

Workstream II: Governance and Institutional Arrangements

Background note: Review of the legal status of select international funds and financial institutions

I. Introduction

1. This paper provides a brief review of the legal status of select international funds and financing institutions, specifically:

(a) The International Development Association (IDA);

(b) The Global Fund to fight Aids, Tuberculosis and Malaria (The Global Fund);

(c) The Multilateral Fund for the Implementation of the Montreal Protocol (The Multilateral Fund);

(d) The Global Environment Facility (The GEF);

(e) The Adaptation Fund.

2. The review summarises the process of conferring legal status, and the key elements of international legal status and their attributes. The annex reviews the legal status of the funds and financial institutions mentioned above.

3. The review is prepared in accordance with the request from the Transitional Committee to the Co-facilitators of Workstream II in order to assist the Transitional Committee in its work. The review of the funds and financing institutions is not intended to be complete or exhaustive, but illustrative only.

II. Legal status of international funds and financial institutions

4. In accordance with international law, the legal status of an international organization determines the rights, privileges, duties, and powers with which the organization operates at the international level. This is also the case with international funds and financing institutions. Such legal status is distinct and separate from, and in parallel with, that of its Member States. This status is conferred to ensure that the fund or funding institution can operate independently to achieve its purposes and objectives, and fulfil its functions. The international legal status conferred is therefore functional in nature. This means that the funds and funding institutions are empowered to exercise only those rights, privileges, duties, and powers which have been conferred to them explicitly or implicitly by their Member States.

5. The key elements of international legal status accorded to international funds, financing institutions and their respective organs, are:

(a) International juridical or legal personality;

(b) Legal capacity;

(c) Privileges and immunities.

6. There are different ways for an international fund or funding institution to acquire or be conferred with its legal status, with the four main ways being through:

- (a) Its constituent instrument(s) (for example a treaty or international agreement);
- (b) A decision of the supreme organ of an intergovernmental body;
- (c) The national laws of one or more Member States;
- (d) The national laws of all Member States.

7. It should be noted that by whatever means the international fund or financing institution acquires its legal status, such legal status is usually recognized by the national governments and courts of States that have not expressly granted similar legal status under their national laws.

III. International legal status: means of conferring

A. Through its constituent instruments

8. The constituent instruments of many international funds specifically define the international legal character of the fund or financing institution, as well as the core institutions of the fund or financing institution. The Articles of Agreement of the International Development Association (IDA), of the International Monetary Fund (IMF) and of the International Bank for Reconstruction and Development (The World Bank) for example, state that each of these institutions “shall possess full juridical personality, and, in particular, the capacity (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings.”¹ The Articles further defined the immunities and privileges accorded to the IDA, IMF and World Bank, their assets and officials. It is the treaty itself of these three institutions that confer their international legal status, and immunities and privileges.

9. Where the constituent instruments do not explicitly vest the fund or financing institution with international legal status, the existence of such legal status may be inferred from the functions of the fund or financing institution by reference to its constituent instruments. Where the fund or financing institution requires international legal status in order to discharge its functions, such status will be implied, in accordance with the doctrine of functional necessity or implied powers. Thus, in the *Reparation Case*,² the International Court of Justice (ICJ) stated that although the Charter of the United Nations does not contain any explicit provision on the legal personality of the Organization, such personality could be inferred from the totality of the provisions of the Charter. In that decision, the ICJ stated that: “In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and capacity to operate upon the international plane.”

B. Through a decision of the supreme organ of an intergovernmental body

10. International funds or financing institutions may also acquire their international legal status through a decision of the supreme decision-making organ of an intergovernmental body of the Member States.

11. One example of such an approach is the Multilateral Fund, which was established in Article 10 of the Montreal Protocol through the London Amendment of the Montreal Protocol of 1990. That Protocol did not specify the legal status of the Multilateral Fund. In order to clarify the nature, legal status and privileges of the Fund as a body under international law, at the sixth session of the Meeting of the Parties of the Montreal Protocol, the Parties adopted decision VI/16

¹ See Article VIII, Section 2, of the Articles of Agreement of the IDA; Article VII, Section 2, of the IBRD Articles of Agreement; and Article XI, Section 2, of the Articles of Agreement of the IMF.

² *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, International Court of Justice (ICJ). Reports (1949), 174.

which conferred international juridical or legal personality on the Multilateral Fund.³ The decision stated: “Juridical personality: The Multilateral Fund shall enjoy such legal capacity as is necessary for the exercise of its functions and the protection of its interests, in particular the capacity to enter into contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings in defence of its interests”. It further defined the privileges and immunities of the fund and the officials of the secretariat of the Fund.

12. The international legal character of the Multilateral Fund was further confirmed by the Government of Canada in its national legislation and in the Headquarters Agreement concluded between the Government of Canada and the Multilateral Fund.⁴ The Agreement provides that “The Multilateral Fund shall possess juridical personality. It shall have the capacity (a) to contract; (b) to acquire and dispose of immovable and movable property; and (c) to institute legal proceedings.”

C. Through the national laws of one or more Member States

13. National governments may be required to take decisions to recognize and make effective in their national laws the international legal status of international funds or financial institutions based on the provisions of treaties or decisions of intergovernmental bodies of Member States - as in the case of the IDA and the Multilateral Fund. However, where no treaty provision or decision of an intergovernmental body explicitly accords international legal status on a fund or financing institution, one or more States may decide unilaterally to confer international legal status on the fund or financial institution.

14. In 2002, the Government of Switzerland adopted legislation to establish the Global Fund as a private non-profit foundation under Article 80 of the Civil Code of Switzerland.⁵ With this, the Global Fund acquired international juridical or legal personality under Swiss Law. This status was further confirmed in the Headquarters Agreement concluded between the Global Fund and the Government of Switzerland in 2004, and which stated that “The Swiss Federal Council recognizes for the purposes of this Agreement the international juridical personality and legal capacity in Switzerland of the Global Fund to fight Aids, Tuberculosis and Malaria”.⁶

15. The legal status as an international organization has also been recognized by the United States of America, through an Executive Order by the President of the United States of America in 2006 designating the Global Fund as a Public International Organization Entitled to Enjoy Certain Privileges, Exemptions, and Immunities in accordance with the International Organizations Immunities Act of the United States.⁷

D. Through the national laws of all Member States

16. Some international organizations and funds have been granted legal status in each of their participating Member States in accordance with the provisions of the constituent instruments of the organization or fund. Each Member State of the IDA, as well as the IMF and the World Bank, are required to take necessary action under their national laws to make effective the legal status of

³ See decision VI/16 “Juridical personality, privileges and immunities of the Multilateral Fund” available in document UNEP/OzL.Pro.6/7/(1994).

⁴ Agreement between the Government of Canada and the Multilateral Fund for the Implementation of the 1987 Montreal Protocol regulating matters resulting from the establishment in Canada of the Multilateral Fund and its Organs. 23 November 1988.

⁵ It was registered in the “Registre du commerce” of Geneva on 24 January 2002.

⁶ Agreement between the Swiss Federal Council and the Global Fund in view of determining the legal status of the Global Fund in Switzerland dated 13 December 2004.

⁷ See Executive Order 13395 of 13 January 2006, Designating the Global Fund To Fight AIDS, Tuberculosis and Malaria as a Public International Organization Entitled To Enjoy Certain Privileges, Exemptions, and Immunities. Federal Register /Vol. 71, No. 12 /Thursday, 19 January 2006 /Presidential Documents.

these institutions in accordance with the Articles of Agreement of these entities.⁸ Article VIII, Section 10, of the IDA Articles of Agreement state that “Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Association of the detailed action which it has taken”. Such action was deemed necessary “To enable the {IDA} to fulfil the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the {IDA} in the territories of each member”.⁹ It should be noted that although international juridical personality has been granted in accordance with applicable national laws of each Member State, the Articles of Agreement serve as the basis for the creation of these entities and their international legal status.

IV. International legal status: key elements

17. As stated above, the three key elements of international legal status are:

- (a) International juridical or legal personality;
- (b) Legal capacity;
- (c) Privileges and immunities.

18. These elements are not mutually exclusive and all or some may be conferred on international fund or financing institutions. The main attributes of each element are discussed below.

A. International Juridical or Legal Personality

19. A number of international funds or financial institutions have been accorded international juridical or legal personality by their constituent instrument and/or by national governments, in particular the IDA, the Multilateral Fund and the Global Fund. International juridical or legal personality is defined under international law as the capacity to enjoy legal rights, duties and powers on the international plane, and having the capacity to maintain its rights by bringing international claims.¹⁰ The criteria of legal personality in organizations may be summarized as follows:

- (a) A permanent association of States, with lawful objects, equipped with organs;
- (b) A distinction, in terms of legal powers and purposes, between the organization and its Member States;
- (c) The existence of legal powers exercisable on the international plane and not solely within the national systems of one or more States.¹¹

20. While the international legal personality of the Global Fund and the Multilateral Fund have been accorded by one State (Switzerland and Canada, respectively), their legal status has been recognized and accepted other States, both Member and non-Member States.

21. The classical attributes of international juridical or legal personality of an international fund or financial institution are:

⁸ See for example: Article VIII, Section 20, of the Articles of Agreement of the IDA.

⁹ See Article VIII, Section 1, of the IDA Articles of Agreement; Article VII, Section 1, of the IBRD Articles of Agreement; and Article XI of the IMF Articles of Agreement.

¹⁰ See Ian Brownlie, “Principles of public international law” Sixth edition. 1998. p. 57. See also Oppenheim’s International Law. Ninth Edition. 1996. p. 119-120.

¹¹ See Ian Brownlie, p. 648-650.

(a) The right to negotiate and conclude international agreements or treaties;

(b) The right to espouse international claims and appear before international courts and international tribunals;

(c) The right to entertain bilateral diplomatic relations with States and other international actors;

(d) Privileges and immunities.

22. The most important of these attributes are the right to conclude international agreements and treaties, the right to espouse international claims and appear before international courts and tribunals, and privileges and immunities.

23. The capacity of international organizations to conclude international agreements and treaties is incontestable, where such capacity is expressly provided in their constituent instruments or where it is indispensable for the fulfilment of their purposes and objectives. International funds or financing institutions with international legal personality may conclude international treaties with Member States, States that are not members of the fund or financing institutions, and with other international organizations. The IDA, the Global Fund and the Multilateral Fund, for example, have all concluded and signed international treaties and agreements with States and international organizations, including:

- The Headquarters Agreements concluded by the Global Fund and the Multilateral Fund with the Governments of Switzerland and Canada, respectively;
- Grant and funding agreements concluded by the IDA and Global Fund with governments;
- The Trust Agreement concluded between the Global Fund and the World Bank concerning the trustee arrangements for the Trust Fund of the Global Fund.

24. The power to espouse international legal claims and to appear before international courts is a central attribute of international legal personality. The ICJ has determined that the United Nations has international legal personality and the capacity to bring claims against both Member and non-Member States for direct injury to the Organization.¹² Since States alone have capacity to appear before the ICJ, international organizations cannot as such be Parties to any case before the ICJ in accordance with its Statutes. The ICJ has established a special procedure, the advisory procedure, available to international organizations to let them seek advisory opinions of the Court. The United Nations General Assembly has granted authority to a number of international institutions, including international financing institutions to request advisory opinions from the ICJ in accordance with the Charter of the United Nations. Such international financing institutions include the IDA, as well as the IMF, the World Bank and the International Fund for Agriculture and Development (IFAD).

25. In order to function effectively, international organizations, including international funds or financing institutions, require certain minimum freedoms and legal security for their assets, premises, officials and representatives of Member States. They are therefore accorded the requisite privileges and immunities for the effective functioning of the institution (see para. 30–36 below).

B. Legal Capacity

26. Legal capacity usually refers to specific acts that the institution can undertake in the discharge of its functions. Legal capacity is distinct from international legal personality:

¹² See footnote 2 above.

international legal personality encompasses certain rights, privileges, duties and powers on the international plane. Legal capacity on the other hand is limited to only those specific legal acts that the institution is empowered to undertake. These acts normally include the legal capacity to:

- (a) Contract;
- (b) Acquire and dispose of immovable and movable property; and,
- (c) Institute legal proceedings.

27. Legal capacity is an essential requirement that should be conferred to an institution, without which the institution cannot operate or conduct its business - such as: contract for goods and services, employ its own staff, enter into funding agreements, etc. Almost all funds and financial institutions reviewed have been explicitly accorded the legal capacities mentioned in para. 27 above. Some of these international funds and financial institutions have been accorded both international legal personality and legal capacity (the IDA, the Global Fund, and the Multilateral Fund). The Adaptation Fund Board of the Kyoto Protocol has been accorded only legal capacity by the Government of Germany. Only one institution, the GEF, has no explicit legal capacity or legal personality.

28. The Conference of the Parties serving as the Meeting of the Parties of the Kyoto Protocol (CMP) decided that the Board of the Adaptation Fund be conferred with legal capacity.¹³ Legal capacity was subsequently conferred on the Adaptation Fund Board by the Government of Germany in February 2011.¹⁴ In accordance with the Act by the Government of Germany, the Adaptation Fund Board possesses in Germany the capacity to contract, to acquire and dispose of moveable and immovable property, and to institute legal proceedings. The Act also provides that the Adaptation Fund Board shall be represented by its Chair and the Vice-Chair.

29. With legal capacity, the Adaptation Fund Board has authority to conclude and sign legal agreements with implementing entities (multilateral, and national institutions) for funding of adaptation fund projects from the Adaptation Fund. Unlike the IDA, the Multilateral Fund and the Global Fund, the Adaptation Fund Board has no international legal personality and can therefore not conclude and sign treaties or international agreements with governments or international organizations, nor appear before international courts.

C. Privileges and immunities

30. As soon as the first international bodies were set up, it became apparent that there was a need to afford them some protection against local State authorities, particularly judges and executive officials, capable of interfering with their operation. International organizations, lacking territory of their own, have to be based in the territory of a State. Being unable to enjoy the protection conferred by territorial sovereignty, as States can, international organizations have as their sole protection the privileges and immunities granted to them. Privileges and immunities are therefore designed to permit international institutions to undertake their activities without hinderance by national governments.

31. The centrepiece of the privileges and immunities is jurisdictional immunity from legal claims in national courts against the institution, representatives of Member States and officials of the institution. In return, the institution is required to provide for an alternative means of to address claims and settle disputes against the institution. Additional privileges and immunities are normally accorded to international funds and financing institutions include: inviolability of the premises, archives and documents of the institution; immunity of the property, funds and assets

¹³ See decision 1/CMP.4 of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol.

¹⁴ See Act of Parliament to establish the legal capacity of the Adaptation Fund Board in Germany of 8 February 2011 by the Government of Germany.

from legal process, search and seizure; exemption from taxes and duties; and privileges and immunities for Representatives of Member States and officials of the institution.

32. Privileges and immunities may be contained in the constituent instruments of the institution (for example in the Articles of Agreement of the IDA), or in a separate agreement (for example, the Headquarters Agreement of the Global Fund). The privileges and immunities of the Adaptation Fund Board has been defined in the law granting the Adaptation Fund Board legal capacity in Germany.

33. In the case of the Multilateral Fund, the Fund and its officials were conferred with the following privileges and immunities through a decision of the Meeting of the Parties of the Montreal Protocol: “Privileges and immunities: (i) The Fund shall, in accordance with arrangements to be determined with the Government of Canada, enjoy in the territory of the host country, such privileges and immunities as are necessary for the fulfilment of its purposes; (ii) The officials of the Fund Secretariat shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Multilateral Fund.”¹⁵ The Headquarters Agreement further defines the privileges and immunities accorded to the Multilateral Fund by the Government of Canada.

34. The Headquarters Agreement of the Global Fund specifies the privileges and immunities of the Fund. The Global Fund also enjoys privileges and immunities in the United States of America by virtue of its designation as an International Organization in accordance with the International Organizations Immunities Act of the United States (see paras. 14-15 above). In accordance with the Trustee Agreement between the Global Fund and the World Bank, the Trust Fund of the Global Fund are accorded privileges and immunities of the World Bank, which serves as Trustee of the Global Fund.

35. The Global Fund enjoys privileges and immunities only in Switzerland and the United States of America, although its operations are global. This gap leaves the Global Fund subject to legal claims in countries where it conducts its operations and where it does not have privileges and immunities. To address this gap, the Global Fund has prepared an Agreement on Privileges and Immunities for the Global Fund and so far only one State, Moldova, has signed this Agreement.¹⁶

36. With respect to the Adaptation Fund, the members and alternate members of the Adaptation Fund Board have privileges and immunities in Germany in accordance with Act of Parliament to establish the legal capacity of the Adaptation Fund Board in Germany (see para. 29 above). As in the case of the Global Fund, the Trust Fund of the Adaptation Fund established by the World Bank, in its role as trustee, is accorded the privileges and immunities of the World Bank.¹⁷ The Adaptation Fund itself has neither legal capacity nor privileges and immunities.

¹⁵ See decision VI/16 of the Sixth Session of the Meeting of the Parties of the Montreal Protocol.

¹⁶ See Press Release of 28 September 2010: “Moldova signs agreement to grant privileges and immunities to the Global Fund” available at: http://www.theglobalfund.org/en/pressreleases/?pr=pr_100928

¹⁷ See Terms and conditions of services to be provided by the International Bank for Reconstruction and Development (the World Bank), as trustee for the Adaptation Fund, decision 1/CMP.4 adopted by the CMP on 12 December 2008.

Annex

Legal status of select international funds and financial institutions

Fund or Financing Institution	Legal status of the fund and/or its organs	Privileges and immunities of the fund and/or its organs
<p>International Development Association (IDA)</p> <p>Est. 1960 by World Bank Member States</p>	<p>International juridical personality. Legal capacity (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings.</p> <ul style="list-style-type: none"> See Articles of Agreement, Article VIII; Member States shall take action to make effective in national law the principles of Article VIII. 	<ul style="list-style-type: none"> Immunity of assets from seizure Immunity of archives and documents Freedom of assets from restrictions Privilege for communications Immunities and privileges of officers and employees Immunities from taxation <p>See IDA Articles of Agreement, Article VIII</p>
<p>Global Environment Facility (GEF)</p> <p>Est. 1994 as the Restructured GEF by the World Bank, the United Nations Development Programme and the United Nations Environment Programme</p>	<p>No explicit international legal personality or legal capacity for the GEF or its organs. The GEF derives its legal identity from the World Bank.</p> <ul style="list-style-type: none"> See Instrument for the Establishment of the Restructured Global Environment Facility 	<ul style="list-style-type: none"> No explicit privileges and immunities for the GEF, its organs or officials The World Bank provides administrative services to the GEF. In practice, all GEF secretariat staff hold World Bank appointments and the privileges and immunities of the World Bank and its staff emanate directly from the Articles of Agreement of the World Bank GEF Council members treated as delegates attending meetings of the World Bank, who may be conferred with diplomatic and/or special status by their governments The GEF Trust Fund, established by the World Bank as trustee, is subject to the privileges and immunities accorded to the World Bank <p>See Instrument for the Establishment of the Restructured Global Environment Facility. See document: GEF/C.22/Inf.15/Rev.1, of November 14, 2003</p>
<p>Global Fund to Fight Aids, Tuberculosis and Malaria</p> <p>Est. in 2002 as a foundation and international organization under Swiss Law</p>	<p>International juridical personality Legal capacity (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings. An International Organization in Switzerland and USA</p> <ul style="list-style-type: none"> See Registre du commerce of Geneva of 24 January 2002. See Headquarters Agreement between the Global Fund and the 	<ul style="list-style-type: none"> Independence and freedom of action Inviolability of premises and archives Immunity from legal process and enforcement of legal measures Exemption from taxation and social security Privileges and immunities for members of the Board, Executive Director, and officials of the Fund, Technical Review Panel, Technical Evaluation Reference Group and experts on mission

Fund or Financing Institution	Legal status of the fund and/or its organs	Privileges and immunities of the fund and/or its organs
	<p>Government of Switzerland of 13 December 2004</p> <ul style="list-style-type: none"> See Executive Order 13395 of 13 January 2006, by the President of the United States of America, Designating the Global Fund To Fight AIDS, Tuberculosis and Malaria as a Public International Organization Entitled To Enjoy Certain Privileges, Exemptions, and Immunities. 	<ul style="list-style-type: none"> Immunities in the USA as an international organization The Global Fund Trust Fund, established by the World Bank as trustee, is subject to the privileges and immunities of the World Bank <p>See Headquarters Agreement and Trustee Agreement See USA International Organization Immunities Act</p>
<p>Multilateral Fund for the implementation of the Montreal Protocol Est. 1990 by the London Amendment to the Montreal Protocol</p>	<p>International juridical personality Legal capacity (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings.</p> <ul style="list-style-type: none"> See decision VI/16 adopted at the 6th session of the Meeting of the Parties to the Montreal in 1994. See Headquarters Agreement between the Multilateral Fund and the Government of Canada of 23 November 1998. 	<ul style="list-style-type: none"> Inviolability and protection of office premises Immunity of property, funds and assets from legal process, search, requisitions, confiscation, expropriation and any form of interference Exemption from taxes and duties of the property, funds and assets Privileges and immunities for representatives of Member States, experts and officials <p>See Multilateral Fund Headquarters Agreement See also decision VI/16 of the Sixth session of the Meeting of the Parties of the Montreal Protocol</p>
<p>Adaptation Fund Est. 2001 by the COP and operationalized in 2007 by the CMP (decisions 5/CP.7 and 1/CMP.3)</p>	<p>Adaptation Fund Board conferred legal capacity (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings.</p> <ul style="list-style-type: none"> See Act of Parliament to establish the legal capacity of the Adaptation Fund Board in Germany of 8 February 2011, adopted by the Government of Germany. 	<ul style="list-style-type: none"> Adaptation Fund Board funds, assets and other property enjoy immunity from legal process and exemption from restrictions in Germany Adaptation Fund Board members and alternate members enjoy immunity from legal process in Germany Adaptation Fund Board members and alternate members accorded inviolability of all papers and documents in Germany The Adaptation Fund Trust Fund, established by the World Bank as trustee, is subject to the privileges and immunities of the World Bank <p>See Act of Parliament to establish the legal capacity of the Adaptation Fund Board in Germany of 8 March 2011 See Terms and conditions of services to be provided by the International Bank for Reconstruction and Development (the World Bank), as trustee for the Adaptation Fund (Annex III of decision 1/CMP.4)</p>