



Conference Draft

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Sophie E. Smyth

Abstract

Recent development challenges highlight a pressing need to re-evaluate whether the post-World War II behemoths of multilateral development finance are up to the tasks being demanded of them today. The institutions that dominate the current order, the United Nations (“UN”) and the World Bank, are undergoing a crisis of confidence as the world’s development aid donors engage in an ongoing quest to find alternatives to them. 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 lacks a coherent, unifying vision of how to meet today’s development challenges. The funds that have been created fill a need but suffer from several deficits, ranging from governance gaps and lacunae in accountability, to high transaction costs and 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 re-design the interrelationship between these special purpose funds and the UN and the World Bank so that these funds can operate in sync with these institutions rather than as bypasses of them.

KEYWORDS: agency, accountability, finance, trust fund, global health, global environment, collective, aid

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I. INTRODUCTION¹

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 United Nations (“UN”)² and the World Bank,³ as they presently operate, have undergone a crisis of

¹ A more extensive treatment of the subject matter of this Article is contained in Sophie Smyth, *Collective Action for Development Finance*, 33 University of Pennsylvania Journal of International Law (2011).

² The UN is a source of economic and technical assistance for underdeveloped countries. See P. de Senarclens, “The United Nations as a Social and Economic Regulator”, in P. de Senarclens and A. Kazancigil, (eds.), *Regulating Globalization: Critical Approaches to Global Governance* (United Nations University Press, 2007), pp. 8-9 (detailing the role of the UN system as a symbol of international community, a forum for multilateral diplomacy, and a source of economic and technical assistance for numerous developing countries). Although the 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.*, p. 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 S. Barkin, *International Organization: Theories and Institutions* (New York: Palgrave, 2006), p. 107 (detailing the role of international organizations in development). Of these, the UN entity that is most directly focused on development is UNDP. *Id.*, pp. 103–08 (stating that the UNDP’s remit is to provide technical assistance to developing countries).

³ 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 J. Head, *Law and Policy in International Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks*, 17 Kansas Journal of Law and Public Policy (2008), pp. 196–97 [hereinafter, Head, *Law and Policy*]. IBRD has since been joined by four additional institutions: the International Finance Corporation (IFC), which lends to the private sector; the International Development Association (IDA), which make interest-free loans to the poorest countries of the world; the Multilateral Investment Guaranty Agency (MIGA), which issues guarantees to the private sector against certain development country risks; and the International Center for the Settlement of Investment Disputes (ICSID), an arbitrating body. See International Bank for Reconstruction and Development, *Information Statement* (2010), available at: <<http://treasury.worldbank.org/cmd/pdf/InformationStatement.PDF>>, accessed 24 June 2011, p. 47 [hereinafter *World Bank Information Statement*]. In this Article, the term “World Bank” will

confidence.⁴ The UN, 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 various 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 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 is little public support for imposing new mandates on these institutions.⁵

be used to apply interchangeably to IBRD or IDA whether acting separately or together. See *id.*, pp. 78–82 (noting that the IDA has no separate staff but is run wholly by IBRD).

⁴ See M. N. Barnett and M. Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 *International Organization* (1999), p. 723 (noting that the World Bank's worldview has translated into a record of development failures); R. W. Grant and R.O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *American Political Science Review* (2005), p. 29 (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 J. R. Pincus and J. A. Winters (eds.), *Preface to Reinventing the World Bank* (Cornell University Press, 2002), p. viii [hereinafter Pincus and Winters, *Preface*] (offering questions on the Bank's operational capacity and whether it is the appropriate vehicle for diverse aid endeavors thrust upon it). Aid skeptics, opposed to government generally, denounce the Bank as usurping reliance on private markets. J. R. Pincus and J. A. Winters, "Reinventing the World Bank", in J. R. Pincus and J. A. Winters (eds.), *Reinventing the World Bank* (Cornell University Press, 2002), p. 2 [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 general disappointment in the institution). Pro-aid, anti-globalization protestors, on the other hand, denounce the Bank as captive to the corporate interests of its more powerful members. *Id.* And see generally, the "Fifty Years is Enough" campaign that surfaced around the fiftieth year of the Bank's founding. K. Danaher, *50 Years is Enough: The Case Against the World Bank and the International Monetary Fund* (Boston, Massachusetts: South End Press, 1994) (describing the various opposition forces facing the World Bank, for both political and economic reasons); de Senarclens (2007), *supra* note 2, pp. 26–35 (citing the "crisis in the legitimacy and accountability" of the UN system); D. C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *Yale Law Journal* (2006), p. 1506 (noting the trepidation of many national officials and citizens over assigning responsibility for important domains to an "ineffectual" UN).

⁵ See H. V. Milner, "Why Multilateralism? Foreign Aid and Domestic Principal-Agent Problems", in D. G. Hawkins, et. al. (eds.), *Delegation and Agency in International Organizations* (Cambridge University Press, 2006) (noting the strong influence public sentiment has on member countries' support for international organizations).

This loss of confidence in the behemoths of multilateral financing for development comes at an inauspicious time; just as globalization is generating an unprecedented need for multilateral efforts.⁶ 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.⁷ The global problems it has spawned are too big for any single country to address alone and demand a collective response.⁸ Further, the easing of fears of a Communist world takeover allows for inter-governmental collaboration in addressing longstanding needs in developing countries.⁹

This increased need for multilateral development financing, when coupled with a loss of confidence in the established institutions charged with primary responsibility for such 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 conundrum is the focus of this Article. I maintain that the efforts donor countries have made so far to address this conundrum are sub-optimal. I argue that we need a changed approach that involves short term and long term changes and I make some suggestions for the form those changes should take.

Donor countries, responding to this conundrum, are on a continuing quest to find alternatives. This quest takes the form of setting up numerous funds narrowly tailored to finance specific, narrowly-defined needs, “special purpose funds.” The most prominent examples of this approach are the Global

⁶ For the purposes of this Article, I take “globalization” to connote an increased inter-dependence 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 opportunities it brought for greater transnational activity. See R. Howse, *The End of the Globalization Debate: A Review Essay*, 121 *Harvard Law Review* (2008), p. 1529 (noting the end of the Cold War as a formation point for a pro-market consensus in the discussion of economic globalization.).

⁷ See *ibid.* (discussing the dynamic struggle between right and left governmental policies at the close of the Cold War); J. E. Stiglitz, *Making Globalization Work*, (New York: W. W. Norton & Company, Inc., 2006), pp. 277–78 (reiterating that the Cold War necessitated collaboration between nations for development responsibility).

⁸ See Esty (2006), *supra* note 4, p. 1493 (recognizing that national governments cannot singularly address the problems associated with globalization and must work collaboratively for the most effective response).

⁹ See The World Bank, *How We Classify Countries*, available at:

<<http://data.worldbank.org/about/country-classifications>>, accessed 16 August 2010 (noting that the World Bank classifies countries with a Gross National Income per capita under \$12,196 as “developing”). See also J. D. Sachs, *The End of Poverty: Economic Possibilities for Our Time*, (New York, NY: The Penguin Press, 2005), p. 290 (discussing calculations for international development through collaboration among World Bank member nations); Howse (2008), *supra* note 6, p. 1541 (citing Stiglitz, *Making Globalization Work* (2006)) (recognizing that these needs, in addition to global problems, include the needs borne of conflict and abject poverty).

Environment Facility Trust Fund (“the GEF Trust Fund”) and the Global Fund to Fight AIDS, Tuberculosis and Malaria (“the Global Fund”). The Climate Change Fund, proposed by the participants in the 15th Conference of the Parties (the COP) of the United Nations Framework Convention on Climate Change (UNFCCC) (also known as the Copenhagen Summit),¹⁰ and renamed the Green Climate Fund at the 16th COP in Cancun,¹¹ is poised to follow this approach.¹²

In critiquing this special purpose fund response, my particular inquiry is whether these funds maximize the likelihood that the monies pooled by donors for a collective purpose will be applied to the purpose intended. I recognize that the key concern is whether these efforts provide meaningful development assistance to the citizens of the developing countries they are created to serve. However, I view the development effectiveness of these efforts and the efficiency and accountability with which they disperse their resources as inextricably intertwined. I conclude that while the funds that have been created fill a need, they are a sub-optimal response to that need because they incur unacceptably high agency costs, suffer from several deficits in accountability and/or incur extraordinarily high transaction costs.

¹⁰ For more information on the Copenhagen Accord, see generally D. Hunter, *Implications of the Copenhagen Accord for Global Climate Governance*, 10 *Sustainable Development Law & Policy* (2010), pp. 4-15 (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).

¹¹ See Pew Center for Global Climate Change, *Summary: Cancun Climate Change Conference* (2010), available at: <www.pewclimate.org/international/cancun-climate-conference-cop16-summary>, accessed 24 June 2011 [hereinafter *Pew Cancun Summary*] (recounting the discussions at Cancun, the articulated goals, and future measures to be taken). The fund was renamed at the Sixteenth Session of the Conference of the Parties in Cancun in December 2010, at which time participants strengthened their financial commitments to the new fund and agreed on implementation mechanisms for financing. *Id.*

¹² The developed country participants 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. See United Nations Framework Convention on Climate Change [UNFCCC], *Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention, Draft decision -/CP.16 ¶ 95*, available at: <http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf>, accessed 24 June 2011 [hereinafter *Cancun Accord*] (detailing the general funding structure resulting from the Copenhagen Summit). The financing is expected to come from a wide variety of sources, public and private, bilateral and multilateral, and the World Bank will serve as interim trustee of the fund for the first three years. *Id.* at note 12, para. 107. See *Pew Cancun Summary*, *supra* note 11, pp. 4-5 (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. *Cancun Accord*, para. 109.

I support my claim by showing the agency costs,¹³ accountability gaps and transaction costs that inhere in the two paradigm-shifting global funds¹⁴ the GEF Trust Fund, and the Global Fund that precede the Green Climate Fund and are primed to serve as precedents for it and similar initiatives.¹⁵ I show how these two funds take two distinct approaches to limiting donors' reliance on the World Bank and UN and why, for differing reasons, neither approach offers an optimal mechanism for setting up a multilateral financing initiative. I advocate for a new approach that will enable special purpose funds to operate in sync with – rather than as bypasses to – those institutions.

To address the inadequacy of the special purpose fund approach, 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 deficits that arise in the precedent funds' structures. I urge that efforts to address those deficits be informed by an understanding of the task at hand drawn from principles of Principal-Agent theory¹⁶ and Accountability theory,¹⁷ as applied to third-party financing

¹³ 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 UN then engages in undesired independent action or does nothing, and to the costs donors incur monitoring the intermediary. See D. G. Hawkins, D. A. Lake, D. L. Nielson, and M. J. Tierney, “Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory”, in D. G. Hawkins, et al. (eds.), *Delegation and Agency in International Organizations* (Cambridge University Press, 2006), p. 9 [hereinafter Hawkins, et al., “Delegation Under Anarchy”] (noting that principals 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 generally R. H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 *Cornell Law Review* (2004), pp. 636–37 (“[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 a principal to prevent shirking by the agent. . . . The losses to the parties that stem from this misalignment of interests are called agency costs.” (internal citations omitted).

¹⁴ S. Smyth, *A Practical Guide to Creating a Collective Financing Effort to Save the World: The Global Environment Facility Experience*, 22 *Georgetown International Environmental Law Review* (2009), p. 97 [hereinafter Smyth, *A Practical Guide*]; A. Triponel, *Global Fund to Fight AIDS, Tuberculosis and Malaria: A New Legal and Conceptual Framework for Providing International Development Aid*, 35 *North Carolina Journal of International Law and Commercial Regulation* (2010), p. 231.

¹⁵ Established in 1994, the GEF Trust Fund has already served as a benchmark approach for many subsequent collective funding efforts for development purposes. See Smyth, *A Practical Guide* (2009), *supra* note 14, p.36.

¹⁶ See Milner (2006), *supra* note 5 (using the Principal-Agent theory of allocation to explore “[v]ariations in the patterns of multilateral aid giving over time and across countries”); Barnett and Finnemore (1999), *supra* note 4, p. 705 (describing the Principal-Agent theory and its application

arrangements. In the longer term, I argue, that the trend towards special purpose fund financing points to a need to re-design key aspects of the way the UN 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 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 despite the fact that these funds give rise to the same issues of legitimacy and accountability as the World Bank and UN, about which there is an extensive literature.¹⁸ Thus, this Article fills a gap in the legal scholarship on multilateral development finance. Furthermore, as billions of dollars pass annually from the developed world to the developing world through these initiatives¹⁹ and the Green Climate Fund gears up to expand this form of finance to an unprecedented level,²⁰ discussing the elements of an optimal multilateral 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

to analyzing the autonomy of international organizations).

¹⁷ See Grant and Keohane (2005), *supra* note 4, p. 41 (discussing the role of accountability mechanisms in relation to various actors in global politics and the various conditions necessary for accountability).

¹⁸ See J. Head, *Losing the Global Development War: A Contemporary Critique of the IMF, the World Bank and the WTO* (Brill Academic Publishers, Inc., 2008), pp. 49–62 [hereinafter Head, *Losing the War*] (detailing the origins and consequences of the global economic organizations' role in the "Global Development War"); Pincus and Winters, *Preface* (2002), *supra* note 4, pp. vii–x (prefacing academic responses to the "reinvention" of the World Bank to better serve poor nations); N. Woods, *The Globalizers: The IMF, The World Bank, and Their Borrowers* (Cornell University Press, 2006), pp. 22–38 (discussing a brief history of the World Bank and the IMF); de Senarclens (2007), *supra* note 2, p. 9 (discussing the social and economic regulatory role of the United Nations); Barkin (2006), *supra* note 2, pp. 105–06 (arguing that "[t]he World Bank, as a regime, has been criticized from both efficiency and legitimacy perspectives.").

¹⁹ The World Bank, *A Management Framework for World Bank Administered Trust Funds* (2007), available at:

<http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/11/01/000020439_20071101164945/Rendered/PDF/410630R200710198.pdf>, accessed 24 June 2011 [hereinafter *WB Trust Funds Management Framework*] (stating that over \$4.4 billion dollars worth of 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. I. Bantekas, *Trust Funds under International Law: Trustee Obligations of the United Nations and International Development Banks* (T.M.C. Asser, 2009).

²⁰ *Cancún Accord*, *supra* note 12, paras. 8–10 (establishing the Green Climate Fund, with signing nations significantly increasing contributions to reducing worldwide greenhouse gas emissions).

development assistance to the developing world,²¹ all can agree on the importance of having an infrastructure that maximizes the likelihood that the assistance that is provided will reach its intended beneficiaries. Second, I proceed on the basis that providing an optimal financing mechanism falls squarely within the remit of the international legal order.²² All of development's stakeholders rely on the legal order to provide the infrastructure within which development finance occurs.

This Article is organized as follows. Section IIA sketches the backdrop to the special purpose fund phenomenon. It shows the expanding range of needs that these funds meet and how two competing models have emerged from donors' quest to find alternatives to the World Bank and the UN. Section II (B) sets the emergence of these two models in the context of Principal-Agent theory. Section II(C) details the distinctive characteristics of the two 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 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 UN to perform certain functions but differ from an approach

²¹ In favor of such a moral or ethical obligation, see A. Sen, *Development as Freedom* (Oxford University Press, 1999), pp. 8-10 (advancing the norms, values and principles associated with development); P. Singer, *Practical Ethics* (New York: Cambridge University Press, 1979), pp. 218-46 (discussing the claim that developed countries have an ethical obligation to assist developing countries). For the contrary view, see R. Barro, *Getting It Right: Markets and Choice in a Free Society* (MIT Press, 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 (2006), *supra* note 5, p. 108 (noting that the literature on donor motivation points to two main motivations for aid; the satisfaction of recipient needs and of donor political goals, with donor interests being the dominant motive); or that aid has a checkered history and can have detrimental effects. See D. Moyo, *Dead Aid* (New York: Farrar, Straus and Giroux, 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 Sachs (2005), *supra* note 9, pp. 56-66 ("Eight major categories of problems can cause an economy to stagnate or decline."); P. Collier, *The Bottom Billion* (Oxford University Press, 2007) (arguing that if failed states are ever to be helped, the G8 will have to adopt preferential trade policies, new laws against corruption, and new international charters, and carefully calibrated military interventions).

²² I refer here to the coordinating role of the legal order. See e.g., D. Kennedy, "The Globalization of Law and Legal Thought: 1850-2000", in D. M. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006), pp. 19-72 (arguing that "[l]egal institutions and ideas have a dynamic, or dialectical, or constitutive relationship to economic activity").

that gives those institutions additional funds directly with broad discretion to address additional causes as they see fit.

Section III critiques these models. I argue that the theoretical logic of the Quasi Entity Fund fails due to the extent of this model's continued dependence on the World Bank, and show how this dependence perpetuates the agency costs the model is intended to avoid. I show how this dependence causes such funds to be dominated by the World Bank's lending agenda²³ rather than the agenda of the donors who created the fund, or the agenda of the fund's beneficiaries. I also argue that the Quasi Entity Fund governance structure has several significant gaps in accountability²⁴ that have 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 UN or the World Bank. Additionally, 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 multilateral development 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

²³ Pincus and Winters, *Reinventing the World Bank* (2002), *supra* note 4, p. 24 (describing the highly centralized nature of the World Bank and how a voluntary surrender of control is unlikely); Woods (2006), *supra* note 18, p. 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 (2006), *supra* note 2, p. 137 (discussing how developing countries are receiving greater decisional power in international organizations, though this change is "only concentrated in a small group of big and influential developing countries, led by China and India"); Rep. of Sen. Com. on Foreign Relations, *The International Financial Institutions: A Call for Change* 111 Cong. 2nd Sess. 10 March 2010, available at: <www.foreignpolicy.com/files/fp_uploaded_images/int_fin_inst2.pdf>, accessed 28 June 2011 [hereinafter *Senate Committee Report*]; G. Safarty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 *American Journal of International Law* (2009), p. 682 (discussing how the decision making process of the World Bank affected its decision not to adopt a human rights policy).

²⁴ 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." See Grant and Keohane (2005), *supra* note 4, p. 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 portions of their activities. *Id.*

responsibility and expense involved in this model. Lastly, I show that as a result of their not having legal status and capacity under international law, special purpose funds may face obstacles that prevent them from operating optimally.

Section IV proposes a tentative road map for the new approach I advocate. I maintain that the emergence of the Quasi Entity Fund and the National Law Entity models are symptomatic of a larger issue that needs a long-term solution – namely, that the post-World War II institutions that have been charged with primary responsibility for multilateral development finance are not the kind of institutions the international community needs or wants anymore. I argue that those institutions need to re-design the way they do business so as to become institutions that facilitate donors' achievement of the goals and purposes they express in setting up special purpose funds, rather than to be regarded as historical anachronisms that have to be by-passed. Given the immediacy of the needs these funds serve, however, I maintain that the change we need should be accomplished in stages.

For the short term, we need to fill the holes in the two special purpose fund models that have emerged. For the longer term, we need a more expansive vision of what the role of the World Bank and the UN should be in a globalized world that presents new challenges and new attitudes about how to address them. To fill the holes for the short term, I suggest a number of changes be made in the Quasi Entity Fund model to address the agency costs and accountability gaps that undermine the model's potential to serve as a means for getting donors' funds to the purposes intended. I also suggest ways of lowering the transaction costs and enhancing the international legal stature of the National Law Entity model to make it a more effective and viable model.

For the longer term, I argue that the special purpose fund phenomenon points to the need to re-design the role of the UN and the World Bank in providing multilateral development finance that involves grant finance. In particular, the donor community, together with these institutions, needs to consider what the special purpose fund phenomenon suggests about how UNDP and IDA (the arms of the UN and the World that provide resources to the same recipient countries as the special purpose funds) should change. A greater degree of flexibility and broader participation are called for and some degree of consolidation may be in order.

II. The Multilateral Finance Challenge

This Section gives the background to the special purpose fund and shows how its popularity as a financing vehicle reflects established principles of Principal-Agent theory. It details the distinctive characteristics of the two models that have

emerged and shows how both models rely on the World Bank and the UN to perform certain functions but differ from an approach that gives those institutions additional funds directly.

A. Financial Administration and Development Operations

Creating a new multilateral financing effort requires both financial administration and development-focused activities,²⁵ 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.²⁶ 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.²⁷ In undertaking to perform these functions, the financial administrator is generally regarded as having undertaken certain fiduciary duties to the donors.²⁸

Donor countries generally use a third party to serve as a financial manager for a new development effort and usually ask an intergovernmental organization to act as that third party.²⁹ While commercial banks could also serve this role,

²⁵ See Smyth, *A Practical Guide* (2009), *supra* note 14, pp. 26-35 (discussing the choices parties have to make when creating a collective financing initiative).

²⁶ See *ibid.*, p. 97 (discussing how the structure of successful collective finance necessitates the appointment of a financial manager to facilitate the collective financing efforts of the donors).

²⁷ See *ibid.* (describing the responsibilities for the financial manager of a collective fund).

²⁸ See Bantekas (2009), *supra* note 19, p. 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 J. Gold, *Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles*, 72 *American Journal of International Law* (1978), pp. 860-65 (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).

²⁹ See Bantekas (2009), *supra* note 19, pp. 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). As part of their new commitment to harmonize aid approaches, some donor governments have recently begun to manage the aid funds of others, pursuant to collective approaches. See generally *The Paris Declaration on Aid Effectiveness (2005) and the Accra Agenda for Action (2008)*, available at: <www.oecd.org/dataoecd/30/63/43911948.pdf>, accessed 24 June 2011 (increasing joint efforts to direct involvement of donor countries in delivering and

they are more expensive³⁰ 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.³¹

The development task involved in a multilateral 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.³² The development task requires 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.³³

B. Principal-Agent Theory

Both the financial administration task and the development task necessitate reliance on third parties as intermediaries, and thereby give rise to agency cost concerns. Faced with tasks they cannot perform themselves, donor countries must choose either to (i) engage an existing entity to perform those tasks, including, if necessary, amending the entity to equip it to serve, (ii) create a new entity 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

managing aid); Norwegian Agency for Development Cooperation (NORAD), *Nordic Plus: Practical Guide to Delegated Cooperation* (2006), available for download at: www.norad.no/en/Tools+and+publications/Publications/Publication+Page?key=109585, accessed 24 June 2011, Annex 2 p. 31 (providing an overview of the financial management requirements of the Nordic Plus donors to increase aid effectiveness).

³⁰ 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 19, p. 42 (discussing the expense of standard fees).

³¹ See Smyth, *A Practical Guide* (2009), *supra* note 14, p. 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).

³² See The World Bank, *Project Cycle*, available at: <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20120731~menuPK:41390~pagePK:41367~piPK:51533~theSitePK:40941,00.html>, accessed 2 March 2011 (detailing the World Bank's process for administering loans to low and middle-income countries to support development).

³³ See Milner (2006), *supra* note 5, p. 115 (noting that foreign aid, like all public spending, involves long chains of delegation).

want the existing entity to perform.³⁴ In making this choice, donors' goal is to find a mechanism that maximizes the likelihood that their resources will be used for the purposes for which they are intended. This is the Holy Grail of any third party financing arrangement.³⁵

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,³⁶ the key aspect of agency costs that concerns development aid donors is *agency slack*. Agency slack refers to independent action by the agent – the entities(s) to which donors entrust their pooled resources – that is undesired by the donors.³⁷ In searching for an effective financing vehicle, therefore, donors are looking to minimize the likelihood of, and opportunity for, the occurrence of slack.³⁸

³⁴ See *ibid.*, pp. 114–22 (analyzing the conditions under which donor countries will opt to provide multilateral rather than bilateral aid); Esty (2006), *supra* note 4, p. 1510 (“[N]ational governments must contract for decision-making authority to be lodged at the supranational level . . . [and][n]ation 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”).

³⁵ See M. M. Lyne, D. L. Nielson, and M.J. Tierney, “Who Delegates? Alternative Models of Principals in Development Aid”, in D. G. Hawkins, et al. (eds.), *Delegation and Agency in International Organizations* (Cambridge University Press, 2006), pp. 43–44 (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 S. Biswas, *W(h)ither the Nation-state? National and State Identity in the Face of Fragmentation and Globalisation*, 16 *Global Society* (2002), pp. 177, 194. 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 J. Heimans, *Multiactor Global Funds: New Tools to Address Urgent Global Problems* (World Institute for Development Economics Research, 2004), available at: <www.wider.unu.edu/publications/working-papers/research-papers/2004/en_GB/rp2004-047/_files/78091745868055742/default/rp2004-047.pdf>, accessed 24 June 2011, pp. 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).

³⁶ See Hawkins, et al. “Delegation Under Anarchy” (2006), *supra* note 13, pp. 4–8 (arguing that Principal-Agent theory views international organizations as the agents of the principal member states which create them, and the rules governing such organizations as member governments' efforts to limit opportunities for the international organization to stray from its core mandate).

³⁷ See *ibid.*, p. 8 (noting that the defining characteristic of an agent is an entity which receives a conditional grant of authority from a principal but that this characteristic does not imply that agents always do what principals want.); Lyne et al. (2006), *supra* note 35, pp. 43–44 (providing recommendations in response to agency slack).

³⁸ See Hawkins et al., “Delegation Under Anarchy” (2006), *supra* note 13, p. 8 (defining agency slack as “independent action by an agent that is undesired by the principal”).

As applied to multilateral 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 agent."³⁹ Creating a new agent is costly but likely to produce an agent closer to the preferences and purposes of the principal (here donor principals).⁴⁰ 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, a scenario especially likely to arise when delegating to an intergovernmental organization, as there are a limited number of such organizations to choose from.⁴¹

Applying Principal-Agent theory to donors' quest for a multilateral financing vehicle, the most obvious choices among existing entities to serve as donors' agents might seem to be the World Bank and the United Nations (UN), the intergovernmental behemoths of multilateral financing for development.⁴² But skepticism about the efficacy of these institutions precludes either from being regarded as an "ideal agent" to take on the tasks involved in addressing post-globalization challenges. The causes of this skepticism are multi-faceted but it has resulted in strong opposition on the part of donor governments or, more accurately, the citizens of those governments,⁴³ to increasing those institutions' budgets to assume new mandates.⁴⁴ Moreover, increasingly, recipient governments, eager for greater input in development efforts, express a similar opposition.⁴⁵

³⁹ *Ibid.*, p. 25.

⁴⁰ See *ibid.* (weighing the advantages and disadvantages of creating an agent from scratch as opposed to hiring an existing agent).

⁴¹ See *ibid.*, pp. 19, 26 ("Given the finite number of possible agents and positive costs of creating new agents, however, the 'exogenous' traits of agents are likely to matter . . .").

⁴² See *supra* notes 3 and 4.

⁴³ See Milner (2006), *supra* note 5, p. 110 (discussing domestic politics and the problems that arise when the donor government and their public differ in interests as well as how it affects multilateral aid).

⁴⁴ See Heimans (2004), *supra* note 35, p. 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).

⁴⁵ See "UN Climate Change Talks in Cancun Agree a Deal", BBC News, 11 December 2010, available at: <www.bbc.co.uk/news/science-environment-11975470>, accessed 28 June, 2011 (discussing developed countries' insistence that the World Bank be trustee, while other countries were negotiating for a different approach); J. M. Broder, "Climate Talks End with Modest Deal on Emissions", New York Times, 11 December 2010, available at: <www.nytimes.com/2010/12/12/science/earth/12climate> (noting countries' reluctance to combine many climate change finance efforts under the U.N.).

The skepticism about the World Bank stems largely from a concern that the driving force within the Bank at an operational level is to make loans, and that this lending imperative permeates and dominates the Bank's relationship with its borrowing member countries.⁴⁶ The force of this lending imperative gives rise to a loss of confidence in the Bank. Although the Bank's founders created it as a bank 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.⁴⁷ 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.⁴⁸ Repeatedly, these additional development goals end up in irreconcilable tension with the Bank's desire to make loans.⁴⁹ Notwithstanding a wealth of Bank rhetoric

⁴⁶ See B. M. Rich, "The World Bank under James Wolfensohn", in Pincus and Winters, *Reinventing the World Bank*, p. 26 [hereinafter Rich, *The World Bank*] (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 4, p. 22 (noting that the Bank's incentive structure which emphasizes new lending and volumes over project quality and supervision has played a role in the lack of development effectiveness of Bank projects); Safarty (2009), *supra* note 23, p. 668 (noting that the Bank's incentive system emphasizes lending targets rather than results on the ground); *Senate Committee Report*, *supra* note 23, p. 4 (noting that the World Bank, like all of the international financial institutions (IFIs), suffers 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 a borrowing country, and calling for a systematic reorientation to focus on outcomes instead of outputs, including new incentive structures within the IFIs and new evaluation mechanisms).

⁴⁷ See generally D. Kapur, "The Changing Anatomy of Governance of the World Bank", in Pincus and Winters, *Reinventing the World Bank* (discussing the disempowerment of poorer countries in the international arena and the failure of governance structures to effect change). See *id.*, p. 20 (noting that an 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]").

⁴⁸ See Pincus & Winters, *Reinventing the World Bank*, *supra* note 4, pp. 13-15, 20 (noting that the Bank's rhetoric of acting in partnership ultimately dead ends in the World Bank calling the shots, because it is not a representative organization comprised of people or local communities, but countries).

⁴⁹ This tension was aptly described in a meeting of senior Bank managers with then-president James Wolfensohn in 1996, where 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 which deals with borrowing country governments as agencies with whom the Bank works in order to meet its clients' needs. See Rich, *The World Bank* (2002), *supra*

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.⁵⁰

The Bank's pressure-to-lend culture is reinforced by skewed incentives for those Bank staff responsible for the Bank's lending operations and, therefore, 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.⁵¹

The UN is also ill-placed to take on the task of managing new multilateral financing efforts. As documented by Pierre de Senarclens,⁵² structural problems

note 46, p. 52

⁵⁰ See Pincus and Winters, *Preface*, (2002), *supra* note 4, p. 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 4, pp. 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 encompassing a sustained increase in a country's capacity to satisfy social preferences. According to Pincus & 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.*, p. 15.

⁵¹ See Rich, *The World Bank* (2002), *supra* note 46, p. 26 (detailing Wolfensohn's changes which actually made the Bank accommodate its corporate and governmental clients more and weaken 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.*, p. 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 (2006), *supra* note 18, pp. 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); Head, *Losing the War* (2008), *supra* note 18, p. 57 (noting a strong criticism of the World Bank's staffing policies in that they do not reward appropriately for performance, and promotion criteria is inappropriate).

⁵² See de Senarclens (2007), *supra* note 2 (detailing a plethora of problems that have constrained the UN).

have hampered the UN'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.⁵³ Its highly fragmented system of agencies, programs, and funds has diluted the effectiveness of any one of them and has led to many of them being very poorly funded.⁵⁴ 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 UN as an ossified structure) but also on the part of other major powers.⁵⁵ This negative image makes the UN a poor contender for spearheading new collective financing initiatives despite the fact that its original mandate, Article 55 of the UN Charter, contemplated the UN taking a leadership role in global development.⁵⁶

Consistent with Principal-Agent theory, the logical response for a group of donors in the role of a collective principal⁵⁷ 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.⁵⁸ But the difficulties of garnering support for new collective efforts, 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 is tentative 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 creation, of new international organizations⁵⁹

⁵³ See *ibid.*, pp. 26-35 (discussing structural problems and lack of a unified vision that have led to failure on the part of the UN to solve certain social and economic problems)

⁵⁴ See *ibid.*, pp. 25, 28 (discussing how the involvement of many nations has added further confusion to many of the problems the UN has been charged with solving).

⁵⁵ See *ibid.*, pp. 25-28 (asserting that "Western governments have regularly complained" about UN repeat agendas and inefficiency).

⁵⁶ See generally, United Nations, *UN Charter, Chapter IX: International Economic and Social Cooperation, Article 55*, available at: <www.un.org/en/documents/charter/chapter9.shtml>, accessed 24 June, 2011.

⁵⁷ 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. (2006), *supra* note 35, p. 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.*, p. 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.

⁵⁸ See Hawkins et al., "Delegation Under Anarchy" (2006), *supra* note 13, p. 25 (arguing that a principal can choose to create its own agent, and while costly, this can lead to one whose existence and goals lie more clearly in line with that of the principal).

⁵⁹ See Bantekas (2009), *supra* note 19, p. 133 (discussing contributing nations and their potential use of trust accounts); N. M. Blokker, "Proliferation of International Organizations: An Exploratory Introduction", in N. M. Blokker and H. G. Schermers (eds.), *Proliferation of*

(although this norm is shifting).⁶⁰ For these reasons, multilateral 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 endeavor to use those aspects of the World Bank and the UN 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 financing effort under the auspices of the World Bank.⁶¹ The other form of the hybrid, the National Law Entity, involves setting up the new financing effort as a legal entity under national law and then having that entity contract out specific financial management and development tasks to the World Bank and the UN, 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

International Organizations: Legal Issues (Kluwer Law International, 2001), pp. 14-15 (noting that the majority of analysts emphasize the disadvantages of proliferation); J.E. Alvarez, *International Organizations: Then and Now*, 100 *American journal of international law* (2006), 324-47 (discussing the progression of international organizations). Critics of proliferation cite problems of coordination, different interests and inefficiency. See Blokker (2001), p. 14 (discussing legal issues pertaining to the United Nations); C. W. Jenks, *Co-Ordination a New Problem in International Organization*, 77 *Recueil des Cours* 2 (1950), pp. 135-271; C. W. Jenks, *Some Structural Dilemmas of World Organization*, 3 *Georgia Journal of International and Comparative Law* 1 (1973), pp. 1-13 (describing structural problems of international organizations). Some criticism of proliferation is based on a lack of support for international organizations generally. See Alvarez (2006), pp. 343-45 (pointing out that the developing world may see the proliferation of international organizations as their losing autonomy given their lack of control in such organizations relative to developed world countries).

⁶⁰ The trend is shifting towards supporting proliferation. Alvarez (2006), *supra* note 59, p. 343 (discussing the troubling future of the international organization). See also, for example, J. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward a Comparative Institutional Analysis*, 17 *Northwestern Journal of International Law & Business* (1997) (noting the potential of organizations to increase transactional gains, decrease losses and decrease costs notwithstanding problems of overlapping, competition and conflicting interests).

⁶¹ See Bantekas (2009), *supra* note 19, p. 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 (2007), *supra* note 2, p. 27 (noting that the World Bank and the International Monetary Fund, as the most resource-rich multilateral aid institutions, increasingly "call the tune").

customized agent for the principal's purposes but retains ties with pre-existing agents (the World Bank and the UN) in certain respects.⁶²

C. The Special Purpose Fund Approach

1. The Quasi Entity Fund

Under the Quasi Entity Fund model, donors create the new financing effort under the auspices of the World Bank as a separate fund dedicated to a specific development purpose. The fund 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 which have undertaken a joint approach to addressing global environmental issues.⁶³ The separate fund has a specific governance structure that gives donors an ongoing role in allocating the fund's assets.⁶⁴ The donors and the World Bank characterize these Quasi Entity Funds as World Bank trust funds and the World Bank as their trustee.⁶⁵ 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.⁶⁶ The Bank is also involved in development operations of the

⁶² This Article's focus is on the potential of 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 which is beyond this Article's scope. Nonetheless, meaningful deductions can be made as to the potential of these models to promote donors' fund goals. The likelihood that these goals will be honored to the fullest extent feasible can be measured by analyzing how these models address perverse incentives and other challenges posed by the operating environment.

⁶³ See Global Environment Facility, *What is the GEF*, available at: <www.thegef.org/gef/whatisgef>, accessed 18 March 2011 (providing a description and a brief history of the GEF).

⁶⁴ These World Bank Quasi Entity Funds are to be distinguished from the programs and funds set up under the UN, which together constitute the mainstay of the UN's development arm (some, such as UNDP, began as UN Trust Funds and subsequently re-organized into more formal entities). See de Senarclens (2007), *supra* note 2, p. 11 (describing the organization of the various UN commissions and programs). The UN's mix of funds and programs reflect the way in which 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 (2006), *supra* note 18, pp. 164–65 (describing the loan operations of the World Bank).

⁶⁵ I. F. I. Shihata, "Techniques to Avoid Proliferation of International Organizations—The Experience of the World Bank", in N. M. Blokker and H. G. Schermers (eds.), *Proliferation of International Organizations: Legal Issues* (Kluwer Law International, 2001), p. 125 (explaining how the Bank oversees various trust funds).

⁶⁶ See Bantekas (2009), *supra* note 19, p. 33 (outlining the various ways to structure international

fund, including proposing, supervising and monitoring fund-financed projects, a role it usually shares with such other entities as the donors designate as eligible intermediaries for the fund.⁶⁷

a. The Origin of the Quasi Entity Fund

The Global Environment Facility (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.⁶⁸ Its structure grew out of donors' (internally conflicting) desires to harness the World Bank's capacity to manage a collective fund while simultaneously preventing the World Bank from assuming complete control over the effort.

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.⁶⁹ 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.⁷⁰

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.⁷¹ 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

trust funds).

⁶⁷ See *infra* notes 103-04, 128, 136, 147 and accompanying text.

⁶⁸ See Smyth, *A Practical Guide* (2009), *supra* note 14, p. 40 (describing the intentions of the GEF's creators).

⁶⁹ 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 (2001), *supra* note 65, p. 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 1970's 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 (1978), *supra* note 28, p. 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 (2001), *supra* note 65, p. 125.

⁷⁰ S. A. Silard, *The Global Environment Facility: A New Development in International Law and Organization*, 28 *George Washington Journal of International Law and Economics* (1994-95), pp. 624-25.

⁷¹ Bantekas (2009), *supra* note 19, pp. 133-34 (discussing distinct funds created by the World Bank that serve the Bank's purpose or a closely related purpose).

Bank to make regular financial and progress reports on the use of the trust fund's assets.⁷²

The disadvantage of the traditional World Bank Trust Fund, and the reason the donors to the GEF Trust Fund did not want to follow that 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.⁷³ 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.⁷⁴

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 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

⁷² See Bantekas (2009), *supra* note 19, pp. 220–21 (explaining the reporting responsibilities of groups responsible for or connected to the use of trust funds); The World Bank, *World Bank Operational and Bank Policies: Trust Funds, OP 14.40/BP14.40*, (July 1, 2008), available at: <www-

wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/12/01/000350881_20091201114756/Rendered/PDF/518940BR0CORRI1C0disclosed011130191.pdf>, accessed 24 June 2011 [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 way of 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 on the use of the trust fund assets, not to the donors. J. Klick and R. H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 *Columbia Law Review* (2008), pp. 770–81.

⁷³ See Woods (2006), *supra* note 18, p. 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 23 (discussing the way in which the World Bank decides between competing interests).

⁷⁴ Hawkins et al., "Delegation Under Anarchy" (2006), *supra* note 13, pp. 26–28.

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.⁷⁵

When the creators of the GEF Trust Fund opted to form the fund as a World Bank Trust Fund,⁷⁶ there was an immediate outcry from the global environmental NGO community.⁷⁷ At the time, the World Bank's record of addressing environmental concerns was dismal⁷⁸ and 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 in the donors' selection of the Bank as agent.⁷⁹

b. A Governance Structure to Reduce Agency Slack

In response to this outcry, the donors determined to give the GEF Trust Fund a governance structure that would control the World Bank's role in the new fund and, thereby, reduce the risk inherent in the Bank's role as trustee. The resulting structure contains several components that 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.⁸⁰ Indeed, from the start, donors

⁷⁵ 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 4, pp. 20–23 (pointing to the misalignment between the Bank's lending agenda and the expectation that its loan officers would 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 usurped other roles assumed by the Bank from time to time).

⁷⁶ A number of reasons, including expense-saving concerns, prompted this choice. See Silard (1994-95), *supra* note 70, pp. 622–23 (outlining the considerations that prompted the donors of the GEF Trust Fund to choose a trust fund form).

⁷⁷ See *ibid.*, p. 633 (discussing the contentious debates over the structuring of the GEF Trust Fund).

⁷⁸ B. M. Rich, *The Multilateral Development Banks, Environmental Policy, and the United States*, 12 *Ecology Law Quarterly* (1984–85) (considering how multilateral development banks could effectively promote sound environmental policies).

⁷⁹ Hawkins et al., "Delegation Under Anarchy" (2006), *supra* note 13, p. 27.

⁸⁰ The World Bank, *Instrument for the Establishment of the Restructured Global Environment*

identified the United Nations Environment Programme (UNEP) and the United Nations Development Program (UNDP) as entities which, along with the World Bank, would propose projects for Fund financing (with each of UNEP, UNDP, and the World Bank being described as an “Implementing Agency”).⁸¹ Previous World Bank Trust Funds under the traditional structure financed World Bank projects only.⁸² 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.⁸³ The center of power is the GEF Council, which includes representatives from each donor country and representatives from recipient countries. This Council meets twice a year and is responsible for approving the Implementing Agencies’ work program.⁸⁴ The GEF Assembly, on the other hand, is an overseeing body which provides strategy direction and is the body authorized to approve amendments to the GEF Instrument, the GEF’s founding charter.⁸⁵ The Assembly only meets every three years.⁸⁶ The World Bank is not a member of either the GEF Council or the GEF Assembly.⁸⁷

The other key components of the GEF’s structure are the Secretariat and the Trustee.⁸⁸ The Secretariat, designed to be “functionally independent,”⁸⁹ is made

Facility, 33 International Legal Materials (1994), pp. 1294–95 [hereinafter *GEF Instrument*] (outlining the fiduciary duties and responsibilities of the GEF Fund’s trustee, including the ways in which funds are allocated).

⁸¹ *Ibid.*, para. 9(b) (describing eligibility requirements for funding).

⁸² Silard (1994-95), *supra* note 70, p. 624 (discussing how the GEF Trust Fund broke new ground in intra-organizational cooperation); D. Freestone, “The Establishment, Role and Evolution of the Global Environment Facility: Operationalising Common but Differentiated Responsibility?”, in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum* (Martinus Nijhoff Publishers, 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).

⁸³ *GEF Instrument*, *supra* note 80, paras. 11–20 (establishing the structure and responsibilities of the GEF Assembly and the GEF Council).

⁸⁴ *Ibid.* (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.*

⁸⁵ *Ibid.*, para. 13.

⁸⁶ *Ibid.*, (“The Assembly shall consist of Representatives of all Participants. The Assembly shall meet once every three years”).

⁸⁷ *Ibid.*, paras. 13, 16 (outlining the membership of the two bodies, neither of which include the World Bank).

⁸⁸ *Ibid.*, para. 2, Annex B (describing the roles and duties of the Secretariat and the Trustee).

⁸⁹ *Ibid.*, para. 21.

up of several staff headed by a Chief Executing Officer (CEO)⁹⁰ who is selected by, and answerable to, the GEF Council.⁹¹ 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.⁹² 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.

c. The Proliferation of Quasi Entity Funds

Following the GEF Trust Fund's creation, the Quasi Entity Fund model fast became a norm for creating collective financing efforts for development.⁹³ The Bank's apparent 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.⁹⁴

⁹⁰ *Ibid.*, 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”).

⁹¹ *Ibid.*, 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.*

⁹² *Ibid.*, Annex B (providing for the role and fiduciary responsibilities of the Trustee).

⁹³ See *WB Trust Funds Management Framework*, *supra* note 19, pp. 1–2 (discussing the growth and development of trust funds and stating that “[t]rust funds have emerged as a key instrument of development finance in recent years”); S. Smyth, *World Bank Grants in a Changed World Order: How Do We Referee this New Paradigm?*, 30 *University of Pennsylvania Journal of International Law* (2008), p. 499 [hereinafter *World Bank Grants*] (discussing how changes in development aid norms since the 1990s have resulted in a shift toward the use of trust funds).

⁹⁴ See World Bank Operations Evaluation Department, *The World Bank's Approach to Global Programs: An Independent Evaluation, Phase I Report* (1 August 2002), available at: <[http://lnweb90.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/F97A9075E643981785256C0700753005/\\$file/GPPP.pdf](http://lnweb90.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/F97A9075E643981785256C0700753005/$file/GPPP.pdf)>, accessed 28 June 2011, p. ix, para. 1 [hereinafter *OED Phase I Report*] (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.*, p. x, para. 5. 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.*, p. xii, para. 15. 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.*, p. xii, para. 14. See also The World Bank, *2007 Trust Funds Annual Report* (2007), available at:

Now that donors have a way to control a fund more tightly than they can under a traditional World Bank Trust Fund, several factors make 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.⁹⁵ Calls to address specific development issues by setting up special funds to address those issues have more political appeal than general pleas for increases in aid.⁹⁶ 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.⁹⁷ Further, the donor participation and control that is advanced by the Quasi Entity Fund model can help to reassure a reluctant legislature that the donor country's goals in providing support will be advanced.⁹⁸

Second, Quasi Entity Funds offer a flexible mechanism that works for a world which embraces development as a process that engages 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.⁹⁹ Following this discovery, the Bank instituted certain reforms aimed at

<http://siteresources.worldbank.org/CFPEXT/TrustFunds/21892003/TFAnnualReport_2007.pdf>, accessed 24 June 2011, p. 14 (noting that Recipient-Executed Trust Funds "continued to serve as a versatile instrument of Bank support" in the 2007 fiscal year).

⁹⁵ Heimans (2004), *supra* note 35, p. 2.

⁹⁶ *Ibid.*, p. 3 (arguing that the popularity of global funds "reflects the political implausibility of raising much-needed new funds through the UN.").

⁹⁷ *Ibid.*, p. 2 (highlighting how multi-actor global funds are result-driven).

⁹⁸ 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 to provide support to failing financial institutions in developing countries. R. B. Zoellick, "A Stimulus Package for the World", *New York Times*, 22 January 2009, 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.

⁹⁹ See S. Fidler, "Corruption Leads to Freeze on Trust Funds", *Financial Times*, 7 February 2001, p. 14 (describing a kickback scheme in the awarding of contracts that led to the suspension of five trust funds).

improving trust fund controls.¹⁰⁰ Audits of World Bank Trust Funds conducted in 2004 and 2005, however, showed continued significant lapses.¹⁰¹ These findings reinforced donors' preference for the Quasi Entity Fund as a model that they perceive as affording them more control over such agency slippage.¹⁰²

Donors' repeated use of this model shows a strong need for multilateral financing vehicles but 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,¹⁰³ the institutional tendency of donors (and the World Bank) to replicate out of inertia,¹⁰⁴ and the limitations of existing alternatives. As shown in Section 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.¹⁰⁵

2. The National Law Entity

Under this form of the hybrid approach, donors create a new multilateral 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

¹⁰⁰ See *ibid.* (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).

¹⁰¹ 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 19, p. 31 para. 4.01. 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.

¹⁰² *Ibid.*, p. 31 (noting poor documentation practices and fiduciary review compliance issues).

¹⁰³ See Bantekas (2009), *supra* note 19, p. 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 a large international organization."); Heimans (2004), *supra* note 35, pp. 2–3 (describing the heated political context under which these funds are created and the conflicts regarding how they are managed).

¹⁰⁴ See Woods (2006), *supra* note 18, p. 2 (noting that the World Bank tends to fall back on existing habits and solutions to deal with unforeseen and unexpected problems).

¹⁰⁵ See *OED Phase I Report, supra* note 94 (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).

Milner, all multilateral aid efforts involve multiple forms of agency costs.¹⁰⁶

The National 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. But this result is achieved 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 which is the target of the fund's assistance. Further, these funds' lack of international legal status has the potential to constrain their efficacy.

a. The Origin of the National Law Entity

The National Law Entity model emerged as a widely accepted option when the G8 countries¹⁰⁷ set up the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) in 2001.¹⁰⁸ The Global Fund is a multi-billion fund¹⁰⁹ that finances efforts to combat HIV/AIDS, malaria, and tuberculosis in developing countries.¹¹⁰ Set up by many of the same core countries that set up the GEF Trust

¹⁰⁶ See Milner (2006), *supra* note 5, pp. 115–16 (observing that foreign aid in general poses a principal-agent problem because, like 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: (1) longer chains of delegation; and (2) the fact that, unlike with domestic spending programs where voters can see for themselves the benefits of the spending, voters in donor countries cannot measure aid performance reliably, leading to additional principal-agent problems.

¹⁰⁷ 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 these countries convene to discuss global issues. See University of Toronto, *G8 Information Center* (2005), available at: <www.g8.utoronto.ca/what_is_g8.html>, accessed 18 August 2010.

¹⁰⁸ United Nations, *General Assembly Resolution S-26/2*, U.N. Doc. A/RES/S-26/2 (Twenty-Sixth special Session, 2 August 2001), available at: <www.un.org/ga/aids/docs/aress262.pdf>, accessed 28 June 2011, p. 14, para. 90 (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 together, along with private sector donors, to create a collective financing effort under a national law regime, but 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.

¹⁰⁹ See The World Bank, *Trustee Report, GF/B7/6* (February 2004), available at: <www.theglobalfund.org/documents/board/07/gfb76.pdf>, accessed 28 June 2011, pp. 1-2 (detailing the finances of the Global Fund).

¹¹⁰ See The Global Fund, *Third Meeting of the Transitional Working Group to Establish a Global Fund to Fight AIDS, Tuberculosis, and Malaria* (2001), available at: <www.theglobalfund.org/documents/twg/3RD_TWG_FINAL_REPORT.pdf>, accessed 28 June 2011, p. 1 (describing the measures necessary for the Fund's success); The Global Fund, *The*

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 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.¹¹¹ In addition, the donors wanted 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.¹¹² Both of these goals pointed donors away from, rather than towards, creating the effort 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.¹¹³

Framework Document of the Global Fund to Fight AIDS, Tuberculosis and Malaria (2002), available at: <www.theglobalfund.org/documents/TGF_Framework.pdf>, accessed 24 June 2011 [hereinafter *Global Fund Framework Document*] (establishing the title, purpose, principles and scope of the Fund). See generally, Triponel (2010), *supra* note 14 (presenting “the key innovative features of the Global Fund” and discussing “how its features adapted to changing circumstances”).

¹¹¹ See S. Radelet, *The Global Fund to Fight AIDS, Tuberculosis and Malaria: Progress, Potential, and Challenges for the Future* (Center for Global Development, 2004), available at: <www.theglobalfund.org/documents/library/studies/position_papers/PP_GEN1_full.pdf>, accessed 24 June 2011 (discussing the goals, objectives and administrative schemes of the Global Fund); The Global Fund, *How the Global Fund Works*, available at: <www.theglobalfund.org/en/how>, accessed 18 August 2010 (describing how the Global Fund operates). Research showed that the prevention and treatment of the target diseases was most likely to be effective if assistance was made available at the local clinic level and not confined to the coffers of government health ministries. See Triponel (2010), *supra* note 14, pp. 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).

¹¹² See The Global Fund, *First Meeting of the Transitional Working Group to Establish a Global Fund to fight AIDS, Tuberculosis, and Malaria* (2001), available at: <http://www.theglobalfund.org/documents/twg/Meeting_report_F_011030.pdf>, accessed 24 June 2011, p. 5 (questioning whether a separate legal mechanism was available that could “perform services for the Fund without sacrificing the independence of the Fund and its ability to seek contributions from both public and private sources”).

¹¹³ See The Global Fund, *Report of the Governance and Partnership Committee, Annex 6* (Fifth Board Meeting, 2003), available at: <http://www.theglobalfund.org/documents/board/05/gfb57annex6.pdf>, accessed 28 June 2011, pp. 2–3 [hereinafter *Global Fund Report Annex 6*] (stating that the Global Fund is a private foundation under articles 80 ff. of the Swiss Civil Code and that it was incorporated pursuant to a public deed dated January 22, 2002 and registered in the Geneva Trade Register). As a nonprofit foundation, it operates under the supervision of the Swiss Federal Supervisory Board for Foundations.

b. A Governance Structure 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.¹¹⁴ The Fund has both a global-level and a country-level governance structure.¹¹⁵ At the global level, it consists of a Board of Directors, Secretariat, Technical Review Panel, and the World Bank as Trustee.¹¹⁶ 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, all of which are comprised of representatives from the local level and drawn from a diverse group of sources.¹¹⁷ 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, working through local stakeholders rather than UN agencies or other multilateral or bilateral development partners.¹¹⁸

The Fund's Board of Directors (Board) is the "supreme governing body of the [f]oundation."¹¹⁹ It plays a role similar to the role played by the GEF Council, including making final funding decisions.¹²⁰ The Board's members are drawn

¹¹⁴ See Hawkins et al., "Delegation Under Anarchy" (2006), *supra* note 13, p. 25 (discussing how a principal is able to "design" an agent based on the preferences of the principal).

¹¹⁵ See Triponel (2010), *supra* note 14, p. 195 (stating that "[t]he Global Fund has both a country and a global level governance structure" and briefly describing the mechanisms of each).

¹¹⁶ *Global Fund Framework Document*, *supra* note 110, pp. 3, 6, 17 (describing the Fund's oversight mechanisms).

¹¹⁷ *Ibid.* (describing the roles of the Fund's Board of Directors, CCM, Regional Coordinating Mechanisms, Principal Recipients and Local Funding Agents).

¹¹⁸ See A. Shakow, *Global Fund–World Bank Hiv/Aids Programs Comparative Advantage Study* (2006), available at:

<<http://siteresources.worldbank.org/INTHIVAIDS/Resources/375798-1103037153392/GFWBReportFinalVersion.pdf>>, accessed 24 June 2011, pp. 18-19 (outlining the strengths of the Global Fund); See also The Global Fund, *Guidelines for Proposals Round 7* (2007), available at:

<www.theglobalfund.org/documents/rounds/7/Guidelines_for_Proposals_R7_en.pdf>, accessed 18 August 2010, p. 35 [hereinafter *Global Fund Round Seven Guidelines*] (detailing the administrative components of the Global Fund).

¹¹⁹ The Global Fund, *By-Laws as Amended 2 March 2011*, available at:

<www.theglobalfund.org/documents/core/Core_GlobalFund_Bylaws_en.pdf>, accessed 22 March 2011, pp. 5-6 [hereinafter *Global Fund Bylaws*].

¹²⁰ *Ibid.*, pp. 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).

from developed and developing countries, civil society, and the private sector, with the World Bank, WHO, and UNAIDS serving as non-voting members.¹²¹ The Secretariat handles the Fund's day-to-day management and reports to the Board.¹²² Its responsibilities include receiving proposals for Fund financing,¹²³ commissioning the Technical Review Panel (a body of experts that advises on scientific matters such as new treatment protocols),¹²⁴ and forwarding proposals that receive positive recommendations from the Technical Review Panel to the Board for final decision.¹²⁵ It also negotiates and executes the Fund's grant agreements.¹²⁶

Although the World Bank is labeled the fund's "Trustee," its role as Trustee is simply that of a financial functionary.¹²⁷ It collects, administers, and invests the fund's resources, disburses them to grant recipients in accordance with the instructions of the Board and periodically reports to the Board on the status of the Fund's resources.¹²⁸ It does not enter into grant agreements with the Fund's recipients; such agreements are concluded directly between the Fund and the Principal Recipients. Nor does the Bank as Trustee play any role in supervising or monitoring the recipients' use of the Fund's resources.

¹²¹ See *Global Fund Bylaws*, *supra* note 119, p. 4. See also Triponel (2010), *supra* note 14, pp. 202–05, Figure 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 *The Global Fund, Board Members*, available at: <www.theglobalfund.org/en/board/members/>, accessed 18 August 2010.

¹²² *Ibid.*, p. 8 (detailing the responsibilities of the Secretariat).

¹²³ See *Global Fund Bylaws*, *supra* note 119, pp. 8–9 (explaining that, in facilitating the application process, the Secretariat receives proposals for funding from the CCM, ensures that all the required information is included in these proposals, and then forwards the proposals to the Technical Review Panel); *Global Fund Framework Document*, *supra* note 110, Section VIII.A.3 ("The Secretariat will ensure that all the required information is included, before forwarding proposals to the independent Technical Review Panel.").

¹²⁴ The Technical Review Panel reviews all funding proposals submitted to the Global Fund for technical merit. See *The Global Fund, Technical Review Panel*, available at: <www.theglobalfund.org/en/trp/>, accessed 18 August 2010 (describing the role and composition of the Technical Review Panel); see also *Global Fund Round Seven Guidelines*, *supra* note 118, at v (stating how the Technical Review Panel uses a set of proposal review criteria established by the Board of Directors).

¹²⁵ See *Global Fund Framework Document*, *supra* note 110, Section VIII.A.5 ("The Secretariat will forward the recommendations from the Technical Review Panel to the Board for final decision.").

¹²⁶ See *Global Fund Bylaws*, *supra* note 119, p. 8.

¹²⁷ See *Global Fund Framework Document*, *supra* note 110, Section 10(C) (outlining the role of the World Bank as Trustee).

¹²⁸ See *ibid.*, Section 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.").

At the country level, the Global Fund's point entity is the Country Coordinating Mechanism (CCM) whose composition will usually include broad representation from government agencies, NGOs, community-based organizations, commercial sector organizations (where these exist) and bilateral and multilateral agencies.¹²⁹ The CCM 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.¹³⁰ The Principal Recipient is often a government ministry but it may also be an NGO or a faith-based organization or a private sector firm or foundation.¹³¹ The Regional Coordinating Mechanism (RCM) performs similar functions as the CCM regarding regional proposals.¹³²

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.¹³³ The Principal Recipient is financially accountable to the Global Fund for the grant proceeds and for implementation of the program being financed by the Global Fund's grant.¹³⁴ Accordingly, the

¹²⁹ See *ibid.*, Section 7(A)(3) ("Country proposals will be accepted from a Country Coordination Mechanism (CCM)"). The Global Fund, *Guidelines and Requirements for Country Coordinating Mechanisms* (Sixteenth Board Meeting, 2007), available at: <www.theglobalfund.org/documents/board/16/GF-BM16-07_PC_Attachment1.pdf>, accessed 24 June 2011, pp. 1-6 [hereinafter *Global Fund CCM Guidelines*] (outlining the purpose, structure, responsibilities, and composition of the Country Coordinating Mechanisms and the principles that 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).

¹³⁰ See *Global Fund CCM Guidelines*, *supra* note 129.

¹³¹ See The Global Fund, *Principal and Sub-Recipients*, available at: <www.theglobalfund.org/en/recipients>, accessed 18 August 2010 (outlining the role of the Principal Recipients and their interaction with the Sub-Recipients); The Global Fund, *Round Nine – Frequently Asked Questions* (2008), available at: <www.theglobalfund.org/documents/rounds/9/CP_Pol_R9_FAQ_en.pdf>, accessed 24 June 2011, p. 33 [hereinafter *Round Nine FAQ*].

¹³² See *Round Nine FAQ*, *supra* note 131, p. 7 (explaining how national CCMs for each country in which RCMs operate must approve the RCMs' funding application before it is submitted to the Global Fund).

¹³³ See Global Fund, *Principal and Sub-Recipients*, *supra* note 131 (outlining the role of the Principal Recipients and their interaction with the Sub-Recipients); *Round Nine FAQ*, *supra* note 131, p. 33.

¹³⁴ See The Global Fund, *Fiduciary Arrangements for Grant Recipients* (2003), available at: <www.theglobalfund.org/documents/6_pp_fiduciary_arrangements_4_en.pdf>, accessed 24 June 2011, p. 3 [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

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.¹³⁵ The CCM monitors the Principal Recipients.¹³⁶ Finally, the Fund hires local in-country entities (such as local accounting firms) (Local Fund Agents) to assess (in accordance with criteria approved by the Board)¹³⁷ the financial capacity of a proposed Principal Recipient to assume responsibility for a grant.¹³⁸

c. 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. In 2003, 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.¹³⁹ The Government conferred this status on the Fund by entering into a Headquarters Agreement with it.¹⁴⁰ Under

CCM").

¹³⁵ See *Global Fund Round Seven Guidelines*, *supra* note 118, pp. 35–36 (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”).

¹³⁶ See *Global Fund CCM Guidelines*, *supra* note 129, p. 2 (specifying that it is the responsibility of the CCM to select and evaluate the Principal Recipients).

¹³⁷ See *Global Fund Fiduciary Arrangements*, *supra* note 134, pp. 3–4 (“The Global Fund . . . contracts for independent advice from . . . Local Fund Agents (LFAs). The Global Fund normally contracts with one LFA per grant-receiving country . . .”).

¹³⁸ See generally The Global Fund, *Local Fund Agents*, available at:

<www.theglobalfund.org/en/lfa/>, accessed 18 March 2011 (providing additional information on the Local Fund Agents).

¹³⁹ See The Global Fund, *Global Fund Gains Privileges and Immunities Similar To International Organizations*, (Press Release, 13 December 2004), available at:

<www.theglobalfund.org/en/pressreleases/?pr=pr_041213>, accessed 24 June, 2011 [hereinafter *Global Fund Privileges*] (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 The Global Fund, *Report of the Governance and Partnership Committee* (Sixth Board Meeting, 2003), available at: <www.theglobalfund.org/documents/board/06/gfb67.pdf>, accessed 24 June 2011, p. 9 [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).

¹⁴⁰ See *Global Fund Sixth Board Meeting*, *supra* note 139, p. 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

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.¹⁴¹ In addition, the Fund's archives are inviolable.¹⁴² Further, the Fund's staff, including the members of its Board, enjoy certain privileges and immunities in Switzerland, including immunity from liability for acts performed in their official capacity and tax exemptions.¹⁴³

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.¹⁴⁴ The Global Fund's Executive Director, though selected by the Fund's Board, also served on a contract of employment with the WHO.¹⁴⁵ In December 2008, however, the Fund terminated the Administrative Services Agreement with the WHO¹⁴⁶ so as to give its Secretariat staff independence and free them from the conflict of serving two entities with distinct

December 13, 2004. *Global Fund Privileges*, *supra* note 139. See generally, The Global Fund, *Report of the Governance and Partnership Committee, Headquarters Agreement*, (2004), available at: <www.theglobalfund.org/documents/board/08/gfb87_annex4a.pdf>, accessed 24 June 2011, annex 4a [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).

¹⁴¹ See *Headquarters Agreement*, *supra* note 140, arts. 5, 7 (2004), available at: <http://www.theglobalfund.org/documents/HQ_agreement_en.pdf>, accessed 28 June 2011 (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).

¹⁴² See *ibid.*, art. 13 (referencing 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).

¹⁴³ See *ibid.*, arts. 13, 15 (listing the privileges and immunities enjoyed by Members of the Board and all officials of the Global Fund).

¹⁴⁴ See The Global Fund, *Report on Legal Status Options for the Global Fund* (2003), available at: <www.theglobalfund.org/documents/board/04/GF%20B4%2012%20Legal%20Status%20Report.pdf>, accessed 24 June 2011, p. 6 [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).

¹⁴⁵ See *ibid.* (discussing the administrative relationship between the Global Fund and the World Health Organization).

¹⁴⁶ See The Global Fund, *Board Decisions of the Sixteenth Board Meeting* (2007), available at: <www.theglobalfund.org/documents/board/16/GF-BM16-Decisions_en.pdf>, accessed 24 June 2011, p. 23 (deciding that "the Global Fund shall discontinue the Administrative Services Agreement with the World Health Organization" by December 31, 2008); see also The Global Fund, *Report of the Seventeenth Board Meeting* (2008), available at: <www.theglobalfund.org/documents/board/18/GF-B18-02_ReportSeventeenthBoardMeeting.pdf>, accessed 24 June 2011, p. 10 (discussing delays in implementing the new administrative arrangements and recommending an interim solution).

agendas – the Fund and the WHO.¹⁴⁷ The Executive Director of the Fund’s Secretariat and the Secretariat staff now serve on contracts of employment with the Fund.¹⁴⁸ As of January 1, 2009, the Global Fund is a wholly “autonomous, international financing institution.”¹⁴⁹

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.¹⁵⁰

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.¹⁵¹

¹⁴⁷ See *Global Fund Report on Legal Status Options*, *supra* note 144, p. 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.”).

¹⁴⁸ See *ibid.*

¹⁴⁹ The Global Fund, *Report of the Executive Director, GF/B19/3* (2009), available at: <www.theglobalfund.org/documents/board/19/GF-B19-03_EDReport.pdf>, accessed 24 June 2011.

¹⁵⁰ See Loi sur l’Etat hôte [LEH] [“Host State Act”], (22 June 2007), available at: <www.admin.ch/ch/e/rs/1/192.12.en.pdf>, accessed 24 June 2011, art. 25 (defining international non-governmental organizations (INGOs)).

¹⁵¹ See GAVI Alliance, *Hosting Transition Update* (GAVI Alliance & Fund Board Meeting, 25-26 June 2008), available at:

<www.gavialliance.org/resources/12_GAVI_Secretariat_transition.pdf>, p. 2 (providing an update on GAVI’s application for international status and confirming that the Foreign Affairs Department intended to support the organization). The Global Alliance Vaccine Initiative Foundation grew out of an earlier initiative, the Global Alliance for Vaccines and Immunization, which was created by a number of developed and developing countries, the Bill and Melinda Gates Foundation, WHO, UNAIDs, the World Bank, and several vaccine manufacturers. The initiative was formed to provide vaccines for a range of deadly diseases, such as pneumococcal disease, rotavirus disease, and meningitis to those living in the poorest countries, facilitate research for strains of vaccines that would be effective in those countries, and strengthen the countries’ health care systems. See generally GAVI Alliance, *GAVI Alliance Progress Report 2008*, available at:

<www.gavialliance.org/resources/2008_GAVI_Alliance_Progress_Report.pdf>, accessed 22 June 2011 (providing an overview of the GAVI Alliance’s efforts and accomplishments in 2008).

III. The Failure To Meet the Challenge

So what's wrong with the Quasi Entity Fund and National Law Entity models and why do I label both models as sub-optimal responses to the global need for multilateral development financing vehicles? The short answer is that the Quasi Entity Fund, as currently conceived and constituted, is a flawed model. It fails in its central objective – the reduction of agency costs – whilst simultaneously generating a new kind of cost – the cost of opaque accountability – which was not a feature of the pre-Quasi Entity Fund era. The National Law Entity, on the other hand, succeeds in reducing the agency costs associated with creating a World Bank Trust Fund. But it generates significant transactional and operational costs which likely preclude it from becoming a readily useable template. It also lacks the legal capacity and stature at international law that is appropriate for a multilateral financing effort that involves coordinated inter-governmental activity on a significant transnational scale. This section shows how these deficits; unabated agency costs, opaque accountability, high transactional and operational costs; and uncertain stature arise, and their actual and potential adverse effects.

A. The Deficits of the Quasi Entity Fund

The Quasi Entity Fund's deficits consist of unabated agency slack and inadequate accountability both of which flow from its governance structure.

1. Unabated Agency Slack

To understand why the Quasi Entity Fund model fails in its central objective requires recalling what that central objective is. Briefly, when considering using the World Bank to set up a new collective financing effort, donors concern is that giving the World Bank broad discretion over the use of the fund's resources will result in the Bank using the fund's resources to advance its lending agenda at the expense of the donors' priorities. The defining feature of the Quasi Entity Fund, therefore, consists of donors' efforts to address this concern by creating a donor governing body through which they retain for themselves the power to decide project by project or program by program, how their collective monies, will be spent. Having a donor governing body that exercises this power in turn generates the need to also have a secretariat to gather proposals for the donor governing body's review, convene and organize the donor governing body's meetings and generally manage the fund on a day to day basis. Donors intend this structure to serve as a brake on the World Bank's ability to hijack their fund's agenda.

But the experience of the Quasi Entity Fund structure in practice shows that the structure is not up to the task. Two shortcomings dog its potential to serve as an effective brake on agency costs. First, the structure assumes that the World Bank is ready and willing to serve as the financial administrator of these funds, without demanding an operational role. Experience shows that this assumption is generally wrong. Second, the structure ignores the fact that the Quasi Entity Fund lacks legal capacity. This lack of legal capacity precludes a Quasi Entity Fund from being able to hire an independent secretariat answerable exclusively to the donors. Instead, the secretariat head and staff end up being hired by the World Bank, a result which crimps the degree to which the secretariat can make the goals of the fund's donors the top priority.

a. An Operational Stake as the Price of Financial Administration.

Consistent with the World Bank's lending agenda, the Bank's willingness to serve as trustee of a fund is usually conditioned on donors giving the Bank an operational stake in the fund.¹⁵² This generally translates into an understanding (explicit or implicit) that some part of the fund's resources will finance Bank operations. The Bank does not simply hire itself out as a financial manager without this *quid pro quo* because 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.

Our earlier hypothetical *supra*, at 32-33, serves to illustrate how this can play out. Assume that instead of setting up a traditional World Bank Trust Fund to support small-scale farming in Africa, the group of donors sets 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.

Faced with the choice of funding a feasibility study for building new irrigation systems or a farmer training grant, for example, the idea of the Quasi

¹⁵² There are isolated exceptions where the World Bank has agreed to provide financial management services without being given an operational stake in the fund. The Global Fund is one such example and two other global health initiatives, the International Finance Facility for Immunisations and the Advance Market Commitments for Vaccines provide additional examples. International Finance Facility for Immunisations, *About IFFIm* (2005), available at: <www.iffim.org/about/>, accessed 28 June 2011; Advance Market Commitments for Vaccines, *What is an AMC?*, available at: <www.vaccineamc.org/about.html>, accessed 24 June 2011. Those instances, however, are the exception rather than the rule. The norm has been for the Bank to assume an operational role in any fund for which it serves as trustee, see *WB Trust Funds Management Framework*, *supra* note 19, p. 8, para. 2.08; Bantekas (2009), *supra* note 19, pp. 133-34.

Entity Fund is to enable the donors to choose the proposal that best fits with their goals. But 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. It may force them to select the World Bank project even though it is not their first choice. In this way, donors' coerced commitment to use some fund resources to finance World Bank projects undermines the extent to which the Quasi Entity Fund model can curtail agency slack when donors rely on the World Bank to serve as a trustee.

True, the *quid pro quo* requirement also derives in part from considerations of prudential financial management and not exclusively from turf protection. For example, the requirement reassures the Bank that it will not end up being trustee of an initiative that finances poorly designed non-World Bank projects. Projects that do not comply with Bank standards or their equivalent could expose the Bank's reputation to significant risks. Moreover, given that serving as trustee has been linked, traditionally, with issuing grants of fund resources and undertaking to supervise and monitor the recipients' activities, the *quid pro quo* approach also protects the Bank from undertaking a task on which it cannot deliver. If the Bank has no active operations in a particular sector in a particular country, for example, it will not have the right staff with the appropriate training on hand to supervise and monitor a grant made for that sector in that country.

Nonetheless, whatever the reasons driving a given instance of the Bank insisting on an operational stake as the *quid pro quo* of its providing financial management services, the fact remains that the Bank's insistence on having an operational stake undercuts the potential of the Quasi Entity Fund model to serve as a collective financing mechanism that minimizes the agency slack in having the World Bank serve as a fund's trustee. Frequently, a new financing effort's agenda will overlap with the Bank's agenda but the cause of development is not well-served by perpetuating a situation where the Bank dominates.

For this reason, as developed in more detail in Section IV, *infra*, the international community should consider creating a separate international institution; a Global Trust Corporation, whose sole purpose and function would be to serve as a financial manager for funds for international development. The key contribution of such an entity would be to serve as an objective financial administrator independent of any conflicting lending agenda of its own.

b. The Illusion of Secretariat Independence

The World Bank's lending agenda also interferes with the independence of a Quasi Entity Fund's secretariat. This interference results from the kind of 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 the donors enter into with the World Bank as trustee,¹⁵³ which are generally regarded as governed by international law.¹⁵⁴ These arrangements incorporate certain *fundamental principles of the law of trusts*,¹⁵⁵ including the principle that a trust is not a legal entity in the sense that it does not bear rights or hold duties.¹⁵⁶ Instead, all rights

¹⁵³ See Bantekas (2009), *supra* note 19, pp. 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).

¹⁵⁴ See *ibid.*, pp. 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 them); A. R. Sureda, *The Law Applicable to the Activities of International Development Banks*, 308 *Recueil des Cours* (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 J.E Alvarez, *International Organizations as Law-makers* (New York: Oxford University Press, 2005), 1-4 (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* (2nd rev. ed., 2005) (listing the differences between private and public international organizations, including the fact that private international organizations are not 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 (2009), *supra* note 19, *passim* (comparing and contrasting the generally similar, but sometimes different, treatment of trusts under domestic versus international law); Head, *Law and Policy* (2008), *supra* note 3 (detailing the history, legality, and policy surrounding important international financial institutions); Smyth, *World Bank Grants* (2008), *supra* note 93, pp. 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 The 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>>, accessed 24 June 2011 [hereinafter *WB Standard Conditions*].

¹⁵⁵ See Shihata (2001), *supra* note 65, pp. 125–26 (describing the structure of the World Bank’s trust funds).

¹⁵⁶ See Bantekas (2009), *supra* note 19, pp. 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 (1978), *supra* note 28, p. 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”).

and duties owed by and to a trust fund are held by and owed to the trustee.¹⁵⁷ A trust fund itself does not have any independent legal personality or capacity.¹⁵⁸

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.¹⁵⁹ The donors as a group have no collective legal capacity to engage with third parties, for example, as an employer.¹⁶⁰ Nor does the fund they create from their pooled resources have this capacity.¹⁶¹ 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.¹⁶²

This arrangement, by which a Quasi Entity Fund's CEO serves on a contract of employment with the World Bank, is fraught with conflict 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 World Bank's Articles of Agreement, to owe his/her duty *entirely to the Bank and not to any other authority*¹⁶³ and to be

¹⁵⁷ See Bantekas (2009), *supra* note 19, p. 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).

¹⁵⁸ See *ibid.* (discussing the importance of administration agreements and treaties, the mechanisms that actually bind donors and trustees).

¹⁵⁹ See *ibid.* (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).

¹⁶⁰ See *ibid.* (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).

¹⁶¹ See *ibid.* (“[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 . . .”).

¹⁶² A similar constraint applies to the creation of other multilateral efforts that serve a non-financing purpose, see R. Churchill, R. and G. Ufstein, *Autonomous Institutional Arrangements In Multilateral Environment Agreements: A Little-Noticed Phenomenon in International Law*, 94 *American Journal of International Law* (2000), p. 627 (noting that the secretariats of multilateral environment agreements are usually integral parts of their host intergovernmental organizations, even though they act under the guidance of a functional autonomous Conference of the Parties created by the agreement)

¹⁶³ See World Bank International Bank for Reconstruction and Development, *Articles of Agreement, Article V*, available at: <<http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>>, accessed 24 June 2011, Section 5(c) (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).

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.¹⁶⁴

Simply revealing that this conflict of interest exists does not demonstrate that it prevents the Quasi Entity Fund model from effectively limiting the agency slack inherent in a World Bank trust fund. With a Secretariat's CEO placed in the position of having to serve two masters, however, one of two scenarios is 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 the 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, factors which serve as a counterweight to being under a World Bank supervisor. In these circumstances, the CEO has leverage to speak with an independent voice. A secretariat with that kind of independence, however, is threatening to the World Bank, an institution accustomed to calling the shots. As a result, such a secretariat and the Bank are poised to become locked in a continuing struggle that will result in back-biting, unnecessary delays, stalemates, and a waste of both entities' resources.

Protracted tensions between the Bank and the GEF Secretariat in the GEF Trust Fund, the secretariat of the founding Quasi Entity Fund, show how the second scenario plays out in practice. In 2001, emboldened by swelling contributions to the GEF Trust Fund, the CEO of the GEF Secretariat sought greater autonomy for the Secretariat.¹⁶⁵ He sought 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,

¹⁶⁴ These are standard undertakings for all World Bank employees. See The World Bank, *Principles of Staff Employment*, available at: <http://siteresources.worldbank.org/INTSTAFFMANUAL/Resources/StaffManual_WB_web.pdf>, accessed 24 June 2011 (setting out the guiding principles that govern the World Bank's internal staff rules and policies).

¹⁶⁵ See Global Environment Facility, *Overall Structure, Processes and Procedures of the GEF, GEF/C.18/8* (GEF Council Meeting, December 2001), available at <www.thegef.org/gef/sites/thegef.org/files/documents/C.18.8%20SPP%20FINAL.pdf>, accessed 22 June 2011, para. 63(a) [hereinafter *GEF 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 80, p. 1293, para. 34 (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).

and to sign agreements with external parties such as country governments on the GEF's behalf.¹⁶⁶ He also sought the right to determine the terms and conditions of Secretariat staff independent of the World Bank's Staff Rules and Policies.¹⁶⁷ 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.

The World Bank opposed all aspects of the Secretariat's bid for expanded powers.¹⁶⁸ Under pressure from the GEF donors to reach a compromise, the Bank and the Secretariat eventually worked out a matrix of responsibilities clarifying which entity would be responsible for what.¹⁶⁹ The matrix did not make any fundamental change in the formal legal status or capacity of the GEF,¹⁷⁰ and 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.¹⁷¹ These proposed changes included authority for the GEF Secretariat to issue GEF grants directly to GEF recipient countries,¹⁷² a fundamental change given that the GEF was set up to work through intermediaries, not as a stand-alone entity dispensing funds direct to

¹⁶⁶ See *GEF Structure, Processes and Procedures*, *supra* note 165, 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").

¹⁶⁷ See *ibid.*, 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").

¹⁶⁸ See *ibid.*, Annex C, pp. 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).

¹⁶⁹ See Global Environment Facility, *Joint Summary of the Chairs*, (GEF Council Meeting, May 2002), available at: <http://207.190.239.143/COUNCIL/GEF_C19/Joint%20Summary%20of%20the%20Chairs%20-%20FINAL.pdf>, accessed 22 June 2011, paras. 19-22 (recognizing the importance of coordination between the Secretariat and Implementing Agencies as well as the need for greater power and independence for the Secretariat); Global Environment Facility, *Clarifying the Roles and Responsibilities of the GEF Entities*, *GEF/C.19/8* (GEF Council Meeting, May 2002), available at: <http://207.190.239.143/COUNCIL/GEF_C19/C.19.8%20Roles%20and%20Responsibilities.pdf>, accessed 22 June 2011, paras. 5-10 (clarifying the roles and responsibilities of each GEF entity including the Secretariat).

¹⁷⁰ See *Clarifying the Roles and Responsibilities of the GEF Entities*, *supra* note 169.

¹⁷¹ See Global Environment Facility, *Draft GEF Policy, Institutional, and Governance Reforms*, *GEF/R.5/15* (GEF Council, Second Meeting for the Fifth Replenishment of the GEF Trust Fund, June 2009), available at: <www.thegef.org/gef/sites/thegef.org/files/documents/GEF.R.5.15.pdf>, accessed 22 June 2011, paras. 125-127 [hereinafter GEF Fifth Replenishment Reform] (advocating a clarification and strengthening of the Secretariat's legal capacity in order to increase the overall effectiveness and efficiency of the GEF).

¹⁷² See *ibid.*, para. 88 (listing suggested reforms such as "[c]onferring onto the GEF Secretariat the primary role for resource mobilization").

countries. The CEO also proposed that the GEF Secretariat be made solely responsible for mobilizing resources for the GEF (a responsibility it shares with the World Bank as Trustee) and that the Secretariat be exempted from certain World Bank employment policies.¹⁷³ Further, the CEO made a direct bid to the GEF Council for independent legal personality and legal capacity for the GEF.¹⁷⁴

Again, the GEF Council decided against making any fundamental formal change in the GEF's legal status or capacity.¹⁷⁵ The GEF Council also rejected the idea that the Secretariat should assume exclusive responsibility for mobilizing resources for the GEF.¹⁷⁶ Instead, the Council endorsed the Bank and Secretariat's agreement that the Bank and the Secretariat would develop processes for recipient countries to receive direct grants from the Secretariat for limited purposes.¹⁷⁷ The Council also agreed to formalize the Secretariat's joint responsibility (shared with the Bank as Trustee) to mobilize resources for the GEF.¹⁷⁸

These cyclical negotiations between the GEF Secretariat and the World Bank show that the concept of a fund having a *functionally independent*

¹⁷³ See *ibid.*, 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).

¹⁷⁴ The GEF Secretariat asserted the position that the GEF's constituent documents should be interpreted as already conferring independent legal personality and capacity on the GEF, a view opposed by the World Bank. Irrespective of which side of this argument one might adopt, however, 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.

¹⁷⁵ The recommendations for amendments to the GEF Instrument submitted to the GEF Assembly in connection with the final policy recommendations for the Fifth Replenishment omitted any suggestion for a change in the GEF's legal capacity. See Global Environment Facility, *Proposed Amendments to the GEF Instrument, GEF/A.4/9* (Fourth GEF Assembly, May 2010), available at: <www.thegef.org/gef/sites/thegef.org/files/documents/GEF-A.4-9-Change%20to%20GEF%20Instrument--FINAL.pdf>, accessed 24 June 2011.

¹⁷⁶ Global Environment Facility, *Policy Recommendations for the Fifth Replenishment of the GEF Trust Fund, GEF/R.5/26* (Fifth Meeting for the Fifth Replenishment of the GEF Trust Fund, March 2010), available at: <www.thegef.org/gef/sites/thegef.org/files/documents/GEF_R5_26%20%20Policy%20Recommendations,Feb%2012,%202010.pdf>, accessed 24 June 2011, pp. 9–10, para. 48; 18, Table 2.

¹⁷⁷ Global Environment Facility, *Policy Recommendations for the Fifth Replenishment of the GEF Trust Fund, GEF/R.5/32/CRP.1* (Sixth Meeting for the Fifth Replenishment of the GEF Trust Fund, May 2010), available at: <www.thegef.org/gef/sites/thegef.org/files/documents/GEF_R5_32_CRP1.pdf>, accessed 24 June 2011, pp. 3, paras. 15–16; 4, Paras. 17–19 (supporting proposals for recipient countries to receive GEF assistance to conduct national GEF portfolio identification reviews and to fund national communications reports to the secretariats of the conventions for which the GEF serves as a financing mechanism).

¹⁷⁸ Global Environment Facility, *Policy Recommendations for the Fifth Replenishment of the GEF Trust Fund, GEF/R.5/26* (Fifth Meeting for the Fifth Replenishment of the GEF Trust Fund, March 2010), *supra*, note 176.

secretariat, while simultaneously purporting to operate within the World Bank is not viable. The ambitions of a secretariat inevitably expand commensurate with the amount of funding placed under its control. Quickly the appearance of a conflict of interest in the secretariat serving two masters becomes an unworkable reality.¹⁷⁹ The kinds of conflicts that have arisen between the World Bank and the

¹⁷⁹ Similar conflicts dogged the relationship between the World Bank and the more recently created global fund for education, the Education For All Fast Track Initiative Catalytic Fund (the Education Fund), the financing arm of the Education for All Fast Track Initiative (a broad-based partnership of donor and recipient countries that aims to achieve universal primary education). 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 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). See K. Maloof, *Resourcing Global Education: How Reform of the Fast Track Initiative Should Lead to a Global Fund for Education* (Oxfam International, 19 January 2010), available at: <www.oxfam.org/sites/www.oxfam.org/files/resourcing-global-education.pdf>, accessed 24 June 2011, pp. 13-17 (discussing bureaucratic delays within the Bank). 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, *inter alia*, for formulating normative criteria for eligible country plans. See *Note on Bank's Multiple Roles in the FTI Partnership; EFA-FTI Draft Charter* (On File with Author, Dated September 21, 2006) (discussing proposed responsibilities of the Secretariat, and raising issues of Secretariat accountability and Secretariat's reporting obligations to the World Bank). 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. In its relatively short existence, the Fund has had four different heads of the Secretariat. See generally EFA-FTI, *Education for All – Fast Track Initiative Annual Report 2009*, available at: <www.educationfasttrack.org/media/library/Annual-report-2009/annual-report-2009.pdf>, accessed 24 June 2011 (pointing out how, in December 2009, Mr. Robert Pouty was selected as the new head of the FTI Secretariat); EFA-FTI, *Education for All –Fast Track Initiative Annual Report 2008*, available at: <www.educationfasttrack.org/media/library/Annual_Report_2008_EFA_FTII.pdf>, accessed 24 June 2011. 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 and was unresolved for two years, between 2007 and 2009. 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 *id.*

In November 2010, the donors of the Education Fund agreed to a major restructuring of the Fund, following upon the Fund's expansion. See EFA-FTI, *FTI Reform Agenda*, available at: <www.educationfasttrack.org/news/185/290/Key-Decisions-and-Next-Steps-Conclude-EFA-FTI-Meetings/d,Whats%20New/>, accessed 20 February 2011 (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). The dual reporting role of the Secretariat however; to the executive body of the Education For All Fast Track Initiative

GEF Secretariat are inevitable and they diminish the value of the Quasi Entity Fund as a multilateral 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.

In sum, although the Quasi Entity Fund model appears on its face to be a useful first step to get a new effort off the ground, history shows otherwise. These funds are not primed to convert seamlessly into independent, autonomous funding efforts in due course. Instead, their secretariats and the World Bank are on a collision course from the moment of a fund's inception. For this reason, as more fully developed in Section IV, *infra*, I maintain that we need a new approach. Instead of creating a fund with a supposedly functionally independent secretariat inside an existing institution, donors seeking to create a new financing effort should take the bold step of declaring their intention to have the effort serve as an autonomous entity with legal capacity from the outset.

2. Lacunae in Accountability

Unabated agency slack is not the only flaw that precludes the Quasi Entity Fund from being an optimal financing vehicle. The model also contains some significant lacunae in accountability. *Accountability*, as defined by Ruth Grant and Robert Keohane,¹⁸⁰ presumes a state of affairs in which some 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

Partnership as a whole, and to the World Bank as its legal employer, remains. See EFA-FTI, *EFA-FTI Governance of the Partnership, as amended Nov. 2010*, available at:

www.educationfasttrack.org/media/Revised%20Final%20Governance%20Document_Jan%202011.pdf, accessed 24 June 2011, para. 4.4.6 (detailing how the 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).

¹⁸⁰ Grant and Keohane (2005), *supra* note 4. This is a seminal work on accountability. See J. Cohen and C. F. Sabel, *Global Democracy?*, 37 *New York University Journal of International Law and Politics* (2005), pp. 774-775 (relying on Ruth W. Grant and Robert G. Keohane's article, *Accountability and Abuses of Power in World Politics* as a relevant source for analyzing institutional design). See generally Esty (2006), *supra* note 4, pp. 1537-41 (discussing the problems of divided responsibility, informality, institutional weakness, and the participation of private actors); S. Dantiki, *Power Through Process: An Administrative Law Framework for United Nations Legislative Resolutions*, 40 *Georgetown Journal of International Law* (2009), p. 677 (pointing out the problematic transfer of power from states to less accountable international institutions through delegated legislative authority); V. Heyvaert, *Levelling Down, Levelling Up, and Governing Across: Three Responses to Hybridization in International Law*, 20 *European Journal of International Law* (2009), pp. 666-69 (arguing for ". . .the establishment of individual state responsibility for technical and financial assistance" so there can be greater accountability from the parties from whom it is necessary).

sanctions if they determine that these responsibilities have not been met.¹⁸¹ This state of affairs does not exist under the Quasi Entity Fund. The respective responsibilities to be assumed and standards to be followed by the component parts of the Quasi Entity Fund; the donor governing body, the secretariat and the World Bank as trustee, are not clearly articulated. In the absence of such standards being articulated, their observance cannot be judged. Nor can any failure to observe unarticulated and undefined standards be sanctioned.

This breakdown in accountability occurs because the Quasi Entity Fund gives rise to a different relationship between the donors to a fund and the World Bank as trustee than exists under a World Bank Trust Fund and donors and the World Bank have been slow to appreciate this reality and to respond to its implications. The Quasi Entity Fund shifts the locus of responsibility for the use of a fund's resources away from the World Bank as trustee and imposes it on the donors in their role as a donor governing body.¹⁸² To reflect this shift in responsibility, donors and the World Bank need to agree upon a framework of accountability that articulates; (i) who, as between the donor governing body, the secretariat and the World Bank as trustee, will assume responsibility for monitoring the use of a fund's resources and how; and (ii) the scope of responsibility the donors, acting as a donor governing body, owe to their citizens (whose taxes supply the resources that governments contribute to these funds) for the decisions they will take as a donor governing body and the policies and procedures they will follow in making those decisions.

¹⁸¹ See Grant and Keohane (2005), *supra* note 4, pp. 29-30 (discussing "accountability"). 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.*, pp. 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, according to 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).

¹⁸² 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 of those citizens' agent. See generally Lyne et al (2006), *supra* note 35, p. 44 (explaining the inter-workings of collective principals). 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 which, though more limited than under a World Bank Trust Fund, still exist.

The GEF provides several examples of how the need for a revised accountability framework has been overlooked. Starting with the GEF Instrument, its terms show a misunderstanding of the shift in responsibilities that the Quasi Entity Fund entails. For example, in disregard of the limited financial functionary role the World Bank as Trustee has in the GEF,¹⁸³ the GEF Instrument makes the 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*.¹⁸⁴ According the Bank as Trustee oversight responsibility for the Implementing Agencies' use of GEF Trust Fund resources reflects a misalignment of responsibilities because as a pure financial functionary, the Bank as Trustee lacks the authority, substantive knowledge, and resources to exercise such oversight.

The Bank as Trustee of the GEF lacks the authority to police the Implementing Agencies because the GEF Instrument mandates that it commit and disburse funds to the Implementing Agencies pursuant to the Council's decisions and gives it no authority to withhold funds if the Implementing Agencies cannot account to it for their use of GEF resources already received.¹⁸⁵ It lacks the substantive knowledge to police UNDP and UNEPs' use of GEF resources because when the GEF was set up the GEF donors agreed that each Implementing Agency would apply its own operational policies when making grants of GEF Trust Fund resources.¹⁸⁶ The Bank as Trustee, unfamiliar with the specifics of UNEP and UNDPs' operational policies, is in no position to monitor whether those agencies are observing their own policies.¹⁸⁷ It was not afforded any extra resources to acquire that familiarity.

¹⁸³ See Smyth, *A Practical Guide* (2009), *supra* note 14, pp. 32-33 (describing in detail the Bank's functions in relation to the GEF Trust Fund).

¹⁸⁴ See *GEF Instrument*, *supra* note 80, 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.").

¹⁸⁵ See *GEF Instrument*, *supra* note 80, 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).

¹⁸⁶ See generally Smyth, *A Practical Guide* (2009), *supra* note 14, p. 62 (clarifying that while each agency would have 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 for thirty days).

¹⁸⁷ 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 The World Bank, *About Us, United Nations*, available at: <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040610~menuPK:41691~pagePK:43912~piPK:44037,00.html>>, accessed 18 August 2010 (stating the Bank's formal relationship with the United Nations is defined by a 1947 agreement which recognizes the

In short, the founders of the GEF Trust Fund failed to recognize that the Quasi Entity Fund model requires that the intermediaries of the grant financing be directly responsible to the donors. The Bank's limited powers as Trustee of the GEF do not equip it to play an intermediating oversight role. As discussed in more detail in Section IV,¹⁸⁸ donors could choose to appoint an independent overseer of the intermediary entities to provide oversight on the donors' behalf. But the overseeing entity would need both the right expertise and the resources to perform that role; an entity authorized and funded to assume a purely financial functionary role (whether it be the World Bank or another institution), has neither.

These gaps in oversight responsibility and standards eventually came to the attention of the GEF donors in the late 1990s when they decided, through the GEF Council, that the Council should begin to allocate GEF Trust Fund resources to regional development banks and a range of additional UN agencies and programs.¹⁸⁹ 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 intermediaries, how it should determine whether an entity met those standards, what sort of oversight should be exercised over new intermediaries, and which body should exercise such oversight.

The Council turned to the Secretariat to devise criteria for selecting new intermediaries.¹⁹⁰ In response, the Secretariat developed a set of criteria which focused entirely on an entity's technical expertise to contribute to the GEF's mission; namely strategic match, capacity and complementarities,¹⁹¹ and assumed the role itself for deciding, in consultation with the Implementing Agencies, whether an entity met those criteria.¹⁹² Notably absent from these criteria was any

Bank as an independent Specialized Agency of the UN as well as a member and observer in many UN bodies).

¹⁸⁸ See *infra*.

¹⁸⁹ See generally Global Environment Facility, *Criteria for the Expansion of Opportunities for Executing Agencies*, GEF/C.17/13 (GEF Council Meeting, May 2001), available at:

<www.thegef.org/gef/sites/thegef.org/files/documents/C.17.13.pdf>, accessed 22 June 2011, paras. 4-5 (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 pursuant to para. 28 of the GEF Instrument, *supra* note 80, which provides that "[t]he 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.").

¹⁹⁰ See *Criteria for the Expansion of Opportunities for Executing Agencies*, *supra* note 190.

¹⁹¹ See *ibid.* (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 (capacity) while also being able to fully commit to the program (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.*

¹⁹² See *ibid.* (describing how, after the Council's initial review and acceptance of an entity, the

guidance on what fiduciary standards, or financial management capacity, an entity would have to have in order to serve as an intermediary. This failure to identify fiduciary standards for potential new intermediaries created an accountability lacuna in two ways. First, it left the Secretariat and the Implementing Agencies with no guidance from the GEF Council on how a potential new intermediary's financial management capacity would or should be evaluated. Second, it generated uncertainty regarding donors' expectations about the degree to which the Bank as Trustee would exercise oversight of the new intermediaries, given the vagueness of the language of the GEF Instrument on that issue.

The first gap went unaddressed until the early 2000s, when an explosion in the number of new intermediaries being approved catapulted the issue onto the donors' radar.¹⁹³ The second gap, however, the question of the scope of the responsibility assumed by the Bank as Trustee, was addressed right away, at the insistence of the Bank as Trustee. When the GEF was first created, the Bank as Trustee agreed with UNDP and UNEP that it would discharge whatever oversight responsibility it owed to the donors by simply securing an externally audited financial report from each of UNEP and UNDP annually.¹⁹⁴ Though never formally blessed by the GEF donors, this arrangement became the standard practice.

In light of this practice, when the GEF began to fund the regional development banks and other UN agencies, the Bank proposed and the GEF Council agreed that the Bank as Trustee would discharge its oversight responsibilities by securing externally audited financial reports from the new

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).

¹⁹³ 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 Global Environment Facility, *Expanded Opportunities for Executing Agencies*, GEF/C.12/10 (GEF Council Meeting, October 1998), available at: <www.thegef.org/gef/sites/thegef.org/files/documents/GEF.C.12.10.pdf>, accessed 24 June 2011, pp. 2–5 (discussing the roles of the World Bank, UNDP and UNEP as Implementing Agencies and their efforts to expand opportunities for executing agencies); Global Environment Facility, *Review of Experience with Executing Agencies Under Expanded Opportunities*, GEF/C.22/12 (GEF Council Meeting, November 2003), available at: <www.thegef.org/gef/sites/thegef.org/files/documents/C.22.12_Executing_Agencies_FINAL.pdf>, accessed 22 June 2011, para. 20 [hereinafter GEF Expanded Opportunity Report] (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).

¹⁹⁴ See Global Environment Facility, *Trustee Report*, GEF/C.23/Inf.3 (GEF Council Meeting, May 2004), available at: <http://207.190.239.143/COUNCIL/GEF_C23/C.23.Inf.3_Trustee_Report_FINAL.pdf>, accessed 22 June 2011, para. 13.

intermediaries.¹⁹⁵ At the Bank's urging, the Council also confirmed that the GEF Instrument should be interpreted as allowing the Bank as Trustee to withhold committing or disbursing funds to any intermediary that failed to provide the Bank with the required financial reports.¹⁹⁶

These Council rulings gave the Bank as Trustee clarity and the police powers necessary to fulfill the auditor-like role it had agreed to assume.¹⁹⁷ In this way, the uncertainty concerning the scope of the Bank's responsibilities as Trustee was removed. At the same time, the standard agreed to – the mere securing of externally audited financial reports – was a much diluted level of fiduciary oversight. The adequacy of this standard to ensure fiscal accountability in an expanding, diverse range of intermediaries was open to question.

The question of what fiduciary standards an entity should have to qualify as a GEF intermediary became the focus of the GEF donors' concern when pressure mounted (starting in the early 2000s and continuing to the present day) to expand, significantly the number and diversity of GEF intermediaries.¹⁹⁸ It was only then that the donors recognized the need to identify what kind of minimum fiduciary standards would be acceptable for an entity to qualify as a GEF intermediary and the related need to determine who and how the GEF would confirm whether an entity seeking to serve as an intermediary both met those standards and complied with them on an ongoing basis. Once they became cognizant of this need, the GEF donors' immediate response was to ask the World Bank as Trustee to develop a set of mandatory policies to be adopted by all GEF intermediaries, aimed at strengthening fiduciary standards GEF-wide.¹⁹⁹ The Bank as Trustee duly produced a set of policies.²⁰⁰

¹⁹⁵ See *ibid.*, para. 13 (“[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 . . .”).

¹⁹⁶ See *ibid.* 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).

¹⁹⁷ *Ibid.*

¹⁹⁸ GEF Fifth Replenishment Reform, *supra* note 171, paras. 27-28, 50; GEF Expanded Opportunity Report, *supra* note 193, para. 12.

¹⁹⁹ See Global Environment Facility, *Summary of Negotiations on the Fourth Replenishment of the GEF Trust Fund Annex A* (October 2006), available at: <http://207.190.239.143/GEF-3-4Replenishment/Reple_Documents/SummaryofNegotiations_Revised_October2006.pdf>, accessed 24 June 2011, para. 22 (“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.*

²⁰⁰ See Global Environment Facility, *Recommended Minimum Fiduciary Standards for GEF Implementing and Executing Agencies* (GEF Policy Paper, July 2007), available at: <www.thegef.org/gef/sites/thegef.org/files/documents/Recommended_Minimum_Fiduciary_Standard.pdf>, accessed 24 June 2011, para. 12 [hereinafter *GEF Fiduciary Standards*] (“The Council

The GEF Council's demand that the Bank as Trustee of the GEF develop those standards again manifests conceptual confusion regarding the roles and responsibilities – and, therefore, the overall accountability – of the Quasi-Entity Fund model. In the abstract, the World Bank is an obvious institution 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,²⁰¹ it is well placed to perform this standard-setting function. But the multiple roles the Bank assumes in the GEF, or any Quasi Entity Fund, preclude it from assuming the kind of independent, objective, credible role that is required for standard-setting. As the primary intermediary of GEF Trust Fund resources, the Bank competes with other intermediaries for GEF resources, so much so, that it, actively opposed donors expanding the pool of GEF intermediaries.²⁰² In these circumstances, and in the face of this history, the Bank's ability to serve as an objective standard-setter of fiduciary standards for other GEF intermediaries is tainted.

Further uncertainties arose on the question of who in the GEF structure should evaluate whether an entity met the minimum fiduciary standards and was, or is, complying with them on an ongoing basis. Again, the Bank, as Trustee, clearly has the expertise to make those determinations, given that it compiled the standards. However, the fact that it competes with potential new intermediaries for GEF resources also disqualifies it from objectively evaluating an entity's initial and ongoing compliance with those standards.

The GEF Council, perhaps in recognition of this conflict of interest, assigned the task of an entity's initial and ongoing compliance with the minimum fiduciary standards to the Secretariat.²⁰³ As an exercise in finding the right body for the job, however,²⁰⁴ this designation is not satisfactory. The Secretariat is primarily staffed with environmental experts (rather than accounting or financial management staff), and so lacks the right expertise to evaluate and monitor adherence to financial management standards. Meanwhile, the Bank as Trustee,

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.”)

²⁰¹ See generally *WB Trust Funds Management Framework*, *supra* note 19, pp. 31–40 (detailing a risk-based approach to trust fund management).

²⁰² See Smyth, *A Practical Guide*, *supra* note 14, p. 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).

²⁰³ See *GEF Fiduciary Standards*, *supra* note 200, para. 3 (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).

²⁰⁴ See Hawkins et al., “Delegation Under Anarchy” (2006), *supra* note 13, pp. 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).

the designer and proponent of the minimum fiduciary standards, has the correct expertise for the task but cannot assume it due to potential conflicts with the other roles the Bank has in the Quasi Entity Fund structure. This is not an optimal division of labor or use of institutional resources.

The need to clarify what fiduciary and other standards fund intermediaries and recipients will observe, which the GEF donors have struggled with, is a need which does not arise when donors create a World Bank Trust Fund. In contrast to the number of choices donors must make when they create a Quasi Entity Fund, the World Bank Trust Fund, provides a ready-made framework of accountability both with respect to the fiduciary standards to be observed by intermediaries and recipients and other aspects of their grant activities. This framework applies because under a World Bank Trust Fund, the World Bank as trustee, in accordance with the Bank's internal policies, applies the same rules and policies to the use of the fund's resources as it applies to the administration of its own resources.²⁰⁵ Accordingly, the processes and procedures applicable to World Bank loans apply to the grant agreements the Bank as trustee of a World Bank Trust Fund enters into with recipients.²⁰⁶

The Bank's lending policies set out a comprehensive set of standards that apply to the fiduciary aspects and the operational aspects of recipient and intermediary selection. The fiduciary standards 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*. They mandate that recipients have a minimal level of financial capacity.²⁰⁷ They also require recipients to 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

²⁰⁵ See generally *World Bank OP/BP 14.40*, supra note 72. In 2006, the Bank introduced a set of Standard Terms and Conditions for World Bank Grants, which incorporate these policies. See generally *WB Standard Conditions*, supra note 154. See also Smyth, *World Bank Grants* (2008), supra note 93, pp. 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).

²⁰⁶ See Smyth, *World Bank Grants* (2008), supra note 93, pp. 529–35.

²⁰⁷ 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 The World Bank, *World Bank Safeguard Policies*, available at: <<http://go.worldbank.org/QL7ZYN48M0>>, accessed 22 February 2011 [hereinafter *World Bank Safeguard Policies*] (describing a series of policies to assure sound use of resource and 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, and to report to donors on the status of the fund and the use of donors' resources.

eligible bidders get a fair opportunity to compete.²⁰⁸ In addition, they require the World Bank to monitor and supervise the execution of grants from trust fund resources.²⁰⁹ The operational aspects of the World Bank's lending policies require that all loans, and borrowers, comply with an additional set of policies, known as the Bank's *social safeguards*.²¹⁰ These policies keep the Bank's operations consistent with generally accepted principles of sustainable development.²¹¹ Together, the *fiduciary safeguards* and the *social safeguards* combined are specifically designed to create a clear framework of accountability.²¹²

Following the creation of numerous additional Quasi Entity Funds after the GEF's creation, with governance structures that reflect a range of variations, the

²⁰⁸ See The World Bank, *The World Bank Operations Manual* (2005), available at: <<http://siteresources.worldbank.org/EXTOPMANUAL/Resources/EntireOpManualExternal.pdf>>, accessed 24 June 2011, OP 11.00 (outlining procurement policy).

²⁰⁹ See *ibid.*, OP 11.00, para. 1 (“The Articles of Agreement establish the Bank’s fiduciary responsibility to ensure that the proceeds of its loans are used 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 72, p. 3, n. 7. The Bank is responsible for supervising and monitoring the recipient’s performance of these obligations. See *id.*, p. 5, para. 8 (“[T]he [task team leader] is responsible for supervising and reporting to his/her line manager . . . on progress in implementation of trust-funded activities.”).

²¹⁰ 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 A. Wilks, *World Bank Social and Environmental Policies: Abandoning Responsibility?* (Bretton Woods Project, September 2003), available at: <www.brettonwoodsproject.org/doc/env/safeguards.PDF>, accessed 24 June 2011 (revealing that the World Bank’s efforts to “reformat” its ten safeguard policies caused fears among NGOs that the Bank intended to evade responsibility for social and environmental concerns); *World Bank Safeguard Policies*, *supra* note 207 (noting social safeguards).

²¹¹ 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 (2002), *supra* note 47, pp. 65–66 (noting the strong influence of Washington-based NGOs over the World Bank). See generally, B. Kingsbury, “Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples”, in G. S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press, 1999), p. 323 (discussing the World Bank’s operational policies and practices and their impact on international law).

²¹² *Fiduciary safeguards* and *social safeguards* are part of the World Bank’s Operational Policies and Procedures. See *The World Bank Operations Manual*, *supra* note 208, OP 4.00, para. 2, tbl. A1 (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).

World Bank itself has recorded concern about the accountability of the Quasi Entity Fund model. The Bank's internal evaluations department, the Operational Evaluation Department (OED), identified several failures in accountability in the model.²¹³ 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.²¹⁴ Further, OED found nine different models of governance in use in the twenty-six initiatives, with no obvious reason for the differences between them.²¹⁵

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.²¹⁶ 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 or regarding what role the World Bank or other intergovernmental organizations should assume with respect to them.²¹⁷ Section IV, *infra*, seeks to initiate that dialogue

In sum, in addition to unabated agency costs, the Quasi Entity Fund suffers from a number of accountability gaps that have actual and potential negative

²¹³ See *OED Phase I Report*, *supra* note 94, p. 42 (noting, for instance, conflicts of interest, whether real or perceived); The World Bank, *Addressing the Challenges of Globalization: An Independent Evaluation of the World Bank's Approach to Global Programs—Phase 2 Report* (2004), available at: <www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/04/25/000020953_20070425114157/Rendered/PDF/396470PAPER0Ch1obalization01PUBLIC1.pdf>; accessed 24 June 2011 [hereinafter *OED Phase2 Report*] (concluding in summation that “[w]hile pure shareholder models of programs are being replaced by stakeholder models, programs are still struggling to balance legitimacy and accountability for results with efficiency in achieving them”).

²¹⁴ *OED Phase 2 Report*, *supra* note 213, p. 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).

²¹⁵ See *ibid.* p. 53 (noting that “programs have adopted their practical 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).

²¹⁶ See *WB Trust Funds Management Framework*, *supra* note 19, p. 11, para. 2.13 (discussing the problems arising from complexity such as multiple layers of decision-making, increased financial management requirements, and the need for greater administrative processing).

²¹⁷ See Bantekas (2009), *supra* note 19, pp. 156–58 (discussing corporate governance duties and the lack of clarity regarding such duties in intergovernmental trust funds).

outcomes. These outcomes include failure in the oversight of the funds' resources resulting from misaligned responsibilities among the fund's organs; reputational risk for donors and the World Bank; the application of *ad hoc* rather than optimal fiduciary practices; lack of clarity regarding the application of operational policies aimed at ensuring sustainable and equitable development; and unnecessarily high transaction costs.

B. 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 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 multilateral 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 without conceding that the costs are manageable, whether the National Law Entity model has the potential to serve as an optimal model for multilateral financing also depends on whether this model's goals are impeded by its lack of international legal personality.

1. Uncertain Availability

a. 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 Directors 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

epidemic²¹⁸ – a response that many viewed as long overdue.²¹⁹ It is funded by the Bank's 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 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.²²⁰ The Bank based this position on concerns about liability and reputational risk.²²¹ As indicated earlier in connection with the GEF Trust Fund,²²² the Bank views a fund that channels its resources through the Bank and UN 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.²²³ 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.²²⁴ The Bank 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.²²⁵

²¹⁸ See United Nations, *Secretary-General Proposes Global Fund for Fight Against HIV/AIDS and Other Infectious Diseases at African Leaders Summit, SG/SM/7779/Rev.1* (Press Release, 26 April 2001), available at: <www.un.org/News/Press/docs/2001/SGSM7779R1.doc.htm>, accessed 28 June 2011 (discussing the high incidence rate of HIV/AIDS in Africa, and outlining broadly various steps that need to be taken to curtail the spread of the epidemic).

²¹⁹ See Radelet (2004), *supra* note 111, pp. 3–7 (examining some of the most common criticisms of foreign aid programs and how the Global Fund structure responds to the criticisms).

²²⁰ See *Global Fund Report on Legal Status Options*, *supra* note 144, p. 7 (determining that “the Global Fund lacks a cost-effective administrative structure, independent authorities, and sufficient liability protection”).

²²¹ See *ibid.* (also pointing out concerns that the proposed design of the fund might result in redundancy, increased costs, and a subversion of existing programs and expertise).

²²² See text accompanying note 138, 141–42 (describing the role of Local Fund Agents as well as the legal liability of the Global Fund).

²²³ See Triponel (2010), *supra* note 14, p. 183 (discussing the reasons why the Global Fund was established as an independent legal entity); *Global Fund Framework Document*, *supra* note 110.

²²⁴ See *Global Fund Report on Legal Status Options*, *supra* note 144, p. 2 (providing background information on the establishment of the Global Fund).

²²⁵ See *ibid.* (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).

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 agreed to serve as trustee for independent initiatives.²²⁶ However, the criteria that determine whether the Bank will or will not provide financial administration services are opaque. The clear demand for multilateral financing vehicles 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 multilateral financing efforts, donors need the assurance that such services are available.

b. Donor Commitment

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.²²⁷ 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's termination of 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 strongly supports the argument (as the GEF's CEO claims) that such independence is essential if a multilateral 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 if donors are willing to assume the responsibilities and costs that independence entails.

²²⁶ See International Finance Facility for Immunisation, *supra* note 152 ("The International Finance Facility for Immunisation (IFFIm) exists to rapidly accelerate the availability and predictability of funds for immunisation"); Advance Market Commitments for Vaccines, *supra* note 152 (explaining that "[d]onors commit money to guarantee the price of vaccines once they have been developed").

²²⁷ See Triponel (2010), *supra* note 14, pp. 184–86 (discussing the creation of the Global Fund as an independent legal entity).

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 to account. In setting up the component parts of the Global Fund, therefore, the donors carefully delineated the responsibilities of each part at the global level and at the local level.²²⁸ 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.²²⁹ 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.²³⁰

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.²³¹ Vis-à-vis the recipients, its role 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

²²⁸ See *Global Fund Framework Document*, *supra* note 110, Sections IX-X (providing an overview on the process of monitoring programs and of different entities' fiduciary responsibilities).

²²⁹ See text accompanying note 129 (noting that the GUIDELINES AND REQUIREMENTS FOR COUNTRY COORDINATING MECHANISMS outline the principles the Country Coordinating Mechanisms must advance); *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).

²³⁰ See Hawkins et al., "Delegation Under Anarchy" (2006), *supra* note 13, pp. 30–31 (discussing how "when collective choice dilemmas are expected, states may actually prefer delegating agenda control to an international organization rather than to other states").

²³¹ 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 144, p. 2.

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.²³² Those terms signal to the parties and to all stakeholders where accountability lies.²³³ 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.²³⁴

c. High Transaction Costs

Apart from this deficit, the National Law Entity, as reflected in the Global Fund, achieves formal fiscal accountability. 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.²³⁵ 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.

2. Absence of 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

²³² See Grant and Keohane (2005), *supra* note 4, pp. 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).

²³³ See *ibid.* (recognizing that the transparency of responsibilities, standards, and sanctions within principal-agent relationships promotes stable accountability. Here, concrete examples of transactional accountability mechanisms based on transparency are provided).

²³⁴ 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 continuing 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.

²³⁵ See Hawkins et al., "Delegation Under Anarchy" (2006), *supra* note 13, pp. 26, 30 (noting the expense of instituting proper control mechanisms for agents).

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.²³⁶ For this reason, whether the National Law Entity model is an optimal vehicle for multilateral 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.²³⁷ As the experiences of the GEF and the experience of the Global Fund's initial agreement with the WHO show, 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 enter into legally valid agreements, such as employment agreements. Indeed, this has led some commentators to view international legal personality as a somewhat empty concept.²³⁸

At the same time, certain advantages 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 UN is limited to international organizations,²³⁹ the right to participate in other governmental and inter-governmental meetings and fora, both in the developed

²³⁶ For example, the United States has conferred the equivalent of International Organization status on the Global Fund under U.S. law. See Executive Order No. 13,395, 71 Fed. Reg. 3,203 (Jan. 13, 2006), available at: <<http://www.thefederalregister.com/d.p/2006-01-19-06-554>>, accessed 24 June 2011 (extending the application of the International Organizations Immunities Act, 22 U.S.C. § 288, to the Global Fund). See also *Global Fund Report Annex 6, supra* note 113, p. 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).

²³⁷ See J. Klabbbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2009), p. 47 (examining how the International Court of Justice determines organizational legal capacity); Amerasinghe (2005), *supra* note 154, pp. 77–78 (recognizing that international personality does not automatically grant the ability to perform functions with international consequences).

²³⁸ See Klabbbers (2009), *supra* note 238, pp. 52–53 (contending that the notion of international legal personality is relatively weak and difficult to apply to concrete legal actions).

²³⁹ See Alvarez (2005), *supra* note 154, pp. 154–56 (noting that extending participation rights, including observer status, is limited to international organizations).

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.²⁴⁰ 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.²⁴¹ In addition, international organization status enables an entity to enter into international agreements, such as Headquarters Agreements with host states.²⁴² 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.²⁴³ This higher status translates into vastly improved access to government officials and diplomats, enabling the organization to make its case directly to governments.²⁴⁴ States do not enter into Headquarters Agreements with national law entities that are not subjects of International Law.²⁴⁵ For these reasons, an optimal multilateral financing vehicle for development would have both legal capacity and international personality.

In sum, the deficits of the National Law Entity model consist of high transaction costs, its unsuitability for short term initiatives and initiatives for which broad-based donor support is lacking at the time of creation, uncertainty regarding the availability of an inter-governmental (and, therefore, fiscally airtight and relatively inexpensive) financial administrator to manage its resources; and its lack of international legal stature, all of which preclude it from being an optimal financing vehicle.

²⁴⁰ See Klabbbers (2009), *supra* note 238, pp. 125–27 (providing examples of specific integration of international organizations for particular functions); Amerasinghe (2005), *supra* note 154, p. 359 (discussing the various methods of funding by international organizations).

²⁴¹ See Klabbbers (2009), *supra* note 238, pp. 128–29 (describing the obligatory funding of donor countries to qualified organizations under the Articles of the United Nations).

²⁴² See *ibid.*, p. 256 (discussing the treaty-making powers of international organizations and noting that most organizations conclude a headquarters agreement with their host state).

²⁴³ See Amerasinghe (2005), *supra* note 154, p. 337 (recognizing that many agreements result in privileges and immunities for international organizations in “exercising their functions in relation to the organization”).

²⁴⁴ See *ibid.*, pp. 337–388 (noting how the privileges and immunities translate into beneficial improvements that fulfill the proposed functions of the organizations).

²⁴⁵ See *ibid.*, pp. 315–317, 338–39 (noting that subjects of international law, such as 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).

IV. PROPOSALS FOR CHANGE

The special purpose fund phenomenon reflects a shift in how donors want to mobilize multilateral development finance but falls short of being a coherent vision of how best to effect that shift. Ideally, the goal of maximizing the likelihood that donors' funds will be used for the purposes intended would be achieved by integrating the flexibility of special purpose funds and the opportunities they offer for broad participation with the capacities of existing institutions in which donors have significant sunk costs. Some tangible changes in the Quasi Entity Fund and National Law Entity models could bring both models closer to realizing that goal.

Starting with the agency slack in the Quasi Entity Fund, the risk of agency slack in this model could be reduced by creating a new legally distinct international institution; a Global Trust Corporation, whose sole purpose and function would be to serve as a financial administrator, or manager, for funds for international development. This entity could be created as (but need not necessarily be) a sixth member of the World Bank Group. Its key contribution would be to serve as an objective financial administrator of funds for development, independent of any conflicting lending agenda of its own. Donors seeking to launch a new effort would then have the reassurance that an entity exists and is willing to provide the financial administration services needed without their having to cede an operational stake to that entity as a *quid pro quo*.

As indicated above,²⁴⁶ several factors (desirability of having international institution privileges and immunities, avoidance of private bank fees and liquidity risk) point to the wisdom of having such an institution be an intergovernmental organization. The mandate and expertise of the proposed Global Trust Corporation would be financial administration rather than development. The development-specific tasks associated with a multilateral financing effort for development (including supervision and monitoring) would be the responsibility of such entities as the donors might choose to have serve as financial intermediaries and/or recipients. Such intermediaries could include the World Bank in its operational (as distinct from a financial administrator) capacity.

An additional role that could be considered for a new legally distinct Global Trust Corporation would be the role of developing fiduciary best practices, on such issues as record keeping, reporting and procurement, which donors could then draw upon in determining what standards to demand of entities vying to serve as intermediaries and recipients of new financing efforts. The development community loses out when an institution like the World Bank, with the right expertise to set best practices, is precluded from doing so because of being

²⁴⁶ See *ibid.*, pp. 16, 47-48, 90-92.

compromised by multiple conflicting roles. In serving this role, an independent Global Trust Corporation would fill a strong need.²⁴⁷

The other core source of agency slack in the Quasi Entity Fund, the illusion of independence of the *functionally independent* secretariat, should be confronted directly. The GEF and the Global Fund experience show that this notion is not workable in practice. The relationship between the World Bank and the GEF Secretariat is still fraught.²⁴⁸ Moreover, even when the influence of the host organization is attenuated by a formal Administration Services Agreement, as it was in the original version of the Global Fund, (whose Secretariat staff initially served as employees of the WHO), donors have found that it is necessary for a financing effort's secretariat staff to be direct employees of the effort or fund, in order to have true independence.²⁴⁹

These lessons of experience enable donors of future initiatives to make an informed choice. They underscore the advantages of making a new financing effort a legally autonomous entity with its own employees from the start. Alternatively, if the support for an initiative seems insufficiently deep for the level of investment required for an autonomous initiative, or if donors anticipate that an initiative will be fairly short term, they may decide to settle for an in-house secretariat. The history of this form, however, dispels any illusion that having an ad hoc donor body will materially abate the agency slack inherent in the predecessor to the Quasi Entity Fund, the World Bank Trust Fund. If the donor body is dependent on an in house secretariat within the host organization, that secretariat's incentives will not align in favor of straying from the host organization's agenda.

Addressing the accountability gaps in the Quasi Entity Fund will require that donors and the World Bank delineate clearly the respective roles and responsibilities of the component parts of a Quasi Entity Fund to avoid gaps in oversight and misperceptions about where responsibility lies. Three key areas are of crucial importance; (i) clarifying the limited authority and responsibility of a trustee role which amounts to no more than the role of a financial functionary; (ii) enhancing donors' awareness of the responsibilities they assume and of the concomitant responsibility to agree upon the standards they will (a) follow

²⁴⁷ If the proposed Global Trust Corporation were created as a sixth member of the World Bank, having it serve as a standard-setter of fiscal fiduciary practices would fit with the characterization of the World Bank Group as having the potential to play a significant role in the evolving field of global administrative law. See generally B. Kingsbury, et al., *The Emergence of Global Administrative Law*, 68 *Law & Contemporary Problems* (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).

²⁴⁸ See *supra* Section III(A)(1)(b)

²⁴⁹ See *supra* Section II(C)(1)(b) and Section III(A)(1)(b).

themselves when discharging their responsibilities and; (b) require of third parties to which they allocate resources; and (iii) determining how donors and others can be adjudged against the standards they have agreed should apply.

With respect to the trustee, donors need to address the fact that a limited financial functionary role does not encompass overseeing how intermediaries and recipients use a fund's resources unless the financial functionary is explicitly given the authority and the resources to perform that function. If the trustee entity does not assume that role, donors need to acknowledge that a de-centralized accountability framework will apply whereby entities to which fund resources are transferred are directly responsible to the donors. Alternatively, donors need to appoint and resource an independent watchdog to exercise oversight.

Perpetuating confusion about the scope of the financial administration task, whether by failing to be precise about the parameters of the functions, using a label, "trustee," which is historically associated with a more extensive fiduciary role, or both, imperils the credibility of the overall aid effort. When that confusion implicates the World Bank, it risks impugning the Bank's reputation in the international financial markets on which the Bank's access to the operating capital which it lends to developing countries depends.²⁵⁰ To the extent that the international community still believes in the need for a global development bank,²⁵¹ risking this result means risking jeopardy to all of development's stakeholders.

Enhanced donor awareness of the need to articulate standards to govern their role and the activities of intermediaries and recipients is critical to improved accountability in the Quasi Entity Fund. The Quasi Entity Fund allows donors to participate in the allocation of a fund's resources in a hands-on way but the price donors pay for that participation is the responsibility to articulate a framework of accountability that substitutes for the framework that applies as an automatic default when donors set up a World Bank Trust Fund. The default framework of World Bank fiduciary and social safeguards does not apply when donors decide that recipients may be allowed to apply their own policies and that the trustee will play a more limited role. Therefore, some replacement criteria and standards are needed.²⁵² This need is especially critical as the range of possible intermediaries

²⁵⁰ *World Bank Information Statement* (2010), *supra* note 3, p. 2. And see generally Kapur (2002), *supra* note 47, pp. 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).

²⁵¹ See Pincus & Winters, *Reinventing the World Bank*, *supra* note 4, p. 18 (noting that while the World Bank has many critics, most of its critics advocate reform, not abolition, of the institution).

²⁵² If fund donors decided not to give the donor governing body discretion, but instead set rules for the donor governing body to administer, accountability would be more easily determined. See Hawkins et al., "Delegation Under Anarchy" (2006), *supra* note 13, p. 27 (summarizing the benefits and drawbacks of "rule-based" and "discretion-based" delegation of authority). This,

and recipients expands and as alternative entities to serve as financial administrators may come under consideration. Otherwise, the best practices which these safeguards represent may be undercut or lost sight of. A preferable outcome would be for these practices to be elevated to standard multilateral development financing norms.

Monitoring the enforcement of an agreed set of norms presents additional challenges that, again, become increasingly important to address as the field of players expands. Enforcing development norms and practices is a challenge that extends far beyond special purpose funds. The World Bank itself was not subject to a readily accessible forum of review until 1994, when the World Bank Inspection Panel was created.²⁵³ And it was only many years after GEF donors created the GEF that they created a Monitoring and Evaluation Unit within the GEF Secretariat to evaluate GEF-funded projects.²⁵⁴ At the same time, each new special purpose fund offers an opportunity to improve on the past and to provide for appropriate monitoring of agreed upon standards in a fund's initial design.

Although the National Law Entity has promise, it does not reflect an 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, the National Law Entity model could be improved in the following ways.

First, ideally, these initiatives would have both legal capacity and international legal personality. If, for example, the creators of a new initiative expressed an intention to confer international legal personality in the initiative's constituent documents, in addition to complying with the requirements necessary for the initiative to have legal capacity under a national law regime, that would be an improvement. Efforts could then be taken to encourage other countries to recognize that status.²⁵⁵

however, would preclude creating a dynamic, flexible funding vehicle that could readily respond to changing needs

²⁵³ See The World Bank, *Accountability at the World Bank: The Inspection Panel at 15 Years*, available at: <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf>>, accessed 24 June 2011.

²⁵⁴ See Global Environment Facility, *Joint Summary of the Chairs* (GEF Council Meeting, May 2003), available at: <www.thegef.org/gef/sites/thegef.org/files/documents/C.21.JointSummary.pdf>, accessed 27 June 2011, p. 10.

²⁵⁵ See Klabbbers (2009), *supra* note 238, p. 47 (discussing competing interpretations of the ICJ's *Reparation for Injuries* opinion on the issue of the international legal personality of organizations); Amerasinghe (2005), *supra* note 154, pp. 66–69 (providing an overview of the dynamic between

Second, the World Bank should clarify the criteria for determining when and whether it, or any new member of the World Bank Group which 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 designation of a trustee or any other label that connotes a fiduciary duty that the Bank does not have the authority to discharge. A less loaded term such as financial administrator would more accurately connote the level of responsibility being assumed. Third, a template National Law Entity model form should be devised that provides the standard building blocks for a new multilateral financing initiative. Such standardization would lower the transaction costs involved in launching a new effort.

Looking ahead to a vision of multilateral development finance in the future, the special purpose fund approach is being embraced by donors, despite the deficits in its current iterations. This warm reception suggests that the long term goal for multilateral development finance must include re-designing the way in which the behemoths of multilateral development finance – the UN and the World Bank- to which these funds serve as a partial alternative, operate. In particular, these funds reveal a pent up demand for more participatory processes. Donors want to be more involved in determining how their funds are used. They also want these institutions' decision-making processes to open up to the input of developing countries and civil society, and to have structures which facilitate contributions from both the nonprofit and for-profit private sector. Addressing the agency slack, accountability gaps, transaction costs and uncertain legal stature of the Quasi Entity Fund and the National Law Entity will serve as a stepping stone towards achieving these overarching goals.

V. CONCLUSION

The overall aid effort will be strengthened if the international legal order provides institutions, mechanisms, and norms that incur minimal agency costs and facilitate accountable multilateral efforts for purposes that both donors and recipients support. This Article offers the theoretical logic for improvements in the status quo and some suggestions for what those improvements should be. In due course, enhanced credibility for multilateral 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

international legal personality and legal capacity, specifically noting that there are many benefits and rationales for the according international organizations international legal personality).

purposes for which they are given, however, is a necessary first step towards achieving those broader objectives.

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