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# The International Finance Facility for Immunization (IFFIm)

Does IMF-related conditionality within the IFFIm run counter to the international human rights obligations of Donor States?



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## **Abstract**

In November of 2006, the United Kingdom, France, Italy, Spain, Sweden and Norway launched a bond in the international capital markets for the purpose of funding immunization programs in the developing world. This was the first financial instrument launched under a structure designed to access donor country aid pledges through 2026 up front. US\$1 billion of approximately US\$5 billion in total pledges was monetized in order to be administered by an entity formerly known as the Global Alliance for Vaccines and Immunization (currently known as the GAVI Alliance). Over the next several years, additional bonds may be launched under this structure, making available almost the full amount of pledges in large amounts early on, rather than in much smaller amounts over the course of the next 20 years. With these “frontloaded” large pools of funds, GAVI immunization programs, in theory and in likelihood, can be more comprehensive and have a far deeper impact on the health and development of the world’s poor, particularly children. Such a capital markets based approach to development financing is both strikingly innovative in its conception and bold in its execution. All parties involved, particularly the United Kingdom as the driving force behind this endeavor, deserve substantial recognition for their pioneering efforts.

However, there is an element of International Monetary Fund (IMF)-related conditionality within the structure of the instrument that potentially undermines the intended purpose of this instrument and may be in conflict with the human rights obligations of the UK and the other donor countries involved. Essentially, because of the conditions within the financing structure, nations that are not part of the IMF (such as, currently, Cuba and North Korea) and those in Protracted Arrears to the IMF (such as, currently, Somalia, Sudan and Zimbabwe and, until recently, Liberia) are precluded from accessing IFFIm “frontloaded” pledges to fund GAVI immunization programs in their countries.

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The populations of these nations comprise up to 100 million of the world's poorest and most destitute, including, and perhaps especially, children. As a result of this conditionality structure, these populations are essentially being locked out of the 20 years' worth of immunization aid which this structure frontloads.

The purpose of this thesis is to explore the nascent nexus between the international capital markets and the human rights obligations of developed nations and other actors. Only sovereign nations can and have formally undertaken human rights related obligations vis-à-vis their own citizens/inhabitants and certain other extraterritorial impacts of their actions. In the context of globalization (particularly given the breadth and depth of reach of financial globalization), the informal or baseline obligations of non-sovereign actors is also explored. This thesis reviews the intent and obligations of the parties involved in the structuring and execution of this financial instrument based on available documentation as well as independent inquiry. The thesis further explores whether and to what extent the structural elements of this financing mechanism undermine any human rights related obligations of the involved parties. Further, the paper suggests practical recommendations (both short and long term) as potential remedies and/or improvements upon the current structure.

In addition, this thesis seeks to highlight certain trends that may require further consideration, and that are likely to surface with increasing frequency, as nations with human rights related obligations act in concert with and through agents, instruments and markets that are simultaneously of crucial importance to the individual, but are also largely devoid of the responsibility to respect, protect or fulfil that individual's human rights.

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## Acknowledgments & Updates

My thanks to Professor Dr. Asbjørn Eide of the Norwegian Centre for Human Rights for his attention, insights, comments and guidance during the writing of this thesis. My gratitude also to Professor Dr. André Nollkaemper of the University of Amsterdam for responding to an out-of-the-blue email with his considered views on the topic non-discrimination between states.

As to the individuals employed by the different actors involved in the structuring and execution of the IFFIm, their names and positions have been footnoted in this document and I thank them for their contributions and candor, though some discussions were more pleasant than others. There are other individuals and entities who did not return my requests for guidance. I wish that the facts they could have provided had replaced some of the speculation and knowledge gaps that admittedly are present in this paper.

In March 2008, an inaugural offering of the IFFIm was completed in the Japanese market. Although these bonds are issued in a different currency (South African Rand vs. US Dollars), have a different coupon rate (9.9% p.a. vs. 5% p.a.), different size (approx. US\$223 million vs. US\$1 billion), different maturity (2 years vs. 5 years) and have a different investor base than the Notes which are the subject of this thesis, the structure and terms under which they have been issued, as they apply to the topics covered herein, are the same.

As of March 2008, the IMF Executive Board restored Liberia's IMF status. After more than two decades of protracted arrears to the IMF, Liberia has received over US\$950 million in financial support (principally from the USA) that enable it to normalize its relations with the IMF. While this is good news for Liberia's 3 million inhabitants, they will unfortunately not be able to benefit from the first IFFIm bond issue proceeds of US\$1 billion, since these had already been disbursed or otherwise committed by the end of 2007. Because large parts of my thesis were written prior to these

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developments, Liberia continues to figure throughout the document as a nation excluded from the scope of the IFFIm structure. One would have hoped that the Herculean acts of international activism, financial structuring and far-reaching compliance with IMF policies and procedures that ended Liberia's irregular status with the IMF would not have to be a precondition for its impoverished children to receive IFFIm funded immunization aid.

It is my hope that certain elements in the IFFIm structure be realigned to match the intended purpose of the instrument. The Donor Countries involved in this structure should be reminded of their international human rights responsibilities and obligations towards the poorest and most vulnerable. It would be tragic for such funding innovation to remain needlessly marred and for the world's most disenfranchised men, women and children to be further excluded from large pools of available development aid.

Beatriz Malo de Molina  
Oslo, May 2008

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## 1. Introduction

### 1.1 *Problem Statement*

The human rights implications of international engagement by governments outside of their own territories has been a source of much recent research and debate. Such *extraterritorial obligations* are being explored as they relate to wartime actions, economic sanctions, the parameters of technical cooperation and assistance, as well as obligations relating to development aid and governments' roles in international and multilateral organizations. The human rights obligations of international agencies comprising or including substantial government participation are also an area of current study. In particular, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its treaty body (CESCR), as well as the UN Charter (particularly articles 55 & 56) and its bodies, and the Universal Declaration of Human Rights have been the sources and focus of much of the legal and moral framework for this ongoing analysis.

International engagement is crucial in the effort to achieve the U.N. Millennium Development Goals (MDGs). Yet any hope of achieving the MDGs will require not only the world's concerted focus, but the world's concerted capital. To date, conventional bilateral and multilateral aid has not succeeded in making the kind of impact that will lead to MDG success. Utilizing the international capital markets to access very large pools of capital is a uniquely appropriate source of funding for these ambitious targets.

This paper is an effort to link the pre-existing human rights obligations of governments to the structure of a capital markets financing instrument designed to frontload immunization aid funds supporting MDGs 4, 5 and 6 (the IFFIm). Particularly the conditionality aspect included in the IFFIm structure presents potential conflicts with the human rights obligations of the donor countries involved. Therefore, this paper conducts research into the background, preparatory work and



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execution of the IFFIm in order to explore the context, motivation and levels responsibility of the parties involved.

Questions to be addressed through the research include: What was the intent of the actors involved in the IFFIm? Which actors have formal or informal human rights obligations? Do some of the structural elements of the IFFIm undermine these duties? Do the effects of the structure amount to discrimination based on government viability? Can these elements be amended and the issues resolved or improved?

## ***1.2 Methodology & Thesis Structure***

This paper applies policy-oriented jurisprudence methodology<sup>1</sup>: mapping out content (participants, perspectives, base values, strategies and outcomes) as well as procedure (clarification & specification of goals, identification of conflicting claims, past trends in decision & conditioning factors, projection of future trends and alternatives & recommendations in the global common interest) as they relate to the IFFIm.

This first section provides an overview of the thesis structure as follows:

In the second section, *Background & Context*, financial globalization is discussed, highlighting its pervasive nature, importance and impact on today's world. International finance can hardly be seen to be an area apart from other areas of human activity, since the infrastructure that has been created to permit and encourage international capital flows reaches or impacts virtually everyone. The IFFIm structure is placed within that background, as an innovative structure through which the established international financial infrastructure can be leveraged to the benefit of development and aid related activities. The troublesome aspects of IMF-related conditionality within the IFFIm structure are also explored, given that they result in

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<sup>1</sup> Wiessner and Willard (1999) p.334.

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the exclusion of up to 100 million<sup>2</sup> of the world's poorest populations from the important and dynamic efforts of the GAVI Alliance.

The third section, *Perspectives on Motivation, Intent & Expectations*, explores the intent of the various parties involved in the creation, structuring and execution of the IFFIm. There is a particular focus on the intentions of the donor countries involved and in particular the UK, given that its leadership role behind this innovative structure. This concludes that Donor Country intent was to arrive at a mechanism for maximizing the impact of their immunization related aid, though certain accounting principles played a pivotal role in structuring. While the motivations of other actors involved were perhaps more purpose-driven, none of the actors can be said to have motives that sought to undermine the noble intentions of the UK government.

The fourth section, *Participants' Human Rights Obligations*, reviews the formal, legal and/or moral obligations of the different IFFIm actors. Again, the principal focus is on human rights related obligations, including extraterritorial and other related aspects. The areas of international assistance & cooperation, non-discrimination, due diligence, conditionality & disintermediation and aggregation are explored. Particular focus is given to the concepts of disintermediation (the capital markets replacing traditional donor-recipient negotiations) and aggregation (the broader impact of state actions on the rights of entire populations, rather than on the rights of individuals or groups/peoples within nation states). Both concepts are found to be insufficiently treated in current human rights discourse, but may become increasingly relevant as global financial architecture is utilized to support/fund international development aid.

In the fifth section, *Overview of Program Functions & Governance*, the configuration of the IFFIm as well as the interactions that the various actors have within that structure are reviewed. The purpose of this section is to clarify the roles of the various actors

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<sup>2</sup> CIA World Factbook (July 2008 est.); the populations of Somalia: 9.6 million and Zimbabwe: 12.4 million - are noted as particularly difficult to estimate given refugee movements resulting from famine and warfare, as well as the effect of AIDS. Cuba: 11.4 million, North Korea: 23.5 million, Liberia: 3.3 million, Sudan: 40.2 million.

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and the timing elements that can be important for determining responsibilities and potential areas of conflict.

The sixth section, *Identification of Conflicts*, is a schematic overview of participants' interactions, intents, obligations and approaches. This section seeks to highlight the principal areas of conflict between participants' human rights related obligations and their actions within the IFFIm construct.

Finally, the section titled *Conclusions: Alternatives & Recommendations*, outlines in summary two short term and two long term recommendations aimed at redressing the IFFIm structure and encouraging the interaction between the capital markets and philanthropic investment.

### **1.3 Update**

Important developments, including the issuance of bonds under the IFFIm structure in the Japanese market and the regularization of Liberia's relationship with the IMF, occurred in March 2008. In April, IFFIm's Chairman told Reuters that the IFFIm structure could find other applications, such as 'clean-water bonds' to build wells or pipes and that additional IFFIm bonds were likely to be issued in Europe within 2008. To the extent possible, these updates have been included either in the body of the text or in footnotes. Largely, however, the thesis is written from the perspective and about the situation at year end 2007. On the one hand, this author wishes that all data in this paper were rigorously up-to-date. On the other, it is bracing to see that the topic of this thesis is the subject of such dynamic focus and engagement.

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## 2. Background & Context

### 2.1 *Financial Globalization and its Development Impact*

The past twenty years have seen the increasing globalization of the world's financial systems. This change has occurred with increasing velocity and has linked developing and developed economies in ways that are still being analyzed and understood. While a globalized financial system would theoretically optimize capital and risk allocation, and facilitate the spread of financial know-how and access to capital to even the smallest economies, serious concerns regarding financial globalization persist. Capital flight and concentration (from developing nations to principally the US), potential contagion from downturns in a global industry or commodity (rather than pure correlation to domestic economic performance), systemic shocks with wide-ranging knock-on effects (such as those related to sub-prime mortgages currently) and increased foreign ownership of large domestic banks and financial institutions are only some of the potential risks of the globalization trend.<sup>3</sup>

The generally held view within human rights academia holds that the globalization of international trade and finance is primarily influenced by the World Bank, the International Monetary Fund (IMF) (together, the International Financial Institutions (IFIs)<sup>4</sup>) and the World Trade Organization (WTO)<sup>5</sup>. While this view can be

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<sup>3</sup> Bank for International Settlements (2006) and (2008).

<sup>4</sup> This definition typically includes all World Bank institutions (namely, the International Bank for Reconstruction and Development – IBRD – and the International Development Association – IDA) and affiliates (namely, the International Finance Corporation – IFC – , the Multilateral Investment Guarantee Agency – MIGA – and the International Centre for Settlement of Investment Disputes – ICSID) as well as the IMF. The IBRD (also generally referred to as the World Bank) was established at the July 1944 Bretton Woods Conference together with the IMF. The IBRD's purpose post WWII rebuild: earliest recipients were the European countries and Japan. By the early 1960s, these countries no longer needed World Bank assistance, and lending was redirected to the newly independent and emerging nations of Africa, Asia, Latin America, and the Middle East, and, in the 1990s, to the transition countries of Central and Eastern Europe. The IMF and the World Bank complement each other's work: the IMF focuses primarily on macroeconomic and financial sector issues, while the World Bank focuses primarily on longer-term development and poverty reduction. Its loans finance infrastructure projects, the reform of particular sectors of the economy, and broader structural reforms. Countries must join the IMF to be eligible for World Bank membership. Sources: <http://www.worldbank.org/> and <http://www.imf.org/external/>.

<sup>5</sup> Salomon (2007) p.8: "...the internationalization of global trade and finance, the enhanced role, and influence, of international institutions at the forefront of which are the World Bank, the IMF and the WTO... [through which] much of the agenda of economic restructuring, and of deregulated multinational capitalism, is being pursued...".

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convincingly contested and qualified<sup>6</sup>, particularly the work of Erica Gould (2006) detailing the significant influence of supplementary financiers on the IMF is of relevance, the fact remains that other much larger and more pervasive financial entities also significantly impact the lives of individuals worldwide, either directly (through lending) or indirectly (through their role in the macroeconomic and financial development of a particular country or region, including its exchange rate, commodity prices, etc.).

Any discussion regarding human rights and finance must not discount or exclude the extraordinary influence and impact of the vast number of International Financial Actors (IFAs)<sup>7</sup> who participate daily and actively in financial globalization. IFAs, through their lending policies (project finance, inter-bank loans, corporate lending, or consumer loans and mortgages), trading and hedging practices (foreign exchange, equity indices, single equities, credit, interest rates, commodities, etc.) and securitization activities (creation of financial and derivative instruments or contracts for the purposes of risk trading, hedging, arbitrage and/or speculation) have a

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See also Salomon, et al. (2007) p.20: ‘There are few areas that impact more profoundly on the ability of people in remote places to exercise their human rights than those addressed by the work of international economic organizations... the Bretton Woods institutions are today inextricably tied up with the ability of people in poor countries to exercise their basic human rights.’ See also Asbjørn Eide *Human Rights Based Development in the Age of Economic Globalization* in Andreassen, et al (2006) p.231: “If the IMF finds that a developing country’s macroeconomic policy is not sufficiently disciplined, potential private investors are likely to abstain from investing there”.

<sup>6</sup> Center for Global Development website at <http://www.cgdev.org/section/topics/iffi/> “While [IFIs] influence on development outcomes is often less than their more virulent critics contend, nonetheless it can be quite substantial, especially in smaller low-income countries.” (emphasis added). Accessed March 2008.

<sup>7</sup> For the purposes of this paper, IFAs will refer both to IFIs as well as central banks, large commercial banks (Citigroup, HSBC, Bank of America, UBS, Société Générale, Mizuho Financial Group, Santander Central Hispano, Crédit Agricole, Royal Bank of Scotland, and similar) and large global investment banks and broker-dealers (Merrill Lynch, Goldman Sachs, JPMorgan Chase, Morgan Stanley Dean Witter, and similar) and non-bank entities (ie, lenders not affiliated with banks, such as mutual funds, pension funds, insurance companies, hedge funds and similar). The global activities and interests of IFAs broadly defined can and do have significant influence, power and ability to impact domestic economies and individuals. The recent U.S. sub-prime real estate mortgage crisis and its repercussions on IFAs, investors, homeowners, and general economic confidence worldwide is an example of the important impact and influence of non-Bretton Woods financial institutions. The foreign exchange trading and hedging activities of IFAs before and during the several currency crises at the end of the 20<sup>th</sup> century (Mexico, Thailand, Russia, etc) can also be said to have impacted the wellbeing of millions of non-financial actors (i.e. individuals not directly participating in global financial markets). This definition is different than Gould’s (2006) p. 17 definition of supplementary financiers in that a) it excludes creditor states and multilateral organizations; and b) Gould’s concept of private financial institutions (PFIs) is expanded to include financial institutions with significant government ownership, either domestic or foreign, given that many investment banks and other IFAs have historically or recently been owned to a material extent by governments directly or through government-controlled investment funds.

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considerable impact on global development and the lives of many individuals, both in the developed and in the developing world.

The number and value of financial transactions that occur on a daily basis globally is nearly unfathomable. Average daily turnover in April 2007 in the foreign exchange market alone exceeded US\$3 trillion, over the counter (OTC) open positions in interest rate risk hedges alone reached US\$389 trillion every day on average during June 2007 and total OTC open positions were closer to US\$516 trillion daily. Looking at quarterly data, emerging markets received an “unprecedented flow of bank credit,” growing by US\$201 billion in the quarter ended June 2007 after a record-setting first quarter of 2007, with half of these funds going to emerging Europe and US\$32 billion destined for Africa and the Middle East<sup>8</sup>. All of these financial activities either directly or indirectly affect the lives and livelihoods of hundreds of millions of individuals, as well as the general economic climate and possibilities of entire nations.

Unfortunately, the human rights obligations of the institutions engaging in these activities are unclear at best, and are most likely non-existent. The only human rights focus related to this very tangible globalization activity comes (or should come) from the regulatory oversight role of States and multi-lateral organizations. Given the lack of direct obligations at all other levels, it is highly unlikely that there is a satisfactory amount of focus on the human rights impact of this vast financial and economic activity. Indeed, the shortcomings of financial and trade globalization and of the capital markets in general are often much-maligned in the human rights and development discourse, despite the fact that the manifold benefits of globalization cannot be denied<sup>9</sup>.

A global trend towards a market-based system of financing is what has enabled a structure such as the IFFIm to be developed and successfully executed. While the human rights discourse is almost entirely lacking in the oversight and regulation of

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<sup>8</sup> Bank for International Settlements (2007); (1 billion = 1 thousand million; 1 trillion = 1 thousand billion).

<sup>9</sup> See for example Siqqid Osmani *Globalization and the Human Rights Based Approach to Development* in Andreassen, et al (2006) pp.266-268 and Howard-Hassmann (2005) pp.14-16 and pp.20-27..

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global capital markets, global capital markets financing practice is marked by certain inherent characteristics that can have a positive impact on development in general. The fairly uniform standards of disclosure, documentation, as well as the central bank, legal, financial and rating agency review that are the hallmarks of the capital markets have the benefit of providing greater overall transparency both to regulators and to the public. This heightened, periodic and more detailed level of disclosure dovetails nicely with the fundamental accountability requirement of human rights based approach to development. As Philip Alston states, “[i]nstitutionalized arrangements for monitoring processes and outcomes and for establishing some form of accountability are indispensable in any human rights context” and “[a]ccountability mechanisms are the *sine qua non* of a Human Rights Approach”<sup>10</sup>.

While vaccination levels, immunization rates and other health indicators arguably lend themselves well to the analytical and methodological bent of financial actors, the IFFIm could become the first of future mechanisms through which similarly quantifiable development work (such as clean-water infrastructure projects in developing countries)<sup>11</sup>, or other MDGs, could be financed. These efforts would necessarily then be subject to regular and standardized reporting, monitoring and public scrutiny. Indeed, the IFFIm is regarded as a “test case” for an International Finance Facility (IFF) through which development aid to developing countries could be channelled<sup>12</sup>. While the IFFIm structure currently has approximately US\$5 billion in pledges (bonds outstanding currently total US\$1.2 billion), estimates on the total potential size of a larger IFF range from US\$300 to US\$500 billion.

The nature of the international capital markets is such that international investors, operating from many different parts of the world, must be able to receive and analyze the structural and financial information related to a particular security without material misstatements or omissions. The documentation standard for debt securities

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<sup>10</sup> Alston (2005) p.813.

<sup>11</sup> Macinnis (2008)

<sup>12</sup> Eurostat CMFB (2005) p.1. Confirmed in several personal communications.

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in the capital markets is familiar to the banks, broker/dealers, investors and other IFAs that have been the driving force of financial globalization described above. By way of comparison, privately negotiated loans, and any conditions or covenants agreed to between borrowers and lenders (whether these be IMF loans or loans between banks and individuals) are not fully available for public scrutiny or review if they remain outside the capital markets<sup>13</sup>.

Enhanced public disclosure, greater information flows, and the adoption of international principles and standards are positive elements that lead to an increased ability to supervise and create a “macroprudential regulatory framework”<sup>14</sup>. These standards can also aid in the monitoring and prevention of human rights abuses that can be caused, supported or perpetuated by financial transactions. Typically, it is useful when attempting to pinpoint the source of human wrongdoings to be guided by the principle of “follow the cash.” To the extent that the world’s financial operations are joined up in the globalized capital markets, this task becomes easier.

Putting the role of IFIs into this context is important: as of January 2008, the IMF had total loans outstanding of US\$15 billion to 68 countries; the World Bank circa US\$30 billion. While the endeavours of IFIs are clearly dwarfed by the overall scale and scope of daily IFA activity, the historical role and moral authority of these institutions lends disproportionate weight to their pronouncements, decisions, activities and, more controversially, conditionality packages. Erica Gould’s 2006 work also cautions against placing too much stock in the IMF as a driver, rather than a facilitator, of international financial flows, and clearly states that “[t]he Fund often provides only a

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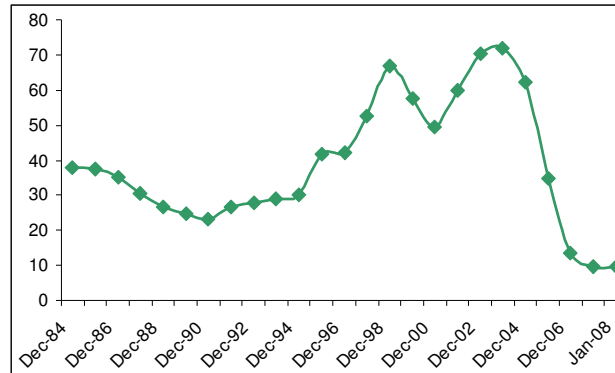
<sup>13</sup> IMF (2008) seeks a “balance between transparency and confidentiality... [and] the possibility for members to request deletions of highly market-sensitive material.” Nevertheless, the report demonstrates a drop of disclosure across all report types, with 20% of countries choosing not to publish the key Article IV and Use of Funds Resources (UFR) reports, and fully 60% choosing not to publish their Financial System Stability Assessment (FSSA) reports, and 31% choosing not to publish Poverty Reduction Strategy Papers (PRSP) and related reports. No progress in reducing lags in publication times, substantial deletions relating to foreign exchange and/or financial system topics in published Article IV reports (on average 11% of these reports contained deletions) and postponement by one year of the IMF’s review of its transparency policy has prompted a reaction from civil service watchdogs [www.freedominfo.org](http://www.freedominfo.org) and the Global Transparency Initiative. Gould (2006) p.211 also mentions challenges in accessing IMF information for her research.

<sup>14</sup> See Zdenek Tuma (Governor, Czech National Bank) *Financial Globalisation and Financial Stability* in Bank for International Settlements (December 2006) pp.46-53.



fraction of the amount of money that a country needs...". Indeed, this is also a very small, and decreasing, fraction of global financial activity.

**Figure 1: IMF Credit Outstanding in SDR billions<sup>15</sup>**



As a result, calls to review the relevance and future roles of the Bretton-Woods institutions are increasing in both number and intensity.<sup>16</sup> One might argue that the IFIs have in essence become the lender of last resort to those nations unable to gain a steady foothold in the globalized financial system. These are the nations on the brink of being left behind and outside the system, either on a temporary or on a permanent basis. The “gradual shift from the government-dominated system of the Bretton Woods tradition to a market-led system... [and] gradual shift from bank-centered to market-based financing”<sup>17</sup> indeed raises the question: if the IFIs, largely on the back of a moral standing that far exceeds their actual financial wherewithal or impact are bankers to the poorest and most disenfranchised nations, and specific details of their financial agreements are not available for public or regulatory scrutiny, should they not have an even greater moral imperative to safeguard and defend human rights?

While the debate surrounding the human rights obligations of IFIs, explored in greater detail in a subsequent section of this paper, has recently generated volumes of

<sup>15</sup> Source IMF at <http://www.imf.org/external/np/fin/tad/extcred1.aspx> , SDR exchange rates at [http://www.imf.org/external/np/fin/data/rms\\_mth.aspx?SelectDate=2008-01-31&reportType=SDRCV](http://www.imf.org/external/np/fin/data/rms_mth.aspx?SelectDate=2008-01-31&reportType=SDRCV)

<sup>16</sup> See Raghuram Rajan (Economic Counselor and Director of Research, IMF) *The IMF in a Changing World* in Bank for International Settlements (2006) pp.37-45.

<sup>17</sup> Several other contributors to Bank for International Settlements (2006), including C. Cumming (First Vice President, Federal Reserve Bank of New York), Prof. D.T. Llewellyn (Loughborough University) and Z. Tuma, referenced this trend in their contributions to the paper.

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discourse<sup>18</sup>, it becomes all the more critical given the confluence of factors that affect the IFFIm. The Programme is the meeting point of the interests, intents and obligations of sovereign states (both donor and recipient), IFAs, IFIs, development (in the form of MDGs), human rights<sup>19</sup> and the global capital markets. Because the IFFIm is an example of what future development funding could look like in the context of a globalized financial system, ensuring a precise and defensible alignment of intent, obligations and execution is critical.

## ***2.2 The IFFIm and GAVI Activities in Brief***

In November 2006, US\$1 billion in 5-year 5% coupon Notes due November 2011 (hereafter “IFFIm Notes” or the “Notes”) were successfully issued in the capital markets under the Global Debt Issuance Programme (the “Programme”) for the International Finance Facility for Immunization (the “IFFIm”)<sup>20</sup>. The IFFIm was originally proposed to the Group of Seven (G7) countries by the UK government in 2005 as a structure whereby donor governments could make 10-20 year, legally-binding aid commitments and these pledges could then be securitized in the international capital markets and thereby be made available up front.

The Notes are the first to be issued under this innovative mechanism for financing development work and, generally, this is a watershed event in bringing capital markets efficiency directly to bear on development efforts to benefit the poor, particularly children. As mentioned earlier, the IFFIm is seen as a test case for a much larger IFF facility dedicated to providing aid to developing countries or for other types of aid bonds (such as clean-water infrastructure, for example).

The Programme is a legal documentation framework under which multiple bonds or notes can be issued over time and these Notes were the first of a series expected to be issued. US\$5 billion of legally-binding pledges (to be paid out in installments mostly

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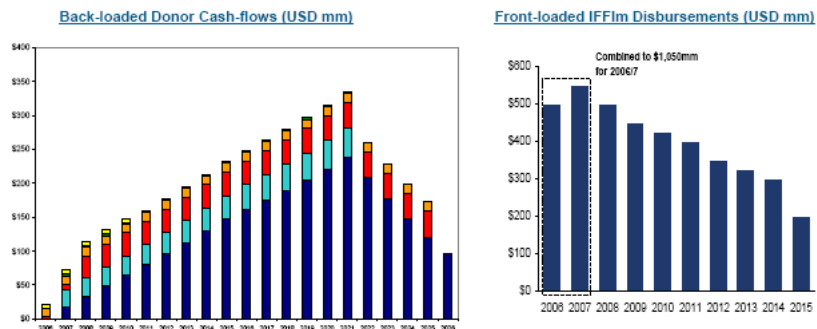
<sup>18</sup> See among others: Salomon (2007), Salomon, et al. (eds.) (2007), Skogly (2001), and Skogly (2006).

<sup>19</sup> Alston (2005)

<sup>20</sup> Offering Memorandum, cover.

over the course of 15 to 20 years from the date of issuance) have been made by the governments of the United Kingdom (GBP1,380 million), France (EUR1,240 million), Italy (EUR473 million), Spain (EUR190 million), Sweden (SEK276 million), and Norway (US\$27 million over five years). The governments of South Africa and of Brazil also joined the Facility in March 2007 (US\$20 million each), (together, the “Grantors” or “Donor Countries”). In January 2008, the GAVI Alliance, the World Bank and Daiwa Securities announced that they would be issuing additional notes during the first quarter of 2008 to target mainly Japanese investors (marketing and press materials termed the notes “Vaccine Bonds”). Approximately US\$223 million worth of Vaccine Bonds were issued in the Japanese market in March 2008<sup>21</sup>. Recently, Alan Gillespie, Chairman of the IFFIm, told Reuters that the IFFIm plans to float another bond for in the European market in “mid- to late 2008.” The remaining balance (approx. US\$3 billion) is expected to be issued by 2015. The current schedule of payments and frontloaded disbursements is as follows:

**Figure 2: Expected Donor Country Schedule of Payments and IFFIm Disbursements<sup>22</sup>**



Depending on the market and investor reception of these bonds (which to date has been “enthusiastic”), on increased awareness of GAVI’s programs, on successful future marketing of “Vaccine Bonds”, and on any additional or increased donor pledges, there is no theoretical upper limit to the amounts that could be raised under this structure. Indeed, some GAVI presentations have US\$10 to US\$20 billion as target pledge amounts under the IFFIm. In Allan Gillespie’s view, the capital markets would

<sup>21</sup> Press release dated 04 March 2008 at [http://www.iff-immunisation.org/pdfs/pr\\_3\\_04\\_2008.pdf](http://www.iff-immunisation.org/pdfs/pr_3_04_2008.pdf).

<sup>22</sup> Source: IFFIm PowerPoint Presentation (February 2007). Donor cash flows have increased since this date.

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not have any trouble digesting these amounts: “The investor interest is there. The only limiting factor right now is the amount of money we need.”<sup>23</sup>

Proceeds from the IFFIm Notes are utilized for the purpose of funding vaccination projects, focused primarily on the world’s poorest countries<sup>24</sup>. Funding of these projects takes place within a specific framework of project applications and approvals, the conditions of which are stipulated in the Programme documentation<sup>25</sup>. All vaccination programs to be funded by IFFIm Notes proceeds are administered by the GAVI Alliance, a public-private partnership formerly known as the Global Alliance for Vaccines and Immunization (“GAVI”)<sup>26</sup>. Of the US\$1 billion raised in November 2006, US\$994.7 million had already been given GAVI Board approval and had been allocated to specific programmes, and US\$836 million had been disbursed by GAVI to developing countries by December 2007<sup>27</sup>.

The World Health Organization (WHO), UNICEF, the World Bank, the Bill & Melinda Gates Foundation (initial donors creating GAVI’s US Fund in 1999), the International Pediatric Association, public health institutes, vaccine industry representatives and other high-level advocates and professionals are an integral part of GAVI’s partnership structure. Under GAVI’s coordination (the GAVI Secretariat is currently based in Geneva and is hosted by UNICEF), UN entities, civil service organizations in the recipient nations, the international donor community, NGOs, research institutions and the private and business sector collaborate toward the implementation of vaccination programs in the world’s poorest countries. GAVI’s role is to receive, approve and fund project proposals, and to coordinate field support of the

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<sup>23</sup> Macinnis (2008)

<sup>24</sup> Source: GAVI website at <http://www.gavialliance.org>.

<sup>25</sup> Offering Memorandum (2006) p. 14 and p.89

<sup>26</sup> It is important to note that there are several GAVI entities, including the GAVI Alliance (Geneva, CH – hosted by UNICEF) which serves as Secretariat and headquarters, as well as the GAVI Fund (Washington D.C., USA) and the GAVI Fund Affiliate (London, UK), both of which are primarily focused on the disbursement of funds to approved projects. Currently, there is much discussion internally within GAVI regarding the optimal constellation of these entities, including most efficient (from a tax, cost and operating perspective) headquarters and domicile for GAVI. In this paper, the term GAVI will be used to refer to the alliance as a whole, and the specific GAVI entity will be named only if required to elucidate a specific point.

<sup>27</sup> Press release at [http://www.gavialliance.org/media\\_centre/press\\_releases/2007\\_11\\_28\\_en\\_pr\\_iffim\\_results.php](http://www.gavialliance.org/media_centre/press_releases/2007_11_28_en_pr_iffim_results.php) and GAVI Alliance and The World Bank (2007).

vaccination projects. GAVI also seeks to optimize product purchases, implementation, governance, monitoring and performance review of projects.

To understand the importance of the type of work that is being carried out, and the impact of potentially being excluded from this funding, it is worth noting the uses of IFFIm funds allocated by GAVI during 2007.

**Figure 3: Uses of IFFIm funds through GAVI at Year-End 2007 (in USD millions)<sup>28</sup>**

Amount	Purpose	Note
181.0	Pentavalent 5-in-1 Vaccine	Fights diphtheria, pertussis, tetanus, hepatitis B and Hib (meningitis & pneumonia); country applications almost doubled in a year to 44
71.0	Health System Strengthening	Build long-term national health (training, cold chain, logistics, etc.)
178.0	Country-Requested Programmes	New vaccines & immunisation safety
139.0	Measles	Equals 80% of total external measles funding for high-burden countries in 2007; life-saving measles immunisation for 194 million children in 32 countries
191.3	Polio	Fast-tracked into existing programs; June 2007, helped immunise over 100 million children, averting major set-back to 20-yr. effort to eradicate polio
32.0	Tactical (yellow fever vaccine stockpiles)	Demand has almost doubled from 12 million doses in 2005 to 23 million in 2007
44.0	Maternal & Neonatal Tetanus (MNT)	Equals 90% of funding resources for 2007 MNT global elimination campaign
<b>836.3</b>		

In essence, the IFFIm is the result of an effort by GAVI to secure sustainable and innovative financing sources for its work<sup>29</sup>. This allows GAVI to better plan its programs and optimize its operations with maximal current impact secured by long-term funding. Although the IFFIm is registered as a separate entity, all of the funds raised through the Programme are directed to fund GAVI projects.

This transaction won the Financial Times & IFC Sustainable Banking Deal of the Year Award in 2007, and characterized the IFFIm as follows:

*[A] new multilateral development body that for the first time enables capital markets to provide grants, not loans, to recipient countries ... Qualifying programmes are approved for grants by an independent board with stringent approval and monitoring processes provided by the GAVI Alliance. Investors demonstrated strong support for its innovative structure and development mission. WHO estimates that through IFFIm, 500 million children will be vaccinated and 10 million lives saved, making an*

<sup>28</sup> Ibid.

<sup>29</sup> Sustainable sources of financing in addition to the IFFIm include Advanced Market Commitments (AMC), which uses private donations to secure new vaccine product purchases at stable prices over time, and direct donations to GAVI from both individual governments and private philanthropy (individuals & institutions).

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*unprecedented contribution to achieving the Millennium Development Goal of reducing child mortality by two-thirds by 2015.*<sup>30</sup>

The Offering Memorandum of the Programme, as well as much of the IFFIm and GAVI documentation and information material, also make direct references to the importance of the IFFIm in helping to finance and to support the Millennium Development Goals (“MDGs”), particularly MDG 4 (“reduce child mortality”), and MDG 5 (“improve maternal health”), though also MDG 6 (“combat HIV/AIDS, malaria and other diseases”)<sup>31</sup>. Indeed, the commitment of the Donor Countries to the achievement of the MDGs is often cited by the relevant credit rating agencies in their reports as an important element to consider in the creditworthiness of the IFFIm. Standard & Poor’s (“S&P”) rated IFFIm AAA/Stable/A-1+, its highest rating for creditworthiness and Fitch Ratings (“Fitch”) rated IFFIm AAA/F1+/Stable, also its highest rating for creditworthiness<sup>32</sup>.

Another critical factor highlighted by the credit rating agencies in their reports and by the IFFIm itself in its transaction materials is the importance of the role of the International Bank for Reconstruction and Development (the “World Bank”) as Treasury Manager. The World Bank’s stature and rating underpins the credibility and creditworthiness of this innovative financial instrument and is “a key component of IFFIm’s AAA/aaa/AAA ratings.” The participation of the World Bank, its “60 years of capital market experience,” and its “established conservative financial management policies”<sup>33</sup> are often referred to in materials relating to the Programme and these are clearly an important element of the structuring of the Facility.

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<sup>30</sup> Financial Times Sustainable Banking Awards (2007). Linklaters, legal advisors to GAVI, have also have been named Banking and Finance team of the year by *Legal Business*, and Finance team of the year, debt and structured finance by *The Lawyer Awards* for their work on the GAVI fund.

<sup>31</sup> <http://www.linklaters.com/practiceareas/specialismdetail.asp?specialismid=133&PracticeAreaID=5>

<http://www.un.org/millenniumgoals/>; [http://www.iff-immunisation.org/01\\_about\\_iffim.html](http://www.iff-immunisation.org/01_about_iffim.html);  
<http://www.gavialliance.org/vision/index.php>

<sup>32</sup> Fitch Ratings (2006); Standard & Poor’s (2006); Moody’s Investors Service (2006)

<sup>33</sup> All quotes in this paragraph taken from GAVI Alliance and The World Bank presentation in Oslo (2007).

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### 2.3 IFFIm Conditionality – Rationale and Effects

Much less visible in the marketing and information materials is the International Monetary Fund (“IMF”). Although the IMF does not have a formal role within the structure, the key conditionality provisions that govern the IFFIm are linked directly to the IMF: to IMF membership and to IMF Protracted Arrears. Protracted Arrears are defined as the failure by a country “to meet any IMF Financial Obligation where such failure has continued for a period of six calendar months or more from the date upon which the relevant amount which is the subject of such IMF Financial Obligation was originally due and payable.”<sup>34</sup> While this conditionality is not referenced in any press release, it is clearly stated in the IFFIm’s Offering Memorandum, a public document:

*There are 72 countries currently eligible for support through GAVI programmes. IFFIm resources can be used in ... GAVI eligible countries that are also members of, and not in Protracted Arrears (as defined herein) to, the International Monetary Fund (IMF). There are two GAVI eligible countries that are not members of the IMF (Cuba and North Korea<sup>35</sup>) and which will therefore not benefit from IFFIm funds. There are four GAVI eligible countries currently in protracted Arrears (Liberia, Somalia, Sudan and Zimbabwe).<sup>36</sup>*

Subsequent sections of the IFFIm Offering Memorandum discuss the Payment Conditionality clause linked to a Reference Portfolio of GAVI eligible countries that developed for the IFFIm structure<sup>37</sup>. Essentially, according to the Payment Conditionality clause, should any eligible country enter into “Protracted Arrears in meeting any of its IMF Financial Obligations<sup>38</sup>,” payments due by the Donor Countries to the IFFIm will be reduced by a percentage weighting allocated to that country (62 countries are allocated a 1% weighting, Viet Nam is allocated a 3%

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<sup>34</sup> Offering Memorandum at p.94.

<sup>35</sup> Despite the fact that a Cuba delegation was present at the Bretton Woods meetings that created the IMF and the World Bank, Cuba withdrew from the fund in 1964; Pujol (1991) Both Cuba and North Korea manage their economies centrally. Trade between the US and Cuba and North Korea is restricted given TWEA (1917).

<sup>36</sup> Offering Memorandum at p.7

<sup>37</sup> Ibid. at p.13. This reference portfolio was developed together with GAVI, reflecting GAVI’s estimates regarding its level of engagement in a particular country over the course of the pledge periods. Source: personal communications.

<sup>38</sup> Ibid. at p.93, defined as “any obligation of a Specified Country to make a payment of principal or interest due and payable to the IMF pursuant to any loan agreement or similar arrangement entered into by that Specified Country with the IMF”

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weighting, while 7 countries are allocated a 5% weighting<sup>39</sup>). For example, if 25 or more days prior to a payment date Ethiopia were to enter into Protracted Arrears with the IMF, Donor Countries' payments to the IFFIm would decrease an additional 5% from pledged amounts. Ethiopia would not be eligible to receive funding from the IFFIm until its Protracted Arrears with the IMF were cleared. Once Ethiopia managed to clear its IMF Protracted Arrears, payments for all the grantors would go up by 5% again and Ethiopia would again become eligible for program funding using IFFIm funds. Because Liberia, Somalia, Sudan and Zimbabwe each have a 1% weighting, Donor Countries have been required to make 96% of their committed payments to the IFFIm. Now that Liberia has come out of IMF Protracted Arrears, 97% of pledged amounts will become due.<sup>40</sup>

The effects of this conditionality are discussed in more detail in the section below, but essentially, there are three: 1) entire countries are excluded from participating in IFFIm-funded immunization programs; 2) the IFFIm funds available for distribution are decreased for all GAVI eligible countries should any one of them fall into arrears with the IMF<sup>41</sup>; and 3) in order to give the IFFIm the highest credit rating (AAA), rating agencies respond to the uncertainty created by this structure by requiring that approximately 30% (or US\$1.5 billion) of total pledges be held back as security for bondholders rather than used for immunization programs (Gearing Ratio Limit)<sup>42</sup>.

As early as 18 months prior to the issuance of the IFFIm Notes in November 2006, the consequences of this conditionality were clear:

*There are four countries in protracted arrears at present (Liberia, Somalia, Sudan and Zimbabwe), and from 1990 onwards 7 countries entered protracted arrears. These*

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<sup>39</sup> This weighting is intended to reflect "the expected larger value of programmes funded by IFFIm in those countries." The 7 countries allocated a 5% weighting are Bangladesh, Congo DR, Ethiopia, India, Indonesia, Nigeria, and Pakistan. These estimates were based on GAVI's input.

<sup>40</sup> Fitch Ratings (2008) p.4.

<sup>41</sup> Ibid. at p.13 describes the Payment Conditionality clause and the Reference Portfolio of countries that have been established under the IFFIm.

<sup>42</sup> Offering Memorandum pp.13, 15, 17, 24, 27, 49, 92,93; CMFB Consultation (July 2005) p.2, footnote 2; Standard & Poor's (2006) pp.2, 6; Fitch Ratings (2006) p.4.



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*four countries will not be eligible for IFFIm-backed programmes whilst in protracted arrears. ... If a country enters into such 'protracted arrears', donors will reduce their payments to IFFIm by an amount equal to the percentage of the expenditure for that country in the total programme expenditure... By borrowing against only a fixed percentage of pledged amounts, IFFIm creates a cushion.. if this percentage is set at 70%, the bonds will get a AAA debt rating...<sup>43</sup>*

### **2.3.1 Rationale for Conditionality**

Nowhere in GAVI's promotional materials or in the official IFFIm documentation is the reason behind the inclusion of IMF-related conditionality explained in any detail<sup>44</sup>. While the rating agencies are clear in their reports that the Gearing Ratio is required to mitigate the risk created by the IMF Protracted Arrears clause<sup>45</sup>, nothing points to the rationale for the IMF Protracted Arrears clause in the first place.

A presentation during an Innovative Finance conference held in Oslo three months after the launch of the Notes notes the following:

- *It is important to the donors that their grant payments fund immunisation programmes in well-governed states over the next 20 years.*
- *Donors pay 100% of their legally binding grants, unless a recipient country breaches a 'high level performance test'.*
- *The high level performance test for recipient countries chosen for IFFIm is 'protracted arrears to the IMF'.*
- *IFFIm may not fund programmes in countries that have breached the test and donors will be relieved of a fixed percentage of their payments for each recipient country in arrears (see prospectus).<sup>46</sup> (emphasis added)*

These points indicate that the conditionality was the result of Donor Countries' concern over recipient country governance. The question as to why children living in states that are not well-governed do not require immunization aid is not addressed,

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<sup>43</sup> CMFB Consultation (July 2005) pp.2-3.

<sup>44</sup> Carmichael in her 2007 Newsweek article mentions "tricky rules of budgeting" but no further explanation. No information is available from GAVI or in the Offering Memorandum (2006).

<sup>45</sup> Standard & Poor's (2006) pp.2, 6; Fitch Ratings (2006) p.4

<sup>46</sup> GAVI Alliance and The World Bank (2007) p.16.

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nor is the question of whether there are poorly-governed states not in protracted arrears to the IMF.

Neither the offering documentation nor the marketing materials explain the genesis of the IMF conditionality. The reader is left to wonder why Ethiopia's entering into IMF Protracted Arrears should impact the United Kingdom's or any of the Donor Countries' ability to abide by their "valid and binding obligations"<sup>47</sup>. Why is the payment risk of developed nations, through intentional structuring, being impacted by the weighted macroeconomic stability of 70 of the world's least developed countries? If Ethiopia did enter into Protracted Arrears with the IMF, wouldn't Ethiopian children still need immunization? Wouldn't they especially need aid in such a difficult macroeconomic time for the country?

Only through discussions with individuals involved in IFFIm structuring did the rationale behind the IMF conditionality become clear. According to these individuals, and borne out by materials relating only to the preparatory work of the IFFIm structure, the existence of the IMF-related conditionality is the result of discussions with Eurostat, the Statistical Office of the European Communities. Eurostat is not focused on aid or development: its role is to "gather and analyse figures from the different European statistics offices in order to provide comparable and harmonised data to the European Institutions so they can define, implement and analyse Community policies."<sup>48</sup>

At issue was the accounting impact of the multi-year Donor Country pledges. If pledged amounts were unconditional, then Eurostat would ask that they be accounted by each Donor Country as national debt. Donor Countries' entire pledged amounts for the next 20 years would be reflected as debt the moment the IFFIm issued its first Notes. To avoid this classification, which is very unattractive to Donor Countries, an

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<sup>47</sup> Offering Memorandum p.27 as part of an explanation regarding Risk Factors related to the Notes that "the financial servicing and performance of the terms of the Notes depend primarily upon performance by each Grantor of its obligations under the Grant Agreement to which it is a party, and its covenant to make payments thereunder."

<sup>48</sup> Mission statement from Eurostat's homepage. Accessed March 2008.

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element of conditionality or uncertainty would have to be introduced. The IMF Protracted Arrears and Payments resolved this accounting issue.

It is important to realize that the debt-to-gross domestic product (GDP) metric is a critical concern to governments, since too high a percentage of debt-to-GDP can impact the perceived financial health of a country and have other broader monetary policy and EU-related implications. Countries that are part of the European Union (EU) are under the scrutiny of the European Commission and the European Central Bank, which monitor that member countries are complying with the “institutional arrangements for sound fiscal policies that have been agreed at the EU level, also with a view to limit risks to price stability.” This focuses primarily on Articles 99 and 104 of the European Treaty as well as the Stability and Growth Pact, which establishes a limit of debt-to-GDP. This limit, set at 60% debt-to-GDP, is considered to be the “basic rule of budgetary policy” in the EU<sup>49</sup>.

At the time that these critical structuring decisions regarding the IFFIm were being made (early 2005), the Council of the European Union had just released its Presidency Conclusions document<sup>50</sup>. Item 1 of this document was to endorse the EU’s Economic and Financial Affairs Council’s (ECOFIN) proposals for improving the implementation of the Stability and Growth Pact, which “reaffirms the need to reduce government debt to below 60% of GDP ... The higher the debt to GDP ratios of Member States, the greater must be their efforts to reduce them rapidly.”<sup>51</sup>

At the time, while the UK was comfortably below the 60% debt-to-GDP ratio, it is interesting to note that the second largest Donor Country to the IFFIm, France, had a debt-to-GDP ratio of 66.4%. Italy’s ratio was 105.8%, the highest within Europe<sup>52</sup>. The

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<sup>49</sup> European Central Bank <http://www.ecb.int/mopo/eaec/fiscal/html/index.en.html>; European Treaty Arts.99, 104.

<sup>50</sup> Council of the European Union (2005)

<sup>51</sup> Ibid. at p.35.

<sup>52</sup> Based on Eurostat data, the debt-to-GDP rates of the Donor Countries in 2005 –the time of the IFFIm structuring – were as follows: UK (42.1%); Spain (43.0%); Sweden (50.9%); Norway (43.8%). Public debt is defined in the Maastricht Treaty as consolidated general government gross debt at nominal value, outstanding at the end of the year. The general government sector comprises central government, state government, local government, and social security funds. The relevant definitions are provided in Council Regulation 3605/93, as amended. Data for the general government sector are consolidated between sub-sectors at the national level. The

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decision by Eurostat to allow the IFFIm pledges to be classified as something other than government debt “opens the door for interested EU donors to make off-budget pledges of future ODA streams to the IFFIm”<sup>53</sup>. For France and Italy, the next two largest donors after the UK, this must have been a compelling argument when pledging the EUR1.7 billion that would eventually nearly double the size of the IFFIm.

Clearly, achieving “off-budget” classification has significant and positive implications. The critical issue is whether the measure that was chosen to create the conditionality required by Eurostat was the only available option. Is 4% conditionality really conditionality? Is it worth excluding 100 million people from large pools of capital earmarked for the immunization of children?

In order to reach its determination, Eurostat required an unambiguous and transparent “conditionality trigger”. A delicate balance needed to be reached between being able to securitize (i.e. sell to the market) multi-year pledges portrayed as “legally binding”, and creating conditionality that would keep them “off budget”. On the one hand, the pledges were good as gold; on the other hand, maybe they would get paid, but maybe they wouldn’t. Admittedly, this is a tough balance to strike.

By choosing IMF Protracted Arrears as a high-level test, and assigning percentages to the eligible countries, the risk that some portion of the pledged amounts would not be honored by Donor Countries was introduced. Bondholders would have to consider not only the ability of Donor Countries to pay, but the risk that eligible countries would enter into protracted arrears with the IMF. In essence, the payment risk of some of the world’s highest rated countries was now conditioned by at least a measure of the risk of some of the world’s poorest nations. Clearly, if the risk had been transferred too much in the direction of the poor countries, bondholders would

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series are measured in euro and presented as a percentage of GDP.

<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=0&language=en&pcode=eb070>

<sup>53</sup> The World Bank and The International Monetary Fund (2005) at p.5. Interestingly, already at this early date, this report mentions commitments from France, Italy, Spain and Sweden totaling over US\$5 billion. According to GAVI, France’s initial commitment in 2006 was EUR372.8 million and only in 2007 did France pledge an additional, much larger commitment of EUR867.2 million which would bring total pledges to that figure.

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be reticent to purchase bonds for fear of not being repaid. What was required was a risk transfer that was potential, but not likely. A risk transfer mechanism that everyone would be relatively comfortable would never really be fully triggered, but with enough reasonable doubt to pacify the accounting authorities.<sup>54</sup>

Amazingly, the almost cosmetic nature of this conditionality is recognized by the very agency requiring it, and the Eurostat task force report states:

*...using historical events as an indicator of the future, the risk of any recipient country entering into protracted arrears with the IMF can be judged as limited and bondholders can be reasonably secure. Therefore, the conditionality clause might seem as artificial, as pledges from government in this case could be judged as being almost certain to be honoured (due to the contractual obligations)<sup>55</sup> (emphasis added)*

In discussions with several professionals involved, the case has been strongly and convincingly argued that without this clause, the IFFIm structure and billions of pledged aid would never have been possible. Clearly, this is true, and the intention of all involved was to resolve a major obstacle to the structuring of this highly innovative and beneficial structure. Nevertheless, the discriminatory effects of this condition are also a part of the IFFIm reality and are equally undeniable.

It is difficult to justify purposely denying access to aid to some children, or even to one, for the benefit of giving access to aid to many others. Not having to do it face to face probably helps. Particularly when the gating issue is accounting regulation and when the funds in question are public, not private, the consequences of potentially “artificial” structuring require scrutiny. The fact that other sources of aid may potentially be available to those excluded from IFFIm funding does not mitigate the argument. The funds in question are government funds, not private donations, and as such, their distribution should be held to higher standards of non-discrimination. Would it be legal to deny access to government services to the very poor within the UK, France or Spain, on the theory that “others” would tend to their needs? Do

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<sup>54</sup> Confirmed through several personal communications in 2008; Fitch Ratings (2006), Fitch Ratings (2008), Standard & Poor’s (2006).

<sup>55</sup> CMFB (20 July 2005)

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nations have the obligation to behave similarly on the international stage as they do domestically? Are nations responsible for the extraterritorial effects of their actions?

Before reviewing responsibilities and obligations, the specific effects of IMF conditionality within the IFFIm should be detailed.

### **2.3.2 Three Effects of IMF Conditionality**

IMF conditionality within the IFFIm (Membership, Protracted Arrears, and Payment Conditionality) has several effects: 1) the Membership and Protracted Arrears clauses prohibit the funding of immunization programmes with IFFIm funds to some of the world's poorest nations<sup>56</sup>; 2) Payment Conditionality potentially reduces the total amount of IFFIm funds available to fund immunization programs; and 3) the uncertainty created by the conditionality (however 'artificial') results in rating agencies requiring additional security for bondholders through the Gearing Ratio.

Firstly, the preemptive exclusion of Cuba, North Korea, Liberia, Somalia, Sudan and Zimbabwe (together, the "IFFIm Excluded States" and as a subset, Liberia, Somalia, Sudan and Zimbabwe, together, the "IFFIm Sub-Saharan Excluded States") is mentioned twice in the bond documentation, but is not discussed at all in GAVI's promotional materials. While perhaps Cuba, a High Human Development country ranked No. 51 in the UNDP's 2007/2008 Human Development Report, is not currently in need of immunization aid, the same is unlikely to be true for North Korea<sup>57</sup>. Irrespective of current need, utilizing the IFFIm precedent for future MDG or development funding, as is clearly intended, would perpetuate these exclusions.

By way of context, the IFFIm Sub-Saharan Excluded States have been in an arrears situation that predates the information available on the IMF website<sup>58</sup>. In the case of

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<sup>56</sup> Subsequent sections of this thesis will explore whether the exclusion of the entire population of certain countries given their governments' inability or unwillingness to repay IMF arrears could potentially amount to discrimination based on government viability.

<sup>57</sup> Human Development Report (2007) p.233; North Korea (the Democratic People's Republic of Korea), Liberia and Somalia not ranked given unavailability of reliable data. North Korea's % Population Undernourished (33%) indicates severity of that nation's situation.

<sup>58</sup> <http://www.imf.org/external/np/fin/tad/extdbt1.aspx>.

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Zimbabwe, the country has been in arrears for 'only' 6.5 years, whereas the other nations have been in an arrears situation for at least 20 years. In February 2008, the World Bank and the IMF 'deemed' that Liberia<sup>59</sup> was eligible for debt relief under the enhanced Heavily Indebted Poor Countries (HIPC) initiative<sup>60</sup>. Such announcements signal the commencement of a process (eligibility-decision point-completion point), eligibility only "paves the way for the consideration of the HIPC decision point in the near future and multilateral debt relief going forward."

To date, 32 countries have reached a 'decision point', of which 23 have reached the 'completion point'. As of December 2007, Liberia, Somalia and Sudan had reached the level "Pre-Decision Point Countries"<sup>61</sup> (Zimbabwe has not). While Liberia managed to regulate its relationship to the IMF in March 2008, it did so too late to benefit from the over US\$800 million in IFFIm funds that were disbursed by GAVI during 2007<sup>62</sup>.

While a GAVI eligible country that resolves its arrears situation with the IMF will again become eligible to have IFFIm proceeds fund its approved GAVI programs<sup>63</sup>, the probability of such resolutions taking place in the short to medium term is uncertain at best and improbable at worst (Liberia is now the exception that may prove this rule). Historically, countries spend an average of 7 years in default to the IMF<sup>64</sup>, which is also not ideal, considering that the intention is to issue Notes and disburse funds through 2015. The question remains whether any arrears situations can be resolved before 20 years' worth of immunization aid is "frontloaded" and disbursed to other countries. The severity of this situation would only be compounded, and the exclusion of certain nations from the benefits of international development aid would be even more dramatic, if either the IFF large-scale program

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<sup>59</sup> At February 2008, Liberia had approx. US\$1.5 billion in arrears to the IMF (US\$824 million), the World Bank (US\$474 million) and the African Development Bank (US\$196 million), representing approx. 10x Liberian government revenues. Several donor nations and institutions, including the UK and the US worked to secure financing that would enable Liberia to become current on these accounts. Much of this aid comes in the way of debt relief and other non-sustainable types of aid. DFID (February 2008)

<sup>60</sup> IMF (February 2008)

<sup>61</sup> See <http://www.imf.org/external/np/exr/facts/hipc.htm> for details.

<sup>62</sup> GAVI Alliance (November 2007) p.1.

<sup>63</sup> Confirmed through personal communication (October 2007).

<sup>64</sup> Fitch Ratings (2006) p.8. Median number of years spent in IMF arrears is 4; Fitch uses 6 for its risk analysis.

is launched or if the IFFIm structure is employed for other development projects (such as the aforementioned clean-water bonds).

**Figure 4: Countries in IMF Arrears as of December 31, 2007**

(in SDRs whereby 1SDR = 1.580248 USD)

By Type				
Member	Total	General Dept. (incl.		PRGF-ESF
		SAF)	SDR Dept. /1/	Trust/Trust Fund
Liberia	540,245,257	479,857,435	29,682,492	30,705,330
Somalia	238,300,218	217,019,714	13,213,505	8,066,999
Sudan	1,025,950,385	945,902,604	0	80,047,781
Zimbabwe	88,023,439	0	0	88,023,439
<b>Total</b>	<b>1,892,519,299</b>	<b>1,642,779,753</b>	<b>42,895,997</b>	<b>206,843,549</b>

By Duration						Arrears Since
Member	Total	< 1 year	1-2 years	2-3 years	3+ years	
Liberia	540,245,257	12,970,698	11,527,467	8,362,469	507,384,623	~ 1986
Somalia	238,300,218	6,386,744	5,660,633	4,105,233	222,147,608	~ 1986
Sudan	1,025,950,385	14,707,366	14,680,250	11,484,579	985,078,190	~ 1986
Zimbabwe	88,023,439	3,435,748	2,843,420	5,419,421	76,324,850	Aug-2001
<b>Total</b>	<b>1,892,519,299</b>	<b>37,500,556</b>	<b>34,711,770</b>	<b>29,371,702</b>	<b>1,790,935,271</b>	

/1/ Includes assessments levied for purpose of reimbursing the General Department under Article XVI, Section 2

/2/ Source IMF and Fitch Ratings report 04 September 2006 at p.8

Secondly, the Payment Conditionality condition has the additional negative repercussion that in the time of one country's economic emergency or government truancy (leading to a protracted arrears situation for that government), not only would children living in that nation no longer be eligible for IFFIm funded vaccination programs, but the funds available to all of the other eligible countries would also be reduced. In traditional financing instruments, where investments made in a specific country or region are expected to yield a certain return, and if they cease to do so, additional investments in that country may be curtailed, such clauses mitigate certain risks. However, in the case of the IFFIm, where "return" is measured in number of lives saved, exposure-weighted and pro-rata reductions of commitments seem anathema to the purpose of the IFFIm itself.

Thirdly, the rating agencies become very focused on the transfer of risk to bondholders that is created through the IMF conditionality. Fitch notes both the



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“political risk” and the fact that “the size of the commitments from donor countries is conditional on the recipient countries honouring their financial obligations to the IMF”<sup>65</sup> and devotes significant portions of its analysis to determining the likelihood and impact of these risks. S&P focuses only on the risk that has been created within the structure through the addition of the IMF Protracted Arrears clause. In essence, if all countries eligible for funding go into IMF protracted arrears, Donor Countries would not have to make any payments under their grant agreements and purchasers of the Notes would not be repaid. This risk then requires a mitigant, which in the case of the IFFIm structure is the Gearing Ratio Limit. In order to provide a safety margin for bondholders, approximately 30% of the funds received from Donor Countries which could be used for immunization programs are set aside for the comfort of bondholders<sup>66</sup>.

Arguably, through the IFFIm structure, not only is structural risk created that could potentially work at cross-purposes with the intended goals of GAVI and the IFFIm, but the mitigant to that created risk also substantially reduces the amount of funds available for immunization programs. In practical terms, 30% of the first Notes issuance totals US\$300 million, or more than twice what was allocated during 2007 by GAVI for funding the measles vaccines that immunized 194 million children in 32 countries. The question is whether there is a better use for that US\$300 million than serving as a buffer to compensate for the ‘artificial’ uncertainty created by the IMF conditionality itself.

In the section that follows, the underlying intent of the parties involved in the IFFIm will be reviewed. The human rights related implications of this intent, given Donor Country obligations, will be examined subsequently.

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<sup>65</sup> Fitch Ratings (2006) p.7: “... a donor country might conceivably re-consider its commitments if one or more of the recipient countries became a ‘rogue’ state unworthy of ongoing support.”

<sup>66</sup> Standard & Poor’s (2006) p.9.

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### **3. Content: Perspectives on Motivation, Intent & Expectations**

When considering the topic of aid in general, much has been written and debated about the underlying concerns and motivations of donors as well as the expectations and obligations of recipients. While a significant portion of aid is arguably given only to further the strategic, political, religious, economic, and commercial interests of donors, a certain percentage of aid is given as a result of humanitarian, ethical or moral imperatives<sup>67</sup>. In the case of the IFFIm, and based on the press releases and public statements made by representatives of each of the participants relating to the mechanism, it seems clear that the underlying intent in both the structuring and execution of this structure can be placed in the latter category.

Nevertheless, conversations with individuals involved in the structuring and execution of the IFFIm confirm that discussions regarding this conditionality were held “at the highest government levels” and that “in the case of Liberia, Somalia, Sudan and Zimbabwe, there is no practical chance of them benefitting [sp.] at the moment - they were in arrears at the start of the programme, and everyone was aware of that.”<sup>68</sup> Understanding the juxtaposition of this knowledge with the stated intent of the parties involved is the purpose of this section.

#### ***3.1 Underlying Intent of Donor Countries***

This section will focus principally on the United Kingdom given its pivotal role. Already in early 2003, UK Chancellor of the Exchequer Gordon Brown presented a proposal for a broader, larger International Finance Facility (IFF) at the G-7 Meetings in Paris (February 2003) and Washington, D.C. (IMF-World Bank Spring Meetings, April 2003)<sup>69</sup>. This joint initiative of the UK’s Treasury Department and its Department

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<sup>67</sup> Riddell (1996).

<sup>68</sup> From verbal and written personal communications held 15 May 2008 and 24 October 2007, respectively.

<sup>69</sup> Mavrotas (2003).

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for International Development (DFID)<sup>70</sup> was specifically intended to “exploit techniques for securitization in the capital markets as an innovative source for generating funds necessary for the achievement of MDGs”<sup>71</sup>. It should also be noted that already in 2003, the government of France was on the record as fully supporting the initiative, while other donors were considering the feasibility of the structure primarily on the basis of whether such long term legally binding commitments were possible under their respective constitutions (an issue that has inhibited German and possibly also U.S. participation in the IFFIm), and whether such frontloaded aid amounts could be effectively absorbed.<sup>72</sup>

### 3.1.1 Intent Regarding Development-Related Aid Generally

In determining the UK’s underlying intent in relation to the IFFIm, as well as to aid policies in general, the following statements are telling:

On the IFFIm at the time of its launch (underlining added)<sup>73</sup>:

*"Today's launch of the International Finance Facility for Immunisation - IFFIm - will help poor children in the developing world get the vaccines that children in the developed world take for granted."* Hilary Benn (Secretary of State for DFID).

*"Today, by matching the capacity of medical advance with the power of long-term finance we are launching an initiative capable of saving ten million lives - sparing millions of families across the world from the avoidable pain of a son or a daughter needlessly dying."* Gordon Brown (UK Chancellor of the Exchequer).

On development aid, the UK aid budget, debt relief and innovative financing, respectively (underlining added):<sup>74</sup>

*The Government aims to promote UK economic prospects by pursuing increased productivity and efficiency in the EU, international financial stability and increased global prosperity, including especially protecting the most vulnerable.*

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<sup>70</sup> The DFID “is the part of the UK Government that manages Britain’s aid to poor countries and works to get rid of extreme poverty”. See <http://www.dfid.gov.uk>.

<sup>71</sup> Mavrotas (2003) p.1.

<sup>72</sup> United Nations – Financing for Development (2003).

<sup>73</sup> IFFIm Press Release (September 2005)

<sup>74</sup> UK Treasury’s website. Accessed intermittently February-May 2008.

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*Tackling global poverty remains a key priority for the UK Government, as demonstrated at the 2007 Comprehensive Spending Review (CSR07), which announced significant increases to the Department of International Development's (DFID) budget.*

*The Government supports the full financing and swift implementation of both the Heavily Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief Initiative (MDRI). Together, HIPC and MDRI are expected over time to deliver over US \$100 billion of debt relief to the World's poorest countries.*

*The Government's aim is to ensure that no country committed to poverty reduction and good governance should be denied the opportunity of pursuing this goal through lack of resources. Innovative financing mechanisms are needed to help deliver and bring forward the financing urgently needed to achieve the MDGs.*

*We believe that debt relief should be provided on the basis of a country's economic situation rather than on their history of poor or corrupt governance. Many countries that have a history of poor governance are now middle-income countries ... Unpayable debts should not hinder the poorest countries from making progress towards the Millennium Development Goals.<sup>75</sup>*

When answering the question "Why is the UK Government involved in development?" (underlining added):

*In a world of growing wealth, such levels of human suffering and wasted potential are not only morally wrong, they are also against our own interests. We are becoming much closer to people in faraway countries. We trade more and more with people around the world. Many of the problems which affect us, such as war and conflict, international crime, refugees, the trade in illegal drugs and the spread of diseases like HIV and AIDS, are caused or made worse by poverty in developing countries. Getting rid of poverty will make for a better world for everybody.<sup>76</sup>*

From these statements, it appears that the UK links its development assistance to a moral imperative, the global impetus behind the Millennium Development Goals, and its own interests, including national security and immigration, as well as its international standing as a generous, aid-giving nation. While the UK (and other European nations) may arguably also have a historical imperative obligation to fulfill vis-à-vis its former colonies and territories, this topic is not addressed. The

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<sup>75</sup> Alexander (January 2008).

<sup>76</sup> DFID website. Accessed intermittently February-May 2008.

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preponderance of statements are targeted broadly on highly sympathetic topics: poverty reduction, saving the lives of children, improving living conditions for other human beings in the most disadvantaged nations, and similar.

A review of intents expressed by other Donor Countries reveals broadly the same intent, and nowhere is a differentiation drawn between children who reside in nations which have regularized relationships with the IMF and those who do not.

### **3.1.2 Intent Regarding Aid to IFFIm Excluded States<sup>77</sup>**

In terms of actual flows of overseas development aid (ODA) from IFFIm Donor Countries, it should be noted that: 1) several of the Donor Countries are and have been aid providers to the IFFIm Excluded States outside the IFFIm structure; and 2) several of the Donor Countries are aid providers to GAVI directly, outside the IFFIm structure. These two facts, reviewed in detail below, contradict the assumption that IFFIm Donor Countries would refuse to fund aid programs in countries with poor governance. Not only have they done so bi- and multi-laterally, but they have done so through GAVI, which has funded programs in most of the IFFIm Excluded States. Importantly, project execution and monitoring is the same for all GAVI programs, irrespective of funding source<sup>78</sup>.

With the exception of France and Spain, each of the IFFIm Donor Countries has been an aid provider to at least one IFFIm Sub-Saharan Excluded State. Taking the United Kingdom specifically, and given its level of activity particularly in the IFFIm Sub-Saharan Excluded States, one can hardly conclude that the DFID or the British government are reticent to give aid to these countries or that UK ODA is typically dependent on a “high level test” linked to IMF dues. While it is clear that the UK (and

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<sup>77</sup> All quantitative information in this section, unless otherwise noted, is sourced from OECD (DCD-DAC) 2007.

<sup>78</sup> Sources of funding for GAVI include IFFIm, Advanced Market Commitments (AMCs) for guaranteeing purchase volumes of new vaccine products at agreed prices over a period of time, and direct funding from donor governments. Nevertheless, IFFIm funds represent over 50% of GAVI’s funds. GAVI has non-government sources of funding as well, including approx. US\$2 billion from the Bill & Melinda Gates Foundation, US\$8 million from private donations (philanthropists, foundations and individual donors) as well as a recent EUR4 million grant from La Caixa Foundation announced on 15 February 2008. (La Caixa is the largest savings bank in Spain, and its EUR500 million per annum foundation is Spain’s largest corporate foundation, Europe’s second-largest and ranks 5<sup>th</sup> worldwide). Source: GAVI Alliance website.

probably other IFFIm Donor Country governments) are reticent to provide aid directly to the governments of certain nations for fear of mismanagement of funds or corruption, it is equally clear that aid channelled through non-governmental, UN agencies or other channels is common. This multi-pronged approach to aid (i.e., not directly through government channels) is fundamentally similar to the method that GAVI uses in carrying out its own projects (see section titled *GAVI Oversight & Governance*, as well as Annex I for more information).

**Figure 5: Major Recipients of Individual DAC Members' Aid**<sup>79</sup>  
Gross disbursements as a % of total ODA (highlighting added)

Italy				Norway							
1985-86		1995-96		1985-86		1995-96		2005-06			
Ethiopia	6.7	Mozambique	5.0	Iraq	15.5	Tanzania	8.5	Tanzania	4.2	Sudan	3.6
Somalia	6.2	Ethiopia	4.4	Nigeria	13.9	Bangladesh	4.8	Mozambique	4.1	Palestinian Adm. Areas	2.8
Sudan	4.5	Bosnia-Herzegovina	2.5	Ethiopia	2.1	Mozambique	3.9	Palestinian Adm. Areas	3.5	Tanzania	2.4
Mozambique	2.4	Morocco	2.3	Serbia	1.6	Kenya	3.8	Bangladesh	3.2	Mozambique	2.3
Pakistan	2.0	Malta	1.7	China	1.1	India	3.5	Bosnia-Herzegovina	3.1	Afghanistan	2.3
Tanzania	1.8	Jordan	1.6	Congo, Rep.	1.1	Zambia	3.3	Zambia	2.6	Zambia	2.0
Tunisia	1.8	Argentina	1.4	Nicaragua	0.9	Pakistan	1.8	Angola	2.1	Sri Lanka	1.8
Chad	1.4	Congo, Rep.	1.1	Tunisia	0.8	Zimbabwe	1.8	Nicaragua	2.0	Pakistan	1.8
Turkey	1.4	Egypt	1.1	Cameroon	0.7	Botswana	1.7	Sri Lanka	1.8	Malawi	1.7
Angola	1.4	Algeria	1.0	Afghanistan	0.6	Sri Lanka	1.6	Ethiopia	1.8	Uganda	1.7
Senegal	1.3	Eritrea	1.0	Morocco	0.6	Ethiopia	1.6	States Ex-Yugoslavia	1.6	Ethiopia	1.4
China	1.3	Guinea-Bissau	1.0	Argentina	0.6	Sudan	1.2	Uganda	1.6	Serbia	1.2
India	1.3	Albania	0.9	Zambia	0.6	Nicaragua	1.2	Rwanda	1.6	Somalia	1.1
Cape Verde	1.3	Brazil	0.8	Mozambique	0.6	Madagascar	0.6	Zimbabwe	1.5	Indonesia	1.0
Uganda	1.2	Tunisia	0.8	Madagascar	0.6	China	0.6	Indonesia	1.4	Bangladesh	0.9
<b>Total above</b>	<b>35.8</b>	<b>Total above</b>	<b>26.7</b>	<b>Total above</b>	<b>41.4</b>	<b>Total above</b>	<b>39.9</b>	<b>Total above</b>	<b>36.0</b>	<b>Total above</b>	<b>27.9</b>

Sweden				United Kingdom							
1985-86		1995-96		1985-86		1995-96		2005-06			
Tanzania	8.0	Mozambique	3.1	Iraq	4.0	India	9.9	India	5.2	Nigeria	22.2
India	6.3	Tanzania	3.0	Tanzania	2.8	Bangladesh	3.1	Zambia	2.3	Iraq	6.3
Mozambique	5.3	India	2.8	Mozambique	2.3	Sudan	2.6	Bangladesh	2.3	India	4.2
Viet Nam	5.2	Nicaragua	2.2	Uganda	1.5	Kenya	2.5	Uganda	2.1	Afghanistan	1.9
Zambia	3.5	Viet Nam	2.2	Ethiopia	1.5	Malaysia	2.4	Malawi	2.1	Tanzania	1.8
Ethiopia	3.1	Ethiopia	2.1	Kenya	1.3	Zambia	2.0	Pakistan	1.8	Sudan	1.7
Sri Lanka	3.0	Bosnia-Herzegovina	1.8	Sudan	1.3	Indonesia	1.5	States Ex-Yugoslavia	1.6	Bangladesh	1.6
Zimbabwe	2.3	Zimbabwe	1.8	Afghanistan	1.2	Pakistan	1.5	Indonesia	1.6	Pakistan	1.3
Bangladesh	2.0	Zambia	1.7	Palestinian Adm. Areas	1.2	Ethiopia	1.4	China	1.6	Ghana	1.2
Kenya	1.8	Iraq	1.7	Bosnia-Herzegovina	1.2	Gibraltar	1.4	Tanzania	1.5	Malawi	1.1
Angola	1.7	Angola	1.7	Viet Nam	1.2	Egypt	1.4	Kenya	1.2	Serbia	1.1
Nicaragua	1.6	Uganda	1.6	Zambia	1.1	Ghana	1.2	Zimbabwe	1.1	Uganda	1.1
Botswana	1.2	Bangladesh	1.5	Nicaragua	1.1	Zimbabwe	1.2	Mozambique	1.1	Zambia	1.0
Guinea-Bissau	1.0	South Africa	1.4	Serbia	1.1	Tanzania	1.2	Ghana	0.9	Ethiopia	1.0
China	0.9	Palestinian Adm. Areas	1.2	Sri Lanka	1.0	Malawi	1.0	Ethiopia	0.9	Congo, Dem. Rep.	0.9
<b>Total above</b>	<b>47.0</b>	<b>Total above</b>	<b>29.7</b>	<b>Total above</b>	<b>23.7</b>	<b>Total above</b>	<b>34.3</b>	<b>Total above</b>	<b>27.4</b>	<b>Total above</b>	<b>48.6</b>

There is an important discrepancy between tables listing the main recipients of bilateral aid from IFFIm Donor Countries, and tables listing the top ten donors to IFFIm Excluded States shown below. Although some recipient countries do not rank in the top fifteen aid recipients from the Donor Country perspective, every single

<sup>79</sup> OECD (DCD-DAC) 2007 Table 32.

Donor Country appears at least once as a top ten aid provider for the IFFIm Excluded States (no data on North Korea was available).

For example, a DFID profile states “Historically, DFID has not been a major donor to Liberia”. From the tables below, it would be more exact to say that Liberia has not been a major destination for DFID aid, since, from the perspective of Liberia, the United Kingdom has been a major donor indeed.

**Figure 6: Top Ten Donors of Gross ODA (2004-2005 Average)**

USD millions (source: OECD, World Bank at www.oecd.org/dac)

Liberia		Somalia		Sudan		Zimbabwe		Cuba	
1 United States	96	1 EC	46	1 United States	575	1 WFP	61	1 Spain	16
2 EC	42	2 United States	34	2 United Kingdom	157	2 United Kingdom	48	2 United States	10
3 Sweden	14	3 Norway	33	3 EC	141	3 EC	44	3 Canada	8
4 United Kingdom	12	4 Netherlands	17	4 Netherlands	126	4 United States	32	4 United Kingdom	8
5 Norway	9	5 Italy	14	5 Norway	78	5 Germany	15	5 Arab Agencies	6
6 Netherlands	8	6 Sweden	13	6 Germany	47	6 Sweden	14	6 Global Fund (GATF)	5
7 UNHCR	7	7 United Kingdom	11	7 Sweden	36	7 Netherlands	13	7 Switzerland	5
8 Global Fund (GFATM)	7	8 Global Fund (GFATM)	8	8 Arab Agencies	28	8 Canada	11	8 Japan	5
9 Germany	6	9 UNICEF	6	9 WFP	27	9 Norway	11	9 France	4
10 UNDP	5	10 UNDP	6	10 Canada	24	10 Denmark	6	10 EC	3

Note: '06 UK aid est. GBP10m (approx. USD18m), up 54% from 2004-05 figure above

Note: '07 UK aid est. GBP21m (approx. USD42m), up 282% from 2004-05 figure above

Note: '07 UK aid est. GBP114m (approx. USD228m), up 45% from 2004-05 figure above

Note: '07 UK aid est. GBP40m (approx. USD80m), up 67% from 2004-05 figure above

What follows is a more detailed review of Great Britain’s recent aid activities in the IFFIm Sub-Saharan Excluded States (no country profiles on Cuba or North Korea were available from the DFID)<sup>80</sup>.

On Liberia: From 2003 through 2006, DFID provided GBP22 million to Liberia, (GBP16 million in humanitarian assistance). DFID plays a supporting role, channelling aid mostly through multilateral arrangements. In a response to a communication sent by the *Children Can’t Wait* campaign on debt relief in Liberia, Hilary Benn (DFID Secretary of State) responded on behalf of himself and of Gordon Brown by stating “Liberia’s arrears to the main international financial institutions have to be cleared up before it can receive aid under the HIPC (debt relief initiative), but Liberia will not be expected to clear the arrears itself”.

Further, Mr. Benn states that the UK has an increased commitment to Liberia,

<sup>80</sup> See <http://www.dfid.gov.uk/countries/allcountries.asp> for a review of the countries which as of the writing of this paper receive funding from DFID – either directly or through multilateral agencies. All information referred to below is sourced from the Country Factsheets available on the DFID website.

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and *“are giving priority to the health sector.”*<sup>81</sup> In February 2008, the UK contributed GBP20 million towards the clearing of Liberia’s long term arrears.

On Somalia: DFID notes significantly increased aid (from GBP3.1 million in 2002/2003 to GBP21 million in 2007/2008 budget) and that it is working closely with other donors and UN agencies.

On Sudan: DFID has Khartoum office as of July 2006, which takes the lead in development and humanitarian work and works together with the British Embassy in Sudan. In addition, a Joint Donor Team (involving the UK, Netherlands, Norway, Sweden, Denmark and Canada) was established in May 2006. *“None of the substantial development and humanitarian assistance that HMG [Her Majesty’s Government] provided to Sudan over the last 12 months went directly to the government of Sudan”*<sup>82</sup>.

On Zimbabwe: DFID does not provide direct funding to the government of Zimbabwe, but channels aid through UN agencies and Non-Governmental Organizations (NGOs). Focus in the region is support of the poorest and most vulnerable, with priority on HIV/AIDS and reducing food insecurity. In February 2008, the UK government announced it was providing GBP5 million in emergency support for medicines and medical supplies in order to *“ensure that the poorest and most vulnerable Zimbabweans are able to access the vital medicines that they require”*. This Emergency Vital Medicines Support aid would be managed by UNICEF to *“ensure that the money does not pass to the government of Zimbabwe.”*<sup>83</sup>

As in the case of the UK, DAC donors in general respond to the crisis situations of fragile states with increased aid (Liberia, Somalia, Sudan and Zimbabwe are all

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<sup>81</sup> Benn (March 2007).

<sup>82</sup> UK Parliament on 11 December 2006. Daily Hansard – Written Answers. Column 761W. See <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm061211/text/61211w0009.htm>.

<sup>83</sup> Alexander (February 2008).





**Figure 8: Commitments of Donor Countries to IFFIm as of January 2008<sup>86</sup>**

In millions USD, using average 2006 FX (as per Federal Reserve Bank of New York)

GAVI Funding Sources						
Country	IFFIm		GAVI		AMC	TOTAL
		through	Direct	through		
UK	2,544	2026	116	2008	485	3,144
France	1,558	2026	19	2006	-	1,576
Italy	595	2026	-	-	635	1,230
Spain	238	2026	-	-	-	238
Sweden	37	2021	67	2008	-	104
Norway	27	2011	1,000	2015	50	1,077
Brazil	20	2026	-	-	-	20
South Africa	20	2026	-	-	-	20
SubTotal	\$ 5,039		\$ 1,201		\$ 1,170	7,410
% of Gov't	68.0%		16.2%		15.8%	
% of Total	53.5%		12.7%		12.4%	78.6%
Non-Gov't			\$ 2,013			2,013
					<b>TOTAL</b>	<b>9,423</b>

### 3.1.4 Conclusions Regarding the Intentions of Donor Countries

IFFIm Donor Countries have provided development aid, humanitarian assistance, debt relief and technical assistance to at a minimum the IFFIm Sub-Saharan Excluded States, with documented aid flows also to Cuba. Nothing would indicate that Donor Countries' intent when participating in the IFFIm is dissimilar to general intent and actions as members of the DAC.

Despite statements made at the Oslo Innovative Finance meeting (referenced above), the IMF Protracted Arrears "high-level test" condition cannot be credibly cited in connection with the willingness or ability of Donor Country governments, acting either bilaterally or multilaterally, to provide aid and assistance to the IFFIm Excluded States. Against this background, accounting classification requirements imposed by Eurostat emerge as the primary reason for the Programme's IMF conditionality.

Should Donor Countries (or others who join the IFFIm at a later date) decide to channel all or most of their vaccination or health-related assistance through the IFFIm, countries which in the past have been recipients and depend substantially on these

<sup>86</sup> GAVI Alliance website.

countries' aid flows could suffer drastic reductions in aid from their top donors. Should a similarly conditioned structure be used to finance other development or MDG-related initiatives, the "aid orphan"<sup>87</sup> status of IFFIm Excluded States would be compounded.

### 3.2 Underlying Intent of GAVI and Partners

In GAVI's informational and promotional materials, focus is on its mission to "save children's lives and protect people's health by increasing access to immunization in poor countries." GAVI's list of eligible countries includes all of the IFFIm Excluded States<sup>88</sup>:

Figure 9: GAVI Alliance Country Groups and Corresponding Co-Financing Policies<sup>89</sup>

GAVI Alliance country groups and corresponding co-financing policies			
Group <sup>a</sup>	Country	Definition <sup>b</sup>	Co-financing policy
<b>Poorest</b>	Bangladesh, Benin, Bhutan, Burkina Faso, Cambodia, Chad, Comoros, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lao People's Democratic Republic, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, United Republic of Tanzania, Togo, Uganda, Yemen, Zambia	<ul style="list-style-type: none"> <li>- Latest GNI under US\$ 1,000 per capita.</li> <li>- Classified by the United Nations as a LDC country.</li> </ul>	<ul style="list-style-type: none"> <li>- Until 2010, all countries will pay a minimum fixed co-financing amount per dose of the chosen vaccine.</li> <li>- This amount will increase after 2010, depending on the estimated future price of the chosen vaccine.</li> </ul>
<b>Intermediate</b>	Cuba, Ghana, India, Kenya, Democratic People's Republic of Korea, Kyrgyzstan, Republic of Moldova, Mongolia, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Tajikistan, Uzbekistan, Viet Nam, Zimbabwe	<ul style="list-style-type: none"> <li>- Latest GNI under US\$ 1,000 per capita.</li> <li>- Not classified by the United Nations as a LDC country.</li> </ul>	<ul style="list-style-type: none"> <li>- Until 2010, all countries will pay a minimum fixed co-financing amount per dose of the chosen vaccine.</li> <li>- This amount will increase after 2010, depending on the estimated future price of the chosen vaccine.</li> <li>- The minimum co-financing level will be higher than that of the poorest group.</li> </ul>
<b>Least poor</b>	Armenia, Azerbaijan, Bolivia, Cameroon, Djibouti, Georgia, Guyana, Honduras, Indonesia, Kiribati, Sri Lanka, Ukraine	<ul style="list-style-type: none"> <li>- Latest GNI over US\$ 1,000 per capita.</li> <li>- All countries will pay a co-financing amount that gradually increases towards a target in 2015, consistent with the estimated future price of the chosen vaccine.</li> </ul>	<ul style="list-style-type: none"> <li>- The minimum co-financing levels will start at a level higher than that of the intermediate group co-payment level.</li> </ul>
<b>Fragile</b>	Afghanistan, Angola, Burundi, Central African Republic, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Eritrea, Haiti, Liberia, Sierra Leone, Somalia, Sudan, Timor-Leste	<ul style="list-style-type: none"> <li>- GAVI Alliance eligible country meeting the GAVI Alliance fragile state criteria.</li> <li>- Until 2010, all countries will pay a fixed co-financing amount per dose of the chosen vaccine, but with flexible payment terms.</li> </ul>	<ul style="list-style-type: none"> <li>- This amount will increase after 2010, depending on the estimated future price of the chosen vaccine.</li> <li>- The minimum co-financing level will be lower than that of the poorest group.</li> </ul>

GNI gross national income  
LDC least developed country

<sup>a</sup> Designation of countries by GAVI group as of November 2007.

<sup>b</sup> The United Nations classification for "least developed countries (LDC)" is based upon three criteria: 1) low-income criterion; 2) human resource weakness criterion; and 3) economic vulnerability criterion. The criteria (and the countries) are re-evaluated every three years. GAVI defines fragile states as countries eligible for international development aid post-conflict allocation and countries in conflict.

<sup>87</sup> OECD (April 2007).

<sup>88</sup> GAVI Alliance (2008) p.37. Importantly, internal documents regarding the selection of GAVI's domicile notes that a US domicile would restrict potential recipient countries given the US Trading with the Enemy Act.

<sup>89</sup> WIDER discussion paper No.2007/01 also lists "Top Priority" MDG 4 countries, including Liberia, Somalia, Sudan and Zimbabwe; "High Priority" countries include North Korea.

Although GAVI has not approved any programs to date in Somalia or Sudan, programs have been approved in the other IFFIm Excluded States.<sup>90</sup> Given the IFFIm's critical importance for funding prevention of several major diseases (it represented fully 80% of the total amount of funding for measles prevention available to high-burden countries in 2007, and 90% of the global amount available for mother and neonatal tetanus)<sup>91</sup>, the IFFIm Excluded States may suffer a significant disadvantage in these areas.

**Figure 10: GAVI Programs in IFFIm Excluded States<sup>92</sup>**

GAVI Programs / Most Recent Board Approval Dates					
Country	ISS	NVS	INS	HSS	CSO
Cuba	-	-	01-Jun-05	-	-
North Korea	01-Jun-02	01-Jun-02	-	01-Feb-07	-
Liberia	01-Nov-07	12-May-07	01-Nov-05	12-May-07	-
Somalia	-	-	-	-	-
Sudan	-	-	-	-	-
Zimbabwe	01-Mar-01	07-Feb-07	-	-	-

It bears repeating that the US\$836 million of IFFIm funds that GAVI disbursed by year-end 2007 were destined for strengthening health systems (9%), pentavalent (five in one) combination vaccines (22%), vaccinating against polio (23%), measles (17%), maternal and neonatal tetanus (5%), and other GAVI programs (26%)<sup>93</sup>. None of these programs were able to be carried out in the IFFIm Excluded States with IFFIm funds, though it is clear that excluding these countries is not the goal of the GAVI organization.

High level representatives of the many GAVI partners, as well as internationally recognized health, human welfare and human rights luminaries are members of the numerous Boards, Committees, Working Groups and Task Teams that focus on the

<sup>90</sup> GAVI Alliance website at [http://www.gavialliance.org/performance/country\\_results/index.php](http://www.gavialliance.org/performance/country_results/index.php)

<sup>91</sup> GAVI 2008 Handbook

<sup>92</sup> GAVI Alliance website. Accessed February 2008

<sup>93</sup> GAVI Alliance and The World Bank (2007).

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governance and execution of GAVI's strategy<sup>94</sup>. The efforts of all of these individuals are based on a good faith effort that can best be summarized by Bill Gates' statements at the IFFIm launch in November 2006 (emphasis added)<sup>95</sup>:

*The commitments announced today provide a major boost to GAVI's work to ensure that all children - no matter where they are born - have access to lifesaving vaccines. The IFFIm will provide major new resources for GAVI to extend the reach of its programs. These funds are urgently needed - it's unacceptable that each year, 27 million children go without immunizations that are taken for granted in rich countries. The IFFIm is a bold and innovative approach to financing critical global health programs.*

### **3.3 Underlying Intent of Financial and Legal Advisors**

Structuring a capital markets transaction typically requires thousands of hours of effort from a large number of advisors, principally financial and legal, over the course of weeks or months. In the case of new or innovative structures, this effort can extend to years. For the IFFIm, including the time it took Gordon Brown's advisors to design a preliminary structure (a process which began in 2002) to the time the first Notes were issued under the Programme in November 2006, close to 5 years of effort had been invested into the design of the structure. This effort included the capital markets, structuring, investor sales and internal legal teams within the investment banks that managed/co-managed the transaction<sup>96</sup>, IFAs involved as trustees, paying and transfer agents<sup>97</sup>, and what was likely a full battery of specialized legal professionals<sup>98</sup>,

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<sup>94</sup> Current GAVI Fund Board Members include: Graça Machel (Chair), Nelson Mandela, Dr. Mary Robinson, Her Majesty Queen Rania Al-Abdullah of Jordan, Dr. Julian Lob-Levyt, Wayne Berson, George Bickerstaff, Dwight L. Bush, Uffe Ellemann-Jensen, Ashutosh Garg, Allan C. Golston, Dagfinn Høybråten, Jean-Louis Sarbib, Prof. Rita Süßmuth, and George Wellde. There are numerous boards within GAVI. See <http://www.gavialliance.org/about/governance/boards/index.php>

<sup>95</sup> IFFIm Press Release (September 2005).

<sup>96</sup> Joint Lead Managers: Goldman Sachs International and Deutsche Bank; Co-Lead Managers: Barclays Capital, Citigroup, HSBC, Morgan Stanley, BNP Paribas, Dresdner Kleinwort, JPMorgan Cazenove, UBS Investment Bank. IFFIm Offering Memorandum cover.

<sup>97</sup> Citigroup (through Citicorp and Citibank London) and Dexia Banque (Luxembourg). Ibid. p. last unnumbered.

<sup>98</sup> Linklaters (advising GAVI), Slaughter and May (advising the IFFIm), and Allen & Overy LLP (advising Goldman Sachs and the other financial actors involved). Ibid. p. last unnumbered.

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consultants, independent advisors and rating agency analysts<sup>99</sup> (together, “IFFIm Financial and Legal Advisors”).

It is impossible to fully understand the true intent of all of these parties, either as individuals or as a group. Judging from comments made publicly and from the goal and success-oriented mentality that typically characterizes these professionals, the argument is put forth that their concern for improving the access to vaccines for the world’s poor was likely significantly tempered by an overriding desire to structure a viable and successful capital markets instrument. This definition of success is likely centred on the “marketability” or attractiveness of the structure to bond investors<sup>100</sup>. The measure of this success was investors’ decision to take US\$1 billion in hand and purchase the IFFIm Notes during the first few days after the launch of the transaction in November 2006. The following quote bolsters this view (emphasis added):

*The recent IFFIm transaction is a perfect example of how the capital markets can be tapped for the public good. Everyone involved in the IFFIm initiative believed passionately in what we wanted to achieve. It was a real challenge to create a structure appropriate for the donor governments and attractive to the market, but the outcome speaks for itself, and we are extremely proud to have been part of it.<sup>101</sup> – Michael Sherwood, Co-Chief of Goldman Sachs International*

IFFIm Financial and Legal Advisors also had to contend with the issue with which most capital markets investors require the greatest amount of comfort: new issuers. In this case, not only was the IFFIm structure a true innovation without precedent, but GAVI as the central operating entity of the IFFIm, despite its solid track record of operating performance since 2000, was unknown in the capital markets.

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<sup>99</sup> Standard & Poor’s (“S&P”), Fitch Ratings (“Fitch”), Moody’s Investor Services (“Moody’s”).

<sup>100</sup> Although it is likely that the IFFIm Financial and Legal Advisors considered that some amount of Notes would be purchased by non-IFAs, their principal focus was surely to meet the requirements/demands of investors whose overwhelming daily concern is achieving the ideal balance of risk and (financial) reward. Whether this risk/reward balance is best achieved through “Vaccine” bonds, or bonds whose funds are destined to expand cement plants is likely to be of secondary importance, though a good “story” is always helpful in marketing.

<sup>101</sup> GAVI Alliance web article on website.

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This confluence of novelty required a delicate balance between fulfilling Eurostat's requirements for government accounting purposes, AAA ratings, attractiveness to bondholders, and the lowest possible funding costs: by no means an easy task.

IFFIm Financial and Legal advisers sought to enhance all aspects of the Notes: attractive coupon (purchasing what is essentially the diversified if somewhat tainted risk of six highly-rated sovereign credits at a coupon rate that is slightly higher than the rate a bond investor would achieve by purchasing the straight sovereign bonds<sup>102</sup>), attractive rating (securing the participation of The World Bank, a AAA-rated entity with significant experience and international recognition<sup>103</sup>), visible risk mitigation structures (IMF-related conditionality provides credit enhancement to the part of the risk that results from recipient countries, since defaults to the IMF are expected by rating agencies to occur less frequently than standard sovereign defaults<sup>104</sup>) and, lastly, attractive story (compelling use of proceeds).

With the current structure, the IFFIm Financial and Legal advisors achieved all of the structural requirements: 1) enough uncertainty was introduced to prevent 20 year's worth of pledges from being reflected in Donor Countries' 2006 fiscal budgets; 2) rating agencies awarded the structure the required AAA rating; 3) the Notes were priced extraordinarily efficiently<sup>105</sup>, striking virtually a perfect balance between achieving attractive rates for investors and low funding costs for the IFFIm; and 4) an unprecedented and highly innovative long-term funding source for international development aid was created and successfully launched.

The fact that only a few countries had to be excluded from benefiting from these funds was a necessary result, a 'collateral damage', without which the benefits of the structure for many millions of others would not have been possible. Realistically, it is

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<sup>102</sup> At issuance, all Donor Countries were AAA rated, except Italy (AA-). The ratings of the UK, as largest lender, and now France are of particular relevance. Fitch Ratings (2008) pp.1, 2.

<sup>103</sup> Fitch Ratings (2008) p.1, 5 highlighting The World Bank's efficiency and quality as both Treasury Manager and IFFIm derivative counterparty.

<sup>104</sup> Personal communications. Fitch Ratings (2008) p.5.

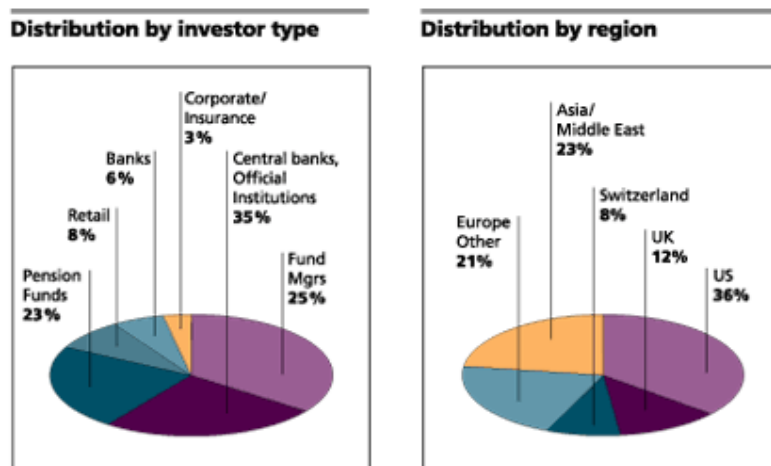
<sup>105</sup> Personal communications indicate that the Notes were priced only approx. 20 basis points wider than the comparably weighted sovereign spreads of the Donor Countries over LIBOR at the time of issuance.

difficult to disagree completely with this view. And yet, one wonders whether extended conversations with Eurostat could have resulted in different or new accounting treatment, or whether in this world of available statistics, another metric could have been found that did not have the same discriminatory effects.

### 3.4 Underlying Intent of IFFIm Noteholders

Investors in the Notes were for the most part IFAs<sup>106</sup>. Because of the regulations under which the Notes were issued, they were available for purchase within the U.S. only to Qualified Institutional Buyers (or QIBs)<sup>107</sup>, which presupposes a high level of wealth and financial sophistication. Outside the U.S., the Notes could be sold to any “non-U.S. persons,”<sup>108</sup>.

Figure 11: Investors in IFFIm Notes by Investor Type and Region<sup>109</sup>



In addition to these institutional IFA investors, and “recognizing this combination of strong moral purpose and the power to raise finance”<sup>110</sup> investors of the Notes included also institutions led by the following: His Holiness Pope Benedict XVI, Her Majesty Queen Rania Al-Abdullah of Jordan, the Archbishop of Canterbury, the UK’s

<sup>106</sup> As of 4 February 2008, the top 12 investors included 7 separate UBS entities (total holdings 3.52% or approx US\$35 million); source: Bloomberg.

<sup>107</sup> U.S. Securities Act of 1933 (as amended) Rule 144A; loosely summarized, either financial institutions or investors with at least US\$100 million invested in securities that are not its own.

<sup>108</sup> As defined under Regulation S of the U.S. Securities Act of 1933 (as amended).

<sup>109</sup> GAVI Alliance and The World Bank (2007).

<sup>110</sup> DFID Press Release (November 2006). Unless otherwise noted, all quotations in this section from same source.



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Chief Rabbi Sir Jonathan Sacks, the Muslim Council of Britain, the Hindu Forum of Britain, the Network of Sikh Organisations, and the entertainers-cum-anti-poverty-campaigners Bono and Bob Geldof, among others (together, “Moral Investors”). The following review of statements made by the Moral Investors underscores the universality of their intentions (emphasis added):

*The Catholic Church consistently shows its deep concern for the needs of all, especially those living in poverty. It is the hope of Pope Benedict that the participation by the Church in this programme will help to inspire others to take the step toward concrete action.*<sup>111</sup> Cardinal Martino, Pontifical Council for Justice and Peace

*This is a humanitarian project of the highest order and deserves the support of all who care for the future of our world. – UK Chief Rabbi, Sir Jonathan Sacks*

*The Muslim Council of Britain welcomes and supports the IFFIm initiative of our Government to provide life saving vaccines to some of the world’s most vulnerable victims: children in developing countries. While the MCB is pleased to be part of the IFFIm, it hopes that further financing structures of similar facilities will become Shariah compliant...[the MCB] will donate all revenue generated from its participation in IFFIm to charitable causes. - Iqbal Khan, the Chairman of the Business and Economics Committee of the Muslim Council of Britain*

*Sikhs everywhere will welcome today’s exciting launch ... to help save the lives of the world’s poorest children. Sikhs will recognise it as a positive and significant move, in line with Guru Nanak’s teaching on the importance of ‘seva’, or service to the less fortunate. In purchasing one of the first bonds, the Network of Sikh Organisations is confident that many Sikh organisations in the UK will follow in supporting this worthy and innovative initiative. - Dr Indarjit Singh, the Director of the Network of Sikh Organizations UK*

A letter by Bono to the IMF’s Managing Director regarding debt relief in Liberia (and Mr. Rato’s response<sup>112</sup>) is testament to Bono’s concern for that nation in particular. It would be difficult to understand that, as an IFFIm investor, he would be in complete agreement with the effects of the IMF ‘high-level test.’

In conclusion, while one could potentially assume that IFA investors in the Notes were motivated purely by the financial risk/reward elements of the IFFIm Notes and

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<sup>111</sup> The Vatican (November 2006).

<sup>112</sup> De Rato (October 2007).

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are perhaps unconcerned with the fate of the people living in the IFFIm Excluded States, this is clearly not the case with Moral Investors. It seems unlikely that Moral Investors would knowingly agree to exclude the poorest of the poor from the benefits of having access to these frontloaded funds. Arguably, the fundamental teachings of every one of these religiously-motivated investors would seek rather to protect those whose situation is most desperate, i.e., those whose governments and economies are so dysfunctional that they are unable to keep current on IMF payments. Although this does not mean that they would not have invested had they been fully aware of the IFFIm's structural conditions (helping the majority of poor children is better than helping none), objections may have been raised based on moral principles, in the same manner as the MCB raised its Sharia-related objections to receiving interest on its purchased Notes.

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#### 4. Content: Participants' Human Rights Obligations

In a globalized world, it is important though difficult to disentangle the effects that an increasingly complex web of relationships and power balances/imbances can have on the realization of human rights of individuals. Many of today's most important (power) relationships do not take place exclusively on the sovereign (State-to-citizen) level, where human rights obligations are relatively clearly enshrined in international law. As discussed in detail in recent work dedicated to human rights and globalization<sup>113</sup>, today's reality of interactions includes actors and stakeholders that operate through and beyond the sovereign nation state: States may be involved in alliances or multi-lateral organizations (such as the European Union or the United Nations, etc.), but the responsibilities of these organizations or their commitment or obligation to *respect, protect and fulfil*<sup>114</sup> human rights are seldom specifically defined.

Interactions affecting the rights of millions of individuals also occur between a particular State and IFIs and IFAs, or directly between international or domestic businesses and private (non-government) individuals. Also, in the case of international humanitarian or other aid, development or poverty-reduction measures, or alternatively, sanctions, embargoes or other extraterritorial actions, these relationships take on an *extraterritorial* character: i.e., they occur directly between a State and non-citizens of that State.<sup>115</sup>

Given that only States are signatories to treaties, covenants and other instruments related to human rights, any duties comprised therein lie with the sovereigns. A surging tide of academic debate suggests that "globalisation has generated a set of new duty bearers in the area of human rights, particularly with reference to economic and social rights in developing countries. ... The new duty-bearers complement the

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<sup>113</sup> See for example Salomon, et al (2007); Salomon (2007); Skogly (2006).

<sup>114</sup> Eide in Eide, et al (2001) p.23.

<sup>115</sup> Skogly (2001) ch.6.

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nation-states acting in their traditional role; they do not displace them.”<sup>116</sup> However, irrespective of who the duty bearers are, rights holders remain the same: individual persons. Whether the rights in question are related to civil, political, economic, social or cultural matters or whether it is children, women or racial minorities that are at issue, it is the effect of others’ actions upon the rights of an individual (or an ethnic group) that are of fundamental importance.

Through the MDGs<sup>117</sup>, the rights contained in many of the international human rights instruments have been synthesized into freedoms and abilities for individuals, and have become the world’s goals through 2015.<sup>118</sup> These goals for development fit well into the evolving concept of what M. Nowak argues is a concept of human development that is no longer “defined as economic growth or industrialisation but as the full realisation of human rights in the broad sense, ie economic, social, cultural, civil and political rights”.<sup>119</sup> This shift in concept from development as defined by macroeconomic indicators to development as an individual’s daily availability of choices and ability to choose is also supported by Martha Nussbaum and Amartya Sen’s freedom-approach to development<sup>120</sup>. Increasingly, development is defined as something closer to the antithesis of poverty, which been defined as “the absence or inadequate realization of certain basic freedoms or human rights, such as the freedom to avoid hunger or disease...”<sup>121</sup>

The nexus of human rights and development involves the IFFIm given its explicit connection to MDGs 4 (child mortality), 5 (maternal health), and 6 (combat disease).<sup>122</sup> Despite this, the concept of human rights or a human rights based approach to development (HRBAD) are completely absent from IFFIm and GAVI materials. Nevertheless, the argument can be made that, given recent and increasing focus on

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<sup>116</sup> Salomon, et al (2007) p.3.

<sup>117</sup> UN Doc. A/Res/55/2 (September 2000)

<sup>118</sup> Nowak’s *The Three Pillars of the United Nations: Security, Development and Human Rights* in Salomon, et al (2007) p.31.

<sup>119</sup> *Ibid.* p.29.

<sup>120</sup> Nussbaum (2000), Sen (1999).

<sup>121</sup> OHCHR (2006).

<sup>122</sup> Offering Memorandum p.6, GAVI Alliance and IFFIm websites.

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the *process and procedures* of development efforts rather than only their *outcomes*<sup>123</sup>, Donor Countries and representatives of GAVI and its partners should have been familiar with the general HRBAD concepts as they relate to poverty reduction<sup>124</sup> (emphasis added):

*As discrimination may cause poverty, poverty also causes discrimination. In addition to their race, colour, gender or social origin, the poor are also subject to discriminatory attitudes by governmental authorities and private actors because they are poor. The twin principles of equality and non-discrimination require States to take special measures to prohibit discrimination against the poor and to provide them with equal and effective protection against discrimination ... the most common discriminatory practices deny poor people equal access to fundamental services and human rights such as the rights to food, education, health or justice...*

Particularly relevant are also the guidelines suggested by Manby in her recommendations to the Human Rights Council regarding non-discrimination and “a fairer distribution of global resources (especially those that are limited)” both nationally and internationally, particularly when considering the case of the IFFIm Sub-Saharan Excluded States.<sup>125</sup>

#### **4.1 Human Rights Obligations of Donor Countries**

International human rights law is focused principally on the responsibilities that a State has vis-à-vis those living within its territory or under its sovereignty. However, because of the fact that the world’s poorest and most disadvantaged now number in the high hundreds of millions, some argue that the world community as a whole is in a state of “massive and systemic” breach of international human rights law.<sup>126</sup> Failure to provide minimally acceptable water, nutrition, health, education, and housing standards for over one billion persons is difficult to reconcile with the “one State, one population” duty-bearer/rights-holder framework of international human rights law.

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<sup>123</sup> See for example Sen (1999); Nussbaum (2000); Gready & Ensor (2005), OHCHR (2006) Ch.1 para.23.

<sup>124</sup> OHCHR (2006); para.61, Guideline 3 Equality and Non-Discrimination. Salomon, et al (2007) p.31.

<sup>125</sup> Manby (2007) A/HRC/8/WG.2/TF/CRP.5 Annex III: *Proposed revisions to the evaluation criteria for development partnerships*.

<sup>126</sup> Salomon, et al (2007) p.10, UN Doc. A/55/2, Art. 11.

Particularly given the tangled cause-and-effect dynamics of colonization, industrialization, and globalization, meeting the systemic challenge of poverty has arguably become the responsibility of not only the States sovereign over a particularly disadvantaged territory, but of the world community. Many have questioned whether a higher standard should be imposed on countries which, by virtue of their geographic location or of historical circumstance, have managed to develop and thrive beyond most others during the last two centuries.

In the case of the IFFIm Donor Countries, it is important to note that as members of the European Community, these countries are parties to regional human rights instruments, particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR). In particular for the UK, “the Department for International Development (and the Secretary of State) are legally bound by the Human Rights Act, which incorporates the ECHR domestically”.<sup>127</sup>

A review of formal/legal commitments to international human rights law reveals a significant commitment to both the concept and the legal instruments which enshrine the concept of human rights currently:

**Figure 12: Status of Core International Human Rights Instrument by Donor Country**

Source: UNDP Human Development Report 2007/2008

	Genocide Convention 1948	Elimination of Racial Discrimination 1965	Civil & Political Rights 1966	Economic, Social & Cultural Rights 1966	Elimination of Discrimination against Women 1979	Convention against Torture 1984	Rights of the Child 1989
<b>Total State Parties</b>	<b>140</b>	<b>172</b>	<b>160</b>	<b>156</b>	<b>183</b>	<b>143</b>	<b>189</b>
UK	1970	1969	1976	1976	1986	1988	1991
France	1950	1971	1980	1980	1983	1986	1990
Italy	1952	1976	1978	1978	1985	1989	1991
Spain	1968	1968	1977	1977	1984	1987	1990
Sweden	1952	1971	1971	1971	1980	1986	1990
Norway	1949	1970	1972	1972	1981	1986	1991
Brazil	1952	1968	1992	1992	1984	1989	1990
South Africa	1998	1998	1998	1994	1995	1998	1995

Core to the IFFIm, the right to health features prominently as a fundamental right in both the human rights discourse generally as well as within several of the core treaties

<sup>127</sup> Ibid. p.411.

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outlined above. Particularly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) focuses on the health-related rights of individuals. Article 12(1)-(2)(d) underscores:

*States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest available standard of physical and mental health. Steps to be taken by the States Parties to the present Covenant ... include those necessary for: (a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; ... c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases; d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness. (emphasis added).*

Elements of *jurisdiction* and *cooperation* are also important in understanding the significance of States' obligations under the ICESCR.<sup>128</sup> Each State Party to the ICESCR in Article 2 "undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical ... with a view towards achieving progressively the full realization of the rights recognized in the present Covenant." In contrast, the International Covenant on Civil and Political Rights (ICCPR) details in its Article 2 that each State Party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the present Covenant..." (emphasis added). While the ICCPR sets out jurisdictional boundaries for obligations, the ICESCR does not; and while the ICESCR clearly requests the cooperation of states to realize the rights it contains, the ICCPR does not.

Common to both covenants, however, and indeed to most human rights instruments, is a clear call to equality and non-discrimination, barring *distinction* (the ICCPR at Art. 2(2)) and *discrimination* (the ICESCR at Art. 2(1)) "of any kind, such as [or *as to*] race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Indeed, "the twin principles of *equality and non-discrimination* are among the most fundamental elements of international human

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<sup>128</sup> See references to jurisdictional clauses and relevant cases in Vandenhole *EU and Development: Extraterritorial Obligations under the ICESCR* in Salomon et al (2007) pp88, fts.4-8.

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rights law.”<sup>129</sup> The implications for the IFFIm Donor Countries of these and other potential areas of obligation are reviewed below.

#### **4.1.1 Potential Areas of Moral and/or Legal Obligations**

In determining Donor Country obligations, this section will focus on the *fulfilment* of potential obligations incumbent upon advanced donor nations as they themselves act in the international arena. Because the extraterritorial nature of human rights obligations continues to be a source of significant debate, this determination will largely be an exercise in extrapolation rather than reference to precedent or established argumentation.

In the international aid context, potential obligations of donor countries generally could include: 1) *willingness to engage in international assistance & cooperation*; 2) *absolute adherence to non-discrimination*; 3) *stringent standards of due diligence*; 4) *focus on conditionality and disintermediation when operating in the global arena*; 5) *awareness on aggregation issues*. IFFIm Donor Countries particularly, given the resources, internal and external advisors, knowledge, experience and awareness at their disposal, should be held to the highest level of compliance with these obligations, each of which is explored further below.

International Assistance and Cooperation: Many of the human rights instruments, as well as other fundamental declarations and agreements, including the UN Charter (Arts. 55&56) and the Universal Declaration of Human Rights (UDHR), and the ICESCR (Art. 2) exhort the international community of sovereign States to assist and co-operate with each other. For example, much of the discussion regarding the obligations of ‘Third States’ regarding right to education as analyzed by Maija Mustaniemi-Laakso<sup>130</sup> has direct parallels to the right to health and to the IFFIm.

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<sup>129</sup> OHCHR (2006) para.21, Guideline 3 (includes a full set of legal references at *Provisions on Equality and Non-Discrimination in International Human Rights Instruments*, including treaties and General Comments).

<sup>130</sup> Mustaniemi-Laakso *The Right to Education: Instrumental Right par Excellence* in Salomon, et al (2007) Ch.15, p.332 defines Third States as ‘states other than the domestic state, acting individually or in concert with other states’.



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Mustaniemi-Laakso points to the ‘collective commitment’ that States have made to the rights underpinning the MDGs (in our case, the right to health and immunization). The content of co-operation and assistance is also detailed in international human rights treaties, world conferences, and also through the General Comments of several Treaty Body Committees, particularly CESCR General Comment 14 on the right to health.<sup>131</sup> Importantly, in its General Comment 14 regarding the right to the highest attainable standard of health, the CESCR outlines the international obligations related to the right to health<sup>132</sup> and often refers to co-operation between states.

Non-Discrimination: One of the fundamental provisions of most core human rights instruments as well as a cornerstone of the human rights based approach to development and most of the academic literature regarding human rights is the obligation to maintain equality and non-discrimination. Indeed, the UN Charter itself is based on the “equal rights of men and women and nations large and small” (Preamble) and “on the principle of sovereign equality of all its Members” (Art. 2(1)). It is perhaps also important to note that the ICESCR’s Article 2 contains both the exhortation to cooperation referenced above as its first clause, and in Art. 2(2), its call for non-discrimination. In contrast to the non-discrimination Article 2 of the ICCPR, there is no mention in the ICESCR that its non-discrimination article should be limited a state’s territory or jurisdiction. Further, the CESCR’s General Comment 14, under “special topics of broad application,” underscores non-discrimination and equal treatment as important principles. In the same way that these principles apply in domestic policies of the IFFIm Donor Countries, they should apply in the context of international co-operation.

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<sup>131</sup> OHCHR (2006) Guideline 4 includes a full set of ‘technical, economic or other assistance’ references at *Provisions on the Nature of States’ Obligations in International Human Rights Instruments*, as does Guideline 7 in *Provisions on International Assistance and Cooperation in Human Rights Instruments* including treaties, world conference agreements, and General Comments.

<sup>132</sup> CESCR General Comments 2, 3, 8, 14; CEDAW General Recommendation 24; CRC General Comment 4.

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It is not argued that the UK should make its foreign or developmental aid available to all countries and all populations at every moment, or that it should not earmark its aid to specific purposes or nations. Rather, the argument is that when the UK, through the IFFIm, targets funds for a specific cause having to do with human rights (in this case, the fundamental aspect of immunization in the right to health), those funds should be at least in theory *available* and *accessible* for all on a non-discriminatory basis. In the same way, if the UK targets its funds towards a specific country, those funds should be allocated to persons within that country on a non-discriminatory basis (i.e., to minorities within that country). Further, if the UK earmarks funds for the benefit of a specific minority, those funds should be available to persons belonging to that minority on a non-discriminatory basis (i.e. to women within that minority)

Mustaniemi-Laakso cites the Human Rights Committee's (HRC) holdings that State parties should not perpetrate violations of Article 2 of the ICCPR (referring to anti-discrimination) on the territory of another State, "which violations it would not perpetrate in its own territory".<sup>133</sup> The CESCR also underscores (emphasis added):

*"[A]rticle 2.2 and article 3 [of] the [ICESCR] proscribe any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status, sexual orientation, and civil, political, social or other status, which has the intention or the effect of nullifying or impairing the equal enjoyment or exercise of the right to health."*<sup>134</sup>

In the case of the IFFIm, discrimination against individuals on the basis of whether or not their governments are in IMF Protracted Arrears could conceivably fit into several of the above categories (national origin, property, birth, political or other status, etc.). In essence, being born into a country with poor governance is just as much a matter of chance than being born female rather than male, and not a

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<sup>133</sup> Mustaniemi-Laakso in Salomon, et al (2007) pp.335-338. Footnotes 23,24,25 and 27 references a wealth of case law and other academic research supporting this viewpoint.

<sup>134</sup> CESCR General Comment 14 at para.18.

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condition for which a person should be excluded from receiving aid that is at least in theory available to others. The OECD *Principles for Good International Engagement in Fragile States & Situations* specifically underscore that donor states “take into account, and act according to” the principles of “avoiding pockets of exclusion” and addressing the problem of “aid orphans”.<sup>135</sup> Further, the CESCR decouples *intention* from *effect*, implying that there can be a violation of the Covenant without intent. Arguably, IFFIm financing for GAVI programs could fit into the Committee’s concept of “means and entitlements” for procurement of underlying determinants of health (for example, strengthening a country’s health system, providing vaccinations and supporting immunization campaigns).

Due Diligence: In the IFFIm, the causal link between its conditionality and the resulting exclusion of millions of persons from the potential benefits of such a large pool of funds is unambiguous. This causality meets Vandenhoe’s test that a “reasonable degree of likelihood that certain policies or interventions or agreements will impact negatively on the ability of people to exercise their basic human rights (and equally whether the ability of the developing state to give effect to its obligations domestically will be undermined)”<sup>136</sup>. Margot Salomon has similarly argued that “the familiar due diligence standard” should be “applied in determining transnational responsibility and an acceptable global standard of care, by questioning whether the states acting singly or jointly could have *foreseen* that their conduct and decisions would lead to these outcomes and whether they could have reasonably averted the harm.”<sup>137</sup> The IFFIm Financial and Legal Advisors found that the IMF-related conditionality was sufficient to achieve the successful launch of the Programme.<sup>138</sup> But was it necessary? The IFFIm Donor Countries were

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<sup>135</sup> OECD (April 2007).

<sup>136</sup> Vandenhoe Ch.5 in Salomon, et al (2007).

<sup>137</sup> Salomon, et al (2007) p. 13.

<sup>138</sup> Personal communications. Those intimately involved in the structuring, differ in their views as to how specific the conditionality had to be, and whether some other non-IMF related conditionality could have served the same purpose. No one at Eurostat was available to comment on the necessity vs. sufficiency of the IMF Protracted Arrears clause.

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fully aware of the practical implications of the clause, and it is difficult to decouple their assent from responsibility for the consequences.

Conditionality and Disintermediation: Significant and heated disagreements abound regarding the subject of conditionality. Whether relating to debt relief, project finance, or broader macroeconomic restructuring packages, conditions negotiated between international agents<sup>139</sup> and fund-recipient nations have been termed either fair and necessary fiscal discipline or have been decried as abusive and usurious. Nevertheless, the fundamental precept of this conditionality is that it is, on some level, a negotiated structure between two parties. Mustaniemi-Laakso underscores that conditionality “tends, by definition, to be a relationship between two unequal partners, the donor and the dependent recipient, of which the latter has a limited room for manoeuvre in the negotiation of the terms and standards.”<sup>140</sup> Importantly, in the case of the IFFIm, the nations most immediately affected by the structure’s conditionality are not engaged in the negotiation relationship.

Employing the international capital markets as a funding source results in *complete disintermediation* of the typical recipient-donor dynamic. While negotiations between donors and recipients may indeed be uneven, in the case of the IFFIm, they are unilateral. The IFFIm Donor Countries, as both initiators and often also recipients of conditionality critique, should arguably be held to a higher standard of responsibility regarding the implications of holding one-sided negotiations with disadvantaged and absent counterparties.

Aggregation: The efficiency of the Programme as designed (i.e., gathering funds in the *international* capital markets for further distribution *internationally* significantly widens the scope of IFFIm Donor Country obligations. Much aid and development debate (as referenced throughout this paper) typically highlights which, if any, particular segments of a particular population may have been disadvantaged by a

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<sup>139</sup> International agents could include IFIs, IFAs, donor states, international organizations or other agents external to the State in question.

<sup>140</sup> Mustaniemi-Laakso Ch. 15 in Salomon, et al (2007).

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particular project, aid or development process. Much of this discussion and regulation is targeted to the concept of the *extraterritorial obligations* of one donor nation vis-à-vis persons living in a recipient nation, particularly “vulnerable groups within the targeted country”.<sup>141</sup> The mechanism of the IFFIm takes the conversation to a broader global perspective: are there any *nations* that are being excluded or disadvantaged?

Mustaniemi-Laakso, drawing also from Nowak<sup>142</sup>, highlights that donor nations should ensure that the provision of aid does not adversely affect individuals’ rights in other states by, for example, promoting or reinforcing discrimination patterns. Policies which may be beneficial to the majority of a population, but are detrimental to some (minorities, women, particular ethnic or indigenous groups, etc.) are not likely to be viewed favourably in the human rights context. In the case of the IFFIm, this exclusion extends to entire countries, rather than population segments. Arguably, detecting discrimination at the state level requires far less insight into a country’s socio-political dynamics than the exclusion of particular population segments and should therefore be an easier standard for donor nations to meet.

Despite the fact that discrimination against states on the basis of poor governance is not a topic of wider debate, drawing parallels between intra-state and inter-state discrimination seems appropriate given the implications of structures such as the IFFIm, which seek to address the world’s problems with the world’s capital.

#### **4.1.2 Testing for Responsibility**

Several cases in the European Court of Human Rights<sup>143</sup> confirm that while “states do not leave their human rights obligations at the door when joining international organisations with mandates in other areas of international affairs” these standards

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<sup>141</sup> Vandenhole Chapter 5 in Salomon, et al (2007) pp. 85-106, quotation with emphasis added from CESCR General Comment 8, footnoted and quoted at page 97.

<sup>142</sup> Mustaniemi-Laakso Ch. 15 in Salomon, et al (2007) pp.342-343

<sup>143</sup> Salomon, et al (2007) p.16, footnote 40 ref: ECtHR cases *Matthews v. United Kingdom*, No. 24833/94; *Waite and Kennedy v. Germany*, No. 26083/94; *Bosphorus Airways v. Ireland*, No. 45036/98.

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tend to drift to the least common denominator and are poorly monitored or enforced. In the case of the IFFIm, it is not the intent to try to determine the degree of obligation that the Donor States have. Merely, it is to point out whether or not this obligation exists at all.

In the IFFIm, the “least common denominator” may result in a compromise on the non-discrimination element of human rights for reasons unrelated to the mission of GAVI or the fundamental beliefs of the Donor Country governments. Given their international human rights commitments, however, the question arises whether it is possible to compromise one of the most basic standard of human rights without incurring at least some material level of responsibility.

In testing for responsibility within the right to education, Mustaniemi-Laakso’s points to the elements of ‘*actual control or effective jurisdiction*’ and ‘*causation or attribution*’.<sup>144</sup> Based on personal communications, the extensive and detailed engagement of the Donor Countries in the Programme structuring easily satisfies the *control* element. Equally, the *direct and causal link* between the structuring of the Programme and its effects as detailed in the sections above is unambiguous.

In determining human rights related responsibility,<sup>145</sup> Vandenhole argues that the European Union (EU) as an entity is “at least under a *general* obligation” to both *respect* and *protect* economic, social and cultural rights in lesser developed nations. Vandenhole also references Fian, Salomon, and the UN Special Rapporteur on the Right to Food, Jean Ziegler, in their suggestion that there is an extraterritorial obligation to “support the fulfilment” of economic, social and cultural rights if the domestic state is unable to do so “for reasons beyond its control” and “notwithstanding the use of the maximum available resources”.<sup>146</sup> In the IFFIm, the exclusion of some countries’ entire populations is based on criteria that the citizens or inhabitants of those states cannot control (i.e., the quality of their state’s governance

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<sup>144</sup> Mustaniemi-Laakso Ch. 15 in Salomon, et al (2007) pp.337-338.

<sup>145</sup> Vandenhole and Mustaniemi-Laakso in Salomon, et al (2007) Chs. 5 and 15.

<sup>146</sup> Vandenhole Chapter 5 in Salomon, et al (2007) pp. 86 and 87 (particularly footnote 2)

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and/or fiscal inability to repay its debts to the IMF). The Donor Countries' EU membership serves only to heighten their level of responsibility in this regard.

Though pointing to the impact on individuals and/or specific groups rather than to an entire nation's population, in his review of non-territorially linked covenants, legal opinions and Treaty Body<sup>147</sup> comments, Vandenhole underscores the concepts of: 1) '*obligations erga omnes*' (or obligations towards all humans – rather than to a selected few or to a subset); 2) '*causation of an adverse impact,*' and 3) '*refraining from direct or indirect interference in other countries' ability to realise rights*'.

These three concepts result in three questions to the Donor Countries within their IFFIm roles: 1) is the obligation to fund immunization to the extent possible an obligation towards all persons, or only some?; 2) are the impacts caused by the IFFIm conditionality adverse (i.e., are the IFFIm Excluded States not in the same situation without the benefit of the IFFIm funds as they were before the funds were made available<sup>148</sup>?); and 3) did the Donor Countries actions directly or even indirectly lead to an interference in immunization aid being available to the IFFIm Excluded States?

While the first and the third question are easily answered<sup>149</sup> and point to Donor Country responsibility, it is impossible to say with certainty whether the IFFIm Excluded States as countries will be adversely impacted in their development given their non-access to IFFIm funding. What is clear, however, is that on a relative basis (i.e. relative to countries which do have access to IFFIm funds), the IFFIm Excluded States are at a disadvantage pre vs. post IFFIm as it regards the amount of immunization resources available to them. For certain diseases, such as measles, polio, and maternal & neo-natal tetanus (as referenced above in this paper), the IFFIm funds comprise 80% to 90% of available global resources. It is difficult to argue that having a

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<sup>147</sup> Treaty Bodies refers to the Committees that are formed to monitor implementation of specific core human rights treaties, as the CESCR is responsible for monitoring implementation of the rights enshrined in the ICESCR.

<sup>148</sup> This argument has been brought forth repeatedly in the course of personal communications with IFFIm Financial & Legal Advisors and others.

<sup>149</sup> 1) Immunization aid is an obligation vis-à-vis *all children of the world, not just some or most*; 2) Donor Countries' budgeting concerns/constraints required conditionality + Donor Countries' structuring involvement.

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hand in diverting such crucial funding sources away from a particular nation is not classifiable as an 'adverse impact'. When Vandenhole concludes that the "extraterritorial obligation to *respect* implies that the EU should refrain from any unjustified interference with the enjoyment of an ESC [economic, social or cultural] right by individuals in the South"<sup>150</sup>, he could well be speaking directly about the IFFIm Sub-Saharan Excluded States.

#### **4.1.3 Conclusions Regarding the Human Rights Obligations of IFFIm Donor Countries**

In many, if not most, nations, the population can no more control the quality of their government than they can the color of their skin or their sex. It is simply too high a burden to place on an already desperate people that it should rise up, educate, find and elect competent leadership and demand good governance and functioning fiscal policies. Italy's experience, everything over a decade of 100%+ debt to GDP ratios to the recent European Court of Justice case over the government's inability to effectively implement waste management plans<sup>151</sup>, to pervasive calls of corruption within government, would indicate that even some of the Donor Countries have substantial difficulties in controlling the quality of their governments. It is nearly unconscionable to condition immunization aid for children on this basis. Against this backdrop, Liberia's recent emergence from over two decades of IMF protracted arrears is no less than miraculous.

Most of the 100 million persons excluded in the IFFIm Excluded States are unlikely to indulge in the luxury of debating the relative merits of the IMF, its fee structures, their government's obligations or the fact that they are in arrears. Most are unlikely to be fully aware of the existence of GAVI, its programs, the IFFIm or the capital markets in general. How can they be expected to advocate for change to either their government's policies or to the structure of this particular Programme?

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<sup>150</sup> Vandenhole Chapter 5 in Salomon, et al (2007) p.100. "South" is undefined.

<sup>151</sup> European Community (Brussels) Press Release 06 May 2008.



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In this case, one can draw important parallels between the case of economic sanctions and the exclusion of access to aid. Again, the case is made that the severity of sanctions to be expected when a state is unable to repay IMF dues should always be less than those occurring when a state violates norms of international peace and security. And yet, based on the CESCR's General Comment 8, even this more severe set of norms should consider seriously the impact on the general population:

*[T]he inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security. The aim is not to give support or encouragement to such leaders, nor is it to undermine the legitimate interests of the international community in enforcing respect for the provisions of the Charter of the United Nations and the general principals of international law. Rather, it is to insist that lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to any such collective action.<sup>152</sup> (emphasis added)*

The inhabitants of the IFFIm Excluded States should not automatically forfeit their right to have equal opportunity to benefit from IFFIm-funded GAVI programs as a result of their governments' unwillingness or inability to repay the IMF. The IFFIm Donor Countries should, in their collective action through the Programme, have paid greater heed to the fundamental right of non-discrimination, particularly since the discriminatory effects of the IMF Protracted Arrears clause were likely to have been evident with even the most basic levels of due diligence.

While this obligation is likely to be moral rather than legal,<sup>153</sup> Vandenhole argues that the lack of a jurisdictional clause in the ICESCR makes the document similar in structure to the four Geneva Conventions and the Genocide Convention. Whether or not the non-discrimination provisions of the ICESCR and other international covenants can take on the same international recognition as the Geneva and Genocide conventions, one could certainly argue that the same moral obligation that inspired

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<sup>152</sup> CESCR General Comment No. 8 (1997) para. 16.

<sup>153</sup> Vandenhole reviews both the HRC's traditional view on extraterritorial jurisdiction as 'only [having] been accepted in cases in which there was a strong degree of direct and/or physical control over territory or persons' and the more liberal 'contextual' view as reviewed by Scheining, as well as Coomans and Kammiga (eds.) as referenced in Vandenhole Chapter 5 in Salomon, et al (2007) p.88 and footnote 8.

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the creation of the IFFIm should further inspire the IFFIm Donor Countries to redress the discriminatory effects of its conditionality.

#### **4.2 Human Rights Obligations of International Financial Institutions –IMF & IBDR**

Secondary to our analysis of Donor Country obligations and responsibilities is the role of the IMF and the IBDR (together the IFIs) in the IFFIm structure. Because the conditionality clause was included in the structuring not at the request of either IFI, the topic of whether the IFIs have human rights obligations in relation to the IFFIm becomes a moot point. The concept of conditionality in IFI dealings with individual nations is a topic covered extensively by the researchers noted below<sup>154</sup>, particularly Skogly, and is outside the scope of our analysis.

In essence, both IFIs are “under negative obligations to *respect* and to *protect* human rights in their own operations through their policies, programmes and projects, and to *fulfil* human rights whenever this obligation stems from customary international law and general principles of law.”<sup>155</sup> Furthermore, a review of the CESCR General Comments by Vandenhoe reveals the widely-held view of the human rights community that

*“the international financial institutions (IFIs) should pay greater attention to economic, social and cultural rights in their lending policies, credit agreements, international measures to deal with the debt crisis, structural adjustment programmes and development projects... International agencies [undefined] should scrupulously avoid involvement in projects which, for example... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant”*<sup>156</sup>

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<sup>154</sup> Skogly (2001), Van Genugten, et al (2003).

<sup>155</sup> Skogly in Van Genugten, et al (2003) p.57.

<sup>156</sup> Specific references to CESCR General Comments in Vandenhoe’s Chapter 5 in Salomon, et al (2007) p. 93-94 footnote 32 and 35

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Tostensen underscores the “continued reluctance (particularly by the IMF) to engage in areas that are deemed ‘politically prohibited’ (eg human rights) under their respective Articles of Agreement, [though] the IFIs would seem in practice to condone the integration of human rights into the PRSPs [Poverty Reduction Strategy Papers]”. Despite these (perhaps increasing) concessions to the human rights discourse and relevance, there is little accountability or recourse, legal or otherwise, regarding the actions of the IFIs or the implications of their considerable influence.<sup>157</sup>

Again, the discussion in Vandenhoele and in Skogly, relates principally to the effect of policies and actions on individuals or groups, and not on entire states. There is no mention of the repercussions that certain policies can have on nations that could potentially go beyond the direct relationship between an IFI and a counterparty nation (i.e., that being in non-compliance with IMF payments could have broader implications in terms of aid eligibility<sup>158</sup>). Particularly under a scenario where increasing amounts of development and other aid are sourced from the international capital markets, structures that discriminate against or exclude the populations of entire nations based on the quality of their governance, or other matters largely beyond that population’s control, should be examined in detail.

Because human rights as a concept of law applies almost exclusively to the behaviour of a sovereign nation vis-à-vis individuals or groups within that sovereignty, international human rights law does not formally apply to the entities formed by groups of nations, despite the fact that it is broadly argued that

*[j]ust as the economic growth of any given country is no longer considered separately from the role, and impact of, the outside world ... the impact on the enjoyment of human rights of actors other than the state acting domestically, such as the IFIs,... is such that their various human rights responsibilities cannot be ignored. Yet while philosophical and social approaches to responsibilities may have come to terms with*

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<sup>157</sup> Salomon, et al (2007) p.20 and Tostensen’s Chapter 9 therein.

<sup>158</sup> This is not only the case with the IFFIm funded GAVI programs. Benn (March 2007) states: “Liberia’s arrears to the main international institutions have to be cleared before it can receive debt relief under [the joint IMF-World Bank Heavily Indebted Poor Country initiative] HIPC”.

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*these developments, the legal discipline has so far demonstrated some serious difficulty in adapting to this new reality...*

*IFIs may not have an explicit mandate in the area of human rights, but certainly impact on them, and a system of human rights accountability – at least in so far as negative obligations would apply – is long overdue.<sup>159</sup>*

For the purposes of this paper, based on the researcher noted above, IFIs cannot be said to have explicit or legal human rights obligations.

### **4.3 Human Rights Obligations of GAVI**

Further removed from legal human rights related accountability are the actions of GAVI. Because GAVI is a private-public partnership and not an organization formed exclusively by sovereign nations (such as the IFIs), it can be held accountable only to the extent it does or does not meet its intended purpose. This accountability is not related to international human rights instruments, but to GAVI's mission of addressing an issue that is inextricably tied to the MDGs and to the fundamental human rights issue of health<sup>160</sup>. At a minimum, GAVI's activities and impact should be on par with the standards set for international business, whereby "business has a responsibility not merely to minimise the negative impact of their ventures on society... but in maximising their positive impact," and that there may be "an emerging consensus on the human rights responsibilities of businesses as 'societal actors'"<sup>161</sup>.

Until this 'emerging consensus' is clarified and, particularly, until it is carried through to practical redress in jurisprudence, the human rights related obligations of GAVI will remain squarely in the moral category.

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<sup>159</sup> Salomon, et al (2007) p.12 and 16.

<sup>160</sup> There is no recognized ranking of the importance of human rights, though it stands to reason that health (together with life, water, food and shelter) is, if only from a biological perspective, fundamentally important.

<sup>161</sup> Salomon, et al (2007) p.21, particularly Buhman's Ch.11 *A Poverty Perspective on Human Rights and Business*, which details the legal framework under which international business can gauge its level of human rights-related responsibilities.

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#### *4.4 Human Rights Obligations of IFAs, Advisors & Investors*

Because only sovereign states formally have human rights related obligations, it would be a stretch to argue that the other participants in the structuring and execution of the IFFIm Programme have similar duties. The professionals working for the investment banks that either managed or co-managed<sup>162</sup> the transaction are not subject to any regulation that would require them to comply with or even to consider international human rights law. Indeed, it is not very likely that any of the professionals involved are aware of the existence of international human rights law in any detail, though they may be aware of the concept generally. The same can be said for the financial actors involved as trustees, paying and transfer agents<sup>163</sup>, despite the tremendous size and global scope of their activities and influence.

Perhaps a certain minimum level of awareness could be expected from the many legal professionals involved in this transaction. Three international top-tier law firms<sup>164</sup> likely devoted thousands of hours to thinking through and developing the framework of the IFFIm. Several of the legal partners involved are specialists in supranational and sovereign-related capital markets structures. Arguably, these legal professionals should be at least familiar in concept with the human rights related obligations of the IFFIm Donor Countries, both in the European and international contexts.

Professional investors, to the extent that they are financial institutions, pension funds or similar, will fall into the International Financial Actor definition above (excluding the IFIs), and would also be without legal human rights obligations. Moral Investors, defined above, are also without legal human rights obligations, though their stated intent likely results in a significant moral obligation to at the very least ‘do no harm’.

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<sup>162</sup> IFFIm Offering Memorandum cover: Joint Lead Managers: Goldman Sachs International and Deutsche Bank; Co-Lead Managers: Barclays Capital, Citigroup, HSBC, Morgan Stanley, BNP Paribas, Dresdner Kleinwort, JPMorgan Cazenove, UBS Investment Bank.

<sup>163</sup> Ibid. page unnumbered: Citigroup (through Citicorp and Citibank London) and Dexia Banque (Luxembourg).

<sup>164</sup> Ibid. Linklaters (advising GAVI), Slaughter and May (advising the IFFIm), and Allen & Overy LLP (advising Goldman Sachs and the other financial actors involved).

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Sorell argues that private actors, on the basis of their “specific and deliberate engagement in the national development effort and the influence they exercise on local communities and governments derived from negotiated agreements”<sup>165</sup> should perhaps be subject to norms that mirror the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (hereafter, “Norms”)<sup>166</sup>. The Norms suggest setting standards of human rights obligations that consider the broad positive and negative impact of transnational corporations and other business enterprises<sup>167</sup>. While the Norms point to the State as the primary duty-bearer with regard to human rights, the Preamble highlights that not only do corporations and enterprises acting as such, but “their officers - including managers, members of corporate boards or directors and other executives - and persons working for them have, inter alia, human rights obligations and responsibilities.”

The Norms focus heavily on the obligation of these entities and persons to “respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments,” but to their detriment then go on to list over 35 treaties and conventions that these persons should be cognizant of, including The International Code of Marketing of Breast-Milk Substitutes as well as “conventions and recommendations of the International Labour Organization” which number into the hundreds. The dilutive impact of all these inclusions is considerable.

Furthermore, the Norms follow the standard of focusing on either harms or violations perpetrated against individuals or groups within nations, but not against entire nations as such. So, for example, the norm on non-discriminatory treatment urges transnational corporations and other business enterprises to “ensure equality of

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<sup>165</sup> Salomon, et al (2007) p.22, in particular also Sorell’s Ch.12 *Project Financing in Developing Countries: Economics, Morals and Law*.

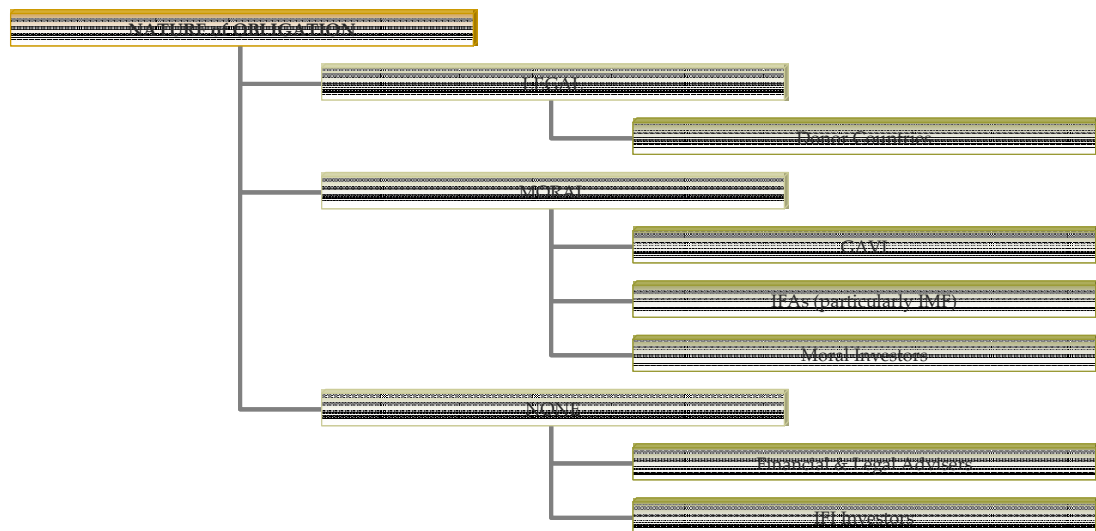
<sup>166</sup> E/CN.4/Sub.2/2003/12/Rev.2.

<sup>167</sup> Transnational corporations are defined in the referenced document as “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.” Other business enterprise is defined as “any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local”.

opportunity and treatment ... of the individual ... [and] complying with special measures designed to overcome past discrimination against certain groups.”

Admittedly it is a non-sequitur that the UN should ask transnational corporations or their officers and directors to engage in business activities in areas of the world that are severely dysfunctional and where business investment or activity is simply not feasible. Nevertheless, when considering the international nature of the financial and legal advisers to the IFFIm, and the obligations to respect that are being formalized in the Norms, perhaps a separate norm regarding involvement in the structuring of overseas or development aid would be appropriate. This might call for members of the legal and financial advisory teams of aid mechanisms to ensure that any exclusion from aid availability, particularly of entire nations, not be based on conditions unrelated to the need of those nations’ populations for the aid in question.

**Figure 13: Graphical Representation of IFFIm Participants’ Human Rights Obligations**



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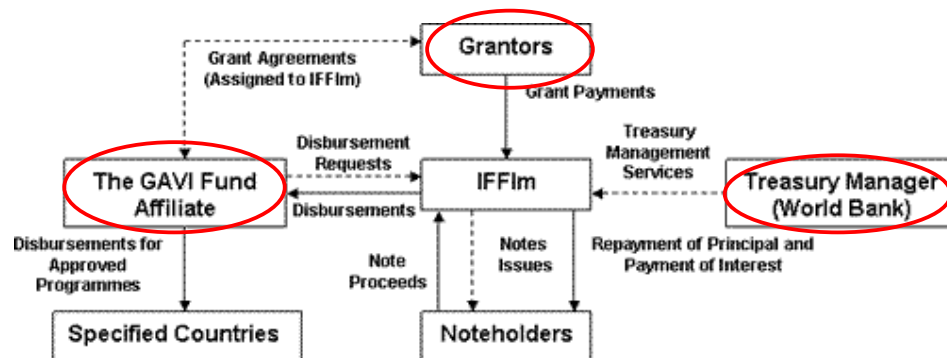
## 5. Content: Overview of Programme Functions & Governance

This section focuses on how the different parties involved in the IFFIm Notes interact with the practical execution of the GAVI immunization programs that are the IFFIm’s ‘use of proceeds’. This review is intended to highlight the areas of influence of actors *with* human rights related obligations and duties, and the areas of influence of the actors *without* any such obligations.

### 5.1 IFFIm Structure and Timeline Schematic

The following schematic<sup>168</sup> outlines the structure by which grant payments are pledged by IFFIm Donor Countries (termed ‘Grantors’ in the *Figure* below) to the IFFIm. These pledges are securitized in the capital markets as Notes. Noteholders (which we have defined as either Financial or Moral Investors) purchase the Notes and deliver, upfront, funds to the IFFIm. The GAVI Fund Affiliate receives proposals from eligible countries, and those that are approved receive funds, either from the IFFIm or from other GAVI funding sources. The Treasury Manager (World Bank), in the meantime engages in activity that ensures that financial restrictions within the Notes structure are being met.<sup>169</sup>

Figure 14: Overview of IFFIm Structure and Directional Fund Flows



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<sup>168</sup> IFFIm website.

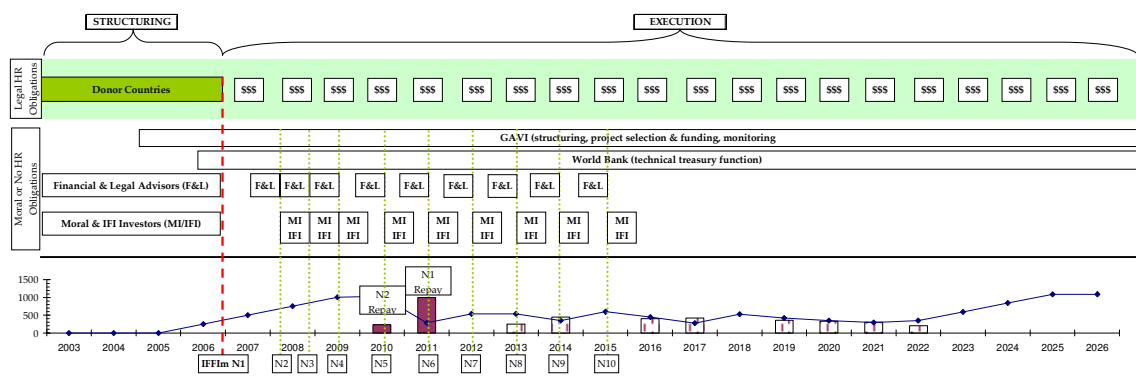
<sup>169</sup> Including the Gearing Ratio Limit and other provisions contained in the IFFIm Offering Memorandum. For the purposes of this paper, it is sufficient to know that the World Bank is engaged in ongoing markets-based transactions relating to interest rate and currency hedging as well as periodic monitoring of certain other metrics.



In essence, IFFIm Programme activity can be split into two parts: structuring and execution. During the structuring phase, the Donor Countries were heavily involved, and in the case of the UK, were largely driving structuring activity. The IFFIm Financial & Legal Advisors and, probably to a lesser extent, GAVI and the World Bank were likely to also have been materially involved in the structuring phase. Once the Programme passed to the ‘execution’ or implementation phase, as it did after the successful launch of the first Notes, the bulk of the direct activity and influence moved from the Donor Countries to the other actors.

Of all the involved parties, GAVI remains the most active. The World Bank, through its treasury activities also remains involved throughout the duration of the Programme (i.e. through 2026, when the final amounts pledged by the Donor Countries will be paid in as grant payments to the IFFIm), as do the Donor Countries. However, their role and influence, as the only actors with legal human rights related obligations is no longer direct. The figure below illustrates the actors’ involvement during the life of the Programme. Essentially, the direct role of the Donor Countries through 2026 is limited to making payments on the scheduled payment dates.

**Figure 15: Actor Participation during IFFIm Programme Timeline (partially illustrative)<sup>170</sup>**



<sup>170</sup> The future issuances of Notes under the Programme (N3 to N10) and the repayment schedule are indicative only and are meant to illustrate potential capital markets and the involvement of the various related actors related to the Programme (Donor Countries with formal/legal human rights related duties; GAVI, The World Bank, Financial & Legal Advisors, and Investors without formal/legal human rights related obligations.). Figures are in US\$ millions and represent only the author’s estimated issuance/repayment schedule for indicative/illustrative purposes. Grant payments expected under Donor Country pledges are based on information on the GAVI Alliance website and should be only considered as estimates for illustrative purposes, and therefore subject to material change.

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The timeline above shows the launching of the Programme with the initial Notes offering in November 2006 (IFFIm N1). The repayment of these Notes is set to occur in November 2011 (solid bar) with the accumulated grant payments received from the IFFIm Donor Countries (line graph). The Japanese Notes (N2) issued in March 2008 and payable in March 2010 (solid bar) are also included. Additional issuances (N3 to N10) are also assumed, as well as their repayments (dashed bars).

While the Donor Countries will continue to be active through seats on GAVI boards and other committees, their legal human rights related obligations will be filtered through the broader GAVI governance mechanisms. GAVI, as determined in the prior section, does not have formal legal human rights duties or responsibilities. Nevertheless, Donor Country indirect involvement continues to be meaningful, and arguably legally-binding human rights related duties should continue to be relevant.

## ***5.2 GAVI Oversight and Governance***<sup>171</sup>

GAVI is the party with the most direct and extensive involvement in the implementation of the intended purpose of the IFFIm. This section reviews GAVI's oversight, governance and other activities, and highlights the participation of Donor Countries within GAVI.

GAVI's four strategic goals (sustainable delivery of immunization and other health services; improving vaccine supplies; sustainability of funding for immunization programs; and promote GAVI's public-private partnership model in global health initiatives) require substantial infrastructure. GAVI's immunization programs are time-limited, performance-based and seeks sustainability through long-term integration with a recipient country's existing health system. Over 40 countries now have multi-year immunization plans<sup>172</sup>. The effective administration and monitoring of such an undertaking necessarily requires the involvement and coordination of a

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<sup>171</sup> Information from GAVI Alliance website, GAVI Alliance Handbook (2008) and personal communications.

<sup>172</sup> [http://www.gavialliance.org/about/in\\_partnership/index.php](http://www.gavialliance.org/about/in_partnership/index.php). Accessed March 2008.

large group of actors. The composition of the GAVI Alliance Board (which includes 5 seats for Donor Countries) gives a good indication of the multi-disciplinary, multi-agency, multi-sector approach that is largely characteristic of GAVI's activities:

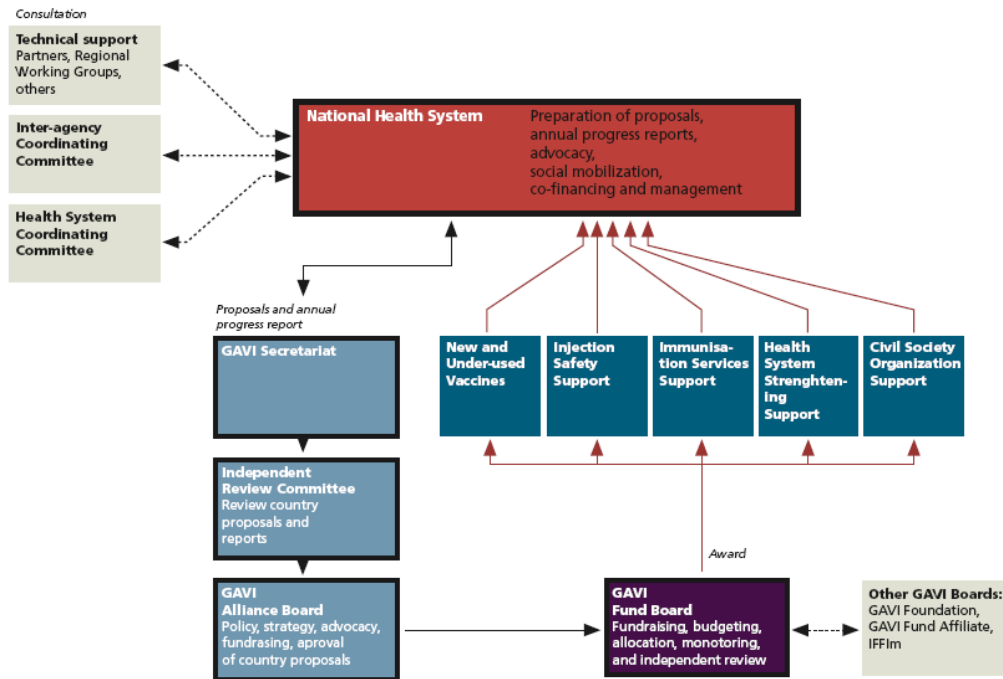
**Figure 16: GAVI Alliance Board Member Composition**

Number	Representative from:
1	GAVI CEO (non-voting)
1	WHO
1	UNICEF
1	World Bank
1	Bill & Melinda Gates Foundation
5	Donor Countries
5	Developing Country Governments
1	Industrialized Vaccine Industry
1	Emerging Vaccine Industry
1	Civil Society
1	Technical/Research Institute
9	Unaffiliated (not beneficiaries, not donors, not GAVI executives)
<b>28</b>	<b>Total</b>

Most important for our purposes is an understanding of the funding, monitoring and oversight processes conducted by GAVI. The public-private partnership model is deeply embedded into all of its policies and procedures. This is evidenced by the composition of the members of GAVI's boards and committees, as well as by the use of WHO and UNICEF established practice in much of its reporting and monitoring functions. While the governments of fund recipient nations and their national health systems play a fundamental role in the organization, data collection and implementation of GAVI programs, safeguards are built into the administration of all immunization programs. These standards serve to satisfy the requirements of Donor Countries regarding funds security, program implementation and oversight. Independent and non-government institutions are present in all phases of GAVI programming and monitoring.

A summary of GAVI's boards and committees is illustrated below:

Figure 17: The GAVI Proposal and Monitoring Process<sup>173</sup>



The monitoring operations carried out by GAVI are the same, irrespective of which sources are used to fund a specific program<sup>174</sup>. The only distinction made occurs once proposals submitted to GAVI are approved for funding. At this point, GAVI cannot use IFFIm funds to pay for approved programs in the IFFIm Excluded States. Given that IFFIm pledges represent 54% of GAVI’s total funding and 68% of its government funding, exclusion significantly impacts funds availability and funds quality for IFFIm Excluded States<sup>175</sup>. There is no mention in GAVI or IFFIm documentation of any special consideration for IFFIm Excluded States when reviewing project funding, or ensuring that similar financing amounts will be available from other sources. In the case of potential clean-water bonds or the larger IFF, it is unclear that there would even be other resources available apart from those sourced in the capital markets.

<sup>173</sup> GAVI is undergoing significant corporate reorganization. On February 2008, the GAVI Alliance Board and the GAVI Fund Board merged into a single Swiss entity to be called the GAVI Alliance Board. See [http://www.gavialliance.org/about/governance/reports/2008\\_02\\_26\\_fund\\_board\\_meeting.php](http://www.gavialliance.org/about/governance/reports/2008_02_26_fund_board_meeting.php)

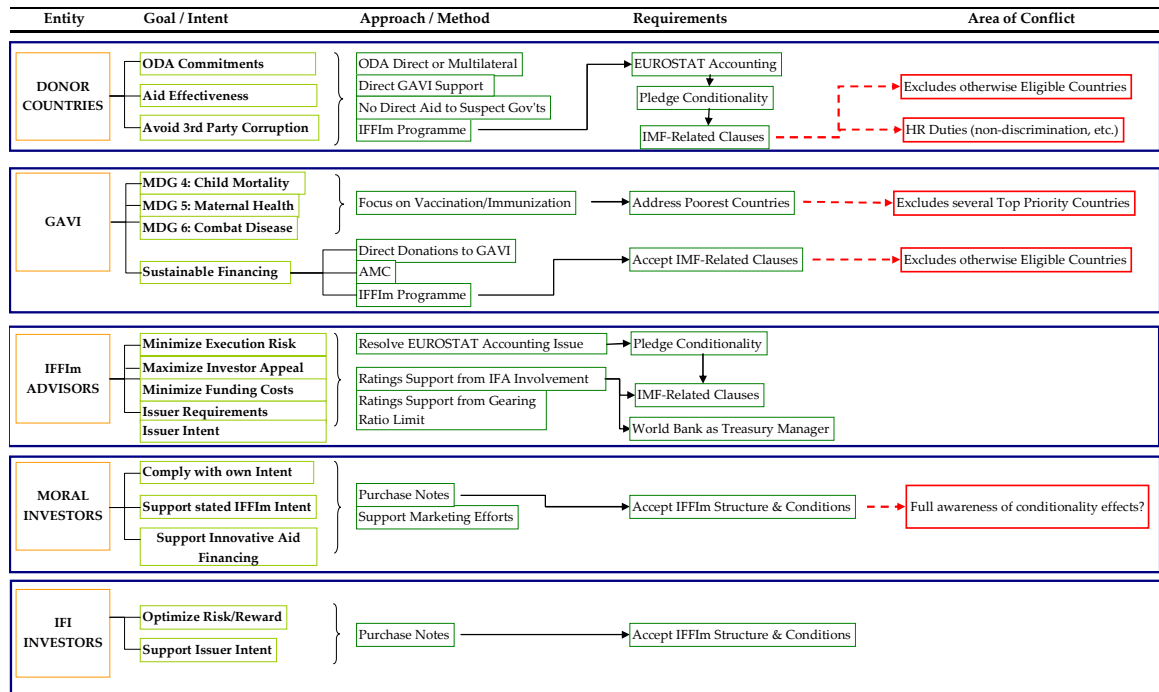
<sup>174</sup> Sources: personal communications and GAVI Alliance website. For additional detail, see Annex I.

<sup>175</sup> With IFFIm funding, projects exhausting funds in the middle of a vaccination campaign may ‘borrow’ against future IFFIm funding. Source: personal communications. It is unclear whether similar funding flexibility for large-scale impact projects will be available for the IFFIm Excluded States from other funding sources.

## 6. Procedure: Identification of Conflicts

A review of the goals and approaches of IFFIm participants indicates that the only parties without meaningful conflicts as a result of the structuring are IFFIm Legal & Financial Advisors and IFI Investors. Donor Countries, GAVI and Moral Investors face conflicts between their intents and IFFIm conditionality. Donor Countries face additional conflicts relating to their legally-binding human rights obligations.

**Figure 18: Summary Overview of Participants' Goals, Methods, Requirements & Conflicts**



Any capital markets financing instrument will be subject to substantial input from financial and legal advisors. Issuers not intimately familiar with the workings of the market are likely to defer to their advisors' guidance. Nevertheless, issuers would do well to understand that their motivation and that of their advisors are not completely aligned. As in the case of the IFFIm Programme, there are instances where what is completely devoid of conflict for an advisor can raise substantial issues for an issuer.

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## 7. Conclusions: Alternatives & Recommendations

The normative content of the right to health as described in the CESCR's General Comment 14 leaves very little room for interpretation: it refers to *available* resources, is unambiguous and repetitive in its call for *non-discrimination*, and highlights as a core obligation *special care for vulnerable and marginalized groups*. The funds harnessed through the IFFIm structure for the purpose of immunizing the world's poor are 'available resources'. As such, they should be administered on a non-discriminatory basis, and allocated with special focus on the poorest of the poor. As the structure stands, expediency and perhaps convenience has introduced an element that discriminates precisely against those nations with governments unwilling or simply unable to regularize their relationship with the IMF. The populations being governed by such governments are literally the definition of 'vulnerable and marginalized'.

The Human Rights Committee has held that for States, "it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant [on non-discrimination] on the territory of another State, which violations it could not perpetrate in its own territory"<sup>176</sup>. Arguably, this sentiment should all the more apply to Article 2.2 of the ICESCR, which does not have a territoriality aspect.

Government funds within the UK, France, Italy, Spain, Sweden, and Norway are available for the basic health and immunization of those inhabitants who have defaulted on their debts or are considered criminal. When the funds of these governments are made available to the global community for the purposes of immunizing children, it is unconscionable to exclude those who are past due on their debts or are considered to be outside the recognized international system.

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<sup>176</sup> Mustaniemi-Laakso in Salomon, et al (2007) pp. 335-338 whereof footnotes 23, 24, 25 and 27 reference a wealth of case law and other academic research supporting this viewpoint.

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It is extraordinarily encouraging to see the development of innovative and efficient sources of financing that can be made available to the overwhelming benefit of the world's least developed populations. The IFFIm takes on all the more significance as an example of how developed nations can harness the world's capital to address the world's problems and meet the world's goals. However, if certain structural elements within the IFFIm structure remain unexplored and unaddressed, the populations of the world's most disadvantaged, most alienated and most fragile nations could be further excluded from (financial) innovation and progress, even in the context of aid.

### **7.1 Limitations**

The principal limitation of this analysis has been my inability to speak with anyone within the EUROSTAT office, despite repeated requests directed at different persons and departments.

Questions which remain unconfirmed, since they have not been corroborated by more than one source are as follows: 1) how much thought and analysis was given to using other metrics which, fulfilling the same requirements as the IMF-related clauses, would not have caused the *a priori* exclusion of the IFFIm Excluded States; and 2) to what extent did the internal debate of those involved in the CMFB review the human rights implications and effects of the IMF-related conditionality?

Questions which remain unexplored include: 1) who were the members of the task force which met at Eurostat on 06 June 2005 to discuss the issue of the IFFIm structure?; and 2) would it have been possible to discuss the creation of a new accounting classification for aid-related government pledges that did not require conditionality to exclude from the gross national debt classification?

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## 7.2 *Future Implications*

The IFFIm is clearly a pilot case for larger, more comprehensive development aid instruments. In many respects, the structure has been a resounding success, and while discriminatory aspects have been left largely unexplored, they are not hidden. The parties involved are currently looking into similar or additional capital markets instruments to fund other large-scale development projects, as well as other instruments that would be open for investment by smaller retail investors<sup>177</sup>. It is precisely because of this success, and the encouragement it gives to the launch of similarly structured instruments, that it is of critical importance that discriminatory elements within the IFFIm structure be remedied. If future or additional development funding instruments perpetuate the discriminatory effect of the IFFIm, the resulting impact on the 100 million people living within the IFFIm Exclude States could be beyond devastating.

In the IFFIm, the duties and obligations incumbent upon Donor Countries were weakened through conditionality. The goal continues to be the development of an instrument whereby human rights obligations do not bend to the pressures of accountants or capital markets advisors.

## 7.3 *Short-Term Recommendations*

Utilizing the capital markets to frontload government development aid and maximize impact is an elegant and welcome funding innovation. The following recommendations seek only to improve the existing structure and to underscore the importance of perfecting this important precedent. The global capital markets are too valuable and too efficient a resource to be excluded from the development debate. Equally, human rights are too fundamental and important a concept to be compromised within the capital markets context.

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<sup>177</sup> Personal communications. May 2008.



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It is important also to note that any amendments to the current IFFIm Programme will carry a cost. Existing Noteholders must agree to changes in structure and documentation must be changed, etc. The complexity (and expense) involved are likely to increase to the extent additional Notes are issued under the existing Programme and the bondholder base expands. Nevertheless, such 'bondholder consent solicitation' procedures are by no means unprecedented.

❖ **Recommendation ST-1: *Replace IMF-linked Conditionality.*** Whether or not Somalia, Sudan or Zimbabwe clear their IMF Protracted Arrears, or Cuba or North Korea enter the IMF has no impact on whether or not the UK or France will over time honor its pledges to IFFIm bondholders. If anything, the existing conditionality increases rather than decreases bondholder risk, tainting donor country with recipient country risk. To the issue of fulfilling Eurostat accounting requirements, either Eurostat's accounting classification of this type of commitment should change (i.e., allow for a new category) or pledge conditionality should be introduced through another measure.

One potential metric could be based on GAVI's performance of its stated goals (i.e., pledges are reduced if GAVI does not implement its mission according to Donor Country expectation). GAVI has in place substantial monitoring, governance and reporting mechanisms that should provide regulators with comfort that the performance metrics chosen are not subject to manipulation. The rating agencies (and the market) would have to shift their analysis to GAVI's creditworthiness and performance, which have heretofore not been the subject of much review, despite the fact that GAVI is the true beneficiary and executor of Donor Country pledges. As GAVI continues periodic reporting, its credit profile and performance will become increasingly familiar to both rating agencies, bondholders and the capital markets in general.

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Alternatively, any one of a thousand economic or human development indicators could be found to replace IMF Protracted Arrears. The critical issue would be that conditionality is based on a 'positive' rather than a 'negative' metric. For example, to the extent that recipient countries' immunization rates *rise* (or GDP or life expectancy or ODA from non-IFFIm Donor Countries, etc.), then Donor Country pledges may decrease based on the same weighted percentage as exists within the structure today. In this way, conditionality is introduced, but no countries are included from the outset of the Programme. Importantly, Donor Country pledges only decrease to the extent that the overall situation in recipient countries becomes *better* and not *worse*. The Gearing Ratio Limit, as it exists today, would continue to protect bondholders' principal and interest.

❖ **Recommendation ST-2: *Add Sharia and Non- or Partial-Repayment Option.***

Given the global and philanthropic appeal of the Programme, and the intentions and obligations of GAVI and the Donor Countries, it would seem appropriate to allow Noteholders to choose whether or not they require interest payments or even repayment of principal invested.

It would not be beyond the administrative scope of established bond issuance practice to allow noteholders to have a certain amount of optionality at their discretion. Convertible bonds, for example, are often convertible into other securities at the bondholder's option – a mechanism that is monitored and administered by the IFI holding the position of Trustee or other Agent (in the case of the IFFIm, Citicorp, Citibank and/or Dexia). Not only would the Sharia option be an clear invitation to Muslims everywhere to participate in the offering, as suggested by Iqbal Kahn of the Muslim Council of Britain, it would free up substantial funds for the funding of additional vaccination and immunization programs.

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Equally, giving investors the option to receive only a portion or indeed none of their principal at maturity could potentially also free up significant amounts of capital to fund programs (for example, if only 10% of current investors in the Notes decided they did not require their principal to be repaid, an additional US\$120 million would currently be available to fund GAVI programs). This option becomes all the more significant as more Notes are issued under the Programme and Donor Countries increase or make new grant pledges to the IFFIm. The partial-or-no repayment option would also potentially encourage the participation of additional segments of philanthropic investors. Opening up a sector of the capital markets where investors were not expecting repayment or return, but are concerned primarily with reporting and performance has larger implications that are part of a longer-term recommendation explored below.

#### **7.4 Long-Term Recommendations**

For the sake of brevity, the following long-term recommendations have been noted, though not fully explored.

❖ **Recommendation LT-1: *Formal Complaint under Proposed ICESCR Optional Protocol.***<sup>178</sup> States parties to the ICESCR include all of the IFFIm Excluded States except Cuba. Article 9 of the proposed Protocol allows the Committee to “receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant.” To the extent the relevant parties are parties to the Protocol, an inter-state complaint should be brought to request the current IFFIm structure be amended or that other remedy be agreed. Initiating an inquiry and receiving the Committee’s views would be helpful in clarifying certain aspects of the interaction between human rights and capital markets funding of development aid.

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<sup>178</sup> De Albuquerque (2008) A/HRC/8/WG.4/3 Article 9.

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❖ **Recommendation LT-2: *Utilizing Capital Markets Infrastructure for Philanthropic or Aid Purposes.*** Existing international capital markets ‘infrastructure’ (investment advisors for the corporate and the retail segment, reporting requirements, credit analysis, dedicated research, enhanced electronic information access, etc.) should extend to the aid and not-for-profit sector. Substantial benefits could result from NGOs and development aid organizations being subject to the reporting discipline and market scrutiny afforded publicly traded companies. Ideally, persons or entities making investments in stocks, bonds, mutual funds and indices could utilize the same platform for making philanthropic donations or pledges through ‘donation shares’ in exchange for receiving regular reporting information and access to comparative research<sup>179</sup>.

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<sup>179</sup> Some entities, such as New Philanthropy Capital in London are already successful in actively researching, analyzing and comparing the performance of UK charities. See <http://www.philanthropycapital.org>.

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<sup>180</sup> Source: Euroweek (2006). Mr. Egerton-Warburton has since resigned Goldman Sachs and is currently a banker in Rand Merchant Bank International UK.

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## *Legal Statutes, Conventions, Treaties & Similar*

CSCCE	<i>Conference on Security and Cooperation in Europe (1975)</i>
Environment & Development	<i>The Rio Declaration on Environment and Development (1992)</i>
ECHR	<i>European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and Protocols</i>
European Social Charter	<i>Revised European Social Charter (1996)</i>
ICCPR	<i>International Covenant on Civil and Political Rights (1966) and Protocols</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights (1966) and Protocols</i>
Friendly Relations	<i>Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (1970)</i>
Right to Development	<i>Declaration on the Right to Development (1986)</i>
UDHR	<i>Universal Declaration of Human Rights (1948)</i>
UN Charter	<i>Charter of the United Nations (1945)</i>

CESCR General Comment 2:	<i>International technical assistance measures (1990)</i>
CESCR General Comment 3:	<i>The nature of States parties obligations (1990)</i>
CESCR General Comment 8:	<i>The relationship between economic sanctions and respect for economic, social and cultural rights (1997)</i>
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Center for Global Development at <http://www.cgdev.org>.

Council of the European Union <http://ue.eu.int/>

European Central Bank <http://www.ecb.int>

Eurostat <http://epp.eurostat.ec.europa.eu>

GAVI Alliance <http://www.gavialliance.org>.

Global Transparency Initiative <http://www.ifitransparency.org/>.

IFFIm <http://www.iff-immunisation.org/>

IMF at <http://www.imf.org/external/>.

Network for Freedom of Information Advocates <http://www.freedominfo.org>.

New Philanthropy Capital at <http://www.philanthropycapital.org>

Organisation for Economic Co-Operation and Development (OECD)  
<http://www.oecd.org/dac>.

Rockefeller Brothers Fund <http://www.rbf.org/>

UK Department for International Development (DFID) <http://www.dfid.gov.uk>

UK Parliament <http://www.parliament.uk>

UK Treasury <http://www.hm-treasury.gov.uk>

United Nations Development Programme <http://www.undp.org/>

United Nations on Financing for Development <http://www.un.org/esa/ffd/>

United Nations Office of the High Commissioner for Human Rights (OHCHR)  
<http://www2.ohchr.org>

United Nations on Millennium Development Goals <http://www.un.org/millenniumgoals/>

United Nations University (UNU) – World Institute for Development Economics Research  
<http://www.wider.unu.edu/>

U.S. Central Intelligence Agency (CIA) <https://www.cia.gov>

World Bank at <http://www.worldbank.org/>.

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## Annex I: GAVI Oversight Procedures

Inter-Agency Participation: all aspects of a government's involvement, with the possible exception of applying for funds, requires the participation of outside partners. The in-country process must also involve civil society organizations in the implementation of GAVI programs. Review of programmes is carried out by an interagency committee (see below).

Committee Review: Two committees are engaged in each country that receives GAVI funding for programs. Both the Interagency Coordinating Committee and the Health Sector Coordinating Committee in each country involve government health officials as well as senior members of GAVI partners (UNICEF, WHO, etc.) and members of civil society and non-governmental organizations. The mission of these committees is to participate in preparing the country annual reports, review and monitor any issues raised by the data quality auditors, and review the execution of annual work plans, provide records of their deliberations, and similar. These annual reports and other country committee reports are then reviewed and monitored by the GAVI Independent Review Committee, which is formed entirely of independent experts and is tasked with reviewing new proposals and annual country reports.

GAVI Oversight: oversight of all programs and procedures is carried out by the GAVI Secretariat, the GAVI Independent Review Committee, and the GAVI Alliance Board (GAVI Alliance Board and GAVI Fund Board) and GAVI Working Groups (Regional Working Groups are made up of technical experts from GAVI partners and seek to represent the interests of particular countries in GAVI's global decision-making processes and the GAVI Working Group, also formed by technical experts from GAVI partners and charged with monitoring implementations of any decisions taken at the GAVI Board).

GAVI Monitoring and Evaluation Requirements: "GAVI support is subject to strict performance monitoring."<sup>181</sup> This monitoring takes the form of three mandatory measures:

- Annual Progress Reports: reporting is submitted annually together with a WHO/UNICEF Joint Reporting Form<sup>182</sup> and dedicates a specific section to detailing the receipt and use of GAVI funds, in addition to other program monitoring sections. Failure to submit annual progress reports in a timely fashion may result in interruption of funding support.

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<sup>181</sup> From the GAVI Alliance Handbook 2008, p.63.

<sup>182</sup> See [http://www.who.int/immunization\\_monitoring/routine/joint\\_reporting/en/index.html](http://www.who.int/immunization_monitoring/routine/joint_reporting/en/index.html). Accessed April 2008.

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- Vaccine Management Assessments: are required for countries receiving new or underused vaccines. These assessments may be conducted using the WHO/UNICEF Effective Vaccine Store Management Tool<sup>183</sup>.
  - Data Quality Audits: recipient governments must allow data quality auditors to inspect reporting systems during the second year of GAVI support (or one year after approval for re-applicants). The audit team includes two external auditors selected by GAVI and two internal auditors selected by the government. These audits are carried out according to the standard WHO procedure for data quality audits and costs are covered by GAVI. Audit methodology includes checking data accuracy, recording and reporting practices (district, regional and central levels), as well as checking the accuracy of existing tally sheets, monthly reports, tabulations and ledgers. In addition, the auditors will observe immunisation sessions taking place and will enter their observations and information independently and daily into laptop computers which will then aggregate the data and provide reporting for both GAVI and the country's interagency coordination committee. Insufficient data accuracy will result in that country's either conducting a coverage survey (again, using standard WHO cluster survey methodology) and/or the formulation and execution of that country (together with its interagency coordination committee and regional working group) of a plan to improve its reporting system.

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<sup>183</sup> [http://www.who.int/vaccines-documents/DocsPDF05/IVB\\_04\\_16-20.pdf](http://www.who.int/vaccines-documents/DocsPDF05/IVB_04_16-20.pdf). Accessed April 2008.