17, at 164-65 (describing the loan operations of the World Bank).

<sup>92</sup> Ibrahim F. I. Shihata, *Techniques to Avoid Proliferation of International Organizations—The Experience of the World Bank*, in *PROLIFERATION OF INTERNATIONAL ORGANIZATIONS: LEGAL ISSUES* 111, 125 (Niels M. Blokker & Henry G. Schermers eds., 2001) (explaining how the Bank oversees various trust funds).

<sup>93</sup> See BANTEKAS, *supra* note 18, at 33 (outlining the various ways to structure international trust funds).

<sup>94</sup> See *infra* notes 131-32, 156, 163, 174.

<sup>95</sup> See Smyth, *supra* note 43, at 40 (describing the intentions of the GEF's creators).

In asking the World Bank to manage the Fund, the GEF Trust Fund donors drew upon the Bank's long tradition of serving as an administrator of externally financed funds, which are referred to by the Bank and all interested parties as World Bank Trust Funds.<sup>96</sup> Prior to the GEF Trust Fund's creation, however, the standard practice for such funds was for donors to impose little control on the Bank's discretionary use of the funds' resources within the broad parameters of the funds' objectives.<sup>97</sup> The pre-GEF Trust Fund model, the World Bank Trust Fund, is essentially an accounting mechanism. It consists of a designated account held by the World Bank, for use by the World Bank, for the purposes designated by the donors.<sup>98</sup> Donors depend on several *ex post facto* controls to manage agency slack in these traditional World Bank Trust Fund arrangements. For example, donors require the Bank to make regular financial and progress reports on the use of the trust fund's assets.<sup>99</sup> In principal-agency terms, this is a police

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<sup>96</sup> The World Bank began administering funds created by other donors to finance specific activities that served the Bank's purposes early on in its existence. See Shihata, *supra* note 92, at 125 (discussing early projects undertaken by the World Bank when administering donated funds). The World Bank began to use the term "trust fund" for these funds in the late 1970s, shortly after the IMF established the IMF Trust Fund and undertook to manage that fund's assets in accordance with six principles which then-IMF General Counsel, Sir Joseph Gold, described as "fundamental principles of the law of trusts." Gold, *supra* note 46, at 865. The Bank assumes the role of trustee of World Bank trust funds pursuant to its inherent powers, consistent with the inherent power of all international organizations, to establish funds to the extent needed to promote their purposes. Shihata, *supra* note 92, at 125.

<sup>97</sup> Steven A. Silard, *The Global Environment Facility: A New Development in International Law and Organization*, 28 GEO. WASH. J. INT'L L. & ECON. 607, 624-25 (1994-95)

<sup>98</sup> BANTEKAS, *supra* note 18, at 133-34 (discussing distinct funds created by the World Bank that serve the Bank's purpose or a closely related purpose).

<sup>99</sup> See *id.*, at 220-21 (explaining the reporting responsibilities of groups responsible for or connected to the use of trust funds); WORLD BANK, WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES, OP 14.40/BP14.40, para. 8 (July 1, 2008), available at <http://go.worldbank.org/MSNAYLJX60> [hereinafter World Bank OP/BP 14.40] (outlining the Bank's responsibilities as a trustee, which include providing financial reports to donors and others involved with the fund). By contrast, under a national law regime that incorporates Anglo-Saxon trust principles, the trustee of a charitable trust reports to the state office charged with the oversight of charitable trusts, not to the donors. Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749, 770-81 (2008).

patrol form of reporting and monitoring,<sup>100</sup> whereby donors control agency slack by themselves playing the role of the police.<sup>101</sup>

The disadvantage of the traditional World Bank Trust Fund, and the reason the donors to the GEF Trust Fund did not want to follow this model, is that under the World Bank Trust Fund model the World Bank has extensive control and discretion over the funds. In light of the World Bank's lending agenda, giving broad discretion over the use of a fund's resources could be perceived as tantamount to asking Henry Ford to figure out how to improve the lives of Detroit's poor. Henry Ford could be counted on to conclude that what every poor family in Detroit really needed in order to improve its standard of living was a car. Likewise, there is a perception that the World Bank would conclude that what every developing country really needs in order to develop is a loan. Following this logic, the World Bank could be seen as likely to use the resources of any externally financed fund for which it is responsible to grease the wheels for making a loan.<sup>102</sup> In the language of principal-agent theory, the preferences and incentives of the donors/principals of these funds and their agent, the World Bank, are misaligned.<sup>103</sup>

A simple hypothetical illustrates why a fund's donors might not want the Bank's lending agenda to dominate a fund. Assume, for example, that a group of donors sets up a World Bank Trust Fund to support small scale farming in Africa. Further, assume the Bank as trustee has a choice of whether to issue a grant to perform a feasibility study for building new irrigation systems or a grant to

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<sup>100</sup> See Hawkins et al., *Delegation Under Anarchy*, *supra* note 55, at 28.

<sup>101</sup> *Id.* See BanModel Form of Multi-Donor Administration Agreement, WORLD BANK (Sept. 16, 2004) [hereinafter *Standard Conditions*] (on file with Author); Klick & Sitkoff, *supra* note 99, at 770-81 (providing an example of donors forcing trustees to account for use of trust funds and noting that states increasingly give donors standing, concurrent with the state attorney general, to enforce a charitable trust). The World Bank Trust Fund created by the application of these principles has been described by one commentator as a *sui generis* financing vehicle, peculiar to international law. See BANTEKAS, *supra* note 18, at 24 ("The *sui generis* nature of these funds does not give rise to a single model by which the intergovernmental trust concept can be explained.").

<sup>102</sup> See WOODS, *supra* note 17, at 212 (pointing out that entities such as the World Bank make decisions by balancing competing interests, as well as taking into account their own interests); Senate Committee Report, *supra* note 22 (discussing the way in which the World Bank decides between competing interests and the need to influence those decisions in order to get more adequate results).

<sup>103</sup> Hawkins et al., *Delegation Under Anarchy*, *supra* note 55, at 26-28.

set up a farmer training program. Finally, assume that the grant for the feasibility study is quite likely to result in a finding that the recipient needs several new irrigation systems (and, therefore, a World Bank loan to pay for them), but that the grant for farmer training is unlikely to generate any need for a World Bank loan. Faced with the choice between these two grant proposals, the concern would be that the Bank's lending agenda would lead the Bank staff to issue the grant for the feasibility study, regardless of which proposal best fits the recipient's needs or the donors' objectives.<sup>104</sup>

When the creators of the GEF Trust Fund opted to form the Fund as a World Bank Trust Fund,<sup>105</sup> there was an immediate outcry from the global environmental NGO community.<sup>106</sup> At the time, the World Bank's record of addressing environmental concerns was dismal;<sup>107</sup> opponents worried that the Bank would either use the Fund to advance its own lending projects regardless of whether they were likely to affect optimal environmental results (agency slippage) or do nothing (agency shirking). To frame this outcry in principal-agent terms, the complex collective principal, comprised of donor governments, was under pressure from constituents within individual governments to take bold measures to address what those constituents viewed as a high risk of agency slack entailed by the donors' selection of the Bank as agent.<sup>108</sup>

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<sup>104</sup> Empirical data would be useful to confirm this hypothesis. Absent the availability of such data, however, there are other materials that lend ample support to the validity of this hypothesis. See Pincus & Winters, *Reinventing the World Bank*, *supra* note 3, at 20-23 (pointing to the misalignment between the Bank's lending agenda and the expectation that its loan officers make decisions on how to use a fund's resources, independent of that agenda, coupled with evidence of how the Bank's lending agenda has, from time to time, usurped other roles assumed by the Bank).

<sup>105</sup> A number of reasons, including expense-saving concerns, prompted this choice. See Silard, *supra* note 97, at 622-23 (outlining the considerations that prompted the donors of the GEF Trust Fund to choose a trust fund form).

<sup>106</sup> See *id.* at 633 (discussing the contentious debates over the structuring of the GEF Trust Fund).

<sup>107</sup> See generally Bruce M. Rich, *The Multilateral Development Banks, Environmental Policy, and the United States*, 12 *ECOLOGICAL L.Q.* 681 (1985) [hereinafter Rich, *MDBs*] (considering how multilateral development banks could effectively promote sound environmental policies).

<sup>108</sup> Hawkins et al., *Delegation Under Anarchy*, *supra* note 55, at 27.

2.2.1.1.2. *A Governance Structure Designed to Reduce Agency Slack*

In response to this outcry, a governance structure was designed to control the World Bank's role in the new Fund and, thereby, reduce the risk inherent in the Bank's role as trustee. Components of the resulting structure effected major innovations in the standard World Bank Trust Fund structure. For one thing, the Fund, in addition to financing projects proposed by the World Bank, is designed and intended to also finance projects proposed by other entities.<sup>109</sup> Indeed, from the start, donors identified the United Nations Environment Programme ("UNEP") and the United Nations Development Program ("UNDP") as entities that, along with the World Bank, would propose projects for Fund financing (with each of UNEP, UNDP, and the World Bank being an "Implementing Agency").<sup>110</sup> Previous World Bank Trust Funds, under the traditional structure, financed World Bank projects only.<sup>111</sup> The Implementing Agencies, which comprise one component of the GEF's governance structure, serve as intermediaries between the donors and the beneficiaries of the Fund by proposing projects to be financed, and by monitoring and supervising recipients' execution of these projects.

In addition, the Fund's structure includes two governing bodies, the GEF Assembly and the GEF Council.<sup>112</sup> The center of power is the GEF Council, which includes representatives from each donor country and representatives from recipient countries. These representatives, *inter alia*, approve the Implementing

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<sup>109</sup> WORLD BANK, INSTRUMENT FOR THE ESTABLISHMENT OF THE RESTRUCTURED GLOBAL ENVIRONMENT FACILITY, 33 I.L.M. 1273, 1294-95 (March 16, 1994) [hereinafter GEF Instrument] (outlining the fiduciary duties and responsibilities of the GEF Fund's trustee, including the way funds are allocated).

<sup>110</sup> See *id.* para. 9(b) (describing eligibility requirements for funding).

<sup>111</sup> Silard, *supra* note 97, at 624 (discussing how the GEF Trust Fund broke new ground in intra-organizational cooperation); David Freestone, *The Establishment, Role and Evolution of the Global Environment Facility: Operationalising Common but Differentiated Responsibility?*, in LAW OF THE SEA, ENVIRONMENTAL LAW, AND SETTLEMENT OF DISPUTES: *LIBER AMICORUM* JUDGE THOMAS A. MENSAH 1077, 1079-82 (Tafsir Malick Ndiaye & Rudiger Wolfrum eds., 2007) (discussing how calls for restructuring included calls for ensuring transparent and democratic governance, and a balanced and equitable representation of the interests of developed and developing countries).

<sup>112</sup> See GEF Instrument, *supra* note 109, paras. 11-20 (establishing the structure and responsibilities of the GEF Assembly and the GEF Council).

Agencies' work program.<sup>113</sup> The GEF Assembly is an overseeing body that meets every three years.<sup>114</sup> The World Bank is not a member in either the GEF Council or the GEF Assembly.<sup>115</sup>

The other key components of the GEF's structure are the Secretariat and the Trustee.<sup>116</sup> The Secretariat, designed to be "functionally independent,"<sup>117</sup> is made up of several staff headed by a Chief Executing Officer ("CEO")<sup>118</sup> who is selected by, and answerable to, the GEF Council.<sup>119</sup> The Secretariat is responsible for convening meetings of the GEF Council and Assembly and for preparing the agenda and the proposed GEF work program for the GEF Council's review. The Bank serves as Trustee of the GEF Trust Fund but, given the functions of the other component parts, the trustee role consists solely of financial management.<sup>120</sup> In sum, although the Bank has three separate and distinct roles in the GEF – Implementing Agency, Trustee, and host to the Secretariat – these three roles, taken together, amount to less Bank control than exists under a traditional World Bank Trust Fund.

#### 2.2.1.1.3. *The Proliferation of Quasi-Entity Funds*

Following the GEF Trust Fund's creation, the Quasi-Entity Fund model quickly became a norm when creating collective financing efforts for development.<sup>121</sup> The Bank's apparent

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<sup>113</sup> See *id.* (stating that the GEF Council is responsible for monitoring and evaluating the progress of the Implementing Agencies). The governance structure also includes a Scientific and Technical Advisory Committee ("STAP") to provide technical advice to the GEF Council. *Id.*

<sup>114</sup> See *id.* para. 13 ("The Assembly shall consist of Representatives of all Participants. The Assembly shall meet once every three years.").

<sup>115</sup> See *id.* paras. 13, 16 (outlining the membership of the two bodies, neither of which include the World Bank).

<sup>116</sup> See *id.* para. 2, Annex B (describing the roles and duties of the Trustee and the focus areas of the GEF).

<sup>117</sup> *Id.* para. 21.

<sup>118</sup> See *id.* paras. 20(j), 21 ("The CEO shall be appointed to serve for three years on a full time basis by the Council on the joint recommendation of the Implementing Agencies.").

<sup>119</sup> See *id.* para. 21 (providing for the appointment of the Chief Executing Officer ("CEO") of the Secretariat). The CEO is appointed by the GEF Council for a three-year term on the joint recommendation of the Implementing Agencies and is accountable to the GEF Council for running the Secretariat. *Id.*

<sup>120</sup> See *id.* at Annex B (providing for the role and fiduciary responsibilities of the Trustee).

<sup>121</sup> See WB TRUST FUNDS MANAGEMENT FRAMEWORK, *supra* note 18, at 1-2 (discussing the growth and development of trust funds and stating that "[t]rust

willingness to accommodate and participate in an arrangement with a donor-friendly governance structure, as evidenced by its role in the GEF, unleashed a pent-up demand for customized collective financing arrangements.<sup>122</sup> Now, donors have a way to control a fund more tightly than they did under a traditional World Bank Trust Fund, making this model more attractive than the alternative strategy of making general contributions to an institution's budget.

First, Quasi-Entity Funds are magnets for fundraising from public and private sources because they create a sense of urgent and focused attention on a particular issue.<sup>123</sup> Setting up special funds to address specific development issues has more political appeal than general pleas for increases in aid.<sup>124</sup> The fact that donors receive reports on the use of a fund's resources makes fund resources easier to track, and therefore this structure is more transparent than contributions to the general budget of an institution.<sup>125</sup> Further, the donor participation and control advanced by the Quasi-Entity Fund model reassures a reluctant

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funds have emerged as a key instrument of development finance in recent years"); Smyth, *supra* note 38, at 499 (discussing how changes in overseas development aid norms since the 1990s have resulted in a shift toward the use of trust funds).

<sup>122</sup> See OED Phase I Report, *supra* note 38, para. 1, at ix (stating that, in responding to changes in the global environment, "the Bank has become the largest manager of trust funds for global programs"). In fact, the majority of global programs supported by the World Bank are less than 13 years old. *Id.* para. 5, at x. The Bank has recently evaluated its performance and needs in light of this shift in demands. *Id.* para. 1.1. Changes have been suggested to "help bring about greater coherence and clarity among the Bank's diverse global roles, reduce transactions costs, and communicate roles and responsibilities to partners . . ." *Id.* para. 15, at xii. Changes include effective standards for involvement in global programs, internal oversight mechanisms, diversifying the instruments available for proper functioning, and improving linkages between global and country programs. *Id.* para. 14, at xii. See also WORLD BANK, 2007 TRUST FUNDS ANNUAL REPORT, at 14 (2007), available at [http://siteresources.worldbank.org/CFPEXT/TrustFunds/21892003/TFAnnualReport\\_2007.pdf](http://siteresources.worldbank.org/CFPEXT/TrustFunds/21892003/TFAnnualReport_2007.pdf) [hereinafter WB TRUST FUNDS 2007 REPORT] (noting that Recipient-Executed Trust Funds "continued to serve as a versatile instrument of Bank support" in the 2007 fiscal year) (emphasis omitted).

<sup>123</sup> See Heimans, *supra* note 27, at 2 (noting that these funds "promise an aggressive focus on results, to the point of withholding funding to non-performing recipients").

<sup>124</sup> See *id.* at 3 (arguing that the popularity of global funds "reflects the political implausibility of raising much-needed new funds through the U.N.").

<sup>125</sup> See *id.* at 2 (highlighting how multi-actor global funds are result-driven).

legislature that the donor country's goals in providing support will be advanced.<sup>126</sup>

Second, Quasi-Entity Funds offer a flexible mechanism that works for a world that embraces development as a process, engaging developed-country donors working in partnership with developing countries and non-government entities. The Quasi-Entity Fund's governance structure—providing for donor governing bodies composed of donor and recipient countries as well as a range of non-World Bank implementing agents—suggests the possibility of including many kinds of entities in a discreet, self-contained fund, small enough in size for such diverse participants to have an impact.

A third, and more prosaic, factor contributing to donors' preference for the Quasi-Entity Fund over the traditional World Bank Trust Fund model stems from the discovery in 2001 of widespread corruption in certain World Bank trust funds.<sup>127</sup> Following this discovery, the Bank instituted reforms aimed at improving trust fund controls.<sup>128</sup> Audits of World Bank Trust Funds conducted in 2004 and 2005, however, showed continued significant lapses.<sup>129</sup> These findings reinforced donors' preference for the Quasi-Entity Fund, which they believe affords them more control over such agency slippage.<sup>130</sup>

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<sup>126</sup> In deference to this political reality, World Bank President Robert Zoellick recently suggested that the developing world create a vulnerability fund with a governance structure that will provide support to failing financial institutions in developing countries. See Robert B. Zoellick, *A Stimulus Package for the World*, N.Y. TIMES, Jan. 23, 2009, at A27. Absent this political reality, one would expect the President of the World Bank to call for an increase in the Bank's budget, rather than for the creation of a new fund.

<sup>127</sup> See Stephen Fidler, *Corruption Leads to Freeze on Trust Funds*, FIN. TIMES, Feb. 7, 2001, at 14 (describing a kickback scheme in the awarding of contracts that led to the suspension of five trust funds).

<sup>128</sup> See *id.* (noting that 54 companies and individuals involved in the corruption were disbarred and prohibiting all consultant trust funds from hiring any Danish, Swedish, or Norwegian consultants).

<sup>129</sup> Out of ten audits of World Bank Trust Funds conducted by the Bank's internal auditing department, "all were rated less than satisfactory, and of those, five were rated 'unsatisfactory.'" WB TRUST FUNDS MANAGEMENT FRAMEWORK, *supra* note 18, para. 4.01, at 31. It should be added that the audits also revealed corruption within the donors' aid agencies themselves and, therefore, a need for donors to tighten internal controls in addition to controlling external agency slippage.

<sup>130</sup> *Id.* at 31 (noting poor documentation practices and fiduciary review compliance issues).

Donors' repeated use of this model shows a strong need for collective financing vehicles. An important caveat to bear in mind, however, is that the repeated use of this model does not necessarily show that the Quasi-Entity Fund model is a success. To draw that conclusion from these funds' proliferation alone would be to ignore the pressures under which many of them are created,<sup>131</sup> the institutional tendency of donors (and the World Bank) to replicate out of inertia,<sup>132</sup> and the limitations of existing alternatives. As shown in Part III, *infra*, donors have embraced this model without paying adequate attention to the agency costs it perpetuates, the accountability gaps that it generates, and the negative outcomes that flow from these deficiencies.<sup>133</sup>

#### 2.2.1.2. *The National Law Entity*

Under this form of the hybrid approach, donors create a new collective financing effort as an independent legal entity under the national law of a country whose location and legal provisions for nonprofit entities meet donors' needs. The independent legal status of these efforts diminishes the agency costs that accrue from being a dependent entity under the auspices of the World Bank or other existing intergovernmental organization. This is not to suggest that there are no agency costs associated with this model. To the contrary, as shown by Helen Milner in *Why Multilateralism? Foreign Aid and Domestic Principal-Agent Problems*, all multilateral aid efforts involve multiple forms of agency costs.<sup>134</sup> The National

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<sup>131</sup> See BANTEKAS, *supra* note 18, at 132 (explaining that, although trust funds set up to address urgent needs lack certain legal personality, they are nonetheless "governed by a complex structure that resembles that of large international organizations"); Heimans, *supra* note 27, at 2-3 (describing the heated political context under which these funds are created and the conflicts regarding how they are managed).

<sup>132</sup> See WOODS, *supra* note 17, at 2 (noting that the World Bank tends to fall back on existing habits and solutions to deal with unforeseen and unexpected problems).

<sup>133</sup> See OED PHASE I REPORT, *supra* note 38 (explaining how the rapid expansion of these funds, without attention to governance details, was raised as a concern by the World Bank's internal Independent Evaluation Group).

<sup>134</sup> See Milner, *supra* note 4, at 115 (observing that "[f]oreign aid in general poses a principal-agent problem" because, "[l]ike all public spending, it involves long chains of delegation"). Milner points out, however, that foreign aid adds at least two elements to the delegation chain that are distinct from domestic spending programs: "[l]onger chains of delegation and the fact that, unlike with domestic spending programs where voters can see for themselves the benefits of

Law Entity model as it has evolved, however, does succeed in preventing the donors' agenda from being hijacked by the competing agenda of the World Bank or other organizations. As the history of this model's use shows, this result has been achieved in increments rather than in one fell swoop—and at a cost. Creating this model involves a substantial investment of financial and other resources. Moreover, the operations of the vertical funds that result from the model can be difficult to integrate with a beneficiary's macro policy in the sector that is the target of the fund's assistance.

#### 2.2.1.2.1. *The Origin of the National Law Entity*

The National Law Entity model emerged as a widely accepted option when the G8 countries<sup>135</sup> set up the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) in 2001.<sup>136</sup> The Global Fund is a \$1.3 billion fund<sup>137</sup> that finances efforts to combat HIV/AIDS, malaria, and tuberculosis in developing countries.<sup>138</sup>

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the spending, voters in donor countries cannot measure aid performance reliably mean additional principal-agent problems." *Id.* at 116.

<sup>135</sup> The Group of Eight ("G8") is a forum, created by France in 1975, that originally included France, Germany, Italy, Japan, the United Kingdom, and the United States and has since added Canada and Russia. Every year representatives of the countries convene to discuss global issues. See UNIVERSITY OF TORONTO, *G8 Information Center*, [http://www.g8.utoronto.ca/what\\_is\\_g8.html](http://www.g8.utoronto.ca/what_is_g8.html) (last visited Aug. 18, 2010).

<sup>136</sup> See G.A. Res. S-26/2, U.N. Doc. A/RES/S-26/2, para. 90, at 14 (Aug. 2, 2001) available at <http://www.un.org/ga/aids/docs/aress262.pdf> (expressing the General Assembly's resolution to take global measures aimed at combating HIV, including providing additional funding for the prevention and treatment of AIDS). Note that the Global Fund is not the only example of a group of sovereign donors joining private sector donors to create a collective financing effort under a national law regime. However, it is unparalleled in its potential to serve as a precedent because it is a comprehensive and deliberate effort to operationalize an alternative to the post-World War II intergovernmental organizations' way of delivering development finance.

<sup>137</sup> See WORLD BANK, TRUSTEE FOR THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, TRUSTEE REPORT, GF/B7/6, 2 tbl.3 (Feb. 2004), available at <http://www.theglobalfund.org/documents/board/07/gfb76.pdf> (detailing the finances of the Global Fund).

<sup>138</sup> See GLOBAL FUND, THE FRAMEWORK DOCUMENT OF THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA (2002), available at [http://www.theglobalfund.org/documents/TGF\\_Framework.pdf](http://www.theglobalfund.org/documents/TGF_Framework.pdf) [hereinafter GLOBAL FUND FRAMEWORK DOCUMENT] (establishing the title, purpose, principles and scope of the Fund). See generally Anna Triponel, *Global Fund to Fight AIDS, Tuberculosis and Malaria: A New Legal and Conceptual Framework for Providing International Development Aid*, 35 N.C. J. INT'L L. & COM. REG. 175 (2010) (discussing

Set up by many of the same core countries that set up the GEF Trust Fund, the degree to which its legal status, structure, and *modus operandi* differ from the GEF Trust Fund is striking. These differences result, in part, from the lessons and experience gleaned from the GEF, and in part from adjustments needed to reflect a divergent recipient base, and an expanded range of potential donors.

From the outset, the Global Fund's donors wanted to create an effort that could channel resources to the grassroots level.<sup>139</sup> Research showed that the prevention and treatment of the target diseases was most likely to be effective if assistance was available at the local clinic level and not confined to the coffers of government health ministries.<sup>140</sup> In addition, the donors wanted to structure their funding with sufficient flexibility to incorporate the contributions and participation of the private sector, as they judged input from the pharmaceutical sector, in particular, to be of vital importance to the Fund's success.<sup>141</sup> Both of these goals pointed donors away from, rather than towards, creating the Fund as an add-on to the World Bank, the Joint United Nations Programme on HIV/AIDS ("UNAIDS"), or the World Health Organization ("WHO"), and set the stage for exploring alternatives. The alternative the Global Fund's donors selected was to set the Fund up as a nonprofit foundation under Swiss law.<sup>142</sup>

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the recent increase of multilateral funding mechanisms, and the creation of the Global Fund to Fight AIDS, Tuberculosis and Malaria as an example).

<sup>139</sup> See STEVEN RADELET, CTR. FOR GLOBAL DEV., THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA: PROGRESS, POTENTIAL, AND CHALLENGES FOR THE FUTURE 4 (2004), available at [http://www.theglobalfund.org/documents/library/studies/position\\_papers/PP\\_GEN1\\_full.pdf](http://www.theglobalfund.org/documents/library/studies/position_papers/PP_GEN1_full.pdf) (asserting that the Global Fund to Fight AIDS, Tuberculosis and Malaria has taken a hands-off approach to its financing, preferring to leave much of the responsibility with country representatives and local groups); *How the Global Fund Works*, GLOBAL FUND, <http://www.theglobalfund.org/en/how> (last visited, Aug. 18, 2010) (describing how the Global Fund operates).

<sup>140</sup> See Triponel, *supra* note 138, at 197-99 (stressing the importance placed on local management of resources distributed from the Fund and how such local control leads to more efficient management).

<sup>141</sup> See FIRST MEETING OF THE TRANSITIONAL WORKING GROUP TO ESTABLISH A GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS, AND MALARIA 5 (2001), available at [http://www.theglobalfund.org/documents/twg/Meeting\\_report\\_F\\_011030.pdf](http://www.theglobalfund.org/documents/twg/Meeting_report_F_011030.pdf) (questioning "whether there is some legally separate organization or entity that can perform services for the Fund without sacrificing the independence of the Fund and its ability to seek contributions from both public and private sources").

<sup>142</sup> See THE GLOBAL FUND, FIFTH BOARD MEETING, REPORT OF THE GOVERNANCE AND PARTNERSHIP COMMITTEE, Annex 6, at 2-3 (2003), available at

2.2.1.2.2. *A Governance Structure Designed to Eliminate Agency Slack*

The basic design of the Global Fund, in contrast to the GEF Trust Fund, is a fund that is largely the donors' own show. It is a paradigmatic example of a group of donors acting as a collective principal to create an agent of its own design.<sup>143</sup> The Fund has both a global-level and a country-level governance structure.<sup>144</sup> At the global level, it consists of a Board of Directors, Secretariat, Technical Review Panel, and the World Bank as Trustee.<sup>145</sup> At the regional and country level, it consists of an innovative apparatus that includes Country Coordinating Mechanisms ("CCM"), Regional Coordinating Mechanisms, Principal Recipients, and Local Funding Agents.<sup>146</sup> These innovations aim to give effect to the founders' belief that the Fund should be a non-bureaucratic and lean financing agency that differs from, and operates more effectively than, existing bilateral and multilateral aid mechanisms. The Fund works through local stakeholders rather than U.N. agencies or other multilateral or bilateral development partners.<sup>147</sup>

The Fund's Board of Directors is drawn from developed and developing countries, civil society, and the private sector. The

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<http://www.theglobalfund.org/documents/board/05/gfb57annex6.pdf> [hereinafter GLOBAL FUND REPORT ANNEX 6] (providing a historical analysis of why the Global Fund chose to incorporate itself as a nonprofit under Swiss law). As a nonprofit foundation, it operates under the supervision of the Swiss Federal Supervisory Board for Foundations.

<sup>143</sup> See Hawkins et al., *Delegation Under Anarchy*, *supra* note 14, at 25 (explaining that while a principal may want to construct its own agent in order to ensure the agent is more in-line with the principal's own preferences, this process is more costly than other options).

<sup>144</sup> See Triponel, *supra* note 138, at 195 (stating that "[t]he Global Fund has both a country and a global level governance structure," and briefly describing the mechanisms of each).

<sup>145</sup> See generally GLOBAL FUND FRAMEWORK DOCUMENT, *supra* note 138, (describing the Fund's oversight mechanisms).

<sup>146</sup> *Id.* at 5-6 (describing the roles of the Fund's Board of Directors, CCM, Regional Coordinating Mechanisms, Principal Recipients, and Local Funding Agents).

<sup>147</sup> See Alexander Shakow, GLOBAL FUND & WORLD BANK, GLOBAL FUND-WORLD BANK HIV/AIDS PROGRAMS COMPARATIVE: ADVANTAGE STUDY 18-19 (2006) (outlining the strengths of the Global Fund); see also GLOBAL FUND, GUIDELINES FOR PROPOSALS ROUND SEVEN 35 (2007), available at [http://www.theglobalfund.org/documents/rounds/7/Guidelines\\_for\\_Proposals\\_R7\\_en.pdf](http://www.theglobalfund.org/documents/rounds/7/Guidelines_for_Proposals_R7_en.pdf) [hereinafter GLOBAL FUND ROUND SEVEN GUIDELINES] (detailing the administrative components of the Global Fund).

World Bank, WHO, and UNAIDS are non-voting members of the Board.<sup>148</sup> The “supreme governing body of the [f]oundation” is the Foundation Board,<sup>149</sup> and it plays a role similar to the role played by the GEF Council, including making final funding decisions.<sup>150</sup> The Secretariat handles the Fund’s day-to-day management and reports to the Board of Directors.<sup>151</sup> Its responsibilities include receiving proposals for Fund financing, commissioning the Technical Review Panel (a body of experts that advises on scientific matters such as new treatment protocols),<sup>152</sup> and forwarding proposals that receive positive recommendations from the Technical Review Panel to the Board of Directors for final decision.<sup>153</sup> It also negotiates and executes the Fund’s grant agreements.<sup>154</sup>

As Trustee, the World Bank’s role is extremely limited.<sup>155</sup> It collects, administers, and invests the fund’s resources, disburses them to grant recipients in accordance with the instructions of the

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<sup>148</sup> See GLOBAL FUND, BY-LAWS art. 7.1 (2010), available at [http://www.theglobalfund.org/documents/core/Core\\_GlobalFund\\_Bylaws\\_en.pdf](http://www.theglobalfund.org/documents/core/Core_GlobalFund_Bylaws_en.pdf) [hereinafter GLOBAL FUND BYLAWS]. See also Triponel, *supra* note 138, at 205, fig.2 (depicting the voting groups of the Global Fund’s Board of Directors). For a complete list of the members of the Global Fund’s Board of Directors, see GLOBAL FUND, *Board Members*, <http://www.theglobalfund.org/en/board/members/> (last visited Aug. 18, 2010).

<sup>149</sup> GLOBAL FUND BYLAWS, *supra* note 148, art. 7.4.

<sup>150</sup> *Id.* at 4–6 (explaining how the Fund’s Board of Directors appoints Board members, sets policies and strategies for the Fund, sets operational guidelines, work plans, and budgets for the Secretariat and the Technical Review Panel, and generally exercises all powers required to carry out the purposes of the Fund).

<sup>151</sup> *Id.* at 8 (detailing the responsibilities of the Secretariat).

<sup>152</sup> The Technical Review Panel reviews all funding proposals submitted to the Global Fund for technical merit. See *Technical Review Panel*, GLOBAL FUND, <http://www.theglobalfund.org/en/trp/> (last visited Aug. 18, 2010) (describing the role and composition of the Technical Review Panel); see also GLOBAL FUND ROUND SEVEN GUIDELINES, *supra* note 147, at v (stating how the Technical Review Panel reviews proposals based on the following criteria: soundness of approach, feasibility, and potential for sustainability).

<sup>153</sup> See GLOBAL FUND FRAMEWORK DOCUMENT, *supra* note 138, § VIII(A)(5) (“The Secretariat will forward the recommendations from the Technical Review Panel to the Board for final decision.”).

<sup>154</sup> See GLOBAL FUND BYLAWS, *supra* note 148, art. 8.2; GLOBAL FUND FRAMEWORK DOCUMENT, *supra* note 138, § VIII(A)(3) (“The Secretariat will ensure that all the required information is included, before forwarding proposals to the independent Technical Review Panel.”).

<sup>155</sup> See GLOBAL FUND FRAMEWORK DOCUMENT, *supra* note 138, § 10(C) (outlining the role of the World Bank as Trustee).

Board of Directors,<sup>156</sup> and periodically reports to the Board of Directors on the status of the Fund's resources.<sup>157</sup> It does not enter into grant agreements with the Fund's recipients; such agreements are made directly between the Fund and the Principal Recipients. Nor does the Bank play any role in supervising or monitoring the recipients' use of the Fund's resources.

At the country level, the Global Fund's point entity is the Country Coordinating Mechanism ("CCM") which coordinates the submission of each country's proposal for funding to the Global Fund's Secretariat and selects the Principal Recipients of the Global Fund's grants.<sup>158</sup> The Regional Coordinating Mechanism ("RCM") performs similar functions as the CCM regarding regional proposals.<sup>159</sup>

The Principal Recipient is the entity selected by the CCM to enter into a grant agreement with the Fund and to receive the proceeds of a Fund grant directly from the World Bank as Trustee, either for the Principal Recipient's own direct use or for on-granting as appropriate.<sup>160</sup> The Principal Recipient is financially

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<sup>156</sup> See *id.* § 10(C)(1)(a)-(b) (describing the Trustee's responsibility for "collection, investment, and management of funds" and for "disbursement of funds to national-level entities").

<sup>157</sup> See *id.* § 10(C)(1)(c) ("Through the Board, the Trustee would report to the GFATM stakeholders as a group on the financial management of the Fund, and the allocation of Fund resources.").

<sup>158</sup> See *id.* § 7(A)(3) ("Country proposals will be accepted from a Country Coordination Mechanism ("CCM") that includes broad representation from government agencies, NGOs, community-based organizations, commercial sector organizations (where these exist) and bilatereal [sic] and multilateral agencies."). See generally GLOBAL FUND, GUIDELINES AND REQUIREMENTS FOR COUNTRY COORDINATING MECHANISMS (2007), available at [http://www.theglobalfund.org/documents/board/16/GF-BM16-07\\_PC\\_Attachment1.pdf](http://www.theglobalfund.org/documents/board/16/GF-BM16-07_PC_Attachment1.pdf) [hereinafter GLOBAL FUND CCM GUIDELINES] (outlining the purpose, structure, responsibilities, and composition of the Country Coordinating Mechanisms and the principles they must advance). The composition of each Country Coordinating Mechanism usually includes representation from governments, NGOs, civil society, multilateral and bilateral agencies, key affected populations, and the private sector. See *id.* pt. 5(12) (listing actors that, whenever possible, should be included in a country's CCM).

<sup>159</sup> See GLOBAL FUND, ROUND NINE FREQUENTLY ASKED QUESTIONS 7 (2008), available at [http://www.theglobalfund.org/documents/rounds/9/CP\\_Pol\\_R9\\_FAQ\\_en.pdf](http://www.theglobalfund.org/documents/rounds/9/CP_Pol_R9_FAQ_en.pdf) (explaining that CCM and RCM both fall under the heading of "Coordinating Mechanism").

<sup>160</sup> See *Principal and Sub-Recipients*, GLOBAL FUND, <http://www.theglobalfund.org/en/recipients> (last visited Aug. 18, 2010) (outlining the role of the Principal Recipients and their interaction with the Sub-Recipients). The Principal Recipient is often a government ministry but may also

accountable to the Global Fund for the grant proceeds and implementation of the program being financed by the Global Fund's grant.<sup>161</sup> Accordingly, the Principal Recipient is responsible for overseeing the program implementation of any sub-recipients to which it makes sub-grants and for regularly auditing sub-recipients' financial arrangements.<sup>162</sup> The CCM monitors the Principal Recipients.<sup>163</sup> Finally, the Local Fund Agents are in-country entities (such as local accounting firms) that the Fund hires to assess (in accordance with criteria approved by the Board of Directors)<sup>164</sup> the financial capacity of a proposed Principal Recipient to assume responsibility for a grant.<sup>165</sup>

### 2.2.1.2.3. *The Evolution of the National Law Entity*

Since the Global Fund was created, the Swiss Government has accorded it enhanced legal stature and its autonomy has also expanded. Its legal stature improved in 2003 when, responding to pressure from the Fund's donors for enhanced privileges and immunities, the Swiss Government agreed to accord the Fund privileges and immunities similar to those it accords international organizations.<sup>166</sup> The Government conferred this status on the Fund by entering into a Headquarters Agreement with it.<sup>167</sup>

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be a nongovernmental or faith-based organization or a private sector firm or foundation. ROUND NINE FREQUENTLY ASKED QUESTIONS, *supra* note 159, at 33.

<sup>161</sup> See GLOBAL FUND, FIDUCIARY ARRANGEMENTS FOR GRANT RECIPIENTS 3 (2003), available at [http://www.theglobalfund.org/documents/6\\_pp\\_fiduciary\\_arrangements\\_4\\_en.pdf](http://www.theglobalfund.org/documents/6_pp_fiduciary_arrangements_4_en.pdf) [hereinafter GLOBAL FUND FIDUCIARY ARRANGEMENTS] (stating that, after receiving disbursements of funds from the World Bank as Trustee, the Principal Recipients must "periodically report on progress made with the grant proceeds to the Global Fund and to the CCM").

<sup>162</sup> See GLOBAL FUND, ROUND SEVEN GUIDELINES, *supra* note 147, § 4.8.2 (describing the responsibilities of the Principal Recipient, including "overseeing the financial arrangements of [sub-recipients], and preparing a plan for the annual audit of [sub-recipient] activities under the grant").

<sup>163</sup> See GLOBAL FUND CCM GUIDELINES, *supra* note 158, pt. 3(7) (specifying that it is the responsibility of the CCM to select and evaluate the Principal Recipients).

<sup>164</sup> See GLOBAL FUND FIDUCIARY ARRANGEMENTS, *supra* note 161, at 3 ("The Global Fund . . . contracts for independent advice from . . . Local Fund Agents ("LFAs"). . . . The Global Fund normally contracts with one LFA per grant-receiving country . . .").

<sup>165</sup> See generally, *Local Fund Agents*, GLOBAL FUND, <http://www.theglobalfund.org/en/lfa> (last visited Aug. 3, 2010) (providing additional information on the Local Fund Agents).

<sup>166</sup> See Press Release, Global Fund, Global Fund Gains Privileges and Immunities Similar to Int'l Orgs. (Dec. 13, 2004), available at [http://www.theglobalfund.org/en/pressreleases/?pr=pr\\_041213](http://www.theglobalfund.org/en/pressreleases/?pr=pr_041213) [hereinafter

Under the Headquarters Agreement the Global Fund's assets, income, and property are exempt from tax and the Fund is immune from legal process and enforcement in the conduct of its business.<sup>168</sup> In addition, the archives of the Fund are inviolable.<sup>169</sup> Further, the Fund's staff, including the members of its Board of Directors, enjoy certain privileges and immunities in Switzerland, including immunity from liability for acts performed in their official capacity and tax exemptions.<sup>170</sup>

As for the Fund's expanded autonomy, when the Fund's donors initially set it up, they provided for its Secretariat staff to serve on contracts of employment with the WHO, pursuant to the terms of an Administrative Services Agreement between the Fund and the WHO.<sup>171</sup> The Global Fund's Executive Director, though

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Global Fund Gains Privileges and Immunities] (citing the "nature and scale of the [Global Fund's] activities" as the primary reasons why the organization was granted the types of privileges and immunities typically reserved for international organizations). The Swiss Government expressly based its willingness to accord the Fund this status on the importance Switzerland attaches to the fight against AIDS. See GLOBAL FUND, SIXTH BOARD MEETING, REPORT OF THE GOVERNANCE AND PARTNERSHIP COMMITTEE, GF/B6/7, 9 (Oct. 15-17, 2003) available at <http://www.theglobalfund.org/documents/board/06/gfb67.pdf> [hereinafter GLOBAL FUND SIXTH BOARD MEETING] (referring to the intervention of the Swiss President, Pascal Couchepin, at the U.N. Special Session on AIDS on September 22, 2003).

<sup>167</sup> See GLOBAL FUND SIXTH BOARD MEETING, *supra* note 166, at 10 ("[T]he Swiss government confirms the principle to conclude a headquarters agreement with the Global Fund which will grant to the Global Fund the privileges and immunities normally accorded to an intergovernmental organization."). The Headquarters Agreement between the Global Fund and the Swiss Federal Council, determining the final legal status of the Global Fund in Switzerland, was signed on December 13, 2004. Global Fund Gains Privileges and Immunities, *supra* note 166. See generally GLOBAL FUND, EIGHTH BOARD MEETING, REPORT OF THE GOVERNANCE AND PARTNERSHIP COMMITTEE, GF/B8/7, Annex 4a (2004) available at [http://www.theglobalfund.org/documents/board/08/gfb87\\_annex4a.pdf](http://www.theglobalfund.org/documents/board/08/gfb87_annex4a.pdf) [hereinafter HEADQUARTERS AGREEMENT] (including the text of the Headquarters Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria).

<sup>168</sup> See HEADQUARTERS AGREEMENT, *supra* note 167, arts. 5, 7 (stating that the Global Fund is generally immune from any legal process or enforcement with several listed exceptions and summarizing the Fund's tax exemptions).

<sup>169</sup> See *id.* art. 13 (confirming the "inviolability of all official papers, data storage media and documents" associated with the Members of the Board in the official discharge of their responsibilities).

<sup>170</sup> See *id.* arts. 13, 15 (listing the privileges and immunities enjoyed by Members of the Board and all officials of the Global Fund).

<sup>171</sup> See GLOBAL FUND, FOURTH BOARD MEETING, REPORT ON LEGAL STATUS OPTIONS FOR THE GLOBAL FUND, GF/B4/12, 6 (Jan. 29-31, 2003), available at <http://www.theglobalfund.org/documents/board/04/GF%20B4%2012%20Legal>

selected by the Fund's Board of Directors, also served on a contract of employment with the WHO.<sup>172</sup> In December 2008, however, the Fund terminated the Administrative Services Agreement with the WHO<sup>173</sup> so as to give its Secretariat staff independence, freeing them from the conflict of serving two entities with distinct agendas—the Fund and the WHO.<sup>174</sup> The Executive Director of the Fund's Secretariat and the Secretariat staff now serve on employment contracts with the Fund.<sup>175</sup> As of January 1, 2009, the Global Fund is a wholly “autonomous, international financing institution.”<sup>176</sup>

Following its experience in negotiating the legal status of the Global Fund with the Fund's founders, in January 2008, the Swiss Government enacted a new statute, the Host State Act, under which groups of donor governments working collectively *inter se* or with nongovernmental entities and private sector entities may apply to the Swiss Government for the equivalent of international organization status under Swiss law.<sup>177</sup>

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%20Status%20Report.pdf [hereinafter GLOBAL FUND REPORT ON LEGAL STATUS OPTIONS] (acknowledging the benefits of the Global Fund's arrangements with the WHO but stating that the arrangements are “neither effective nor cost-effective” and lamenting the persisting structural issues and institutional liability).

<sup>172</sup> See *id.* (discussing the administrative relationship between the Global Fund and the World Health Organization).

<sup>173</sup> See GLOBAL FUND, SIXTEENTH BOARD MEETING, Decision Point GF/B16/DP21 (Nov. 12–13, 2007), available at [http://www.theglobalfund.org/documents/board/16/GF-BM16-Decisions\\_en.pdf](http://www.theglobalfund.org/documents/board/16/GF-BM16-Decisions_en.pdf) (deciding that “the Global Fund shall discontinue the Administrative Services Agreement with the World Health Organization” by December 31, 2008); see also GLOBAL FUND, EIGHTEENTH BOARD MEETING, REPORT OF THE SEVENTEENTH BOARD MEETING, GF/B18/2, 10–11 (Nov. 7–8, 2008) available at [http://www.theglobalfund.org/documents/board/18/GF-B18-02\\_ReportSeventeenthBoardMeeting.pdf](http://www.theglobalfund.org/documents/board/18/GF-B18-02_ReportSeventeenthBoardMeeting.pdf) (discussing delays in implementing the new administrative arrangements and recommending an interim solution).

<sup>174</sup> See GLOBAL FUND REPORT ON LEGAL STATUS OPTIONS, *supra* note 171, at 4 (“[E]mployees 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 mandates of WHO and the Global Fund create chronic conflicts of interest for Global Fund staff.”).

<sup>175</sup> See *supra* note 173 and accompanying text.

<sup>176</sup> GLOBAL FUND, NINETEENTH BOARD MEETING, REPORT OF THE EXECUTIVE DIRECTOR, GF/B19/3, 27 (May 5–6, 2009), available at [http://www.theglobalfund.org/documents/board/19/GF-B19-03\\_EDReport.pdf](http://www.theglobalfund.org/documents/board/19/GF-B19-03_EDReport.pdf).

<sup>177</sup> See Loi sur l'Etat hôte [LEH] [Swiss Host Act], June 22, 2007, Recueil systématique du droit fédéral [RO] 6637, art. 25, available at

The developments in the Global Fund that prompted this statute are already serving as a precedent for other initiatives. In 2008, the participants in another global health initiative, the Global Alliance Vaccine Initiative Foundation (“GAVI Foundation”) (which began life as an informal collaboration between donor governments, the Bill and Melinda Gates Foundation, WHO, UNAIDs, the World Bank, and several vaccine manufacturers) restructured the initiative and filed an application with the Swiss Government for international organization status under this statute.<sup>178</sup>

### 3. CURRENT FINANCING MODELS FAIL TO MEET THE CHALLENGE

As discussed *supra*, donors to collective financing efforts for development face the challenge of designing a framework that maximizes the likelihood that their resources will be used for the purposes they intended.<sup>179</sup> Neither the Quasi-Entity Fund nor the National Law Entity meets this challenge.

#### 3.1. *The Deficits in the Quasi-Entity Fund*

The GEF Trust Fund, giving rise to the Quasi-Entity Fund model, materially altered the principal-agent dynamic of the World Bank Trust Fund. By inserting themselves into the fund’s governance and reserving for themselves the right to allocate the fund’s assets (including the right to allocate funding to entities other than the World Bank), the donors to the GEF Trust Fund changed the nature of the traditional delegation between the donors to a World Bank Trust Fund and the Bank. Restricting the

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<http://www.admin.ch/ch/e/rs/1/192.12.en.pdf> (defining international non-governmental organizations (“INGOs”) for purposes of the Host State Act).

<sup>178</sup> See GAVI ALLIANCE, SECRETARIAT TRANSITION, Doc # AF.12, 2 (June 25-26, 2008), available at [http://www.gavialliance.org/resources/12\\_GAVI\\_Secretariat\\_transition.pdf](http://www.gavialliance.org/resources/12_GAVI_Secretariat_transition.pdf) (providing an update on GAVI’s application for international status and confirming that the Foreign Affairs Department intended to support the organization). See generally GAVI ALLIANCE, GAVI ALLIANCE PROGRESS REPORT (2008), available at [http://www.gavialliance.org/resources/2008\\_GAVI\\_Alliance\\_Progress\\_Report.pdf](http://www.gavialliance.org/resources/2008_GAVI_Alliance_Progress_Report.pdf) (providing an overview of the GAVI Alliance’s efforts and accomplishments in 2008).

<sup>179</sup> See Hawking et al., *Delegation Under Anarchy*, *supra* note 55, at 119 (noting that a key challenge of third-party financing arrangements involves implementing a system that succeeds in matching donors’ contributions with the projects that the donors wish to support).

trustee function to perfunctory financial management tasks emasculates the trustee role. The innovations of the Quasi-Entity Fund introduced the possibility that the donors to a new fund could disaggregate the functions they wanted the World Bank to perform in connection with a fund.<sup>180</sup> At the same time, they opened up new issues about the locus and scope of accountability for these funds between the donors and the Bank when such disaggregation occurs.

These issues limit the potential of the Quasi-Entity Fund to serve as a new and improved model over the traditional World Bank Trust Fund for two distinct but related reasons.

First, the potential of this model to give rise to a lower risk of agency slack can only be realized if: (1) the World Bank agrees to perform the different disaggregated functions donors call upon it to perform; and (2) the international legal order facilitates that disaggregation. Second, a related limitation arises from the fact that creating a Quasi-Entity Fund involves disaggregating a variety of other controls that traditionally apply under a World Bank Trust Fund. The donors to a Quasi-Entity Fund must recognize the need to create an alternative framework of controls in order for Quasi-Entity Funds to constitute accountable financing mechanisms both in theory and in practice. The record shows that neither of these limitations has been adequately addressed.

### *3.1.1. Unabated Agency Slack*

The GEF Trust Fund's donors were reluctant to give the World Bank control over the fund because of the Bank's poor record, at that time, of caring for the environment.<sup>181</sup> Even when the Bank's position on the environment is not an issue, donors' pervasive concern is that giving the World Bank's broad discretion over their funds will result in the Bank using the funds to advance its lending agenda at the expense of the donors' priorities. This concern

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<sup>180</sup> For example, in unbundling the tasks involved in managing the GEF Trust Fund, and splitting up the responsibilities of trustee, secretariat, and implementing agent, the GEF introduced the idea of the World Bank as an institution whose different trust fund-related functions could be decentralized, with donors potentially free to pick and choose which of those functions they want to engage.

<sup>181</sup> See Rich, *MDBs*, *supra* note 107, at 688-702 (exploring the adverse environmental impacts of bank-funded agriculture and energy projects in developing countries).

derives from the force of the Bank's lending agenda.<sup>182</sup> The Bank's drive to lend, and the internal institutional ethos that comes with this drive, is especially problematic for the Quasi-Entity Fund as a model, because it affects the ability of the Bank to serve as a disinterested trustee or administrator. It also limits the degree to which any Secretariat of a Quasi-Entity Fund can make the goals of a fund's governing body the fund's top priority.

3.1.1.1. *An Operational Stake as a Quid Pro Quo for Financial Management Services*

When the Quasi-Entity Fund first emerged, the Bank conditioned its willingness to serve as trustee on donors agreeing that a sizeable proportion of the projects funded by the new effort would be World Bank projects.<sup>183</sup> When the GEF Trust Fund was created, for example, the Bank insisted that two-thirds of the fund's resources would be allocated to World Bank projects.<sup>184</sup> Over time, the strictures of this *quid pro quo* have loosened but the Bank's willingness to serve as trustee of a fund is usually still conditioned on its having an operational stake in the fund. This generally translates into an understanding (explicit or implicit) that some part of the fund's resources will finance Bank operations. Again, hypothetically, assume that instead of setting up a traditional World Bank Trust Fund to support small-scale farming in Africa, the group of donors set up the fund as a Quasi-Entity Fund. Under the Quasi-Entity Fund model the donor governing body, not the World Bank, chooses how to allocate the fund's resources among the categories of recipients that the donors have decided, at the time of the fund's creation, will be eligible to apply for funding.

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<sup>182</sup> See *supra* note 75 and accompanying text (discussing the tension between the aspirations of supporters of the World Bank and the Bank's lending agenda).

<sup>183</sup> See BANTEKAS, *supra* note 18, at 132-35 (discussing the legal personality of trust funds under the administrative direction of the World Bank); Smyth, *supra* note 43, at 34, 57 (stating that, although the World Bank had limited powers as a trustee of the GEF, these limitations were offset by its substantial involvement with GEF projects and, at least initially, the World Bank and the other two Implementing Agencies (UNEP and UNDP) successfully pushed their own agendas).

<sup>184</sup> See Smyth, *supra* note 43, at 37-38 (explaining that, at its inception, the GEF's governance structure formally included the World Bank, UNDP, and UNEP as Implementing Agencies but that, practically, "the World Bank . . . controlled the Fund").

Faced with the choice of funding a feasibility study for building new irrigation systems or a farmer training grant, for example, the purpose of the Quasi-Entity Fund is to enable the donors to choose which proposal best fits with their goals. However, if one of these proposals is for a World Bank project and the other is not, and there is an understanding that part of the fund's resources will fund World Bank projects, then the need to fulfill that understanding constrains the donors' choice. This may force donors to select the World Bank's project even though it is not their first choice. Thus, this understanding curtails the extent to which the Quasi-Entity Fund model can serve as an added brake on agency slack when donors rely on the World Bank to serve as a trustee.

This Bank practice of conditioning its availability to perform the financial management task required for a collective financing effort on its having an operational stake undercuts the potential of the Quasi-Entity Fund as an optimal collective financing mechanism. How much impact this practice has on a fund's independence depends on the bargain the Bank makes with the donors. The Bank does not simply hire itself out as a financial manager without the *quid pro quo* for two reasons: one involves self-interested turf protection, and the other prudential financial management.

On the turf protection side, the *quid pro quo* is driven by the Bank's lending agenda. Bank Task Managers want to be able to dangle the promise of free trust fund resources as a carrot to encourage a borrower to take on a loan. They can only do so if the fund will co-finance World Bank projects. Not all the reasons for the *quid pro quo* are so ignoble, however. On the prudential financial management side, the *quid pro quo* approach reassures the Bank that it will not end up serving as trustee of an initiative that finances poorly designed, non-World Bank projects. Projects that do not comply with Bank standards or their equivalent could potentially expose the Bank's reputation and credibility to significant risks. Also, serving as trustee has traditionally been linked with issuing grants of fund resources and undertaking to supervise and monitor the recipients' activities, while the *quid pro quo* approach avoids having the Bank take on a task on which it cannot deliver. The risk of taking on monitoring tasks becomes even greater if the Bank has no active operations in a particular sector of a country—a situation that would require new staff to be

trained and stationed in order to effectively supervise and monitor the grant.

Given the difficulty of sorting out whether legitimate or illegitimate concerns are at play, having the Bank insist on an operational stake as the *quid pro quo* of its providing financial management services suggests a need for change. In many instances, the agenda of a collective financing effort will overlap with the Bank's agenda, but the cause of development is not well-served by perpetuating a situation in which the Bank dominates. An alternative approach could allow for the donor community to create a separate independent entity—an international development fund administrator—to perform the financial administration services for these efforts.

Creating a new independent entity to provide financial administrative services would enable donors to have their collective financing effort administered by an entity uncompromised by a competing lending agenda. The mandate of such an entity would be strictly limited to financial administration. The development-specific tasks (including supervision and monitoring) requiring specific development expertise would be the responsibility of such entities as the donors might choose to have serve as financial intermediaries between the financial administrator and the ultimate recipients. Such intermediaries could include the World Bank in its operational (as distinct from a financial administrator) capacity. As indicated above,<sup>185</sup> several factors point to the wisdom of structuring any such new entity as an intergovernmental entity.

In sum, in order for donors to gain the autonomy for their collective financing efforts that the Quasi-Entity Fund aims to achieve, they should create a separate and distinct entity to serve as financial administrator of such efforts. This step would remove the conflict of interest between donors and the Bank that is inherent in the Quasi-Entity Fund as it is currently conceived. This step, however, would not alone be sufficient to make the Quasi-Entity Fund an optimal funding mechanism. Additional changes

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<sup>185</sup> See Hunter, *supra* note 5, at 11 (noting the tension between the United States, which supports using the World Bank as the institutional structure that will distribute financial resources for addressing climate change, and developing countries, which prefer to use an entity with more “representative decision making structures”).

in the design of this model would also be necessary, as illustrated below.

### 3.1.1.2. Illusory Independence

The World Bank's lending agenda also drives it to actively limit and interfere with the independence of a Quasi-Entity Fund's secretariat. Such interference defeats the purpose of the Quasi-Entity Fund model, but is facilitated by the nature of the legal arrangements on which the Quasi-Entity Fund model is based. Briefly, the legal status of a Quasi-Entity Fund is based on the arrangements into which the donors enter with the World Bank as Trustee,<sup>186</sup> which are generally regarded as governed by international law.<sup>187</sup> These arrangements incorporate certain fundamental principles of the law of trusts,<sup>188</sup> including the principle that a trust is not a legal entity in the sense that it does

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<sup>186</sup> See BANTEKAS, *supra* note 18, at 133–34 (pointing out that the World Bank does not differentiate between trust funds and the actual accounts that contain the funds, but rather commingles the trust fund assets it maintains).

<sup>187</sup> See *id.* at 25–26 (explaining that trusts under international law are formed by the agreement of both the trustee and the donor, and that the legal form of the contract is left up to the parties); ANDRES RIGO SUREDA, THE LAW APPLICABLE TO THE ACTIVITIES OF INTERNATIONAL DEVELOPMENT BANKS, 308 *Recueil des Cours* of The Hague Academy of International Law, 192 (2004) (discussing the chain of accountability created through World Bank trust funds). In the case of private sector donors, however, such arrangements would be governed by private international law. See JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 1–4 (2005) (recognizing that transnational corporations and non-governmental organizations “help [] to make and enforce modern international law” but distinguishing them from international organizations in that they are not “constituted by one of the recognized sources of international law, an international agreement”); C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 10 (2d rev. ed. 2005) (listing the differences between private and public international organizations including the fact that public international organizations, unlike private ones, are created by international agreement or established under international law). A full discussion of the law governing these arrangements and their enforceability at international law is beyond the scope of this Article. See generally BANTEKAS, *supra* note 18, *passim* (comparing and contrasting the generally similar, but sometimes different, treatment of trusts under domestic versus international law); Head, *supra* note 2 (detailing the history, legality, and policy surrounding important international financial institutions); Smyth, *supra* note 38, at 527–29 (discussing the uncertainty surrounding what form of law should govern the legal status of World Bank grant agreements, and maintaining that all such agreements should specify that they are governed by public international law). The arrangements do not contain a governing law clause. See *Standard Conditions*, *supra* note 101.

<sup>188</sup> See Shihata, *supra* note 92, at 125–26 (describing the structure of the World Bank's trust funds).

not bear rights or hold duties.<sup>189</sup> Instead, all rights and duties owed by and to a trust fund are held by and owed to the trustee.<sup>190</sup> A trust fund itself does not have any independent legal personality or capacity.<sup>191</sup>

The application of this principle to a Quasi-Entity Fund means that all rights and duties owed by or to the fund are owed by or to the World Bank as the fund's trustee.<sup>192</sup> The donors as a group have no collective legal capacity to engage with third parties, for example, as an employer.<sup>193</sup> The fund they create from their pooled resources does not have this capacity, either.<sup>194</sup> Instead, the World Bank as the trustee of a Quasi-Entity Fund hires the CEO of a fund's secretariat. Further, the World Bank as Trustee hires any staff that a CEO recruits to serve on the secretariat, and these staff members thereby become World Bank employees.

This arrangement, by which a Quasi-Entity Fund's CEO serves on a contract of employment with the World Bank, is fraught with conflicts of interest. On the one hand, the donors specifically select the CEO to advance the fund's priorities. On the other hand, the CEO, by entering into a contract of employment with the World Bank, undertakes, pursuant to the Bank's Articles of Agreement, to owe his or her duty *entirely to the Bank and not to any other*

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<sup>189</sup> See BANTEKAS, *supra* note 18, at 22-23 (discussing the formal and customary principles of trust law, including the customary requirement that "the trust relationship . . . does not generate obligations for third States or entities"); Gold, *supra* note 46, at 863 (discussing the restrictions on the use of Trust Fund resources, including the requirement that they be used solely for the benefit of potential beneficiaries and the condition that they be "kept separate from the property and assets of the IMF and . . . all other accounts . . . that it administers in a fiduciary capacity").

<sup>190</sup> See BANTEKAS, *supra* note 18, at 22 (clarifying that while there is a body of international law regarding intergovernmental trust funds, the basic principle that rights and duties are owed only to the trustee is not generally altered).

<sup>191</sup> See *id.* (discussing the importance of administration agreements and treaties, the mechanisms that actually bind donors and trustees).

<sup>192</sup> See *id.* (noting that when the World Bank acts as trustee, its agreements with donors are based on standard model treaties that reference the Bank's Articles of Agreement and internal Bank documents and policies in accordance with which the agreements must be construed).

<sup>193</sup> See *id.* (asserting that, by accepting the donor-trustee agreement and the terms and conditions of the trust, the donor States lose their status as independent entities and become bound to the trust).

<sup>194</sup> See *id.* ("[T]he assets of the trust are in the trust ownership of the trustee and . . . [the trust] does not generate obligations for third States or entities . . .").

*authority*.<sup>195</sup> The CEO also agrees to be bound by the World Bank's Staff Rules and Principles of Employment. Under those rules, the CEO is answerable to his or her World Bank supervisor.<sup>196</sup>

Simply revealing that this conflict of interest exists does not demonstrate that it prevents the Quasi-Entity Fund model from being an effective means of limiting the agency slack inherent in a World Bank trust fund. With the CEO placed in this position of serving two masters, however, one of two possible scenarios seem likely to emerge, neither of which serves the stakeholders of these funds well. Under the first scenario, the CEO finds that her World Bank supervisor is a more immediate presence to please than a non-standing body of donor representatives. In this case, the CEO will be under the thumb of the Bank, and the fund's agenda is likely to be co-opted by that of the Bank. Such subservience results in a scenario similar to the one that exists under a traditional World Bank Trust Fund model, which the Quasi-Entity Fund model is intended to change. Under the second scenario, the Quasi-Entity Fund is large and high-profile and, as a result, the CEO has leverage to speak with an independent voice. A secretariat with that kind of independence, however, will be threatening to the World Bank, an institution accustomed to calling the shots. As a result, such a secretariat and the Bank seem poised to become locked in a continuing struggle that will result in back-biting, unnecessary delays, stalemates, and a waste of both entities' resources.

Developments in the GEF Trust Fund show how the second scenario can play out in a large Quasi-Entity Fund.<sup>197</sup> The

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<sup>195</sup> See INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ARTICLES OF AGREEMENT, art. V, § 5(c), (Feb. 16, 1989), available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> (explaining that, in addition to owing his or her entire loyalty to the World Bank, the Bank's President, officers, and staff shall "respect the international character of this duty" and refrain from being influenced in discharging their responsibilities).

<sup>196</sup> These are standard undertakings for all World Bank employees. See generally WORLD BANK, STAFF MANUAL, sec. 00 Principles of Staff Employment, available at [http://siteresources.worldbank.org/INTSTAFFMANUAL/Resources/StaffManual\\_WB\\_web.pdf](http://siteresources.worldbank.org/INTSTAFFMANUAL/Resources/StaffManual_WB_web.pdf) (setting out the guiding principles that govern the World Bank's internal staff rules and policies).

<sup>197</sup> The evidence regarding smaller Quasi-Entity Funds is harder to quantify, absent empirical research. The positions the World Bank has taken with respect to the larger Quasi-Entity Funds, however, reinforce the impression that any World Bank employee serving as the CEO of a smaller Quasi-Entity Fund will feel

protracted tension between the Bank and the GEF Secretariat illustrate the unresolved issues that arise. For example, in 2001, emboldened by swelling contributions to the GEF Trust Fund, the CEO of the GEF Secretariat sought greater autonomy for the Secretariat.<sup>198</sup> He proposed that the GEF be restructured to give the Secretariat the authority to formulate GEF-specific policies, to conduct GEF country assistance strategies with recipient countries independent of the World Bank and the other Implementing Agencies, and to sign agreements with external parties such as country governments on the GEF's behalf.<sup>199</sup> He also sought the right to determine the terms and conditions of Secretariat staff independent of the World Bank's Staff Rules and Policies.<sup>200</sup>

Not surprisingly, the World Bank opposed all aspects of the Secretariat's bid for expanded powers.<sup>201</sup> In effect, the CEO was seeking powers for the Secretariat equivalent to those of the World Bank, such that the GEF would operate like a mini-World Bank for the environment. As a compromise, the Bank and the Secretariat devised and agreed on a matrix of responsibilities clarifying who

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pressure from the Bank to discharge his or her responsibilities in a manner that advances the Bank's agenda.

<sup>198</sup> See GEF COUNCIL, OVERALL STRUCTURE, PROCESSES AND PROCEDURES OF THE GEF, GEF/C.18/8, para. 63(a) (Dec. 5-7, 2001), available at <http://www.thegef.org/gef/sites/thegef.org/files/documents/C.18.8%20SPP%20FINAL.pdf> [hereinafter STRUCTURE, PROCESSES AND PROCEDURES] (proposing to "[s]trengthen the coordinating and collaborative role of the GEF Secretariat vis-à-vis the Convention Secretariats" to "help . . . clarify the autonomous role of the GEF and the GEF Secretariat"). See also GEF Instrument, *supra* note 109, para. 34, at 1293 (providing that amendments to the GEF Instrument can only be made with the consensus of the GEF's supreme governing body, the GEF Assembly, and that requests for amendments should be channeled to the Assembly through the GEF Council).

<sup>199</sup> See STRUCTURE, PROCESSES AND PROCEDURES, *supra* note 198, para. 36 (suggesting that the Secretariat should "play a pivotal coordinating role in the programmatic dialogue with the countries" and "have an important coordination and policy oversight function in developing GEF programmatic approaches and in proposing commitments on behalf of the GEF").

<sup>200</sup> See *id.* paras. 56, 63(h) (stating that although "all GEF staff are [World] Bank staff," greater clarification is necessary with respect to the "role of the CEO in relation to appointment and dismissal of staff").

<sup>201</sup> See *id.* at annex C1-7 (revising the text of the proposal to confine the Secretariat's authority and clarify that its powers are kept in check by the Implementing Agencies).

would be responsible for what, at the instruction of the GEF Council.<sup>202</sup> But the matrix proved a short-lived détente.

In June 2009 the GEF Secretariat, under a new CEO, renewed the bid for wide-sweeping institutional and governance changes.<sup>203</sup> The CEO is sought authority for the GEF Secretariat to issue GEF grants directly to GEF recipients, thus allowing a direct relationship between the GEF and recipients independent of any intermediaries.<sup>204</sup> She also proposed, *inter alia*, that the GEF Secretariat be solely responsible for mobilizing resources for the GEF (a responsibility currently shared with the World Bank as Trustee) and that the Secretariat be exempted from certain World Bank employment policies.<sup>205</sup> Like her predecessor CEO, she also sought independent legal personality and legal capacity for the GEF.<sup>206</sup> These proposals have been tabled for further review.<sup>207</sup> In

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<sup>202</sup> See GEF COUNCIL, JOINT SUMMARY OF THE CHAIRS, paras. 19–22, (May 15–17, 2002), available at [http://207.190.239.143/COUNCIL/GEF\\_C19/Joint%20Summary%20of%20the%20Chairs%20-%20FINAL.pdf](http://207.190.239.143/COUNCIL/GEF_C19/Joint%20Summary%20of%20the%20Chairs%20-%20FINAL.pdf) (recognizing the importance of coordination between the Secretariat and Implementing Agencies as well as the need for greater power and independence for the Secretariat); GEF COUNCIL, CLARIFYING THE ROLES AND RESPONSIBILITIES OF THE GEF ENTITIES, GEF/C.19/8, paras. 5–10 (May 15–17, 2002), available at [http://207.190.239.143/COUNCIL/GEF\\_C19/C.19.8%20Roles%20and%20Responsibilities.pdf](http://207.190.239.143/COUNCIL/GEF_C19/C.19.8%20Roles%20and%20Responsibilities.pdf) (clarifying the roles and responsibilities of each GEF entity including the Secretariat).

<sup>203</sup> See GEF COUNCIL, DRAFT GEF POLICY, INSTITUTIONAL, AND GOVERNANCE REFORMS, GEF/R.5/15, paras. 125–27, (June 25–26, 2009), available at <http://www.thegef.org/gef/sites/thegef.org/files/documents/GEF.R.5.15.pdf> [hereinafter GEF Fifth Replenishment Reform] (advocating for a clarification and strengthening of the Secretariat's legal capacity in order to increase the overall effectiveness and efficiency of the GEF).

<sup>204</sup> See *id.* para. 88 (listing suggested reforms such as “[c]onferring onto the GEF Secretariat the primary role for resource mobilization”).

<sup>205</sup> See *id.* app. 1, paras. 12–14 (acknowledging that World Bank Staff Manual rules “apply to all staff members alike” and that variance is permitted only for “compelling business” reasons).

<sup>206</sup> The GEF Secretariat argues that the GEF already has independent legal personality and capacity, a view opposed by the World Bank. Whatever the merits of this view, the fact remains that the CEO of the GEF Secretariat, and all GEF Secretariat Staff, along with the CEOs and staffs of all other Quasi Entity Funds, serve on contracts of employment with the World Bank on the understanding that the Bank, as the trustee of such funds, is the sole entity with legal capacity to employ them.

<sup>207</sup> See GEF Fifth Replenishment Reform, *supra* note 203, at i (proposing reforms in five principal areas: (1) accountability to conventions, (2) responsiveness to recipient countries, (3) delivery of measurable results to the international community, (4) the increase and nature of resources for the GEF, and (5) institutional and governance reforms).

due course, however, both the donors and the Bank will have to address them, most likely in the context of determining what role, if any, the GEF Secretariat will have in the Green Climate Fund.<sup>208</sup>

These fifteen years of cat-and-mouse negotiations between the GEF Secretariat and the World Bank cast doubt on whether the concept of a fund within the World Bank, with a functionally independent secretariat, is workable. The ambitions of a secretariat inevitably expand with the amount of funding placed under its control, and the appearance of a conflict of interest in the secretariat serving two masters may become an unworkable reality.

Conflicts also dogged the relationship between the World Bank and the Education Fund in the first seven years after the fund was established in 2003. The donors to the Education Fund<sup>209</sup> had extensive experience in the education sector from previous funding efforts.<sup>210</sup> Thus, though committed to pooling their resources in support of a harmonized approach, they were determined to stay actively involved in the fund.<sup>211</sup> They initially provided for this active involvement by creating a donor governing body (a Strategy Committee)<sup>212</sup> to select what countries would receive financing

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<sup>208</sup> See *supra* note 3 (discussing the “crisis of legitimacy” that the World Bank has suffered due to perceptions that it is ineffective and beholden to powerful corporate interests).

<sup>209</sup> The donors currently consist of seventeen countries and the European Union. See *Donors*, EDUCATION FOR ALL FAST TRACK INITIATIVE, <http://www.educationfasttrack.org/partners/donors-agencies> (last modified Sept. 16, 2010) (listing the major countries and organizations that have donated to Education for All).

<sup>210</sup> See *id.* (“The Fast Track Initiative encompasses all major donor countries and agencies working in education . . .”). The founding donors of this fund, the Netherlands, Norway, Belgium, and Spain, had extensive bilateral aid programs for education prior to the fund’s start in 2002. See UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (“UNESCO”), EFA GLOBAL MONITORING REPORT 2010: REACHING THE MARGINALIZED, 432, available at <http://unesdoc.unesco.org/images/0018/001866/186606E.pdf>.

<sup>211</sup> See Sophie Smyth & Anna Triponel, *Education as a Lynchpin of Development: Legal and Policy Considerations in the Formation of the Education For All – Fast Track Initiative Catalytic Trust Fund*, 6 SUSTAINABLE DEV. L. & POL’Y 8, 9–10 (2005) (describing the formation of the Education for All Fast Track Initiative “Catalytic Fund” which is administered by the World Bank as trustee and was set up to provide short-term funding to “donor orphans,” countries that have developed strategies to reduce poverty and bolster education but that have too few donors to make those plans a reality).

<sup>212</sup> See *id.* at 10 (explaining the structure of the Strategy Committee which was “comprised of a senior representative from each donor and a representative from

from the Education Fund and in what amounts.<sup>213</sup> There was a small secretariat in the World Bank when the Education For All Fast Track Initiative was created, which ran a knowledge-sharing initiative on education.<sup>214</sup> By default, this secretariat became the Secretariat of the Education Fund.<sup>215</sup> Once the secretariat became responsible for a financing mechanism, rather than simply a knowledge exchange, the position's power changed. Friction soon arose between its CEO and the Bank as the Education Fund ballooned in size.

The friction between the Bank and the Fund was caused by several factors. When first established, the Fund provided money for the education sector on terms and conditions that were different from those that applied to IDA funding (the source of Bank funding for the countries that are the Education Fund's target beneficiaries, all of which qualify for IDA funding).<sup>216</sup> Education Fund grants were made without the kind of specificity regarding deliverables, measurable outcomes, and policy reforms that equivalent IDA financing would require.<sup>217</sup> This disparity in terms and conditions ended in 2007 when, pursuant to a bank-wide policy change regarding the terms and conditions applicable to bank-supervised grant funding, World Bank policies and

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the [World] Bank's senior management, who serves as the Committee's chairperson").

<sup>213</sup> The fund was created pursuant to an initiative to improve worldwide literacy, the Education For All initiative ("EFA"), which was founded by a group of 155 countries and 150 organizations at the World Conference on Education, held by the UNESCO in Thailand in 1990. See Smyth & Triponel, *supra* note 211, at 8 (stating that goals of the EFA were to greatly reduce worldwide illiteracy by 2000, and, ultimately, to make basic education available to all).

<sup>214</sup> See *id.* at 8-9 (explaining that EFA-FTI is a partnership formed in collaboration with the UNESCO, the World Bank, and donor and recipient countries and "supported by a small secretariat, housed in the World Bank, which performs a knowledge sharing and coordination role").

<sup>215</sup> See *id.* at 10 (detailing the two-tiered governance structure of the Catalytic Fund and its progress reporting system which required team leaders to provide updates on recipient countries directly to the Secretariat of the EFA-FTI).

<sup>216</sup> See EDUCATION FOR ALL FAST TRACK INITIATIVE, FRAMEWORK 7 (2004), available at <http://www.educationfasttrack.org/media/library/FrameworkNOV04.pdf> (providing a chart illustrating the process by which the EFA-FTI functions).

<sup>217</sup> See Smyth & Triponel, *supra* note 211, at 10 (detailing the flexible monitoring and supervision of countries receiving funding pursuant to the Education for All—Fast Track Initiative "Catalytic Fund").

procedures governing grants to IDA countries were applied to all Education Fund grants supervised by the Bank.<sup>218</sup>

A further cause of conflict between the Education Fund and the Bank arose from the fact that when the Education Fund was created, the externally financed funds of the World Bank were not fully integrated into the Bank's regional portfolio management.<sup>219</sup> This meant that Bank staff involved in the education sector did not get the same credit for work on Education Fund grants as they got for work on Bank-funded activities. This disparity created perverse incentives for the World Bank departments and staff that the Education Fund was counting on to deliver its assistance.<sup>220</sup> It gave rise to a conflict between the Fund's interests and the interests of Bank staff whose time would get diverted to working on monitoring and supervising Education Fund grants instead of being spent on career-building core World Bank work.<sup>221</sup> In the face of such perverse incentives, a Quasi-Entity Fund cannot operate as an effective control on the risk of agency slack that arises due to the World Bank serving as trustee. In principal-agency terms, the collective principal's (the donors') objectives and the Bank staff's (the agent's incentives) were out of alignment—a situation virtually guaranteed to lead to stalemate.<sup>222</sup>

The Education Fund's record is replete with evidence of a stalemate in the first seven years of its existence. The Bank's involvement in the Fund was marked by ambivalence. There were

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<sup>218</sup> See Smyth, *supra* note 38 (detailing the terms and conditions applicable to grants issued by the World Bank).

<sup>219</sup> See *id.* at 529–32 (discussing the problems arising from the lack of administrative coordination between external funds and the World Bank).

<sup>220</sup> See Hawkins et al., *Delegation Under Anarchy*, *supra* note 55, at 26 (noting the importance of agents having preferences that are closely aligned with those of the principal).

<sup>221</sup> See Sarfaty *supra* note 22, at 667–68 (exploring how incentive programs within the World Bank have impacted its organizational culture). For the same reasons, Bank staff have been reluctant to work on loans for technical assistance because such loans are relatively small and perceived by Bank staff as unimportant to Bank management, and, therefore, unlikely to advance a staff member's career. See also Rich, *supra* note 72, at 26 (stating that despite Wolfensohn's aspirations of changing staff incentives, World Bank staff culture still remains tied to money pushing).

<sup>222</sup> See e.g. Rich, *supra* note 72, at 26 (commenting on how former President of the World Bank, James Wolfensohn attempted to change the culture of the World Bank instead of rewarding staff for "pushing" money); see also Milner, *supra* note 4, at 110 (explaining that tensions between donor governments and their publics make it so that their "preferences . . . are likely to diverge").

long delays before the Bank agreed to a basic framework and guidelines for country education plans (which countries must comply with in order to be eligible for a grant from the Fund).<sup>223</sup> Following agreement on a framework, long delays ensued before the Bank convened the initial meeting necessary to initiate the Education Fund.<sup>224</sup> Further delays in securing an agreement from the Bank on the terms of the Fund's expansion ensued after the Fund was launched.<sup>225</sup>

The Bank's ambivalence about the Fund also played out in disputes between the Bank and the donors over the responsibilities of the Secretariat and reporting channels for the Secretariat head. The Bank sought to confine the Secretariat to ministerial functions and to have Bank staff serve as the fund's technical experts—responsible for, *inter alia*, formulating normative criteria for eligible country plans.<sup>226</sup> But the head of the Secretariat saw the Secretariat's role as a substantive one and appealed to (and obtained) some donor support for that vision. This support came at a cost, however, because in its relatively short existence the Fund has had four different heads of the Secretariat.<sup>227</sup> Final agreement on the reporting lines between the head of the Secretariat, the donors, and the Bank's Vice Presidency for Human Development (of which the Bank's Education Sector Units are a part) languished

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<sup>223</sup> See KATIE MALOUF, OXFAM INTERNATIONAL, RESOURCING GLOBAL EDUCATION: HOW REFORM OF THE FAST TRACK INITIATIVE SHOULD LEAD TO A GLOBAL FUND FOR EDUCATION 13–17 (January 19, 2010), available at <http://www.oxfam.org/sites/www.oxfam.org/files/resourcing-global-education.pdf> (discussing bureaucratic delays within the Bank).

<sup>224</sup> See *id.* (detailing the involvement of the World Bank, and how a lack of autonomy for the FTI in this regard led to initial and continuing confusion and delays).

<sup>225</sup> See *id.* at 14–16 (arguing that further bureaucratic delays resulted from the fact that the World Bank's Board of Executive Directors set the grant and disbursement rules instead of the FTI governing bodies).

<sup>226</sup> See Note on Bank's Multiple Roles in the FTI Partnership; EFA-FTI Draft Charter (dated September 21, 2006) (on file with author) (discussing proposed responsibilities of the Secretariat, and raising issues of Secretariat accountability and Secretariat's reporting obligations to the World Bank).

<sup>227</sup> See generally EDUCATION FOR ALL FAST TRACK INITIATIVE, 2009 ANNUAL REPORT (2009), available at <http://www.educationfasttrack.org/media/library/Annual-report-2009/annual-report-2009.pdf> (pointing out how, in December 2009, Robert Prouty was selected as the new head of the FTI Secretariat); EDUCATION FOR ALL FAST TRACK INITIATIVE 2008 ANNUAL REPORT (2008), available at [http://www.educationfasttrack.org/media/library/Annual\\_Report\\_2008\\_EFA\\_FTII.pdf](http://www.educationfasttrack.org/media/library/Annual_Report_2008_EFA_FTII.pdf) (noting that the secretariat is lead by Desmond Bermingham and Robert Prouty).

and was unresolved for two years, between 2007 and 2009.<sup>228</sup> These kinds of conflicts between the World Bank and the secretariats of Quasi-Entity Funds diminish the value of the Quasi-Entity Fund as a collective financing vehicle. The interests of a fund's donors and beneficiaries are not well served by the time, effort, and other resources such conflicts consume.

The Quasi-Entity Fund model might appear on its face to be a useful first step to get a new effort off the ground, but history suggests otherwise. These funds do not convert seamlessly into independent, autonomous efforts in due course. Instead, their functionally independent secretariats and the World Bank seem to be on a collision course from the funds' inception. This history indicates that a preferred approach would be to create these funds as autonomous entities from the outset, free to advance their donors' goals as their paramount objective.<sup>229</sup> Even as an autonomous entity, however, the design of the Quasi-Entity Fund would need to be improved to allow for greater accountability before it could serve as an optimal mechanism.

### 3.1.2. *Lacunae in Accountability*

The Quasi-Entity Fund model gives rise to several weaknesses in accountability. As detailed by Ruth Grant and Robert Keohane in their seminal work, *Accountability and Abuses of Power in World Politics*,<sup>230</sup> accountability requires a state of affairs in which some

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<sup>228</sup> At that time, the parties ultimately agreed that the CEO would report jointly to the Bank's Vice President for Human Development (consistent with the terms of his contract of employment with the Bank) and to the executive body of the Education For All Fast Track Initiative Partnership as a whole. See 2009 Annual Report, *supra* note 227.

<sup>229</sup> See discussion *infra* Part 4 (arguing for greater Quasi Entity Fund autonomy).

<sup>230</sup> For a relevant source analyzing institutional design, see Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763, 774-75 (2005) (relying on Ruth W. Grant and Robert G. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29 (2005). See generally Sumon Dantiki, Note, *Power Through Process: An Administrative Law Framework for United Nations Legislative Resolutions*, 40 GEO. J. INT'L L. 655, 677 (2009) (pointing out the problematic transfer of power from states to less accountable international institutions through delegated legislative authority); Esty, *supra* note 3, at 1537-41 (discussing the problems of divided responsibility, informality, institutional weakness, and the participation of private actors); Veerle Heyvaert, *Levelling Down, Levelling Up, and Governing Across: Three Responses to Hybridization in International Law*, 20 EUR. J. INT'L L. 647 (2009) (arguing for the establishment of

actors have the right to (a) hold other actors to a set of standards, (b) judge whether those actors have fulfilled their responsibilities in light of these standards, and (c) impose sanctions if they determine that these responsibilities have not been met.<sup>231</sup>

Accountability arises as a concern in the Quasi-Entity Fund for the following reason: the Quasi-Entity Fund creates a different relationship between the donors to a fund and the World Bank as trustee, than exists under a World Bank Trust Fund. The Quasi-Entity Fund shifts the locus of responsibility for the use of a fund's resources. While a World Bank Trust Fund gives that responsibility to the World Bank, under a Quasi-Entity Fund, the donors retain that responsibility themselves. This shift in responsibility, therefore, requires the creation of a new framework of accountability which should address two key aspects of how the fund will work: (i) who will assume responsibility for monitoring the use of the fund's resources, and how; and (ii) the responsibility of the donor governments, acting as a donor governing body, to their citizens (whose taxes supply the resources that governments contribute to these funds) for the decisions they will make as a donor governing body and the policies and procedures they will follow in making those decisions.

To put this shift in principal-agent terms, under the Quasi-Entity Fund, the citizens of the donor governments become a collective principal, and the donor governing body, charged with responsibility for allocating the fund's resources, assumes the role

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individual state responsibility for technical and financial assistance so there can be greater accountability from the parties from whom it is necessary).

<sup>231</sup> See Grant & Keohane, *supra* note 3, at 29-30 (discussing accountability systems and problems experienced with them on the global level). Grant and Keohane provide this definition of accountability in the context of assessing whether the democratic deficit that accompanies international institutions (and impugns their legitimacy as instruments of global governance) can be compensated for by accountability mechanisms. *Id.* at 30-33 (crafting a concept of accountability at the global level by distinguishing between two different models of accountability: a participation model, according to which the performance of the power wielders is evaluated by those who are affected by their actions, and a delegation model, under which the performance of the power wielders is evaluated by those who entrust them with power). I adopt the delegation model as the most appropriate for the purposes of analyzing fiscal accountability in a collective financing vehicle for development (while recognizing that a participation model may be more apt for other purposes (e.g., for evaluating the development effectiveness of a given initiative)).

of those citizens' agent.<sup>232</sup> The donor governing body, therefore, is directly accountable to the donor countries' citizens for its actions. These responsibilities exist alongside (not instead of) the responsibilities the Bank as Trustee owes to the donors, though the responsibilities to the donors are more limited than under a World Bank Trust Fund.

Grant and Keohane maintain, further, that accountability in a relationship between power-wielders and those holding them accountable exists when there is a general recognition on the part of all interested parties "of (i) the operative standards for accountability and (ii) the authority of the parties to conduct the relationship (one to exercise particular powers and the other to hold them to account)."<sup>233</sup> As applied to the Quasi-Entity Fund model, this means that the donors, secretariat and World Bank must not only follow clear standards, but they must also recognize and own their respective responsibilities.

The accountability failure in the Quasi-Entity Fund arises from the fact that neither donors nor the World Bank have faced up to the implications of the changes wrought in the World Bank Trust Fund by the Quasi-Entity Fund, nor to the resulting need that the Quasi-Entity Fund model generates to clarify operative standards for their responsibilities or their respective lines of responsibility. Instead, as the history of the GEF Trust Fund and the Education Fund show, the Bank and donors routinely fail to provide a meaningful accountability framework when they create a Quasi-Entity Fund.

This failure arises in part because the accountability gaps in this model are not immediately apparent. Quasi-Entity Funds are routinely labeled "World Bank Trust Funds",<sup>234</sup> a label that masks the difference in the nature of responsibilities that donors and the World Bank assume under the Quasi-Entity Fund model, as compared with a World Bank Trust Fund, and the need for a new accountability framework that the difference brings about. As put by one jurisprudence scholar, "the identity of terms seems

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<sup>232</sup> See generally Lyne et al, *supra* note 54, at 44 (explaining the inter-workings of collective principals).

<sup>233</sup> See Grant & Keohane, *supra* note 3, at 29-30.

<sup>234</sup> The designation of these funds as World Bank Trust Funds is pervasive. See generally WB TRUST FUNDS 2007 REPORT, *supra* note 122 (referring to various Quasi Entity Funds as World Bank Trust Funds in the World Bank's Annual Report).

irresistibly to suggest an identity between the ideas expressed by them.”<sup>235</sup> But the resulting failure in accountability has actual and potential negative outcomes. These outcomes include gaps in the oversight of the funds’ resources resulting from misaligned responsibilities among the fund’s organs; liability and reputational risk for donors and the Bank; the application of *ad hoc* rather than optimal fiduciary practices; and unnecessarily high transaction costs. Issues that have arisen with the GEF Trust Fund show both these flaws and these outcomes.

The GEF provides several examples of conceptual confusion. From the beginning, the terms of the GEF Instrument show misunderstanding. In disregard of the limited role the Bank as Trustee was accorded in the GEF—which amounts to no more than that of a financial functionary—<sup>236</sup>the GEF Instrument makes the World Bank as Trustee the entity responsible for ensuring that the GEF Trust Fund’s resources are being used *in accordance with the terms of the GEF Instrument and the decisions of the GEF Council*.<sup>237</sup> Making the World Bank as Trustee responsible for overseeing the Implementing Agencies’ use of GEF Trust Fund resources reflects a misalignment of responsibilities because the Bank as Trustee lacks the authority, substantive knowledge, and resources to exercise such oversight.

The Bank as Trustee lacks the authority to police the Implementing Agencies’ use of GEF Trust Fund resources. The GEF Instrument mandates that it commit and disburse funds to the Implementing Agencies pursuant to the decisions of the GEF

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<sup>235</sup> See Dan Sarooshi, *Conferrals by States of Powers on International Organizations: The Case of Agency*, in THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 291, 297-98, n.7 (Oxford 2004).

If the expression of widely different ideas by one and the same term resulted only in the necessity for . . . clumsy paraphrases, or obviously inaccurate paraphrases, no great harm would be done; but, unfortunately, the identity of terms seems irresistibly to suggest an identity between the ideas expressed by them.

*Id.* (quoting T. Holland, ELEMENTS OF JURISPRUDENCE 83 (1906), quoted in W. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 33-34 (1914)).

<sup>236</sup> See Smyth, *supra* note 43, at 32-33 (describing in detail the Bank’s functions in relation to the GEF Trust Fund).

<sup>237</sup> See GEF Instrument, *supra* note 109, Annex B, para. 4(d) (providing, that the Trustee shall be responsible for the “monitoring of the application of budgetary and project funds . . . so as to ensure that the resources of the [GEF Trust Fund] are being used in accordance with the [GEF] Instrument and the decisions taken by the Council”).

Council without giving it any authority to withhold funds if the Implementing Agencies cannot account to the Bank for their use of GEF Trust Fund resources already received.<sup>238</sup> The Bank also lacks the substantive knowledge to police UNDP and UNEPs' use of resources. When the GEF Trust Fund donors set up the GEF Trust Fund, they agreed with the Bank, UNEP, and UNDP that each Implementing Agency would apply its own operational policies when making grants of GEF Trust Fund resources to other recipients.<sup>239</sup> The Bank as Trustee, unfamiliar with the specifics of UNEP and UNDPs' operational policies, would be in no position to monitor whether they were being observed.<sup>240</sup>

In short, it was misguided for the GEF Instrument to make the Bank as Trustee responsible for overseeing these agencies' use of GEF resources. In the case of UNEP and UNDP, the parties resolved this mis-alignment by means of a side-agreement, whereby they agreed that the Bank as Trustee would not oversee UNEP and UNDPs' application of their respective operational policies but would simply require UNEP and UNDP to furnish it with regular audited financial statements.<sup>241</sup> But this side-agreement did not resolve the broader accountability gap that the Quasi-Fund model poses with respect to oversight and the

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<sup>238</sup> See GEF Instrument, *supra* note 109, Annex B, para. 3 (holding that the Fund shall be administered according to provisions of the Instrument and the Trustee by-laws and rules, as well as any Council decisions made under the Instrument).

<sup>239</sup> See generally Smyth, *supra* note 43, at 62 (clarifying that while each agency would apply its own policies, the World Bank was allowed by the Council to stop sending funds to agencies if they did not meet their reporting requirements after a grace period of thirty days).

<sup>240</sup> The idea of World Bank staff monitoring and supervising UNDP and UNEPs' execution of their projects is also inconsistent with the co-equal statures of the World Bank and the UN, which, along with the UN's organs and Specialized Agencies, co-exist in the international sphere without either bowing to the other. See *About Us*, UNITED NATIONS, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040610~menuPK:41691~pagePK:43912~piPK:44037,00.html> (last updated June 30, 2003) (stating the Bank's formal relationship with the United Nations "is defined by a 1947 agreement which recognizes the Bank as an independent Specialized Agency of the UN as well as a member and observer in many UN bodies").

<sup>241</sup> See generally GEF COUNCIL, EXPANDED OPPORTUNITIES FOR EXECUTING AGENCIES, GEF/C.12/10, para. 15 (Oct. 14-16, 1998), available at <http://www.thegef.org/gef/sites/thegef.org/files/documents/GEF.C.12.10.pdf> [hereinafter GEF Expanded Opportunities] (listing those entities which would be able to take advantage of the newly expanded opportunities to access GEF financing).

standards the component bodies of a Quasi-Entity Fund should follow.

These broader questions resurfaced in the GEF in connection with a provision in the GEF Instrument not used in the early years of the GEF Trust Fund's existence.<sup>242</sup> This provision allows the GEF Council to allocate GEF Trust Fund resources to a wide range of intermediaries, including multilateral development banks, other specialized agencies and programs of the U.N., other international organizations, bilateral development agencies, national institutions, NGOs, private sector entities and academic institutions, in addition to the three Implementing Agencies.<sup>243</sup> Beginning in the late 1990s, the GEF Council began to allocate GEF Trust Fund resources to some regional development banks and several U.N. agencies and programs.<sup>244</sup> This expanded pool of intermediaries forced the GEF Council to confront the questions left open in the GEF Instrument—namely what standards the Council should apply in selecting additional entities, how the Council should determine whether an entity met those standards, what sort of oversight should be exercised over new intermediaries, and what would be the appropriate body to exercise oversight.

The Council adopted a set of criteria devised by the Secretariat for the selection of new intermediaries,<sup>245</sup> which focused on an entity's technical expertise to contribute to the GEF's mission.<sup>246</sup> It

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<sup>242</sup> See Smyth, *supra* note 43, at 57 (discussing how in the early years of the GEF's existence, the GEF Council only allocated resources to the Implementing Agencies; in time, the complaints of development banks and other entities about being shut out were heard, and the allocation procedures subsequently changed).

<sup>243</sup> See GEF Instrument, *supra* note 109, para. 28 ("The Secretariat and the Implementing Agencies under the guidance of the Council shall cooperate with other international organizations to promote achievement of the purposes of the GEF.")

<sup>244</sup> See generally GEF COUNCIL, CRITERIA FOR THE EXPANSION OF OPPORTUNITIES FOR EXECUTING AGENCIES, GEF/C.17/13, para. 3-5 (May 9-11, 2001), available at <http://www.thegef.org/gef/sites/thegef.org/files/documents/C.17.13.pdf> (detailing the GEF Council's decision to include four development banks and three United Nations agencies among the entities to which it would allocate GEF resources directly).

<sup>245</sup> See *id.* (listing three criteria by which the GEF Council would judge the suitability of an entity including strategic match, capacity, and complementarity). The Council adopted these criteria some time after making some one-off rulings affirming the eligibility of certain specific entities to serve as intermediaries. *Id.*

<sup>246</sup> See *id.* (focusing on the three criteria such that the entity would be able to work to fulfill the needs of the GEF (strategic match) at the necessary levels

also assigned the Secretariat the lead role in deciding, in consultation with the Implementing Agencies,<sup>247</sup> whether an entity met those criteria. But the Council's ruling left gaps. Deciding on standards of technical expertise is only part of the task; a donor governing body of a Quasi-Entity Fund must also clarify what fiduciary standards a recipient or intermediary must meet. The criteria the Council approved omitted any criteria concerning an entity's financial management capacity.

The omission concerning the entity's financial management capacity raised the question of whether the GEF Council would consider potential new intermediaries to have sufficient financial management capacity as long as they could furnish financial reports to the Bank as Trustee, as agreed for UNDP and UNEP.<sup>248</sup> It also raised the question of whether the Bank's role as Trustee to ensure that GEF Trust Fund resources are used in accordance with the terms of the GEF Instrument and the decisions of the GEF Council would be discharged by the Bank's simply securing financial reports from these new intermediaries.

The Bank as Trustee pressed the GEF Council for clarity regarding its responsibilities as Trustee. In response, the Council ruled that securing financial reports from the new intermediaries would fulfill the Bank's oversight responsibilities as Trustee.<sup>249</sup> At the Bank's urging, the Council also ruled that the GEF Instrument should not be read as precluding the Bank as Trustee from withholding the commitment or disbursement of funds to any intermediary that failed to provide the Bank with the required

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(capacity) while also being able to fully commit to the program (complementarity)).

<sup>247</sup> See *id.* (describing how, after the Council's initial review and acceptance of an entity, the Secretariat would "complete the necessary legal and procedural arrangements" and further review the agency before it was invited to become an intermediary for the GEF).

<sup>248</sup> See *supra* note 241 and accompanying text (detailing how the World Bank as Trustee of the GEF Trust Fund agreed with UNEP and UNDP that UNEP and UNDP would furnish the World Bank annually with audited financial reports, the receipt of which would satisfy the Bank's obligation to ensure that GEF Trust Fund resources were being used in accordance with the terms of the Instrument and the GEF Council's decisions).

<sup>249</sup> See GEF COUNCIL, TRUSTEE REPORT, GEF/C.23/Inf.3, para. 13 (Apr. 19, 2004), available at [http://207.190.239.143/COUNCIL/GEF\\_C23/C.23.Inf.3\\_Trustee\\_Report\\_FINAL.pdf](http://207.190.239.143/COUNCIL/GEF_C23/C.23.Inf.3_Trustee_Report_FINAL.pdf) [hereinafter GEF Trustee Report] ("[A]n appropriate manner for the Trustee to discharge [its] responsibility would be for it to require, and accept from, the Implementing Agencies an annual audited financial report . . .").

financial reports.<sup>250</sup> This ruling gave the Bank as Trustee the police powers necessary to fulfill the auditor-like role it had agreed to assume.<sup>251</sup>

Although the Council's ruling resolved the open questions concerning the scope of the Bank's responsibility in its capacity as Trustee of the GEF Trust Fund, the dilution of fiduciary oversight to the mere securing of financial reports is not a reassuring paradigm for the accountability of the Quasi-Entity Fund model. When intermediaries are large institutions, such as U.N. agencies with standard financial and other controls,<sup>252</sup> the limited measure of securing financial reports may provide adequate fiduciary oversight. However, the risk calculation changes in a broad universe of diverse intermediaries with diverse fiduciary policies, which may or may not conform to standards similar to those applied by the World Bank and U.N. entities.

In the case of the GEF Trust Fund, the donors became alert to inadequate fiduciary accountability belatedly when the number of intermediaries expanded rapidly in the early 2000s.<sup>253</sup> At that time, they asked the World Bank as Trustee to develop a set of policy proposals to strengthen the fiscal accountability of all GEF intermediaries.<sup>254</sup> The Bank as Trustee duly presented a set of

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<sup>250</sup> See *id.* para. 15 (authorizing the Bank as Trustee to "suspend commitment and disbursement" whenever a recipient is out of compliance with its financial reporting obligations for thirty days or more after issuance of written notice by the Trustee).

<sup>251</sup> *Id.*

<sup>252</sup> See generally U.N. Secretary-General, *Financial Regulations and Rules of the United Nations*, U.N. Doc. ST/SGB/2003/7 (May 9, 2003) (containing amended directives for the financial management of the U.N.).

<sup>253</sup> Until 1998 the GEF Council only allocated funds directly to the three Implementing Agencies: the World Bank, UNDP, and UNEP. By 2003, however, it had decided to also allocate funds to seven executing agencies pursuant to a series of decisions designed to give expanded access to GEF resources. See GEF Expanded Opportunities, *supra* note 241, at 2-5 (discussing the roles of the World Bank, UNDP, and UNEP as Implementing Agencies and their efforts to expand opportunities for executing agencies); GEF COUNCIL, REVIEW OF EXPERIENCE WITH EXECUTING AGENCIES UNDER EXPANDED OPPORTUNITIES, GEF/C.22/12, para. 20 (Oct. 24, 2003), available at [http://www.thegef.org/gef/sites/thegef.org/files/documents/C.22.12\\_Executing\\_Agencies\\_FINAL.pdf](http://www.thegef.org/gef/sites/thegef.org/files/documents/C.22.12_Executing_Agencies_FINAL.pdf) (stating that the policy of expanded opportunities has clarified the role of the executing agencies and has provided the agencies with greater access to GEF resources both directly and indirectly through the Implementing Agencies).

<sup>254</sup> See GLOBAL ENV'T FACILITY, SUMMARY OF NEGOTIATIONS ON THE FOURTH REPLENISHMENT OF THE GEF TRUST FUND Annex A, para. 22 (Oct. 9, 2006), available

minimum fiduciary standards which the Council asked every intermediary to implement within a year.<sup>255</sup> This step strengthened the fiduciary accountability of the GEF Trust Fund.

The Council's demand that the Bank as Trustee develop such standards, however, again manifests conceptual confusion regarding the roles and responsibilities—and, therefore, the accountability—of the Quasi-Entity Fund model. In principle, there is nothing wrong with the GEF Council asking the World Bank to develop a set of minimum fiduciary standards for GEF intermediaries. As an institution that has developed a comprehensive set of fiduciary safeguards for its own operations,<sup>256</sup> the Bank is well placed, in the abstract, to perform this standard-setting function. In the context of the Bank's role as Trustee of the GEF Trust Fund, however, things are more complicated. As the primary intermediary of GEF Trust Fund resources, and as an entity that opposed expanding the pool of GEF intermediaries,<sup>257</sup> the Bank's ability to appear objective in devising fiduciary standards for other GEF intermediaries is tainted.

The Bank's inability to assume an untainted role as standard-setter is unfortunate given that it has the necessary expertise. If, in the future, the donor community decides to create a separate legal entity—a sixth member of the World Bank Group, to serve as an international development fund administrator for donors' collective financing efforts—such an entity would be well-placed to also serve as an advisor on fiduciary standards for intermediaries

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at [http://207.190.239.143/GEF-3-4Replenishment/Reple\\_Documents/SummaryofNegotiations\\_Revised\\_October2006.pdf](http://207.190.239.143/GEF-3-4Replenishment/Reple_Documents/SummaryofNegotiations_Revised_October2006.pdf) [hereinafter GEF FOURTH REPLENISHMENT] (“The use of GEF resources should be subject to the highest international fiduciary standards.”). The Council asked that the proposals set minimum financial standards consistent with international best practices. *Id.*

<sup>255</sup> See GLOBAL ENV'T FACILITY, RECOMMENDED MINIMUM FIDUCIARY STANDARDS FOR GEF IMPLEMENTING AND EXECUTING AGENCIES para. 12 (2007), available at [http://www.thegef.org/gef/sites/thegef.org/files/documents/Recommended\\_Minimum\\_Fiduciary\\_Standard.pdf](http://www.thegef.org/gef/sites/thegef.org/files/documents/Recommended_Minimum_Fiduciary_Standard.pdf) [hereinafter GEF FIDUCIARY STANDARDS] (“The Council requests each agency to present a report to the GEF Secretariat on its compliance with the fiduciary standards and, as necessary, plans to remedy any shortfall.”).

<sup>256</sup> See generally WB TRUST FUNDS MANAGEMENT FRAMEWORK, *supra* note 18, at 31–40 (detailing a risk-based approach to trust fund management).

<sup>257</sup> See Smyth, *supra* note 43, at 63 (detailing how the World Bank initially opposed regional banks and other entities gaining direct access to GEF resources, as distinct from having access exclusively through sub-grants from the Implementing Agencies).

and direct recipients.<sup>258</sup> This advisory role is precluded when the Bank assumes the multiple roles it currently holds under the Quasi-Entity Fund model.

The Bank as Trustee was also the wrong entity to set standards for GEF intermediaries because of the risk it took by assuming that its standard-setting role would expand to include a role overseeing whether those standards were being met. This overseer role is inconsistent with the limited financial functionary role the Bank has as Trustee of the GEF. Although setting minimum fiduciary standards for intermediaries does not necessarily entail assuming oversight responsibilities over intermediaries' compliance with those standards, it is a slippery slope. This was especially true in the context of the GEF Trust Fund, where the Bank as Trustee had to forcibly wean donors from depending on the Bank to perform an oversight function it was not equipped to fulfill.

To create a situation where the donors of a Quasi-Entity Fund would rely on the Bank as Trustee to exercise fiduciary oversight over the fund's intermediaries and/or recipients, while at the same time excluding the Bank from having any input in selecting those intermediaries and/or recipients, would not serve the interests of development's stakeholders. For example, given the lack of input the Bank as Trustee of the GEF Trust Fund has in selecting GEF intermediaries, if the Bank assumed responsibility for such intermediaries' use of trust fund resources it would effectively be taking on unmanageable amounts of responsibility and risk. Instead, the donor governing body (the GEF Council) is the appropriate body to bear the risk of selecting a fraudulent or incompetent entity because it holds the authority to choose intermediaries or recipients.<sup>259</sup> This arrangement properly aligns control with responsibility.

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<sup>258</sup> An expanded role for the World Bank as a standard-setter of financial assessment and fiduciary monitoring practices would fit within the characterization of the World Bank as having the potential to play a significant role in the evolving field of global administrative law. See generally Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005) (discussing the transnational regulatory systems that are emerging to tackle intergovernmental issues, such as assistance to developing countries and banking and financial regulation, which cannot adequately be addressed by domestic national administrative institutions).

<sup>259</sup> See BANTEKAS *supra* note 18, at 156-57 (noting that an executive board—such as the GEF Council—of an intergovernmental trust fund with a governance mechanism owes obligations to a range of stakeholders, including the donors themselves).

Ultimately, the Bank as Trustee avoided taking responsibility for vetting the GEF's intermediaries or for monitoring intermediaries' compliance with the policies and procedures they had agreed to apply. Instead, the GEF Council ordered the intermediaries to report to the Secretariat on their progress in implementing the standards the Bank as Trustee had recommended.<sup>260</sup> Designating the Secretariat to vet and monitor the intermediaries' compliance with the standards the Bank as Trustee devised helped offset the appearance of a conflict of interest in having the Bank serve as standard-setter. As an exercise in finding the right body for the job, however,<sup>261</sup> this result is also suboptimal. The Secretariat is primarily staffed with environmental experts (rather than accounting or financial management folks), and so lacks the right expertise to perform the task. Meanwhile, the Bank, as the designer and proponent of the minimum fiduciary standards, has the correct expertise, but cannot participate due to potential conflicts in ensuring compliance with other roles the Bank has already assumed. This is not an optimal division of labor or use of institutional resources.

The hit-or-miss quality of the decisions that led to the ultimate division of labor between the different components of the GEF structure does not inspire confidence in the Quasi-Entity Fund as a model. That same hit-or-miss quality was evident in the first drafting of the Education Fund by the donors and Bank, and their struggles with balancing between the Bank's need to observe prudent financial management standards and the donors' desire for autonomy within the constraints of the Quasi-Entity Fund model.

The conceptual confusion about accountability is evident in the Education Fund in connection with the donor governing body's selection of recipients. The Education Fund's donor governing body (the Strategy Committee) was designated to select which countries would receive assistance<sup>262</sup> and also to recommend to the

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<sup>260</sup> See GEF FIDUCIARY STANDARDS, *supra* note 255, para. 12 (requesting "each agency to present a report to the GEF Secretariat on its compliance with the fiduciary standards and, as necessary, plans to remedy any shortfall").

<sup>261</sup> See Hawkins et al., *Delegation Under Anarchy*, *supra* note 55, at 25-26 (discussing the considerations that the principal must take into account when "hiring" an agent, and noting the importance of aligning a principal's demands with an agent's capacity).

<sup>262</sup> Pursuant to the World Bank's Operating Policies governing the Bank's administration of trust funds, each donor to a fund enters into a Trust Fund

Bank as Trustee the specific recipients that should receive Fund resources. Recommended recipients could be chosen from an unlimited range of recipient entities.<sup>263</sup> The Bank as Trustee, however, retained the final say in selection.<sup>264</sup> In principle, this arrangement was intended to allow the Bank as Trustee to avoid providing fiduciary oversight over an entity that would not meet its fiduciary or social safeguards. The Fund's constituent documents, however, did not specify what standards the Strategy Committee would apply in selecting recipients. As a result, since the final say on recipient selection lay with the World Bank as Trustee, the Bank's fiduciary and social safeguards became the default standards.

The terms and conditions of the Education Fund provided that the Bank's standards would apply to all grants from the Education Grant except when the Strategy Committee selected a non-government recipient, in which case the Bank would not supervise the recipient. The terms were entirely vague, however, regarding which policies and procedures any such recipients would be required to observe.<sup>265</sup> The absence of clear and transparent standards to guide when the Strategy Committee might make such an allocation and/or what sort of substitute oversight procedures would apply created a significant gap in accountability. The terms of the Fund include an express disclaimer by the Bank of any responsibility to account to the donors for any such recipient's use of the Fund's resources.<sup>266</sup> The power of this disclaimer to protect the Bank's reputation if a malfeasance occurred, however, and the wisdom of the institution relying on such a disclaimer to protect itself are dubious.

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Administration Agreement or its equivalent with the World Bank as trustee. See World Bank OP/BP 14.40, *supra* note 99, at BANK PROCEDURES, para. 6. Accordingly, each Education Fund donor has entered into a Trust Fund Administration Agreement with the World Bank, the terms and conditions of which create, inter alia, the fund's governance structure. See WORLD BANK, AGREEMENT BETWEEN DONOR AND THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT AND THE INTERNATIONAL DEVELOPMENT ASSOCIATION CONCERNING THE EDUCATION FOR ALL FAST TRACK INITIATIVE CATALYTIC FUND, TF No. 051061, Annex 1, para. 2 (2007), [hereinafter Education Fund Administration Agreement] (on file with author).

<sup>263</sup> Education Fund Administration Agreement Annex 1, *supra* note 262, para. 2.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* paras. 2, 7.b.

<sup>266</sup> *Id.* para 7.b.

These types of accountability gaps are not present under a World Bank Trust Fund. When a group of donors set up a World Bank Trust Fund, they enter into legal agreements with the World Bank which govern the administration of the fund and set out the terms and conditions under which the World Bank will carry out its trustee responsibilities. These agreements provide a relatively clear accountability framework.<sup>267</sup> They set out precisely which policies and procedures the Bank will follow in its discharge of its trustee responsibilities.<sup>268</sup> Under the default rule, of the World Bank's internal policies when administering a World Bank Trust Fund, the World Bank must apply the same rules and policies to the use of the fund's resources as applied to its own resources. The full panoply of processes and procedures that the Bank has developed for its lending activities will apply.

The Bank's lending policies set out a comprehensive set of standards that apply to two different aspects of the recipient selection process. They prescribe the requirements that an entity must meet in order to qualify as an eligible recipient of financing—a set of standards collectively referred to as the Bank's *fiduciary safeguards*.<sup>269</sup> They also prescribe the requirements a recipient must observe while carrying out the activity being financed by the grant.

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<sup>267</sup> See SUREDA, *supra* note 187, at 191 (describing the principles that must be included in trust fund administration agreements).

<sup>268</sup> See generally World Bank OP/BP 14.40, *supra* note 99 (describing the responsibilities of groups with regards to the use of trust funds). In 2006, the Bank introduced a set of Standard Terms and Conditions for World Bank Grants, which incorporate these policies. See generally WORLD BANK, STANDARD CONDITIONS FOR GRANTS MADE BY THE WORLD BANK OUT OF VARIOUS FUNDS (July 20, 2006), available at <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/STDGC-English-06.pdf>. See also Smyth, *supra* note 38, at 529-35 (discussing the World Bank's transition from its original approach to grant agreements, which allowed for variable terms and conditions, to its current emphasis on uniformity, and noting the Bank's authority to cancel or suspend grants when necessary).

<sup>269</sup> The *fiduciary safeguards* allow the World Bank to preliminarily vet a potential recipient's capacity to handle grant funds. For example, they require that the grant recipient maintain a financial management system—including accounting, financial reporting, and auditing systems—that is satisfactory to the Bank. See *World Bank Safeguard Policies*, WORLD BANK, <http://go.worldbank.org/QL7ZYN48M0> (last visited Feb. 22, 2011) (describing a series of policies to assure that the "Bank's operations do not harm people and the environment"). What is satisfactory to the Bank will depend on what kind of information the Bank determines it will need from a recipient in order for the Bank to discharge its responsibilities as a trustee. The Bank also must report to donors on the status of the fund and the use of donors' resources.

These latter requirements are set down as conditions in the grant agreement entered into between the Bank as trustee and the recipient, and are collectively referred to as the Bank's *social safeguards*.<sup>270</sup> These safeguards reflect the principles the Bank observes in order to keep its operations consistent with generally accepted principles of sustainable development.<sup>271</sup> In sum, the *fiduciary safeguards* and the *social safeguards* combined are specifically designed to create a clear framework of accountability.<sup>272</sup>

The Bank's lending policies also mandate that the recipient follow the World Bank's procurement policies and procedures—provisions designed to ensure that the recipient follows a transparent process in procuring goods and services being financed by the grant, and that all eligible bidders get a fair opportunity to compete.<sup>273</sup> Further, they require the Bank to

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<sup>270</sup> The Bank's *social safeguards* apply to a project's environmental footprint and other development-related issues. They require a grant recipient to comply with the Bank's policies covering a host of matters such as mandated environmental assessments and the protection of indigenous people, natural habitats, forestry and physical and cultural resources. The Bank's *social safeguards* consist of ten policies intended to serve as a set of minimum standards that all Bank-supported operations must meet. See generally Alex Wilks, *World Bank Social and Environmental Policies: Abandoning Responsibility?*, BRETTON WOODS PROJECT (Sept. 2003), available at <http://www.brettonwoodsproject.org/doc/env/safeguards.PDF> (revealing that the World Bank's efforts to "reformat" its ten safeguard policies made NGOs fear that the Bank intended to evade responsibility for social and environmental concerns); *World Bank Safeguard Policies*, *supra* note 269 (noting social safeguards).

<sup>271</sup> Many of these policies were introduced in the 1980s in response to pressure from the NGO community to protect the environment and vulnerable groups from being harmed by the World Bank's operations. See Kapur, *supra* note 73, at 65–66 (noting the strong influence of Washington-based NGOs over the World Bank). See generally Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 323 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999) (discussing the World Bank's operational policies and practices and their impact on international law).

<sup>272</sup> *Fiduciary safeguards* and *social safeguards* are part of the World Bank's Operational Policies and Procedures. See WORLD BANK, *THE WORLD BANK OPERATIONS MANUAL*, OP 4.00, para. 2, tbl.A1 (2005), available at <http://siteresources.worldbank.org/EXTOPMANUAL/Resources/EntireOpManualExternal.pdf> (presuming that a borrower's environmental and social safeguard system is the same as the Bank's when it is aimed at the objectives listed in Table A1, which describes appropriate safeguard operations).

<sup>273</sup> See *id.* at OP 11.00 (outlining procurement policy).

monitor and supervise the execution of grants from trust fund resources.<sup>274</sup>

This framework of accountability is lost whenever a group of donors sets up a Quasi-Entity Fund that excludes application of the World Bank's *fiduciary safeguards* and *social safeguards* to the donor governing body's selection of recipients. The Bank's internal policies<sup>275</sup> require that the Bank's fiduciary and safeguard policies apply to all grants the Bank supervises; however, gaps exist when donors retain the right to have non-Bank entities supervise grants made from fund resources. In choosing to retain the right to select non-Bank entities to implement and/or supervise, donors must decide which substitute standards to apply both in initially vetting recipients' fiduciary capacity to handle grant resources, and in determining what kind of sustainable development policies they want recipients to observe in carrying out the grant activities.<sup>276</sup>

As experience shows, Quasi-Entity Fund donors and the World Bank tend not to appreciate the need to proactively determine who will exercise oversight over the recipients' use of resources; what such oversight will entail, and what standards, policies, and procedures will guide the donor governing body's discharge of its responsibilities in allocating a fund's resources. Accountability demands more.<sup>277</sup>

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<sup>274</sup> See *id.* para. 1 ("The Articles of Agreement establish the Bank's fiduciary responsibility to ensure that the proceeds of its loans are used only for specified purposes . . ."). For example, the grant recipient's responsibility to execute the grant holds the recipient responsible for procuring the goods and services needed to carry out grant activities, negotiating contracts, making payments, submitting progress and financial reports as required by the grant agreement and performing other implementation activities. See World Bank OP/BP 14.40, *supra* note 99, at 3 n.7 (describing responsibilities of grant recipients). The Bank is responsible for supervising and monitoring the recipient's performance of these obligations. See *id.* para. 8, at 5 ("The [task team leader] is responsible for supervising and reporting to his/her line manager . . . on progress in implementation of trust-funded activities.").

<sup>275</sup> See generally World Bank OP/BP 14.40, *supra* note 99 (stating the operational policies of the World Bank).

<sup>276</sup> If fund donors decided not to give the donor governing body discretion, but instead set rules to administer, accountability would be more easily determined. See Hawkins et al., *Delegation Under Anarchy*, *supra* note 55, at 27 (summarizing the benefits and drawbacks of "rule-based" and "discretion-based" delegation of authority). This would require, however, the creation of a dynamic, flexible funding vehicle that could readily respond to changing needs.

<sup>277</sup> Further, in a participatory model of accountability for development aid, accountability would flow to all stakeholders. See Grant & Keohane, *supra* note 3, at 38 (discussing various forms of accountability applicable to multilateral

The World Bank itself has expressed concern about the accountability of the Quasi-Entity Fund model. Its internal evaluations department, the Operational Evaluation Department (“OED”), identified several failures in accountability in the model.<sup>278</sup> In a study of twenty-six initiatives, it concluded that the roles and responsibilities of the governing officers and bodies needed clearer articulation, and that the transparency of their decision-making and processes needed improvement to provide clearer accountability for their exercise of power over the initiatives’ resources.<sup>279</sup> Further, OED found nine different models of governance in use in the twenty-six initiatives, with no obvious reason for the differences between them.<sup>280</sup> The Bank’s Senior Management also raised concerns to the Bank’s Board of Executive Directors (the Bank’s governing body on a day-to-day basis) about the risks the Bank faces in administering increasingly complex Quasi-Entity Funds.<sup>281</sup> Despite these concerns, neither the Bank nor the donor or recipient communities have articulated a comprehensive vision regarding what kinds of reform of the Quasi-Entity Fund would best serve the global community; nor

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organizations, multilateral firms, and NGOs). In a delegation model, those who delegate power hold power-wielders “accountable through a variety of mechanisms for judgment after the fact.” *Id.* at 32–33.

<sup>278</sup> See OED Phase I Report, *supra* note 38, at 42 (noting, for instance, conflicts of interest, whether real or perceived); WORLD BANK, ADDRESSING THE CHALLENGES OF GLOBALIZATION: AN INDEPENDENT EVALUATION OF THE WORLD BANK’S APPROACH TO GLOBAL PROGRAMS—PHASE 2 REPORT 85 (2004), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/04/25/000020953\\_20070425114157/Rendered/PDF/396470PAPER0Ch1lobalization01PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/04/25/000020953_20070425114157/Rendered/PDF/396470PAPER0Ch1lobalization01PUBLIC1.pdf) [hereinafter OED Phase 2 Report] (concluding that “[w]hile pure shareholder models of programs are being replaced by stakeholder models, program governance are still struggling to balance legitimacy and accountability for results with efficiency in achieving them”).

<sup>279</sup> See OED Phase 2 Report, *supra* note 278, at xxviii (concluding that the “[l]ack of effective governance and management must be addressed if the Bank’s financial support is to continue”); *id.* at 53–66 (noting a strong need for the World Bank to address the lack of effective governance and management commonly found in global programs, the kinds of programs that are funded by Quasi-Entity Funds).

<sup>280</sup> See *id.* at 53–54 (noting that “programs have adopted their particular governance models for reasons of history and of culture,” and emphasizing that the number of diverse models makes it difficult to differentiate between partners and participants, as well as to judge how effective each governance model is).

<sup>281</sup> See WB TRUST FUNDS MANAGEMENT FRAMEWORK, *supra* note 18, para. 2.13, at 11–12 (discussing the problems arising from complexity, such as multiple layers of decision-making, increased financial management requirements, and the need for greater administrative processing).

have they articulated a vision regarding what role the World Bank or other intergovernmental organizations should assume with respect to them.<sup>282</sup>

Recent developments in the Education Fund indicate that donors and the Bank are aware of the need to proactively address the accountability lacunae that arise in the Quasi-Entity Fund model. In November 2010, the donors of the Education Fund, in collaboration with the full membership of the broader Education For All Fast Track Initiative Partnership, agreed to a major restructuring of the Fund.<sup>283</sup> The changes, in addition to expanding the participatory nature and inclusiveness of the Fund, limit the range of entities to which the Fund will transfer resources and removes the prior opacity about what policies and procedures apply when the Fund issues a grant to an entity that will not be supervised by the World Bank.<sup>284</sup>

Under the restructured fund, the former donor governing body, the Steering Committee, has been abolished.<sup>285</sup> The original Education Fund has been merged with other related funds financing primary education and the newly merged fund, named the Education For All Fund, is governed by a board of directors

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<sup>282</sup> See BANTEKAS, *supra* note 18, at 156–58 (discussing corporate governance duties and the lack of clarity regarding such duties in intergovernmental trust funds).

<sup>283</sup> See *FTI Reform Agenda*, EDU. FOR ALL FAST TRACK INITIATIVE (Dec. 03, 2010), available at <http://www.educationfastrack.org/news/185/290/Key-Decisions-and-Next-Steps-Conclude-EFA-FTI-Meetings/d,Whats%20New/> (detailing the agreed-upon changes including restructuring the Board of Directors, policy reformation, the creation of a single trust fund, and a revision of the "Governance of the Partnership" document).

<sup>284</sup> See EDUCATION FOR ALL FAST TRACK INITIATIVE, COVER NOTE TO GOVERNANCE OF THE PARTNERSHIP ii (Nov. 2010), available at [http://www.educationfastrack.org/media/Revised%20Final%20Governance%20Document\\_Jan%202011.pdf](http://www.educationfastrack.org/media/Revised%20Final%20Governance%20Document_Jan%202011.pdf) [hereinafter EFA-FTI GOVERNANCE DOCUMENT (2010)] (reflecting the changes made to the membership and function of EFA-FTI's Board of Directors).

<sup>285</sup> See DAVID GARTNER, BROOKINGS INSTIT., TRANSFORMED GOVERNANCE AND THE EDUCATION FOR ALL-FAST TRACK INITIATIVE 3 (May 2010), available at [http://www.brookings.edu/~media/Files/rc/papers/2010/05\\_education\\_governance\\_gartner/05\\_education\\_governance\\_gartner.pdf](http://www.brookings.edu/~media/Files/rc/papers/2010/05_education_governance_gartner/05_education_governance_gartner.pdf) (noting the FTI—whose origin can be traced to the 2002 G-8 summit in Canada—has “evolved from an entity formally guided by an annual partnership meeting, to a steering committee without substantial authority over funding decisions, to a unified structure of board governance”)

who makes all financing decisions.<sup>286</sup> The range of possible entities that can supervise a grant of Fund resources has been restricted to any multilateral or bilateral FTI Partner organization;<sup>287</sup> a FTI Partner organization being defined as a bilateral aid agency of a donor country to the Education Fund or any multilateral organization engaged in the primary education sector.<sup>288</sup> The entity selected to supervise a grant is responsible to the EFA FTI Partnership for grants under its oversight.<sup>289</sup> The lack of clarity about what polices an entity supervising the execution of a Fund grant should apply has been resolved in favor of allowing the supervising entity to apply its own policies and procedures, including those related to the procurement of goods and services.<sup>290</sup>

The dual reporting role of the Secretariat (to the overall Partnership and the Bank as the host organization) remains, however.<sup>291</sup> Further, although the re-structured fund's constituent documents declare that the Board of Directors shall monitor the use of the Fund's resources and ensure that they are being used in

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<sup>286</sup> See EFA-FTI GOVERNANCE DOCUMENT (2010), *supra* note 284, para. 4.2 (outlining the amended mandate of the FTI Board of Directors). The Board of Directors has nineteen members and is a much broader representation of interested stakeholders than the Strategy Committee of the former Education Fund. *Id.* at para. 4.2.1. The nineteen representatives include six representatives from donor countries, six representatives from developing countries eligible to receive Fund resources, three representatives from Civil Society, one representative from the private sector, and one representative from each of the United Nations Educational, Scientific and Cultural Organization, the United Nations Children's Fund and an unspecified multilateral or regional development bank. *Id.* para. 4.2.2(a)-(e). Decisions are made by consensus where possible or by a majority which must include a cross-section of the different categories of Board representatives, where consensus cannot be achieved. *Id.* at para. 4.2.17.

<sup>287</sup> See *id.* para. 4.1 (giving the four categories of FTI Partners, all charged with monitoring and advising the Board of Directors).

<sup>288</sup> See EDUCATION FOR ALL FAST TRACK INITIATIVE COUNTRY LEVEL PROCESS GUIDE (Apr. 2010), available at [http://www.educationfasttrack.org/media/library/Secure/Board\\_Documents\\_May-2010/Final\\_Country\\_Level\\_Process\\_Guide.pdf](http://www.educationfasttrack.org/media/library/Secure/Board_Documents_May-2010/Final_Country_Level_Process_Guide.pdf) (providing an "overview of the basic process of joining and working within the EFA FTI Partnership at a country level").

<sup>289</sup> See EFA-FTI GOVERNANCE DOCUMENT (2010), *supra* note 284, para. 3.5.6 (discussing how such organizations can be designated Coordinating Agencies, which have the responsibility to monitor and facilitate fund disbursement).

<sup>290</sup> See *id.* (noting also the Coordinating Agency's role in monitoring the progress and implementation of a country's education sector plan).

<sup>291</sup> See *id.* para. 4.4.6 (detailing how the FTI Secretariat is to report to the Board of Directors regarding "objectives and outcomes," and to the host organization regarding the work plan and budget management).

accordance with the Board's decision,<sup>292</sup> the Board, for all practical purposes, is entirely reliant on the supervising entities to provide oversight. In the meantime, the World Bank as "Trustee" of the Fund would appear (incorrectly) to the outside world, as the entity responsible for that oversight role.

All of the development's stakeholders have a stake in containing the risks that the accountability gaps in the Quasi-Entity Fund model create, not least the World Bank. Unless we ascribe to the view that the World Bank has served its purposes and should cease to exist as an organization, there is reason to preserve its viability as a development bank.<sup>293</sup> This means that the Bank should take steps to prevent the Quasi-Entity Fund model from becoming the tail that wagged the dog, i.e., to prevent Quasi-Entity Funds from becoming a vehicle that, by damaging the Bank's reputation for sound financial management practices, impedes the Bank's ability to function as a viable financial institution.<sup>294</sup> Individual donors may have markedly different risk tolerances than the Bank, given the Bank's dependence on the capital markets to raise operating capital. This difference seems best accommodated in a framework that draws a clear line between the role of the Bank as an administrator of donors' funds and the role of the Bank as a lending institution whose lending rates are driven by its cost of capital. Comprehensive change that recognizes this difference, and the risks created by lacunae in accountability, is overdue.

### 3.2. *The Deficits in the National Law Entity*

The National Law Entity model, as epitomized by the Global Fund, is materially different from the Quasi-Entity Fund. The Global Fund's donors broke free of the agency costs that the donors to a Quasi-Entity Fund incur as a result of the Quasi-Entity Fund's extensive dependence on the World Bank. They also

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<sup>292</sup> See *id.* para. 4.2.8 ("The FTI Board of Directors makes funding decisions for the FTI Trust Funds, monitors their utilization and ensures they are being used in line with FTI objectives and policies . . .").

<sup>293</sup> See Pincus & Winters, *Reinventing the World Bank*, *supra* note 3, at 18-19 (noting that the "Fifty Years is Enough" sentiment reflects just one extreme view and that while the World Bank has many critics, most of its critics advocate reform, not abolition of the institution).

<sup>294</sup> See generally Kapur, *supra* note 73, at 61-63 (noting how the World Bank's dependence on global financial markets has shaped the institutional design and governance of the World Bank itself).

unmasked and plugged the accountability gaps hidden in the Quasi-Entity Fund model. But neither achievement has been absolute or cost-free. Moreover, these gains alone do not establish the National Law Entity model as an optimal model for collective financing efforts. Whether this model can be viewed as such depends, as a threshold matter, upon the costs at which these gains have been achieved. Further, assuming—even without conceding—that the costs are manageable, whether the National Law Entity model's potential to serve as an optimal model for collective financing also depends on whether this model's goals are impeded by its lack of international legal personality.

### *3.2.1. Uncertain Availability*

#### *3.2.1.1. Financial Administration*

The Global Fund secured the financial administration services of the World Bank, despite the fact that it operates independently from the Bank. Further, the Global Fund's Secretariat and its Executive Director have real, not illusory, independence from any other entity. In both of these respects, the National Law Entity model succeeds where the Quasi-Entity Fund model fails. Both gains are directly linked to the Global Fund's independent legal status.

The World Bank agreed, reluctantly, to serve as Trustee of the Global Fund. It was uneasy about the grassroots, locally-based approach the Global Fund donors favored. Its concession to serve as Trustee must be understood within the particular context in which the Global Fund was created. The Fund was a high-profile effort that encapsulated the developed world's response to an urgent epidemic<sup>295</sup>—a response that many viewed as long overdue.<sup>296</sup> It is funded by the Banks' major shareholders acting collectively, whom the Bank was not in a position to refuse.

When earlier versions of the Fund were under consideration, the Bank took the position that it would not serve as trustee of a

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<sup>295</sup> See Press Release, Secretary-General, Secretary-General Proposes Global Fund for Fight Against HIV/AIDS and Other Infectious Diseases at African Leaders Summit, U.N. Press Release SG/SM/7779/Rev.1 (Apr. 26, 2001) (discussing the high incidence rate of HIV/AIDS in Africa, and broadly outlining various steps that need to be taken to curtail the spread of the epidemic).

<sup>296</sup> See RADELET, *supra* note 139, at 3–7 (examining some of the most common criticisms of foreign aid programs and how the Global Fund structure responds to the criticisms).

fund set up under its auspices if the purpose of that fund was to channel funds through country-based mechanisms selected by the donors, rather than through the Bank and other intergovernmental organizations.<sup>297</sup> The Bank based this position on concerns about liability and reputational risk.<sup>298</sup> As indicated earlier in connection with the GEF Trust Fund,<sup>299</sup> the Bank views a fund that channels its resources through the Bank and U.N. entities as a known quantity, from the point of view of the risk the Bank assumes in serving as a trustee.

The Global Fund's donors were adamant, however, that the fund would not operate through those established channels. Thus, under pressure to help facilitate the Fund's creation, the Bank opted for the second-best alternative (from the point of view of protecting the Bank's interests) and conditioned its willingness to serve as Trustee on the Fund's being set up with a legal personality independent of the Bank.<sup>300</sup> That way the Fund, not the Bank, would bear legal responsibility for any loss, damage, or fraud that might result in the course of the Fund's operations.<sup>301</sup> The Bank also saw the Fund's legal independence as a way of attenuating, if not eliminating, any reputational damage to the Bank that might result from something going awry in the course of the Fund's operations.<sup>302</sup>

The Bank's agreement to serve as Trustee of the Global Fund, therefore, cannot be viewed as indicative of a general willingness to assume that role for financing efforts that operate independent of it. In certain limited circumstances, notably in connection with highly specialized, narrowly targeted health initiatives, it has

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<sup>297</sup> See GLOBAL FUND REPORT ON LEGAL STATUS OPTIONS, *supra* note 171, at 7 (determining that "the Global Fund lacks a cost-effective administrative structure, independent authorities, and sufficient liability protection").

<sup>298</sup> See *id.* (pointing out concerns that the proposed design of the fund might result in redundancy, increased costs, and a subversion of existing programs and expertise).

<sup>299</sup> See *supra* text accompanying notes 165, 167-68 (describing the role of Local Fund Agents as well as the legal liability of the Global Fund).

<sup>300</sup> See Triponel, *supra* note 138, at 183 (discussing the reasons why the Global Fund was established as an independent legal entity); GLOBAL FUND FRAMEWORK DOCUMENT, *supra* note 138, at 1 (discussing the purpose and scope of the Global Fund).

<sup>301</sup> See GLOBAL FUND REPORT ON LEGAL STATUS OPTIONS, *supra* note 171, at 2 (providing background information on the establishment of the Global Fund).

<sup>302</sup> See *id.* (detailing the historical perspective in the formation of the Global Fund, and why it was organized as a private entity as opposed to another form).

agreed to serve as trustee for independent initiatives.<sup>303</sup> However, the criteria that determines whether the Bank will or will not provide financial administration services are opaque. The clear demand for collective financing for development gives rise to a need for greater certainty regarding the availability of such services to donors, whether from the World Bank or an alternative institution. For the National Law Entity to be a viable model for new collective financing efforts, donors need assurance that such services are available.

*3.2.1.2. Uncertain Commitment to the Responsibilities of Independence*

The Global Fund's independence from the WHO, the World Bank, and all other pre-existing intergovernmental organizations is real, but as the Fund's history shows, this independence was not automatic.<sup>304</sup> It resulted from the determined, relentless drive of the Fund's supporters to preserve the Fund as a financing vehicle that operates through country and regional-level channels. That determination caused the Global Fund's donors early on to view the Administrative Services Agreement between the Fund and the WHO, and the convenience of relying on the pre-existing institutional apparatus of the WHO to hire Fund staff, as temporary measures.

The independence of the Global Fund's Secretariat serves as a paragon of what the GEF Trust Fund's CEO wants to achieve. Further, the Global Fund terminated its Administrative Services Agreement with the WHO for the express purpose of relieving its Secretariat of the conflict of serving the distinct agendas of the Fund and the WHO; this strongly supports the argument that, as the GEF's CEO claims, such independence is essential if a collective financing effort is to achieve its goals. This evidence squarely confronts donors with the implications of their design choices. The National Law Entity offers a means of achieving real independence

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<sup>303</sup> See *Why IFFIm?*, IFFIM, <http://www.iff-immunisation.org> (last visited Apr. 12, 2011) ("The International Finance Facility for Immunisation (IFFIm) exists to rapidly accelerate the availability and predictability of funds for immunization"); *What Is an AMC?*, ADVANCE MARKET COMMITMENT FOR VACCINES, <http://www.vaccineamc.org/about.html> (last visited Apr. 12, 2011) (explaining that "[d]onors commit money to guarantee the price of vaccines once they have been developed . . .").

<sup>304</sup> See Triponel, *supra* note 138, at 184–86 (discussing the creation of the Global Fund as an independent legal entity).

if donors are willing to assume the responsibilities and costs that independence entails.

Many of the accountability gaps the Quasi-Entity Fund model generates are resolved by the National Law Entity model. Its clear legal independence puts donors on notice *ab initio* that they must decide on standards and processes for the new entity's operations, for which they will hold it accountable. In setting up the component parts of the Global Fund, therefore, the donors carefully delineated the responsibilities of each part at the global and local level.<sup>305</sup> They also delineated the standards by which each should discharge its responsibilities. The Country Coordinating Mechanism, for example, selects the Principal Recipients in accordance with criteria set by the Board of Directors, and the Local Funding Agents are selected in accordance with pre-agreed competitive bidding processes.<sup>306</sup> For the most part, therefore, with one exception, the confusion about roles and responsibilities evident in the Quasi-Entity Fund is absent from the National Law Entity as exemplified by the Global Fund. Moreover, consistent with best practices identified in principal-agent theory, each component part's responsibilities are aligned with its competence and relatively devoid of perverse incentives.<sup>307</sup>

The exception to the Fund's sound framework of fiscal accountability concerns the role of the World Bank as Trustee. Labeling the Bank Trustee of the Global Fund is misleading. As a non-voting member of the Board of Directors, the Bank has no control over who the recipients of the Fund's grants are, or over the criteria applied to select them, or over the terms and conditions of the grants made to them.<sup>308</sup> Vis-à-vis the recipients, the Bank's role

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<sup>305</sup> See GLOBAL FUND FRAMEWORK DOCUMENT, *supra* note 138, §§ IX-X (providing an overview on the process of monitoring programs and of different entities' fiduciary responsibilities).

<sup>306</sup> See *supra* text accompanying note 158 (noting that the GUIDELINES AND REQUIREMENTS FOR COUNTRY COORDINATING MECHANISMS outline the principles the Country Coordinating Mechanisms must advance); *Who We Are*, THE GLOBAL FUND, <http://www.theglobalfund.org/en/lfa/> (last visited Mar. 18, 2011) (stating that Local Funding Agents "are selected through a competitive bidding process").

<sup>307</sup> See Hawkins et al., *Delegation Under Anarchy*, *supra* note 55, at 30-31 (discussing the effect of delegation on the principal-agent theory).

<sup>308</sup> The Fund's grant agreements are concluded between the Fund and the recipient, so the Bank as Trustee is not involved in them and simply disburses funds to the recipients' bank accounts in accordance with the instructions it receives from the Secretariat. See GLOBAL FUND REPORT ON LEGAL STATUS OPTIONS, *supra* note 171, at 2.

is solely that of a disbursement or paying agent on behalf of the Fund. *Vis-à-vis* the Fund's donors, its role resembles that of a collection agent and custodian or investment manager. Neither of these roles entails exercising the oversight over the Fund's resources, ordinarily connoted by having the World Bank serve as Trustee of a fund.

In fact, under the Fund's structure the Local Funding Agent, Principal Recipient, Secretariat, and Board of Directors all have a role in overseeing the use of the Fund's resources. In other words, fiduciary accountability does exist, but it is not centered in, or dependent on, the World Bank. Accountability, however, not only demands clarity in how a principal and an agent allocate their respective duties and responsibilities, but also clarity and consistency in the terms they use to describe the allocations they agree upon.<sup>309</sup> Those terms signal to the parties, and to all stakeholders, where accountability lies.<sup>310</sup> This mislabeling in the Global Fund's structure is an easy, yet important, fix in future efforts seeking to rely upon the National Law Entity approach.<sup>311</sup>

### 3.2.1.3. *High Costs*

Apart from this deficit, the National Law Entity, as reflected in the Global Fund, achieves formal fiscal accountability. Viewing the donors' goal as one which creates a financing mechanism that maximizes the likelihood that their resources will be used for the purposes for which donors have made them available,<sup>312</sup> the National Law Entity model, as exemplified by the Global Fund,

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<sup>309</sup> See Grant & Keohane, *supra* note 3, at 39-40 (emphasizing that accountability depends on the clarification of roles in the principal-agent relationship, specifically noting the importance of transparency of responsibilities in allocating accountability).

<sup>310</sup> See *id.* (recognizing that the transparency of responsibilities, standards, and sanctions within principal-agent relationships promotes stable accountability).

<sup>311</sup> This deficit has the potential to be especially significant from the World Bank's point of view. For an institution whose reputation for financial management competence is key, both to its ability to borrow funds on international capital markets and to receiving continued support from its shareholders, perpetuating this misimpression of having responsibility to provide supervision for the resources of an entity, over which it has no control is imprudent, if not bordering on foolhardiness.

<sup>312</sup> See Hawkins et al., *Delegation Under Anarchy*, *supra* note 55, at 23 (arguing that while the gains from delegation may motivate states to grant conditional authority to international organizations, they do not determine the outcome).

appears to achieve some success. It is an initiative designed by donors to fund a specific issue and, by providing for donor control and eliminating reliance on entities with competing agendas, it achieves focused independence. That independence is achieved at considerable financial cost. Starting afresh is an expensive undertaking.<sup>313</sup> The Global Fund's Secretariat has a staff of six hundred people, and the creation and design of a whole new structure complete with new component parts such as the Country Coordinating Mechanisms, Principal Recipients, and Local Funding Agents, in addition to new standards and processes for them, is a major investment.

### 3.2.2. Adverse Effects of Non-International Legal Status

In passing the Swiss Host Act, the Swiss Government has tried to remove any disadvantage an entity might experience under Swiss law as a result of not having international legal personality. The privileges and immunities the Swiss government extends to a financing effort under Swiss law, however, do not extend beyond Switzerland except under the laws of those countries that decide to confer a similar status on a given entity under their own respective laws.<sup>314</sup> For this reason, whether the National Law Entity model is an optimal vehicle for collective financing depends in part on whether a financing effort's attainment of its goals is likely to be impeded by not having legal personality under international law.

The record shows that having international legal personality is not as critical as one might expect if creating the financing effort under a jurisdiction such as Switzerland is an option. International legal personality does not automatically bring with it legal capacity.<sup>315</sup> As evinced by the experiences of the GEF and the

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<sup>313</sup> See *id.* at 26-27 (noting the expense of instituting proper control mechanisms for agents).

<sup>314</sup> For example, the United States has conferred the equivalent of International Organization status on the Global Fund under U.S. law. See Exec. Order No. 13,395, 71 C.F.R. 3203 (Jan. 13, 2006), available at <http://www.thefederalregister.com/d.p/2006-01-19-06-554> (extending the application of the International Organizations Immunities Act, 22 U.S.C. § 288 and 288f-6, to the Global Fund). See also GLOBAL FUND REPORT ANNEX 6, *supra* note 142, at 13 (noting that the status the Swiss Government has conferred on the Global Fund is a step short of the status it has conferred on the International Federation of the Red Cross and Red Crescent Societies, which enjoy the full equivalent of intergovernmental organization status under international law).

<sup>315</sup> See JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 47 (2d ed. 2009) (noting the different ways of describing international legal

experience of the Global Fund's initial agreement with the WHO, the most important factor affecting an effort's autonomy is independent legal capacity, which the National Law Entity provides. Although an organization might be recognized as having legal personality under international law, it needs legal *capacity* to function and make legally valid agreements, such as employment agreements in the example above. Indeed, this has led some commentators to view international legal personality as a somewhat empty concept.<sup>316</sup>

At the same time, certain advantages do accrue from international legal status that would benefit a new financing effort. For example, international organization status can provide an entrée into meetings and policy discussions with government and other intergovernmental entities that are important to an organization's work. Just as the right to apply for observer status in the U.N. is limited to international organizations,<sup>317</sup> the right to participate in other governmental and inter-governmental meetings and fora, both in the developed and the developing world, is more likely to be granted to a financing effort that has international organization status.

International organization status may also affect an entity's access to resources. International organizations may be written directly into UNDP and other international organizations' funding arrangements for particular activities instead of having to compete on a public procurement basis.<sup>318</sup> Further, international organizations automatically qualify for certain kinds of funding under various government programs, which may not be available to an organization operating at a national level.<sup>319</sup> In addition, international organization status enables an entity to enter into

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personality); AMERASINGHE, *supra* note 187, at 77-78 (recognizing that international personality does not automatically grant the ability to perform functions with international consequences).

<sup>316</sup> See KLABBERS, *supra* note 315, at 52-53 (contending that the notion of "international legal personality" is relatively weak and difficult to apply to concrete legal actions).

<sup>317</sup> See ALVAREZ, *supra* note 187, at 154-56 (noting the objections to extending participation rights to non-state actors).

<sup>318</sup> See KLABBERS, *supra* note 315, at 125-27 (discussing the sources of income for international organizations); AMERASINGHE, *supra* note 187, at 359 (discussing the various methods of funding by international organizations).

<sup>319</sup> See KLABBERS, *supra* note 315, at 128-29 (describing the obligatory funding of donor countries to qualified organizations under the Articles of the United Nations).

international agreements, such as Headquarters Agreements with host states.<sup>320</sup> Headquarters Agreements frequently provide for preferential treatment on taxes and other matters for the organization, privileges and immunities for organization staff, and ambassadorial rank for the organization's head.<sup>321</sup> This higher status translates into vastly improved access to government officials and diplomats, enabling the organization to make its case directly to governments.<sup>322</sup> States do not enter into Headquarters Agreements with national law entities that are not subjects of International Law.<sup>323</sup> For these reasons, an optimal collective financing vehicle for development would have both legal capacity and international personality.

#### 4. PROPOSALS FOR CHANGE

The special purpose fund phenomenon, operationalized in the emergence of the Quasi-Entity Fund and National Law Entity models, shows that the institutions charged with primary responsibility for international development finance need to change. The existing institutions date back to a polarized state-centric world when development aid cooperation was linked to Cold War allegiances and the key donors and recipients consisted of states. Cold War allegiances are now giving way to shared concern about global threats and stymied progress in countries that make up the poorest of the poor. Donors now include a range of private sector actors, as do recipients. Many stakeholders are seen as having a legitimate voice in the design of aid programs as well.

These funds suggest that an overhaul of the international legal order for development is needed. As a long-term goal, an overhaul should include re-designing those organs of the U.N. engaged in development, as well as the structure and responsibilities of the

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<sup>320</sup> See *id.* at 256 (discussing the treaty-making powers of international organizations and noting that most organizations conclude a headquarters agreement with their host state).

<sup>321</sup> See AMERASINGHE, *supra* note 187, at 337 (recognizing that many agreements result in privileges and immunities for international organizations in "exercising their functions in relation to the organization").

<sup>322</sup> See *id.* at 337-38 (noting how the privileges and immunities translate into beneficial improvements that fulfill the proposed functions of the organizations).

<sup>323</sup> See *id.* at 315-17, 338-39 (noting that subjects of international law, including states and international organizations, enter into agreements, such as Headquarters Agreements affording entities privileges and immunities only with entities that are similarly subjects of international law).

World Bank to serve the needs these funds reflect. These needs include a greater degree of participation in decision-making by donors, recipients and other interested parties, such as NGOs. A case could also be made for greater consolidation and a merger of UNDP and IDA. If we were to begin from scratch today, for example, in designing a new order for collective financing initiatives to provide grant funds, the divisions between these institutional bodies would make little sense.

Further, within these institutions, the need for major change is obvious. The U.N.'s development efforts, dispersed amongst a range of under-funded programs, fall short.<sup>324</sup> Donors' repeated preference for donating to special purpose funds, instead of IDA—the component of the World Bank Group these same donor governments specifically created to serve the needs of the countries which are the primary beneficiaries of special purpose funds, must eventually force consideration of how IDA should change.<sup>325</sup> In the short-term, pending implementation of broader reform, there are several concrete steps that should be taken to improve the capacity of the *ad hoc* models to meet immediate needs and to reduce the adverse impact their deficits could have on the overall aid effort.

Starting with the Quasi-Entity Fund, as currently conceived, it is rife with uncontained conflicts of interest and destined to disappoint stakeholders' hopes and expectations. In accordance with basic principal-agent theory, the necessity of an alignment between the principal's and the agent's incentives means that a collective financing initiative for development should either be subject to the control and authority of the Bank, as a traditional World Bank Trust Fund is, or be subject to the control and authority of a separate, autonomous entity. The Quasi-Entity Fund model aims to serve as something in between, but, instead, results in unabated agency costs and poor accountability.

The poor accountability in the Quasi-Entity Fund model, stemming largely from the multiple roles the World Bank assumes, has many negative consequences. Those consequences include a

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<sup>324</sup> See de Senarclens, *supra* note 1, at 10, 32–33 (discussing the U.N.'s critical role as a social and economic regulator while noting significant defects in the U.N. system).

<sup>325</sup> To the extent that the distribution of IDA's voting shares may credibly be viewed as a disincentive for donors to donate additional funds to IDA, perhaps re-evaluating that distribution would be a fruitful starting point.

lost opportunity for all of development's stakeholders because the Bank's multiple roles preclude it from serving as an objective standard-setter of fiduciary and sustainable development safeguards for new initiatives. The Bank has both the expertise and the experience to perform a valuable function as standard-setter. If, however, the Bank is in a position where, as an institution, it is competing for a fund's resources with those for whom it is setting standards, the objectivity of those standards is tainted.

The poor accountability in the model also means that it fails as a useful template for financing efforts that involve a mix of public and private donors, as the Green Climate Fund is intended to be. A key concern of private sector donors is the avoidance of any risk of liability for an initiative's acts or omissions.<sup>326</sup> In the absence of clarity with regards to the scope of a donor governing body's responsibilities, that concern cannot be assuaged.<sup>327</sup>

Perpetuating the poor accountability of the Quasi-Entity Fund model poses risks. At a minimum, the lack of clarity about the responsibilities of its component parts give rise to endless turf battles and the inefficiencies that such battles entail. At worst, the lack of clarity has the potential to result in lax and unsupervised application of inadequate standards, which could damage the credibility of the overall aid effort. In between these extremes, the model's poor accountability presents risks for the World Bank as an institution and, by extension, for those countries that depend on the Bank for loan finance.

The risk to the World Bank stems from the proclivity of donors using this model to expect the Bank as trustee to provide a greater degree of fiduciary oversight than it has the power to provide. Although the Bank can expressly limit its liability by including exculpatory clauses in its agreements with donors, such clauses will not protect the World Bank's reputation if, for example, a major fraud occurs in a fund with which it is associated. This risk is significant because the Bank's reputation as a competent financial institution (which remains intact notwithstanding

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<sup>326</sup> See Sophie Smyth, *Can Business Learn to Love the Environment? The Case for a U.S. Corporate Carbon Fund*, 58 RUTGERS L. REV. 451, 474 (2006) (recognizing that the creation of a U.S. corporate carbon fund would necessitate devising mechanisms to shield private participants from individual liability).

<sup>327</sup> See *id.* (discussing that in order to create a shield against donor or participant liability, the scope of the World Bank's fiduciary duties must be clarified).

widespread criticism of its development effectiveness) is key to the very essence of how the Bank operates.<sup>328</sup> Guarding the Bank's fiscal reputation is more difficult than might appear since it comes under constant pressure from powerful member countries to meet their needs.<sup>329</sup>

This pressure inhibits the articulation of a coherent vision for the Bank's supporting role in these initiatives. One might expect that a proposed way forward would come from the Bank's leadership, but the silence of the Bank's leadership on this issue is deafening. The uncomfortable reality is that confronting this issue means confronting the murky and contentious issue of where the interests of the Bank as an institution begin and the interests of its more powerful members end.<sup>330</sup> In other words, confronting this issue means confronting the degree to which the Bank is a

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<sup>328</sup> See INFORMATION STATEMENT, *supra* note 2, at 1-6 (explaining how the World Bank raises the funds it uses to make loans by issuing bonds on international capital markets. The Bank derives most of its operating capital from the proceeds of its bonds. Absent this capacity to borrow funds on international capital markets, the Bank would have no access to the funds it uses to make loans to the developing world, and therefore could not function as a development bank. Accordingly, the World Bank cannot afford to administer externally financed funds at the risk of jeopardizing the reputation it has in the international capital markets as a robust financial institution); *id.* at 101 (noting that the "IBRD is not required to post collateral under" the derivatives agreements it has entered into with counterparties, as long as it maintains its AAA credit rating).

<sup>329</sup> See Pincus & Winters, *Reinventing the World Bank*, *supra* note 3, at 14-20 (discussing the Bank's difficulty preserving a singular focus because of the intense pressure it comes under from member states and other entities to undertake various mandates). The issue of whether to serve as trustee of a fund is also subject to internal pressures as the Bank is not a monolithic institution. See Sarfaty, *supra* note 22, at 667-76 (detailing, for example, differing views within the World Bank on the issue of human rights). Every proposal for a new collective financing effort sparks differing interests among different fiefdoms within the institution. For example, departments poised to get funds from an effort to add to its particular lending agenda (such as the Environment Department in the case of the GEF Trust Fund) will be vocal advocates in favor of the Bank's agreeing to administer a fund because the gain to it will be immediate; the fund offers it the promise of additional funds, freed from the internecine struggles that attach to the Bank's internal budget wars. Support for protecting the Bank's broader institutional interests, however, is likely to be more diffuse. *Id.* The Bank's Trust Fund Management Department may be keenly aware of the risks of administering a fund for which the Bank's tasks as trustee are unmanageable and may clamor in opposition. But as an arm of the Bank's back office, expected to service and facilitate the front lines of the Bank's lending operations, the Trust Fund Management Department's view is unlikely to prevail.

<sup>330</sup> See Barnett & Finnemore, *supra* note 3, at 714 (discussing the difficulty in determining whether the interests and agenda of an international organization reflect or divert from the intentions of its founding member states).

principal in its own right as an institution as opposed to being merely a loyal puppy of its more powerful member countries.<sup>331</sup>

In spite of these shortcomings, however, the direction taken by the Quasi-Entity Fund appears to be viewed, generally, as in the interests of development. Therefore, the goal is to identify a judicious fund design that captures the advantages of this shift without jeopardizing the Bank's function as a development bank or these funds' goals as a source of grant finance. No one change will serve as a universal cure-all. Cumulative changes are needed.

In the interests of reducing the risk of agency slack in this model, the following changes should be considered. First, the donor community should press the World Bank to formally disaggregate the Bank's functions as a financial administrator from its other functions by creating a new legally distinct sixth member of the World Bank Group—an International Development Fund Administrator entity that would provide new financing efforts with financial administration services. In addition to providing financial administration services, a new legally distinct International Development Fund Administrator entity could also serve as a standard setter and provide new financing efforts with advice on such issues as, standards for assessing financial record-keeping capacity and procurement best practices. These efforts would be untainted and unconstrained by the agenda of other World Bank Group entities. Furthermore, donors should aim for a model that allows for autonomy of the collective financing effort and, therefore, proactively manages the conflicts of interest inherent in the Quasi-Entity Fund model. The conflict of interest that arises between functionally independent secretariats and the World Bank is inevitable. Perpetuating a model that produces the stalemates, stand-offs, and contradictory agendas, that such conflicts of interest generate, hurts those who both give and receive assistance to or from the initiatives that these secretariats serve. Some competition and tension is inevitable as viewpoints and priorities differ. But stalemates, stand offs, and paralysis are not inevitable. They, unlike a conflict of views, result from a lack of

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<sup>331</sup> See Milner, *supra* note 4, at 112 (discussing how "in a multilateral setting the principal-agent problem becomes even more acute). See also WOODS, *supra* note 17, at 179-80 (pointing out that the agendas of the IMF and the World Bank are affected by the preferences of their most powerful members, their bureaucratic agendas and the politics of the countries to which they provide assistance); Kapur, *supra* note 73, at 65-67 (discussing the dilemma of determining the role of the World Bank in the context of "the continued dominance of the United States").

clarity about who is in charge. Change is also needed to address the accountability gaps in the Quasi-Entity Fund and the following steps should be considered. First, donors and the World Bank should delineate clearly the respective roles and responsibilities of the component parts of a Quasi-Entity Fund to avoid gaps in oversight or misperceptions about where responsibility lies. The responsibilities of the component parts of a Quasi-Entity Fund should be aligned with formal authority, technical competence, and dedicated resources to discharge them.

Second, donors should specify whether the World Bank's social and fiduciary safeguards will apply to grants financed by a fund and if World Bank policies do not apply, what alternatives apply and who will assume responsibility for seeing that they are observed. Experience also demonstrates the importance of identifying upfront the source and substance of the standards that a fund's donor governing body will apply when allocating a fund's resources. The issue of what operational standards recipients should apply is a delicate one—allowing for standards different from the World Bank's social safeguards, for example, could end up facilitating end-runs around those standards. As these standards exist to protect the environment and vulnerable groups, the interests of development's stakeholders would not be served by allowing collective funding initiatives to undercut those standards.

Third, the World Bank as a trustee of a Quasi-Entity Fund should not assume responsibility for overseeing non-World Bank recipients' use of the fund's resources unless it is given the powers and resources (including manpower and training as needed) to perform that role. Further, if the World Bank does not assume that role, donors need to find a replacement watchdog or set up mechanisms for the donor governing body to exercise oversight.

The National Law Entity has promise. But as an approach to collective financing, it is not clear that this model is the optimal combination of old and new norms. Devising new practices and institutions is a costly exercise that, to some extent, throws the baby out with the bath water. A financing vehicle that better integrates the knowledge base and experience of the World Bank's and others' fiduciary and sustainable development policies would better serve all stakeholders' interests. Pending the creation of such a vehicle, however, thought could be given to improving the National Law Entity model in the following ways.

A way should be found to give initiatives both legal capacity and international legal personality. If, for example, the creators of new initiatives were to express an intention to confer international legal personality in the initiative's constituent documents, in addition to complying with the requirements necessary for an initiative to have legal capacity under a national law regime, that would be a start. Efforts should then be taken to encourage other countries to recognize that status and to facilitate the process of their doing so.<sup>332</sup>

The World Bank should clarify the criteria for determining when and whether it, or any new member of the World Bank Group that might be created for this purpose, will provide financial administration services.

When the World Bank's role is limited to serving as a conduit of funds, the World Bank should not adopt the label of a "trustee" or any other label that connotes a fiduciary duty that the Bank does not have the authority to discharge. The less loaded "Financial Administrator" label would be more appropriate.

A model National Law Entity form should be devised to allow for replication and the lowering of the transaction costs involved in creating a new entity.

## 5. CONCLUSION

Success in creating credible collective development finance efforts will be easier to achieve if the international legal order provides the institutions, mechanisms, and norms necessary for such efforts to operate with purposive integrity. This Article offers the theoretical logic for improvements and some suggestions for what those improvements should be. The core conclusion is this: even if international development finance is hampered by disillusionment with past aid efforts, divergent motivations, and seesawing political preferences, the overall aid effort will be strengthened by the creation of a baseline set of institutions, mechanisms, and norms that facilitate collective efforts for purposes that both donors and recipients support, with minimal

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<sup>332</sup> See KLABBERS, *supra* note 315, at 47 (discussing competing interpretations of the ICJ's *Reparation for Injuries* opinion on the issue of the international legal personality of organizations); AMERASINGHE, *supra* note 187, at 66-69 (providing an overview of the dynamic between international legal personality and legal capacity, specifically noting that there are many benefits and rationales for according international organizations international legal personality).

agency costs. In due course, enhanced credibility for development finance must be earned by the delivery of results and increased participation in framing what ideal results would be. Achieving improved assurance that funds made available will be used for the purposes for which they are given, however, is a necessary first step towards achieving those broader objectives.