



## REPORT ON LEGAL STATUS OPTIONS FOR THE GLOBAL FUND

**Outline:** At its third meeting in October 2002, the Board asked the Secretariat to continue to explore an agreement with the Swiss Government on granting The Global Fund quasi-intergovernmental status and report on the impact of such a change in status for The Global Fund. This report documents the findings of an analysis on the advantages and disadvantages of obtaining quasi-intergovernmental status for the Global Fund. It concludes with the following recommendations to the Board:

### Summary of Decision Points:

- 1. Request the Secretariat to pursue a legal status with the Swiss authorities that provides for the Global Fund with those privileges and immunities that are necessary for it to effectively fulfil its mandate. This status and its associated practical arrangements should ensure that the Global Fund's administration is efficient and no more costly than the current arrangements.**
- 2. The Secretariat is asked to present to the Fifth Meeting of the Board precise recommendations for change of status with all associated information**

## Outline

- Part I: Introduction and Background
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## Part I: Introduction and Background

### Global Fund Organizational Principles and Priorities

1. The Global Fund was founded as an independent Swiss foundation, tasked to create an innovative, efficient and effective financing mechanism, which would enable and speed country responses to the three diseases. Priority was given by the Board to the autonomy of the Fund, and to its ability to enter into robust collaborations with national and international partners. This requires administrative arrangements that are efficient and cost-effective, which enable the Global Fund to take rapid and responsible action in line with its mandate; and legal arrangements which provide the necessary privileges and immunities.

### Historical Perspective

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

3. To attract the Global Fund to Geneva, the Swiss Government and the WHO submitted a combined bid, in which each promised to provide the following benefits: (1) the WHO committed to house the Secretariat, and provide administrative services through a unit dedicated solely to support the Global

Fund, while respecting Secretariat autonomy; and (2) the Swiss Government committed to providing the Global Fund with quasi-intergovernmental status which, at a minimum, would provide certain tax exemptions and other benefits similar to the privileges allowed other international organizations.<sup>1</sup>

4. The first promise concerning WHO has been partially fulfilled, although difficulties continue in this administrative relationship. The second commitment, the granting of quasi-intergovernmental status, is unresolved and is the impetus for this and previous reports to the Board. Achieving an appropriate fiscal and legal status in Switzerland remains paramount to the Global Fund in order to:

- Secure the privileges and immunities essential to protect the Fund
- Facilitate efficient and least-cost Secretariat administration
- Align staff contractual obligations to the independent needs of the Fund

(These business imperatives for improvement of the Fund's status are further outlined in Part II.)

5. Accordingly, as directed by the Board, the Secretariat has pursued the pledge of enhanced status with the Swiss authorities. In the course of examining the implications of quasi-intergovernmental status, it has become clear that the broader privileges and immunities accorded to intergovernmental organizations would better suit the needs of the Fund, and this has also been examined as a third (and preferred) alternative.

6. Part III describes what has been learned about the cost and benefits of quasi-intergovernmental status. Part IV compares quasi-intergovernmental with intergovernmental status.

## **Part II: Enhanced Legal Status: A Business Imperative**

7. The Global Fund has two important relationships with the World Health Organization (WHO): technical and administrative. The Global Fund has worked collaboratively with its technical partners at WHO. Relations with Stop TB, Roll Back Malaria, the drug policy team, the HIV/AIDS group are good and improving. These collaborations focus on supporting the TRP's work, identifying best practices, and building country capacity to access and make best use of Global Fund resources. These activities compliment the Global Fund's role as a funding mechanism.

8. The administrative relationship has been problematic. As the WHO and Global Fund Secretariat have gained more experience with the implementation of the Administrative Service Agreement, both sides have experienced conflicts and frustration. Delays in signing staff and vendor contracts and making payments have occurred (on occasion, transactions

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<sup>1</sup> The grant of benefits relating to quasi-intergovernmental status is rare; examples include: International Air Transport Association, International Olympic Committee, and the World Conservation Union.

have taken 2-3 months to complete). As a result, the Global Fund has had to make interim arrangements to protect staff and vendors while they wait for claims or contract payments which are several months old. Arrangements for services and supplies have been delayed, causing slippage in important timelines and additional costs. This has particularly affected the start-up of our new facility and its computing needs, (delays and higher rental charges for both space and equipment). Both parties have created these problems and both sides have worked to solve them, without success.

9. More importantly, there is a fundamental structural problem, which puts the Global Fund's ability to do business at risk. Simply put, employees of the Secretariat have a duty to serve their employer, WHO, while also having a duty to serve the Global Fund as a private entity. The differing and distinct mandates of WHO and the Global Fund create chronic conflicts of interest for Global Fund staff. The current arrangements also create ongoing uncertainties concerning responsibility and accountability which, at the least, are confusing and, at worst, raise legal questions that will be hard to resolve in the event of a major challenge to the Global Fund's activities.

10. Finally, issues of liability for the Global Fund and its Board are not resolved by the current legal status and Administrative Services Agreement.

### **Part III: Features of Quasi-Intergovernmental Status**

11. In order to qualify for quasi-intergovernmental status, an organization must have members which are governments, organizations of public law or entities performing public tasks; have a structure similar to an intergovernmental organization (including a Secretariat, an Executive Board and a General Assembly); acquire most of its financing from public sources; and function in the domain of intergovernmental relations.

12. According to these criteria and consistent messages from the Swiss authorities, it is clear that the Global Fund would qualify for quasi-intergovernmental status in Switzerland.

13. With quasi-intergovernmental status come important direct and indirect tax exemptions that must be maintained. There are, however, important benefits that would be lost should the Fund be granted this status: a loss of work privileges for non-Swiss spouses of Global Fund employees; a loss of certain immunities and protections for the Global Fund and Secretariat within and outside of Switzerland; a loss of diplomatic status for certain Secretariat members; and a loss of exemption for Swiss and non-Swiss employees from paying Swiss Social Security taxes.

14. The loss of these benefits would be important for several reasons:

- The ability of the Global Fund to assure safety and security for its employees traveling outside of Switzerland;

- The ability of the Global Fund to recruit and/or retain employees as compared to other international organizations;

15. In April 2002, a letter to Ambassador Bertrand Louis from Dr. Chrispus Kiyonga requested the Government of Switzerland to recognize the Global Fund as a quasi-intergovernmental organization with the following characteristics:

- Employees of the Global Fund Secretariat will be exempt from work permit requirements otherwise applicable to non-Swiss citizens.
- Employees of the Global Fund Secretariat will be exempt from Swiss income taxation.

16. Discussions to date with Swiss authorities do not give us hope that all these benefits will be provided. If these benefits were not provided, employees of the Global Fund would be obliged to contribute to Swiss Social Security, thus increasing staff costs for the Fund, and have their Cartes de Legitimation and their spouses' permis Ci replaced by the usual, more restrictive, work permit 'B' provided to non-Swiss citizens.

#### **Part IV: Comparison of Status Alternatives for the Global Fund**

17. Part III has described the qualifications for quasi-intergovernmental status, the Global Fund's compliance with these qualifications, and some important benefits at risk should such a transition occur.

18. There is another option, however, for independent status, which bears review. Organizations operating with intergovernmental status under a Headquarters Agreement have the full array of benefits currently achieved through WHO (Annex 1).

19. The Secretariat has had detailed discussions with two relevant organizations: the International Federation of Red Cross and Red Crescent Societies (IFRC) and the World Trade Organization (WTO). These organizations have been granted the benefits intergovernmental status by the Government of Switzerland. Both organizations emphasized the value of their status in providing independence and necessary financial and legal protections. Intergovernmental status continues to be granted, with the recent award to the Agency for International Trade Information and Cooperation (AITIC), an organization created to assist developing countries with negotiating trade agreements.

20. It is useful to compare three options (the Status Quo, Quasi-intergovernmental status and Intergovernmental status) in terms of their benefits, costs and probability for success. Annexes 1 and 2 provide tabular information on their array of benefits, and their liability considerations.

**21. Status Quo** – *the Global Fund's Secretariat is nested in a UN organization, such as the WHO.* The Global Fund, through its current arrangements with WHO, gains fiscal and legal protections that have been instrumental in getting our business going. Benefits such as VAT and personal tax exemptions, work permits, diplomatic privileges and laissez-passer are all derived from this relationship. However, the current administrative arrangements are neither effective nor cost-effective. The structural issues, including conflict of interest, are unresolved. Lastly, maintaining the current status provides no protection for the Fund as an institution -- it remains institutionally liable for any claims brought against it in Switzerland.

**22. Quasi-intergovernmental Status.** Conversion to quasi-intergovernmental status would result in greater administrative efficiency for the Global Fund, provided the functions of its Secretariat were fully moved to the foundation.

The Global Fund would maintain certain fiscal benefits, such as exemptions from VAT for the institution and some personal income taxes for individuals. Conversion to quasi-intergovernmental status, however, would also result in the Global Fund having to contribute to the Swiss social security system, a reduction in work permit privileges and no legal protections outside of Switzerland. Global Fund staff would receive the general legal protections applicable to employees of a foundation in Switzerland (e.g. they would only be individually liable for acts outside the scope of their authority). Any property directly owned by the Fund to support its Secretariat would be exposed to legal judgments. As with current arrangements, quasi-intergovernmental status would do nothing to protect the Fund institutionally.

**23. Intergovernmental Status through a Headquarters Agreement.** This status offers the Global Fund the greatest range and level of benefits. This status would permit the establishment (both in-house and outsourced) of a cost-effective administrative system, it would make accountabilities and responsibilities entirely clear and transparent, and it would provide the best platform for building robust collaborations with UN and other development partners. It also provides full fiscal benefits for the institution and its individuals and improves the Global Fund's immunities as an institution. It provides the Secretariat staff with equivalent individual immunities from suits in Switzerland as the current arrangement with WHO, but might result in a loss of government granted immunities in certain countries outside of Switzerland.

**24. Costs.** As an intergovernmental organization, costs would not be significantly different than the status quo, because non-Swiss employees would continue to be exempt from Swiss income taxes and social security charges. However, as a quasi-intergovernmental organization, non-Swiss employees would be subject to Swiss social security charges levied on both the employer and employee, giving rise to an additional cost in maintaining the current level of take-home pay. Under either alternative, the cost of

providing comparable staff benefits to those provided by WHO would be unlikely to differ substantially from the current costs.

25. **Concerns About Duplication.** Concerns continue to be expressed about the potential risk of creating a new intergovernmental organization. These center on the belief that such a development would result in redundant and costly processes and systems that would confound versus leverage well functioning international expertise and services. Since the Global Fund was founded, considerable attention has been paid to avoiding just this situation.

26. These concerns rest, in part, on a mixing of two separate issues; the technical collaboration with WHO and the Administrative Services Agreement. The technical collaboration, which is in good shape and getting better, is the key to ensuring that WHO and the Global Fund fulfill their roles in accordance with their distinct mandates and comparative advantages. This relationship would be enhanced and improved by a move to intergovernmental status because the technical collaboration would not be contaminated by difficult relations concerning administration. The administration of the Global Fund and its legal identity are matters for separate resolution in light of the need for a cost-effective administrative structure, necessary independent authorities, and legal protections against personal and institutional liability. At present, the Global Fund lacks a cost-effective administrative structure, independent authorities, and sufficient liability protection.

## **Part V: Recommendations**

27. After a careful review of options to clarify the Global Fund's status and improve its administration, it is apparent that intergovernmental status offers the best solution. However, further work is needed to clarify in detail the steps needed to acquire this status and to fully explore all its implications for the Global Fund.

28. The following recommendations are for Board approval:

**1. Request the Secretariat to pursue a legal status with the Swiss authorities that provides for the Global Fund with those privileges and immunities that are necessary for it to effectively fulfil its mandate. This status and its associated practical arrangements should ensure that the Global Fund's administration is efficient and no more costly than the current arrangements.**

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## Independent Status – Feature Comparisons

Key Features	WHO	Intergovernmental	Quasi-Intergovernmental
Archive confidentiality – all documents/data shall be inviolable	Y	Y	N
Immunity from jurisdiction and execution, except for: <ul style="list-style-type: none"> <li>• Cases waived by the entity</li> <li>• Civil liability cases involving damage caused by a vehicle owned or operated by the entity</li> <li>• Cases of distraint, where salaries are owed to an entity employee</li> <li>• Countersuits</li> <li>• Execution of an arbitral award related to Article 30 in agreement</li> </ul>	Y	Y	N
Buildings/parts of buildings owned by entity cannot be confiscated or expropriated or restrained as part of a court judgment	Y	Y	N
Publications cannot be restricted	Y	Y	Y
Entity's assets, income and property are exempt from federal, cantonal and communal taxes & V.A.T.	Y	Y	Y
Preferential customs treatment	Y	Y	N
Free disposal of funds, currency, cash & other transferable securities	Y	Y	Y
Communications <ul style="list-style-type: none"> <li>• Diplomatic couriers/bags</li> <li>• No censorship</li> <li>• Free use of wire-based communications</li> <li>• Use of telecoms equipment to be technically coordinated with Fed Office of Comms</li> </ul>	Y	Y	Y
Use of own emblem	Y	Y	Y
Pension Fund & Special funds	Y	Y	Y
Diplomatic agents' privileges, immunities & facilities	Y	Y	N
Federal, Cantonal & Communal tax exemption (for NON-Swiss nationals)	Y	Y	Y
Pension fund contributions exemption, but capital payments/annuities/pension paid AFTER ceasing official functions are not exempt	Y	Y	Y
Subject to other taxable elements based on income	Y	Y	Y
VAT exemption (for NON-Swiss nationals) for articles of personal use	Y	Y	Y
Preferential customs privileges	Y	Y	
Immunity from jurisdiction for verbal or written papers, data media & documents	Y	Y	N
Exemption from immigration restrictions	Y	Y	N <sup>2</sup>

<b>Privileges &amp; Immunities to Non-Swiss Employees</b>			
Exemption from national service obligations	Y	Y	N
Exemption from immigration restrictions/ formalities	Y	Y	N <sup>2</sup>
Repatriation facilities for self & family members	Y	Y	N
Exemption from federal, cantonal & communal taxes on salaries, allowances, etc.	Y	Y	Y
Pension fund contributions exemption, but capital payments/annuities/pension paid AFTER ceasing official functions are not exempt	Y	Y	Y
<b>Privileges &amp; Immunities to All Employees</b>			
Immunity from jurisdiction for verbal or written papers, data media & documents	Y	Y	N
Inviolability of all official documents	Y	Y	N
<b>Social Security</b>			
Non-Swiss employees not obliged to pay insurances for disability, unemployment, pension, etc.	Y	Y	N
Exempt from compulsory sickness insurance	Y	Y	N
Exempt from compulsory personal accident insurance	Y	Y	N
Swiss employees subject to Swiss Law re military service except those with managerial functions	Y	Y	N <sup>2</sup>
Employees not exempt from civil liability proceedings or breaches of traffic regulations	Y	Y	Y
Executive Director has right to waive employee immunity if this would hinder court of justice.	Y	Y	Y
Facilities of entry, residence & departure to/from Switzerland	Y	Y	Y
Carte de légitimation	Y	Y	N
Prevention of abuse of privileges, immunities, etc.	Y	Y	N
Settlement of private disputes	Y	Y	N

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<sup>2</sup> Where key features are indicated with a 'no' we fully expect to continue negotiations with the Swiss authorities towards changing this.

### Liability Considerations

The following table outlines the key areas of exposure for the Global Fund should it be sued, and discusses how protections against these risks are affected under each potential status. Key points from this liability assessment are:

- Among the three options, only a headquarters agreement affording intergovernmental status will protect the Fund from claims in Switzerland, and may insulate the trust account from all claims;
- It is unclear if there is any significant, practical difference among the three options in the legal protections given to employees travelling outside of Switzerland;

Liability Exposure	Status Quo	Quasi-intergovernmental Status	Intergovernmental - Headquarters Agreement
Trust Account Funds	Fund may be sued in Switzerland as a private entity	Same	Fund would be immune from suit in Switzerland
	Fund may be sued in foreign countries	Same	Same
	Funds in the World Bank trust account may be protected from seizure by World Bank privileges and immunities	Same	Same
	<u>Cost Implications:</u> Fund could protect itself through private insurance or self-insuring by encumbering funds in the trust account.	Same	<u>Cost implications:</u> Insurance requirements would be less than previous options due to reduced liability.

Liability Exposure	Status Quo	Quasi-intergovernmental Status	Intergovernmental - Headquarters Agreement
Global Fund Property and Assets (other than Trust Accounts)	The Global Fund, in its current arrangement with the WHO, does not own its material assets. These assets are provided by the WHO and protected to the extent WHO privileges and immunities apply	If the Global Fund were to employ its own staff and acquire its own property, equipment or supplies, then those assets would be subject to legal attachment.	Same as status quo, but Global Fund, rather than WHO, immunities would insulate Fund property in Switzerland from legal attachment.
Global Fund Board and Secretariat	Secretariat Staff likely protected against individual liability based on WHO status in countries that recognize WHO privileges and immunities <sup>3</sup>  Board Members liability equivalent to all other Swiss Foundations	Secretariat Staff directly employed by the Fund would receive the rights and obligations applicable to all employees under Swiss foundation law; they would be liable for acts outside the scope of their official duties and also outside of Switzerland.  No change	Immunities of Secretariat Staff would be recognized in Switzerland; no recognition of immunities outside of Switzerland except for countries that grant immunity to the Fund by government act (could be operationalized as a condition of receiving Fund proceeds)  Immunities of Board Members would be recognized in Switzerland; immunity outside of Switzerland would need to be conferred by government grant.

<sup>3</sup> Countries observe privileges and immunities of the WHO either under the Convention on Privileges and Immunities for the Specialized Agencies or by an independent government conveyance of privileges and immunities. Coverage under the Convention, however, is not comprehensive, and a significant number of countries in which the Fund is doing business do not recognize the privileges and immunities of the WHO under the Convention (the Fund has not undertaken a country-by-country assessment to determine if this status is recognized in another manner).