

**Privileges and Immunities of Global Public-Private Partnerships:
A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria**

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APPENDIX

Fig. 1. Core structures of the Global Fund

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I. INTRODUCTION

The topic of this paper evokes the collision between traditional public international law doctrine and current patterns of global governance characteristic of what Kingsbury *et al* term “the global administrative space.”¹ The law of privileges and immunities is constructed on the idea of international organization as intergovernmental organization. Typically, privileges and immunities regimes (“P&I regimes”) are conferred on international organizations constituted by treaty. P&I regimes are further premised on the notion that member states mutually commit to the attenuation of domestic jurisdiction so as to facilitate the articulated purpose of their organization, as set out in its constituent treaty. In short, P&I regimes inhabit the paradigm of Westphalia.

By contrast, the global administrative space is populated by entities that do not comport with Westphalian notions of international organization; these entities reach beyond state participation to include non-governmental organizations (“NGOs”), corporate actors and individuals.² In this respect, the case study in this paper is probably archetypal. As its name implies, the Global Fund to Fight AIDS, Tuberculosis and Malaria (“the Global Fund”) is an international financing institution that makes grants for in-country programmes to prevent and treat HIV/AIDS, tuberculosis and malaria.³ The significance of the Global Fund is that it is a permanent hybrid intergovernmental-private arrangement formally incorporating non-state actors as equal players in its membership and core governance structures.⁴ Therefore, as

¹ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 18 (2005).

² Kingsbury, Krisch & Stewart, *supra* n 1 at 20.

³ The Global Fund, *About the Global Fund*, <http://www.theglobalfund.org/en/about/> (last visited: Mar. 8, 2009).

⁴ “Hybrid intergovernmental-private arrangements” are posited as one of several “ideal” categories of globalized administrative regulation by Kingsbury, Krisch and Stewart in order to facilitate further inquiry: see Kingsbury, Krisch & Stewart, *supra* n 1 at 20.

distinct from more casual or transactional-type public-private collaboration,⁵ the Global Fund is an institutionalized global public-private partnership⁶ in the fullest sense.

The Global Fund does not implement in-country programmes directly. However, the nature of its activities and the scale of its grants⁷ are perceived to translate to significant liability exposure for the organization and its officials, making P&I regimes necessary for the effective fulfilment of its mandate.⁸ The type of programmes financed by Global Fund grants may render tortious claims by third party claimants plausible, for example. Two scenarios may be briefly cited here. In 2004, an article in *The Lancet* alleged that Global Fund malaria grant policy in Senegal and Kenya amounted to “medical malpractice”, and contravened World Health Organization (“WHO”) guidelines.⁹ In 2008, poor supply chain management in India put Global Fund-financed drugs and health supplies at risk of compromised efficacy.¹⁰ These facts

⁵ Two examples are the World Health Organization’s Tobacco-Free Initiative (http://www.who.int/tobacco/global_interaction/en/), which involves NGOs and civil society in work on tobacco control, and the United Nations Global Compact (<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>), which is a policy initiative designed to align corporate activity with certain “universally-accepted principles” in the areas of human rights, labour, the environment and anti-corruption. Neither is institutionalized along the lines of the Global Fund.

⁶ Here, I use the term “global public-private partnership” to indicate a transnational collaborative relationship involving both state and non-state actors (including NGOs, corporate actors and private foundations) constituted to achieve certain shared goals.

⁷ As at the time of writing, the Global Fund had committed approximately US\$15 billion in grants to programmes in 140 states: see The Global Fund, *Homepage*, <http://www.theglobalfund.org/en/> (last visited: Jan. 1, 2009). For detailed information on grant commitments and disbursements, see The Global Fund, *Commitments and Disbursements*, <http://theglobalfund.org/en/commitmentsdisbursements/> (last visited: Feb. 20, 2009).

⁸ *Ibid.*; The Global Fund, Secretariat, *Report on Legal Status Options for the Global Fund*, at GF/B4/12, Jan. 29-31, 2003, 3, available at: <http://www.theglobalfund.org/documents/board/04/GF%20B4%2012%20Legal%20Status%20Report.pdf> [hereinafter “*Report on Legal Status Options*”]; telephone interview with a legal officer from the Global Fund (Dec. 8, 2008).

⁹ Amir Attaran *et al*, *WHO, the Global Fund, and Medical Malpractice in Malaria Treatment*, 363 THE LANCET 237, 238 (2004) (arguing that Global Fund decisions to finance “cheap but ineffective” chloroquine or sulfadoxine-pyrimethamine instead of artemisinin-class combination therapies for malaria in Senegal and Kenya were “indefensible”).

¹⁰ The Global Fund, Office of Inspector-General, *Final Audit Report on the Procurement, Supply Chain Management and Service Delivery of the Global Fund’s Grants to the Government of India*, Audit Report No. TGF-OIG-08-001, 9 September 2008, 12, available at

ostensibly recall those that culminated in a finding of liability against Unicef by the High Court of Assam in 2003. That suit arose from deaths alleged to have resulted from the administration of Unicef-supplied vitamin A supplements to children.¹¹ As such, grafted onto the Global Fund's novel institutional structure are the kinds of P&I regimes associated with international organizations in the Westphalian mode. In Switzerland and the United States, the Global Fund is accorded privileges and immunities normally reserved for international organizations by a headquarters agreement¹² and by domestic legislation¹³ respectively. In 2008, the Global Fund indicated that it would actively seek to expand the geographic scope of these privileges and immunities.¹⁴

Many elements of the Global Fund's character and institutional design are unprecedented. Not least of these is the fact of equal non-state participation in its governance and decisional processes. Yet, it appears that the question of whether it is at all appropriate to extend P&I regimes to something like the Global Fund has received little attention in the scholarly literature. Given the existing critiques of P&I

http://www.theglobalfund.org/documents/oig/Final_Audit_Report_India_ProcurementAndSCM_Sep08.pdf

¹¹ Subhir Baumik, *India child deaths blamed on Unicef*, BBC News, Sept. 3, 2003, available at http://news.bbc.co.uk/2/hi/south_asia/3079438.stm (last visited: Mar. 8, 2009).

¹² Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in view of determining the legal status of the Global Fund in Switzerland, Dec. 13, 2004, available at: http://www.theglobalfund.org/documents/board/08/gfb87_annex4a.pdf [hereinafter "the Swiss Headquarters Agreement"]. See also Press Release, The Global Fund, Global Fund Gains Privileges and Immunities Similar to International Organizations (Dec. 13, 2004), available at: http://www.theglobalfund.org/en/pressreleases/?pr=pr_041213 (last visited: Feb. 20, 2009). See also Part II.C, *infra*.

¹³ Executive Order 13395, available at <http://www.state.gov/p/af/rls/75508.htm> [hereinafter "Executive Order 13395"]; International Organizations Immunities Act, § 288F-6 (Global Fund to Fight AIDS, Tuberculosis and Malaria; extension of privileges, exemptions, and immunities). See also Part II.C, *infra*.

¹⁴ The Global Fund, *Report of the Policy and Strategy Committee*, Nov. 7-8, 2008, 11, http://www.theglobalfund.org/documents/board/18/GF-B18-04_ReportPSC.pdf (last visited: Jan. 19, 2009) [hereinafter "*Policy and Strategy Committee Report*"]. The Secretariat is to begin this exercise with "key countries", which are donor states with representation on the Global Fund Board: telephone interview with a legal officer from the Global Fund (Dec. 8, 2008).

regimes for international organizations that do fit the Westphalian paradigm,¹⁵ this omission is conspicuous.

In this paper, I suggest that the extension of P&I regimes to global public-private partnerships gives rise to normative and doctrinal concerns, so that this extension cannot be justified on instrumental grounds alone. The intuitive response is that these concerns should not be compounded by extending P&I regimes to global public-private partnerships. However, this type of hybrid structure is clearly here to stay—its increasing use partly brought about by a certain loss of faith in the efficacy of Westphalian multilateralism.¹⁶ Seen in that light, developing a coherent approach to immunity issues becomes both urgent and compelling. Here, I suggest that considerations of genesis and administrative law-type analyses of institutional design may substitute for the classical constituent treaty in order to identify which global public-private partnerships should benefit from P&I regimes. Further, I argue that P&I regimes, even if appropriate, should be disaggregated: blanket conferrals of P&I regimes are to be avoided if they are not critical to function.

II. THE GLOBAL FUND

This Part outlines the genesis, institutional design, decisional processes and operations of the Global Fund. This exercise has a threefold purpose. First, it clarifies the nature and extent of non-state participation in the Global Fund. Second, it delineates those aspects of its institutional design that may be said to roughly assimilate administrative law-type accountability mechanisms. Finally, it indicates some possible

¹⁵ These range from critiques that P&I regimes attenuate legal accountability generally, to critiques specific to situations that are said to qualify as abuse of P&I regimes. See, e.g., Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53 (1995); August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOBAL GOVERNANCE 131 (2001); KAREL WELLENS, *REMEDIES AGAINST INTERNATIONAL ORGANISATIONS* (2002); Frederick Rawski, *To Waive Or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations*, 18 CONN. J. INT'L L. 103 (2002); and Emmanuel Gaillard & Isabelle Pingel-Lenuzza, *International Organisations and Immunity From Jurisdiction: To Restrict Or to Bypass*, 51 INT'L & COMP. L.Q. 1 (2002).

¹⁶ The GAVI Alliance is a second global public-private partnership that intends to secure “international organisation” status under the Swiss Host State Act: see GAVI Alliance, *Hosting transition update*, 2, http://www.gavialliance.org/resources/12__GAVI_Secretariat_transition.pdf.

points of liability exposure, and how the Global Fund seeks to use P&I regimes to address perceived liability issues.

A. Genesis

The genesis of the Global Fund is generally traced to the April 2001 African Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases.¹⁷ The Summit culminated in the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, by which the Member States of the Organization of African Unity (as it then was) pledged their “support” for the creation of such a fund.¹⁸ In June 2001, Annan’s proposal received the wider imprimatur of the international community, expressed through a General Assembly resolution passed during the June 2001 Special Session on HIV/AIDS.¹⁹ Finally, the Group of Eight announced the

¹⁷ In his speech to the Summit, then-UN Secretary General Kofi Annan “propose[d] the creation of a Global Fund, dedicated to the battle against HIV/AIDS and other infectious diseases”: the text of this speech is available at <http://www.africaaction.org/docs01/ann0104.htm> (last visited: Mar. 9, 2009). See also the accounts given in The Global Fund, *History of the Global Fund*, <http://www.theglobalfund.org/en/history/?lang=en> (last visited: Dec. 22, 2008); The Global Fund, *The Global Fund: Who We Are, What We Do*, <http://www.theglobalfund.org/en/publications/whoweare/> (last visited: Dec. 24, 2008); Anna Triponel, *Global Fund to Fight Aids, Tuberculosis and Malaria: A New Legal and Conceptual Framework for Providing International Development Aid* (Publication prepared for the Asian Development Bank, 2008), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1307926; Raymond W. Copson & Tiaji Salaam, *The Global Fund to Fight Aids, Tuberculosis and Malaria: Background and Current Issues*, CRS-2 (2005), available at: <http://www.ncseonline.org/nle/crsreports/05mar/RL31712.pdf> (last visited: Dec. 1, 2008); and Jeremy Heimans, *Multiactor Funds: New Tools to Address Urgent Global Problems* (UNU-WIDER, Research Paper No. 2004/47, 2004), available at http://www.wider.unu.edu/publications/working-papers/research-papers/2004/en_GB/rp2004-047/ (describing then-UN Secretary-General Kofi Annan as a “key instigator” of the Global Fund).

¹⁸ Org. Afr. Unity [OAU], Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, at ¶ 29, OAU/SPS/ABUJA/3 (Apr. 27, 2001), available at: http://www.un.org/ga/aids/pdf/abuja_declaration.pdf.

¹⁹ Declaration of Commitment on HIV/AIDS, G.A. Res. S-26/2, ¶¶ 90-1, U.N. Doc. A/Res/S-26/2 (Aug. 2, 2001). The Declaration both endorsed “the establishment, on an urgent basis, of a global HIV/AIDS and health fund” financed from public and private sources, and linked the establishment of the proposed fund to the effective realization of the Millennium Development Goals, which have their own inception in another soft law instrument, the United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/Res/55/2 (Sep. 8, 2000). The eradication of HIV/AIDS and other infectious diseases is listed as Millennium Development Goal 6: see United Nations Millennium Development Goals, *Goal 6: Combat HIV/AIDS, Malaria and Other Diseases*, <http://www.un.org/millenniumgoals/aids.shtml> (last visited: Feb. 17, 2009).

launch of the Global Fund in July 2001 by a *communiqué* issued at the end of its Genoa summit.²⁰

Negotiations on the proposed fund's legal status, governance arrangements, institutional design and eligibility criteria for programme grants were undertaken by a Transitional Working Group.²¹ The Global Fund's final institutional design and governance arrangements manifest an interesting tension between the Transitional Working Group's initial desire to deliberately dissociate from the formal multilateralism of the UN system,²² and the apparent perception that some trappings of the modern intergovernmental organization—including a fairly substantial permanent Secretariat and a comprehensive privileges and immunities framework²³—are now nevertheless necessary for the operationalization of the Global Fund's mandate.

B. *Institutional design*

1. Overview

Following the Transitional Working Group negotiations, the Global Fund was established in 2002 as a private non-profit foundation under Art. 80 of the Swiss Civil Code.²⁴ It is governed by relevant Swiss law,²⁵ a set of Bylaws²⁶ and a Framework

²⁰ Group of Eight, *Communiqué*, at ¶ 15 (Jul. 22, 2001), available at: http://www.g8italia.it/_en/docs/XGKPT170.htm.

²¹ The meeting and consultation documents of the Transitional Working Group are available at <http://theglobalfund.org/en/twg/>. The Transitional Working Group consisted of about 40 representatives of developing and donor states, NGOs, the private sector and UN agencies: see The Global Fund, *Transitional Working Group*, <http://theglobalfund.org/en/twg/> (last visited: Feb. 20, 2009).

²² According to Heimans' empirical study (*supra* n 17), hostility toward the UN system, including the WHO, was palpable during the negotiations: Heimans, *supra* n 17 at 3. This story is also borne out by Transitional Working Group meeting documents ("Other members would prefer total independence from existing organizations. This was regarded as critical to establish public confidence."): see *Second Meeting of the Transitional Working Group*, at 4, http://theglobalfund.org/documents/twg/TWG_2nd_Meeting-report_011112ehmer_redline.pdf (last visited: Feb. 20, 2009).

²³ David Sullivan, *International Coalitions of the Willing*, 99 AM. SOC'Y INT'L L. PROC. 244, 246 (2005).

²⁴ The Global Fund, Secretariat, *Report on Legal Status Options for the Global Fund*, at GF/B4/12, Jan. 29-31, 2003, available at: <http://www.theglobalfund.org/en/files/boardmeeting4/GF%20B4%2012%20Legal%20Status%20Report.pdf>.

Document.²⁷ Art. 4 of the Global Fund’s Bylaws provide for it to “remain in operation indefinitely.”

On its website, governing documents and publicity material, the Global Fund is described as “an international financing institution” and “a unique public-private partnership dedicated to attracting and disbursing additional resources to prevent and treat HIV/AIDS, tuberculosis and malaria.”²⁸ At its inception, the Global Fund had close institutional links with the WHO, which provided Secretariat staff and other services under an Administrative Services Agreement (“the ASA”), and with the World Bank, which held Global Fund grant moneys on trust under a Trusteeship Agreement. The World Bank continues to play the trusteeship role, but the ASA was terminated at the end of 2008. The Global Fund therefore became an administratively autonomous institution on Jan. 1, 2009.²⁹

Per the Bylaws, the core structures of the Global Fund are the Foundation Board (referred to here as “the Board”), the Secretariat, the Partnership Forum and the Technical Review Panel.³⁰ The Board has established two other governance structures: the Technical Evaluation Reference Group (“the TERG”) in 2003, and the Office of Inspector-General (“the OIG”) in 2005. The TERG is an expert group that advises the Board on a wide range of issues, including organizational efficiency and monitoring of

²⁵ To the extent that the normal operation of Swiss law is moderated under the Swiss Headquarters Agreement, *supra* n 12. This is dealt with further at **xx**, *infra*.

²⁶ The Global Fund, *Bylaws*, http://www.theglobalfund.org/documents/TGF_Bylaws_en.pdf (last visited: Jan. 19, 2009) [hereinafter “Bylaws”].

²⁷ The Global Fund, *Framework Document*, http://www.theglobalfund.org/documents/TGF_Framework.pdf (last visited: Jan. 19, 2009) [hereinafter “Framework Document”].

²⁸ The Global Fund, *Homepage*, <http://www.theglobalfund.org/en/> (last visited: Jan. 1, 2009); The Global Fund, *About the Global Fund*, <http://www.theglobalfund.org/en/about/?lang=en> (last visited: Feb. 19, 2009).

²⁹ Press Release, The Global Fund, The Global Fund Becomes an Administratively Autonomous Institution as of 2009 (Dec. 19, 2008), available at: http://theglobalfund.org/en/pressreleases/?pr=pr_081219 (last visited: Dec. 24, 2008).

³⁰ Bylaws art. 5.

grant performance.³¹ The OIG performs internal oversight functions.³² The details of these structures are set out at *Fig. 1*.

2. Geneva governance structures

Apart from the OIG, the TERG and the Technical Review Panel, the institutional design of the Global Fund may be broadly analogized to the traditional tripartite structure of the modern intergovernmental organization.³³

The *Partnership Forum*, for instance, functions as a plenary body. Given the Global Fund's founding principles,³⁴ the Partnership Forum obviously reaches beyond states to include "stakeholders that actively support [the Global Fund's] objectives".³⁵ These range from donor representatives, multilateral development cooperation agencies, civil society, NGO and community-based organizations, technical and research agencies, and the private sector.³⁶ The Global Fund describes the Partnership Forum as "a process, not an event", consisting of online discussions, consultations and meetings for invited stakeholders.³⁷ However, there is a tangible deliverable in the form of written policy recommendations to the Board, issued after the Partnership Forum's biennial plenary meetings.³⁸ In design, at least, these arrangements evince the theory that Global Fund policies should be responsive to the interests of affected constituencies.

³¹ The Global Fund, *Technical Evaluation Reference Group*, <http://theglobalfund.org/en/terg/?lang=en> (last visited: Mar. 9, 2009).

³² The Global Fund, *Office of Inspector-General*, <http://www.theglobalfund.org/en/oig/?lang=en> (last visited: Feb. 19, 2009).

³³ On this tripartite structure, see JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS*, 9 (2006).

³⁴ These are set out in Sect. III (Principles) of the Framework Document, *supra* n 27, and at The Global Fund, *How the Global Fund Works*, <http://www1.theglobalfund.org/en/how/?lang=en> (last visited: Jan. 19, 2009).

³⁵ Bylaws art. 6.1. See also Sullivan, *supra* n 23 at 245.

³⁶ *Ibid.*

³⁷ The Global Fund, *Partnership Forum*, <http://www.theglobalfund.org/en/partnershipforum/?lang=en> (last visited: Dec. 24, 2008).

³⁸ See, e.g., *Recommendations from the Global Fund Partnership Forum* (Dec. 8-10, 2008), http://www.theglobalfund.org/documents/partnershipforum/2008/PF2008_Recommendations.pdf (last visited: Feb. 20, 2009).

The 24-member *Board* is the supreme governing body.³⁹ There are 20 voting members, with one vote each, and four *ex officio* members. For quorum and decision-making purposes, the voting membership is split into two groups: the first consisting of donor states, the private sector and private foundations (“the donor voting block”), and the second consisting of developing states and NGOs (“the implementer voting block”). The Bylaws provide that the Board should use its “best efforts” to take decisions by consensus. If it proves necessary to put a decision to a vote, then a two-thirds majority of both voting blocks is required for a motion to pass.⁴⁰

The permanent *Secretariat* is based in Geneva. It is responsible for the daily operations of the Global Fund, and is headed by an Executive Director selected by the Board on merit.⁴¹ Among other things, the Secretariat organizes the receipt and review of grant applications, the negotiation of grant agreements, commissions the Technical Review Panel, and communicates the Board’s decisions to stakeholders.⁴²

The Secretariat now numbers approximately 370,⁴³ but the Transitional Working Group initially envisaged a very lean Secretariat numbering no more than “12-15 professionals with associated support staff.”⁴⁴ The idea was that the Secretariat

³⁹ Bylaws art. 7.4. The Board meets at least twice a year. Meeting documents and Board decisions are disseminated through the Global Fund website at <http://theglobalfund.org/en/board/decisions/?lang=en> and <http://theglobalfund.org/en/board/meetings/?lang=en> (last visited: Feb. 20, 2009).

⁴⁰ Bylaws art. 7.6. The Chair and Vice-Chair of the Board are elected by the voting membership from its number in accordance with the voting procedure set out in the main text. The current Chair is Rajat Gupta, a senior partner at McKinsey & Company and the private sector representative. The current Vice-Chair is Elizabeth Mataka, the Executive Director of Zambia National AIDS Network and the developing state NGO representative. Although this is not provided for in the Bylaws, appears that there is a practice to have Chair from donor constituency, and Vice-Chair from implementor constituency: see Luke Aspinall, Jacqueline Wittebrood & Joseph Andre Tiendrebeogo, *Global Fund Governance and Constituency Processes*, Dec. 8, 2008, <http://www.theglobalfund.org/documents/partnershipforum/2008/presentations/0812/C1/3pm/PF%20p res.ppt> (last visited: Feb. 25, 2009).

⁴¹ Bylaws art. 8.1. The current (and second) Executive Director, Dr. Michel D. Kazatchkine, is a French immunologist. Before succeeding Sir Richard Feachem in April 2007, Dr. Kazatchkine served as Chair of the Technical Review Panel, and as Vice-Chair of the Board: The Global Fund, *Executive Director*, <http://theglobalfund.org/en/secretariat/director/> (last visited: Feb. 20, 2009).

⁴² Bylaws art. 8.2.

⁴³ The Global Fund, *Secretariat*, <http://www.theglobalfund.org/en/secretariat/>.

⁴⁴ *Third Meeting of the Transitional Working Group*, Annex 1: Governance, at 4 (Dec. 14, 2001), available at <http://www.theglobalfund.org/documents/twg/1-Governance.pdf> (last visited: Feb. 20, 2009).

“should not be so small that it can’t do its job, but not so large that it grows into a new organization”.⁴⁵ Given these considerations, and to address concerns that the Global Fund’s administrative headquarters should be protected from liability, the Global Fund entered into the ASA at the outset of its operations in 2002.⁴⁶

Although it appears that the ASA was always meant to be a temporary arrangement,⁴⁷ it nevertheless created real conflict of interest issues for Global Fund Secretariat staff concurrently serving as WHO officials. These concerns are reflected in Board meeting documents recording the anxiety of WHO officials over this problem of “dual governance”, noting the private and non-governmental elements on the Board, and that WHO officials could not be expected to “serve two masters”.⁴⁸ The termination of the ASA means, of course, that the Global Fund can no longer rely on WHO privileges and immunities (such as they were) for Global Fund staff on official travel outside Switzerland and the United States.

If the Partnership Forum–Board–Secretariat configuration echoes the tripartite structure of the traditional international organization, then the ombudsman-like functions of the *OIG* invites parallels with the internal oversight mechanisms of other international organizations, such as the World Bank Integrity Vice-Presidency⁴⁹ and the UNHCR Inspector-General.⁵⁰ The *OIG* is an independent unit that reports directly to the Board. It has two main areas of responsibility: investigation of possible fraud, misappropriation, corruption or mismanagement of funds; and audit and inspection of

⁴⁵ *Final Report of the First Meeting of the Transitional Working Group to Establish a Global Fund to Fight AIDS, Tuberculosis and Malaria*, at 3 (Oct. 30, 2001), available at http://www.theglobalfund.org/documents/twg/Meeting_report_F_011030.pdf (last visited: Dec. 24, 2008).

⁴⁶ Sullivan, *supra* n 23 at 246.

⁴⁷ The Global Fund, *supra* n 29.

⁴⁸ The Global Fund, *Report of the Finance and Audit Committee*, at 3 (Oct. 31-Nov. 3, 2006), http://www.theglobalfund.org/documents/board/14/GF-BM-14_09_ReportFAC.pdf (last visited: Oct. 27, 2008).

⁴⁹ The World Bank, *Integrity Vice Presidency*, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,contentMDK:20542001~pagePK:64168427~piPK:64168435~theSitePK:588921,00.html>

⁵⁰ Erika de Wet, *Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review* 9 GERMAN L.J. 1987, 1997 (2008).

Global Fund activities and transactions.⁵¹ To date, the OIG has issued four reports.⁵² The OIG may initiate action of its own accord, but also relies on whistle-blowing procedures for information on possible abuses. These whistle-blowing procedures apply to the Secretariat and governance bodies in Geneva,⁵³ as well as to the Global Fund’s in-country partners.⁵⁴

3. In-country actors

The Global Fund has no country offices apart from its Geneva headquarters. Instead, it relies almost entirely on contracted local partners for in-country implementation and oversight of the programmes it funds. Aspects of the Global Fund grant-making process are set out at *Fig. 2*.

The key actors in-country are the Country Coordinating Mechanism, one or more Principal Recipients per country, and the Local Fund Agent. In line with Section III.C of the Framework Document, which stipulates “national ownership”, the *Country Coordinating Mechanism* develops and proposes grants based on national priorities.⁵⁵ Its membership includes both public and private sector representatives. It is responsible for in-country governance of Global Fund grants. It also nominates the *Principal Recipient* to contract with the Secretariat to receive grants and implement programmes.⁵⁶ The Principal Recipient may be a national government agency, an

⁵¹ The Global Fund, *Office of Inspector General*, <http://theglobalfund.org/en/oig/?lang=en>.

⁵² The Global Fund, *Office of Inspector General—Reports*, <http://theglobalfund.org/en/oig/reports/?lang=en>. There is a fifth report on allegations of misuse of a Global Fund bank account with Credit Suisse not listed at this page. However, that report appears to have been somewhat problematic, drawing vigorous disagreement from Global Fund management: The Global Fund, *Comprehensive Account of the Reports Related to the Credit Suisse Account*, May 31, 2007, <http://theglobalfund.org/documents/board/15/GlobalFund-FinalReport.pdf>.

⁵³ The Global Fund, Office of Inspector-General, *Whistleblowing Policy for the Secretariat and Governance Bodies of the Global Fund to Fight AIDS, Tuberculosis and Malaria*, http://theglobalfund.org/documents/oig/Whistleblowing_Policy_for_the_secretariat.pdf.

⁵⁴ The Global Fund, Office of Inspector-General, *In-country Whistleblowing Policy for the Global Fund to Fight AIDS, Tuberculosis and Malaria*, http://theglobalfund.org/documents/oig/In-Country-Whistleblowing_Policy_for_the_Global_Fund.pdf.

⁵⁵ Sect. III.C provides that “The Fund will base its work on programs that reflect national ownership and respect country-led formulation and implementation processes.”

⁵⁶ Some aspects of the standard form programme grant agreement are dealt with further in Part II.C, *infra*.

NGO, or an international development agency: this essentially appears to be a function of circumstances in the implementer state.⁵⁷ The *Local Fund Agent* is an in-country office of an auditing firm that oversees and reviews grant performance to facilitate the Global Fund's assessment of key indicators that determine whether programmes should continue to be funded.⁵⁸ It is contracted to perform these services by the Secretariat through a competitive bidding process.⁵⁹

Quite apart from the contractual restraints, and in the absence of clear lines of command-and-control to Geneva, the Global Fund attempts to buttress the accountability of in-country actors to the Geneva governance structures and affected constituencies in at least two ways. First, the OIG in-country whistleblowing procedure is, in principle, available to “anyone who knows of misconduct associated with Global Fund activity—or who has reasonable grounds for inferring misconduct.”⁶⁰ Second, the Global Fund issues extensive information and guidance to in-country actors via its website. For example, the Global Fund has had to devise conflict of interest guidance for situations where membership of the Country Coordinating Mechanism overlaps with the Principal Recipient.⁶¹ The Country Coordinating Mechanism section of the Global Fund website also links to two “partner websites”. These belong to Aidspan, a Kenyan NGO that describes itself as “an independent watchdog of the Global Fund”,⁶² and GTZ, a German government-affiliated technical cooperation enterprise.

⁵⁷ For *e.g.*, the Principal Recipient for many grants in Indonesia is the Ministry of Health, while the Principal Recipient for grants in Myanmar, when they subsisted, was UNDP: see information available at The Global Fund, *Advanced Program Search*, <http://theglobalfund.org/programs/search/?lang=en>.

⁵⁸ The Global Fund, *Framework Document*, Sect. VI.4, http://www.theglobalfund.org/documents/TGF_Framework.pdf [hereinafter “Framework Document”].

⁵⁹ The Global Fund, *Competitive Bidding Process*, <http://www.theglobalfund.org/en/lfa/selection/> (last visited: Mar. 9, 2009).

⁶⁰ The Global Fund, Office of Inspector-General, *supra* n 54 at ¶ 5.

⁶¹ The Global Fund, *Country Coordinating Mechanisms: Conflict of Interest*, <http://theglobalfund.org/documents/ccm/CCMThematicReport06-ConflictOfInterest.pdf>.

⁶² Aidspan, *Homepage*, <http://www.aidspace.org/index.php> (last visited: Mar. 8, 2009). Among other publications, Aidspan issues *The Global Fund Observer*, which sets out commentary and analysis on Global Fund in-country activities.

At a more general level, the Global Fund appears to have made a palpable effort to utilize its website in accordance with its enunciated commitment to “operat[e] in a transparent and accountable manner.”⁶³ The website is remarkably comprehensive, and was, in fact, the source from which much of the primary material for this paper was drawn. It includes the text of its governing documents (the Bylaws and the Framework Document), grant commitment, disbursement and performance information, meeting records of the Transitional Working Group and core governance structures—including substantial information on decision processes) and the technical criteria for evaluating grant proposals and performance. The Global Fund website also hosts the eForum, which is the online discussion component of the Partnership Forum process.⁶⁴

C. *Risk management and the deployment of P&I regimes*

On the basis of Part II.B, there are many ways in which the Global Fund differs from the traditional intergovernmental organization. These include the equal participation of non-state actors (institutionalized in the Board and in-country structures, and in a more general sense through the Partnership Forum and the website), the degree of informational transparency with which it operates, and the absence of formal in-country presence.

The throwback to Westphalian multilateralism, however, comes through in the Global Fund’s perception that P&I regimes are nevertheless necessary for the effective operationalization of its mandate. The Policy and Strategy Committee of the Board goes so far as to express the view that “P&Is are an important part of the Global Fund’s identity and risk management strategy.”⁶⁵ Although perhaps not so strongly

⁶³ Framework Document, Sect. III.G; The Global Fund, *How the Global Fund Works*, <http://www.theglobalfund.org/en/how/?lang=en#7>. See also the positive assessment in Kent Buse & Andrew M. Harmer, *Seven Habits of Highly Effective Global Public-Private Health Partnerships: Practice and Potential*, 64 SOC. SCI. & MED. 259, 262, 265 (2007).

⁶⁴ The Global Fund, *eForum 2008*, <http://www.theglobalfund.org/EN/partnershipforum/2008/eforum/>.

⁶⁵ The Global Fund, *Report of the Policy and Strategy Committee*, at 11 (Nov. 7-8, 2008), available at: http://theglobalfund.org/documents/board/18/GF-B18-04_ReportPSC.pdf (last visited: Feb. 20, 2009).

expressed at the time, this idea was attendant from the outset of the Global Fund's operations. It accounts for the Trusteeship Agreement with the World Bank and the ASA with WHO. Since there was then no precedent for the extension of P&I regimes to something like the Global Fund, these arrangements were necessary in order for the organization to benefit—at least in theory—from the P&I regimes of the World Bank and the WHO.⁶⁶

Currently, the Global Fund's P&I regimes operate at two levels. First, the effect of the Swiss Headquarters Agreement and Executive Order 13395 is that the Global Fund and its officials (including Board members from non-state constituencies) are accorded the full range of privileges and immunities usually associated with international organizations in Switzerland and the United States. These include immunity from suit and all forms of legal process, tax and immigration privileges, and inviolability of property and premises.⁶⁷ In other words, these are P&I regimes, classically rendered.

Second, the standard form programme grant agreement between the Global Fund Secretariat and the Principal Recipient seeks to replicate the substantive effect of certain privileges and immunities in implementer states. Art. 4 binds the Principal Recipient to “try to ensure” that Global Fund grants are “free from taxes and duties imposed under laws in effect” in the implementer state. Art. 28 excludes the Global Fund from liability for loss arising from programme implementation by the Principal Recipient. Art. 29 commits the Principal Recipient to indemnify the Global Fund in the event of suit.⁶⁸ It is probably fair to speculate, however, that compliance might be

⁶⁶ Sullivan, *supra* n 23 at 246.

⁶⁷ Swiss Headquarters Agreement, Parts I and II; International Organizations Immunities Act, §§ 288a-d. These compare to the list of privileges and immunities set out in the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15 (entered into force Sept. 17, 1946) [hereinafter “the 1946 Convention”].

⁶⁸ The full text of the Global Fund standard form programme grant agreement is available at http://www.theglobalfund.org/documents/lfa/BeforeGrantImplementation/Standard_Form_Grant_Agreement.pdf (last visited: Mar. 9, 2009).

patchy, especially where the Principal Recipient is not affiliated to or does not have the necessary influence with the relevant national government.

At the time of writing, neither the Global Fund nor its officials had ever been subject to national litigation or legal process.⁶⁹ This suggests that what animates the need to secure privileges and immunities is very much prudential, although as the references above to events in Senegal, Kenya and India show, the nature of Global Fund programmes render national litigation a distinct possibility. The three key foci of liability exposure identified by the Secretariat in 2003 (the trust account moneys held by the World Bank, Global Fund property and assets other than the trust account, and the members of the Global Fund Board and Secretariat)⁷⁰ are now addressed in the Swiss Headquarters Agreement and Executive Order 13395. Beyond Switzerland and the United States, the expansion of privileges and immunities is driven by the need to maintain the integrity of grant moneys in-country⁷¹—from the revenue jurisdiction as well as from suit, since the “deep pockets” of the Global Fund make it a rather more attractive litigation target than the typical Principal Recipient—and to protect Global Fund staff on official business in-country.⁷²

III. DEVELOPING A RESPONSE

This Part is structured as follows. At the outset, I identify some normative and doctrinal concerns that arise when P&I regimes are applied to global public-private partnerships like the Global Fund. Next, I outline why a coherent basis for the conferral of P&I regimes on global public-private partnerships (apart from instrumental reasons alone) is nevertheless necessary. I suggest that an appropriate response should incorporate considerations of genesis and function, as well as administrative law-type analyses of institutional design. These would serve to identify

⁶⁹ Telephone interview with a legal officer from the Global Fund (Dec. 8, 2008).

⁷⁰ *Report on Legal Status Options*, Annex 2: Liability Considerations, *supra* n 24.

⁷¹ *Policy and Strategy Committee Report*, *supra* n 14 at 11.

⁷² Telephone interview with a legal officer from the Global Fund (Dec. 8, 2008).

which global public-private partnerships should benefit from P&I regimes, as well as the reach of such P&I regimes; blanket conferrals should, as far as possible, be avoided.

A. P&I regimes and the global public-private partnership structure

The concerns identified in the first section below are not particular to global public-private partnerships. They are endemic to the use of P&I regimes generally. This does not, however, make these critiques any less relevant for the purposes of the present analysis,⁷³ since the Swiss Headquarters Agreement and Executive Order 13395 demonstrate that the types of P&I regimes under consideration are those that apply to traditional international organizations. In the next section, I then examine specific issues that may arise when P&I regimes are applied to global public-private partnerships.

1. Concerns of a general nature

P&I regimes almost always attenuate legal accountability.⁷⁴ This is quite apart from situations of abuse, criminality or corruption. There is indeed some preliminary sense in national and regional case law that traditional international organization immunities are being rolled back.⁷⁵ However, this development is nevertheless preliminary, and is limited largely to jurisprudential moves in Western European courts. By definition, immunity from domestic jurisdiction closes off a significant channel through which third party claimants may call to account organizations entitled to such immunity. Unless immunity is waived, or extraordinarily robust alternative accountability mechanisms are available, third parties may very well be left without

⁷³ In fact, one might plausibly argue that this is the nub of the issue: it would not do to abandon the monoliths of Westphalian multilateralism so deliberately, only to reawaken some of their worst excesses in attempting to operationalize new global governance forms that are meant to be more transparent and efficient.

⁷⁴ WELLENS, *supra* n 15; Daniel C. Esty, *Good Governance At the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1540 (2006).

⁷⁵ Kingsbury, Krisch & Stewart, *supra* n 1 at 41, citing *Waite and Kennedy v. Germany* 30 Eur. H.R. Rep. 261 (1999); Ralph Wilde, *Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake* 12 ILSA J. INT'L & COMP. L. 395, 412-3 (2005-6).

effective remedy for tortious or contractual claims in the kinds of situations referred to in Part I above.

This is quite apart from the existing problems with pinning down the legal accountability of international organizations at international law, beyond the domestic legal order. To begin with, a coherent theory of the responsibility of international organizations is a question that remains wide open in existing international legal doctrine.⁷⁶ There then remains the question of the appropriate forum; international organizations are not, for example, subject to the contentious jurisdiction of the International Court of Justice.⁷⁷

2. Concerns specific to the global public-private partnership structure

Non-state participation in the global public-private partnership structure creates particular legitimacy and accountability issues that are compounded by the wholesale application of P&I regimes for the reasons set out in the preceding section.

When “legitimacy”⁷⁸ is invoked as a basis of critique for global public-private partnerships, the specific nature of the charge is the lack of input legitimacy, and more specifically, democratic legitimacy. The argument is that global public-private partnerships lack such legitimacy because they differ from formal intergovernmental organizations in at least two ways: they are not constituted by a multilateral treaty

⁷⁶ Although the UN International Law Commission has taken up this issue, work remains very much in progress: see UN International Law Commission, *Analytical guide: responsibility of international organizations*, http://untreaty.un.org/ilc/guide/9_11.htm. Its work product does not have the monopoly on the correct approach (see, e.g., the work of the International Law Association on the Accountability of International Organisations, <http://www.ila-hq.org/en/committees/index.cfm/cid/9>), and has also been the subject of trenchant critique by, e.g., José Alvarez (cited in the Special Rapporteur’s Fifth Report at 8). See also Andrew Stumer, *Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections*, 48 HARV. J. INT’L L. 553 (2007) (arguing for an approach based on secondary or concurrent liability of the member states of an international organization).

⁷⁷ International organizations “authorized by...the Charter” may request advisory opinions pursuant to Art. 65.1 of the ICJ Statute, but there is no equivalent provision for contentious cases.

⁷⁸ Suchman has defined “legitimacy” on a broad level to mean “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions”: see Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995). In the specific context of supranational governance, Esty lists six

based on state consent, and they permit the equal participation of non-state actors in decision-making processes.⁷⁹ Both features apply in the case of the Global Fund. The theory underlying arguments of this variety is that “legitimacy will not be a major issue...where treaty-making occurs, because the decisionmaking authority lies largely with national officials with high levels of democratic legitimacy.”⁸⁰ Here, different conceptions of “legitimacy” cut both ways: opening up the formal state-based international organization to NGOs, civil society and private actors attenuates the type of legitimacy critique levelled at the UN system for excluding non-state actors, but is equally problematic from the perspective of democratic legitimacy.

As to the accountability concerns, the formal incorporation of non-state participation in the global public-private partnership structure concurrently imports political “downward accountability” problems of the sort normally levelled at NGOs.⁸¹ In the realm of global health governance, in particular, there is a concern that global public-private partnerships are both formulating substantive policy⁸² and competing for resources in place of the intergovernmental organizations traditionally charged with executing the global health. Critiques by Allyn Taylor and Lawrence O. Gostin are fairly typical of this view.⁸³ Gostin, for example, argues that the Global Fund is one of

types of legitimacy: democratic, results-based, order-derived, systemic, deliberative and procedural: Esty, *supra* n 74 at 1515ff.

⁷⁹ See, e.g., the type of arguments cited by Sonja Bartsch, *Global Public-Private Partnerships in Health: A Question of Accountability and Legitimacy*, available at <http://www.wsir.pwias.ubc.ca/2007/docs/Bartsch,%20Global%20PublicPrivate%20Partnerships%20in%20Health.pdf>.

⁸⁰ Esty, *supra* n 74 at 1511.

⁸¹ K. Buse & G. Walt, *Global Public-Private Partnerships: Part II—What Are the Health Issues for Global Governance?*, 78 BULL. WORLD HEALTH ORG. 699, 705 (2000).

⁸² Attaran *et al*, *supra* n 9; Eeva Ollila, *Global Health Priorities—Priorities of the Wealthy?*, 1 GLOB. & HEALTH 6 (2005).

⁸³ Allyn L. Taylor, *Public-Private Partnerships for Health: The United Nations Global Fund on Aids and Health*, 35 J. MARSHALL L. REV. 401 (2002); Allyn L. Taylor, *Governing the Globalization of Public Health*, 32 J. L. MED. & ETHICS 500 (2004); Lawrence O. Gostin, *A Proposal for a Framework Convention on Global Health*, 10 J. INT'L ECON. L. 989 (2007).

“[a] relatively small number of global partnerships [which] currently wield considerable influence in setting the global health agenda.”⁸⁴

Finally, from the perspective of existing international legal doctrine, the essential problem with applying P&I regimes to global public-private partnerships is rather like “the survival of a concept outside the framework of thought that made it a really intelligible one.”⁸⁵ P&I regimes are generally theorized on the basis of a doctrine of “functional necessity,”⁸⁶ so that their effective actualization presumes that states’ collective purpose is clearly articulated in the organization’s constituent instrument. The theory is that member states permit exemptions from substantive domestic law or undertake to refrain from the exercise of domestic jurisdiction in order to permit international organizations and their functionaries the necessary space to execute their mandates.

This is not to say that functional necessity theory is easily applied in practice.⁸⁷ Determining the scope of “function” is one of the most contentious issues in the relevant national case law. However, there is a general sense in existing doctrine that P&I regimes for international organizations nevertheless follows from the sovereign character of the individual actors constituting the collective.⁸⁸ In cases where suit is brought against international organizations in the courts of non-member states, or where immunity is not otherwise regulated by a treaty obligation, non-exercise of

⁸⁴ Gostin, *supra* n 83 at 990-1.

⁸⁵ This expression is somewhat recklessly pillaged from G.E.M. Anscombe, *Modern Moral Philosophy*, 33 *PHILOSOPHY* 1, 6 (1958).

⁸⁶ C. WILFRED JENKS, *INTERNATIONAL IMMUNITIES* (1961); PETER H.F. BEKKER, *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES* (1994). The prototypical expression of “functional necessity” doctrine is in Art. 105 of the UN Charter, which provides that “the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.” These purposes are, of course, articulated in Art. 2 of the UN Charter.

⁸⁷ See, *e.g.*, Anthony J. Miller, *Privileges and Immunities of United Nations Officials* *INT’L ORG. L. REV.* 169, 197-8 (2007).

⁸⁸ “Since an international organization is brought into being by sovereign and independent states and is an association of states, it must be given a special status in relation to the exercise of jurisdictional and administrative authority by individual states”: Explanatory Report to Resolution (69) 29 of the Council of

municipal jurisdiction has sometimes been justified on the basis of some variation of delegated sovereignty or act of state doctrine.⁸⁹

B. *Why a coherent response is necessary*

For the reasons set out in Part III.A, P&I regimes ought not to be extended to global public-private partnerships on instrumental grounds only. There are, however, cogent considerations that militate in favour of formulating appropriate national responses.

Implicit in the turn to various forms of privatization, outsourcing and public-private collaboration is a certain “loss of faith in the state.”⁹⁰ This expression was used by Mark Aronson in relation to “the new public management” (“NPM”) in the domestic order, but is just as apposite in relation to the use of new governance structures within the global order. The increasing use of the global public-private partnership structure is driven by a number of reasons connected to the perceived failure of Westphalian multilateralism. Structural and normative critiques of international organizations are well-known, and will not be traversed again here; Eyal Benvenisti, for example, posits that formal treaty-based structures allow small domestic interest groups to control inter-state negotiations, giving them an avenue of “virtual exit” from national law that disfavors their economic positions.⁹¹

In the specific field of global health, writers like Kent Buse attribute the emergence of global public-private partnerships to disillusionment with the perceived

Europe on the Privileges and Immunities of International Organisations, cited in BEKKER, *supra* n 86 at 100-1.

⁸⁹ Two examples may be briefly noted here. In *International Association of Machinists v. OPEC*, the US Court of Appeals for the Ninth Circuit applied act of state doctrine to decline adjudicating on OPEC’s petroleum price-fixing activity, on the ground that this activity had a “significant sovereign component.” In *Re EAL (Delaware) Corp* 1994 US Dist. Lexis 20528 (D. Del. 1994), the US District Court for the District of Delaware dismissed a suit against Eurocontrol on the basis that it was a “foreign state” for the purpose of the Foreign Sovereign Immunities Act. For a survey of national approaches, see AUGUST REINISCH, *INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS* (2000).

⁹⁰ Mark Aronson, *A Public Lawyer’s Response to Privatisation and Outsourcing*, 40, 41 IN *THE PROVINCE OF ADMINISTRATIVE LAW* (Michael Taggart, ed., 1997).

⁹¹ Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 169-70 (1999).

culture, corruption and organizational bloat generally associated with the mammoth bureaucracies of modern intergovernmental organizations.⁹² More crucially, it would appear that national governments can no longer assure the effective delivery and financing of global public goods. Cooperation and buy-in from non-state actors, particularly private foundations, is no longer a bonus, but a necessity.⁹³ The prime example, of course, is the Bill & Melinda Gates Foundation,⁹⁴ which has pledged about US\$650 million to the Global Fund to date.⁹⁵

In short, the turn away from traditional governance forms at the global level is probably just as irreversible as at the domestic level. While NPM is not yet the dominant paradigm, the Global Fund's P&I regimes certainly indicate the type of issues likely to arise as other global public-private partnerships—such as the GAVI Alliance⁹⁶—begin to make similar moves to ensure the effective operationalization of their mandates.

C. *P&I regimes re-theorized for global public-private partnerships?*

The analysis in this section proceeds as follows. First, I suggest that considerations of genesis and mandate, together with an administrative law-type analysis of institutional design, can yield a useful framework for assessing which global public-private partnerships ought to benefit from P&I regimes in the absence of a clear expression of state consent. Second, P&I regimes should be disaggregated to avoid promoting what Jenks called “the psychology of privilege”,⁹⁷ since this would

⁹² K. Buse & G. Walt, *Global Public-Private Partnerships: Part I—A New Development in Health?*, 78 BULL. WORLD HEALTH ORG. 549, 551 (2000).

⁹³ Michael Edwards & Simon Zadek, *Governing the Provision of Global Public Goods: The Role and Legitimacy of Non-State Actors*, 203, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION (Inge Kaul, Pedro Conceição, Katell Le Goulven, and Ronald U. Mend, eds., 2003).

⁹⁴ Bill & Melinda Gates Foundation, *Grants Overview*, <http://www.gatesfoundation.org/grants/Pages/overview.aspx> (last visited: Jan. 19, 2009).

⁹⁵ The Global Fund, *Pledges and Contributions*, <http://www.theglobalfund.org/en/pledges/?lang=en> (last visited: Jan. 19, 2009).

⁹⁶ *Supra*, n 16.

⁹⁷ JENKS, *supra* n 86.

undermine a basic justification for the use of the public-private partnership structure.⁹⁸ The objectives of this approach are twofold: first, to attenuate the concerns highlighted in Part III.A; and second, to cede the appropriate space within the domestic legal order to particular types of global public-private partnerships and their functionalities.

1. Identifying appropriate global public-private partnerships

This element of the approach incorporates two cumulative aspects: first, considerations of genesis and mandate; and second, a qualitative assessment of institutional design based on concepts borrowed from administrative law.

As to the first, where a global public-private partnership is established to fulfil a public interest mandate, and may be traced to collective expression of political commitment, this would militate strongly in favour of permitting that entity the necessary privileges and immunities to operationalize that mandate. This argument applies *a fortiori* if that mandate is associated with UN Charter goals. As Singer argues, “international law does not permit lack of concern with (and certainly not active opposition to) the purposes of the United Nations and its specialized agencies.”⁹⁹ In this way, a soft law obligation to support the work of a global public-private partnership goes some way toward substituting for a treaty obligation. In the case of the Global Fund, this requirement is satisfied: its origin is sited within the Declaration of Commitment on HIV/AIDS, and its mandate is closely linked with realizing Millennium Development Goal 6.

As to the second, this draws on concepts from domestic administrative law. The importance of avoiding simplistic domestic analogues cannot be overstated.¹⁰⁰ However, examining the ways in which domestic administrative law has responded to

⁹⁸ See text accompanying n 92, *supra*.

⁹⁹ Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 72 (1995).

¹⁰⁰ Kingsbury, Krisch & Stewart, *supra* n 1 at 28, 54; Carol Harlow, *Global Administrative Law: The Quest for Principles and Values* 17 Eur. J. Int'l L. 187, 208 (2006); Janet McLean, *Divergent Legal Conceptions of the State: Implications for Global Administrative Law* 68 L. & CONTEMP. PROBS. 167, 184 (2005).

the challenge of private power performing public functions can be broadly instructive. Here, I refer to two particular kinds of domestic responses: common law judicial review of private or hybrid entities performing public functions,¹⁰¹ and legislating to bring these entities within the reach of administrative law, or at least, bind them to administrative law-type transparency and accountability mechanisms.¹⁰² There is a definite sense in these approaches that government through private or hybrid entities is not *ipso facto* immune from public scrutiny. Further, public scrutiny through judicial review is supplemented and supported by rules mandating decisional transparency and participation. These rules serve to reinforce the legitimacy and accountability of entities performing public functions at some remove from a direct statutory framework.

There are some discernible parallels with the self-imposed accountability mechanisms inherent in the institutional design of the Global Fund. Specifically, these include the internal oversight functions of the OIG, the concern with the participation of affected constituencies through the Partnership Forum, and efforts to ensure informational transparency through the Global Fund website. As Esty argues, administrative law-like mechanisms can have a significant compensatory function as regards deficits of legitimacy.¹⁰³

2. Disaggregating P&I regimes

Jenks' phrase, "the psychology of privilege", evocatively warns against the negative acculturating effect of P&I regimes. Further, an easy reliance on institutional

¹⁰¹ The English Court of Appeal decision in *R v. Panel on Takeovers and Mergers, ex p Datafin plc* [1987] Q.B. 815 (C.A. England) [hereinafter "*Datafin*"] is paradigmatic. In *Datafin*, Datafin the company sought judicial review of a decision taken by the Panel on Takeovers and Mergers, arguing that the Panel had wrongly applied its own takeover rules. The Panel was a self-regulating body and had no direct statutory powers. However, the Court held that the Panel "was supported and sustained by a periphery of statutory powers and penalties", and "operate[d] wholly in the public domain." In the grey space between the two extremes of contractual and statutory "sources of power", the Court held that "the nature of the power" could render an entity amenable to public law judicial review.

¹⁰² This is typified by the United States Administrative Procedure Act, which mandates that administrative agency decisions in conformity with procedures that would generate a publicly available administrative record: APA § 552; Richard B. Stewart, *US Administrative Law: A Model for Global Administrative Law?* 68 L. & CONTEMP. PROBS. 63, 74 (2005).

¹⁰³ Esty, *supra* n 78 at 1521-2.

design alone may incur the danger of what Stewart calls “administrative law-lite”: the use of internal, voluntarist administrative law-type mechanisms not actually rooted in strong legal accountability mechanisms. For these reasons, P&I regimes should be disaggregated even in appropriate cases. Above all, they should not be discussed as though they are indivisible, although most national privileges and immunities legislation is written that way.¹⁰⁴

It is suggested that P&I regimes for global public-private partnerships should be strictly streamlined to purpose. In other words, the baseline would not be all of the privileges and immunities normally reserved for international organizations, but only those necessary to enable the global public-private partnership to carry out its mandate. This attenuated version of P&I regimes recalls the Unicef Basic Country Agreement, which confers only immunity from legal process and the benefit of repatriation facilities to Unicef contractors in the field.¹⁰⁵

In the case of the Global Fund, it is possible that grant money may be adequately safeguarded in implementer states by the necessary tax privilege (thereby obviating the need for Art. 4 of the standard programme grant agreement), and by immunity from execution, permitting national courts to pronounce on liability, but directing satisfaction from some other designated contingency fund. Global Fund staff would require facilitation of entry, as well as immunity from legal process in the course of their official functions. With respect to donor states, however, it is difficult to see why blanket conferrals of P&I regimes are necessary, especially if the key instrumental concerns are safeguarding the integrity of grant money, and ensuring the safety of Global Fund staff.

¹⁰⁴ Like the International Organisations Immunities Act, the approach in most Commonwealth jurisdictions is to list the standard privileges and immunities in primary legislation, and to designate new organizations by executive order.

¹⁰⁵ Anthony J. Miller, *United Nations Experts on Mission and their Privileges and Immunities* INT’L ORG. L. REV. 11, 34 (2007).

IV. CONCLUSION

Conferring P&I regimes on global public-private partnerships has a dual effect. It regularizes the use of the public-private structure at the global level. It also modifies the traditional conception of international organization.¹⁰⁶ If empirical assessments of the efficacy of global public-private partnerships are correct in the long run, and the confluence of political will and private wealth continue to favour this structure over formal multilateralism, then the issue of P&I regimes for global public-private partnerships will become as commonplace as they were for the traditional international organization post-1945. The intention of this paper was not to re-imagine the doctrinal basis for P&I regimes generally; in fact, it will be clear that the doctrinal issues set out in Part III.A still remain. Rather, the proposal is that indiscriminate regularization of the global public-private structure may (and should) be avoided by substituting legitimacy and accountability analyses for state consent, and by reducing P&I regimes only to the elements critical to function.

¹⁰⁶ The Global Fund is designated as a “public international organization” for the purposes of the International Organizations Immunities Act.

Fig 1. Core structures of the Global Fund[#]

CORE STRUCTURE	FUNCTION	ACTORS	NUMBER	WHEN CONVENED
Foundation Board	Supreme governing body	Board membership is constituted as follows:	24 seats (20 voting; 20 <i>ex officio</i> non-voting)	The Board meets twice a year.
		<p><u>Developed/donor states</u>^{note 1} (8 seats)</p> <p>Germany, Canada, Switzerland EC, Belgium, Portugal, Finland France, Spain Italy Japan</p> <p>“Point Seven” group (Denmark, Ireland, Luxembourg, Netherlands, Norway, Sweden) UK, Australia USA</p> <p><u>Private sector</u> (1 seat)</p> <p>Global Business Coalition on HIV/AIDS, TB and Malaria (McKinsey & Co)</p> <p><u>Private foundations</u> (1 seat)</p> <p><i>Bill & Melinda Gates Foundation</i> United Nations Foundation Ford Foundation Clinton Foundation Open Society Institute/Soros Foundation Henry J. Kaiser Family Foundation Levi Strauss Foundation Tides Foundation American Foundation for AIDS Research Wellcome Trust Rockefeller Foundation</p> <p><u>Developing/implementer states</u> (7</p>	<p>Donor voting block (10 seats)</p>	
			Implementer voting	

Provided for in Bylaws

CORE STRUCTURE	FUNCTION	ACTORS	NUMBER	WHEN CONVENED
Foundation Board (cont'd)	seats) ^{note 2} Eastern Europe (<i>Bulgaria</i>) Eastern and Southern Africa (<i>Burundi</i>) Eastern Mediterranean (<i>Yemen</i>) Latin America and the Caribbean (<i>Mexico</i>) South East Asia (<i>Maldives</i>) Western and Central Africa (<i>Burkina Faso</i>) Western Pacific (<i>China</i>) <u>NGO from a developed state</u> (1 seat) Health Global Access Project <u>NGO from a developing state</u> (1 seat) African Council of AIDS Service Organizations <u>NGO representative of communities living with HIV/AIDS, tuberculosis and malaria</u> (1 seat) International HIV/AIDS Alliance <u>Ex officio non-voting members</u> (4 seats) UNAIDS (technical partner) WHO (technical partner) World Bank (trustee of Global Fund accounts) Board-designated Swiss citizen domiciled in Switzerland (required under Swiss law by virtue of the Global Fund's legal status as a Swiss private non-profit foundation)	block (10 seats)	No votes	
Partnership Forum	Akin to plenary body; forum for stakeholders to express	Stakeholders "that actively support the Foundation's objectives"	Up to 500 delegates at biennial	The Global Fund describes the biennial Partnership

CORE STRUCTURE	FUNCTION	ACTORS	NUMBER	WHEN CONVENED
	views on Global Fund policies and strategies	(Bylaws Art. 6.1). This includes donor representatives, multilateral development cooperation agencies, states, civil society, NGOs, technical experts and the private sector.	Partnership Forum in-person meeting; open-ended membership during other events in the Partnership Forum process.	Forum as a "process." Generally, there are three components to the Partnership Forum: moderated online discussions for anyone who wishes to contribute, periodic in-person meetings during a Partnership Forum year, and a final in-person plenary meeting for invited stakeholders.
Technical Review Panel	Reviews grant applications for technical merit and makes recommendations to the Board accordingly; contributes two members to an independent Appeal Panel that assesses appeals by unsuccessful grant applicants on the ground of "significant and obvious error" by the Technical Review Panel.	Technical experts are appointed by the Board for a maximum of four funding Rounds. Members of the Panel have expertise in HIV/AIDS, tuberculosis, malaria and cross-cutting issues. Appointments are made with a view to achieving balanced gender, regional and sectoral representation. ^{note 3}	Up to 35 members.	Contingent on the Global Fund grant review process.
Secretariat	Manages the day-to-day operations of the Global Fund.	Secretariat staff are appointed by the Executive Director of the Secretariat based on Board-approved policies and procedures.	Approximately 370-400 staff	n/a; permanent Secretariat headquartered in Geneva.
Office of Inspector-General	Internal oversight mechanism established in 2005; the Inspector-General's oversight extends to all aspects of the Global Fund's operations, both at Secretariat level and in-country.	The current Inspector-General is John Parsons, formerly of UNESCO.	n/a	n/a
Technical Evaluation Reference	Advisory body established in 2003. Its province is broad, and includes making	Appointed members (9) These are drawn from stakeholders, and may include practitioners,	9 appointed and 4 <i>ex officio</i> members ^{note 4}	At least one formal annual meeting.
Other structures				

CORE STRUCTURE	FUNCTION	ACTORS	NUMBER	WHEN CONVENED
Group	recommendations to the Board on the monitoring and evaluation activities of the Global Fund.	<p>researchers, academics, donor and implementer states, and NGOs. <u>Ex officio</u> members (4) Stop TB Partnership UNAIDS Roll Back Malaria Partnership Vice Chair, Global Fund Policy and Strategy Committee</p>		

The information in this table was drawn from The Global Fund, *Governance Policies*, <http://www.theglobalfund.org/en/governance/?lang=en> (last visited: Mar. 9, 2009) (including the relevant provisions of the Bylaws and Board Operating Procedures); The Global Fund, *Guidelines on Constituency*

http://www.theglobalfund.org/documents/publications/other/ConstituencyProcesses/ConstituencyProcessesGuidelines_en.pdf (last visited: Mar. 9, 2009); The Global Fund, *Board Members*, <http://theglobalfund.org/en/board/members/?lang=en> (last visited: Feb. 25, 2009); and Luke Aspinall, Jacqueline Wittebrood & Joseph Andre Tiendrebeogo, *Global Fund Governance and Constituency Processes*, Dec. 8, 2008, <http://www.theglobalfund.org/documents/partnershipforum/2008/presentations/0812/C1/3pm/PF%20pres.ppt> (last visited: Feb. 25, 2009); The Global Fund, *Technical Evaluation Reference Group*, <http://theglobalfund.org/en/terg/?lang=en> (last visited: Mar. 9, 2009).

note 1

Constituency leadership determines who actually holds the seat at the Board. Where applicable, current constituencies may determine their own in italics. Art. 7.2 of the Bylaws and para. 1 of the Board Operating Procedures provide only that constituencies may determine their own processes for selecting their Board members. The Global Fund Secretariat has issued more detailed guidance on the mechanics of constituency leadership selection: see The Global Fund, *Guidelines on Constituency Processes*, Appendix 1, http://www.theglobalfund.org/documents/publications/other/ConstituencyProcesses/ConstituencyProcessesGuidelines_en.pdf (last visited: Mar. 9, 2009)

note 2

Six seats are based on the WHO regional groupings. There is one additional seat for Africa. Detailed information as to which states comprise these regional groupings is set out in The Global Fund, *Guidelines on Constituency Processes*, Appendix 1.

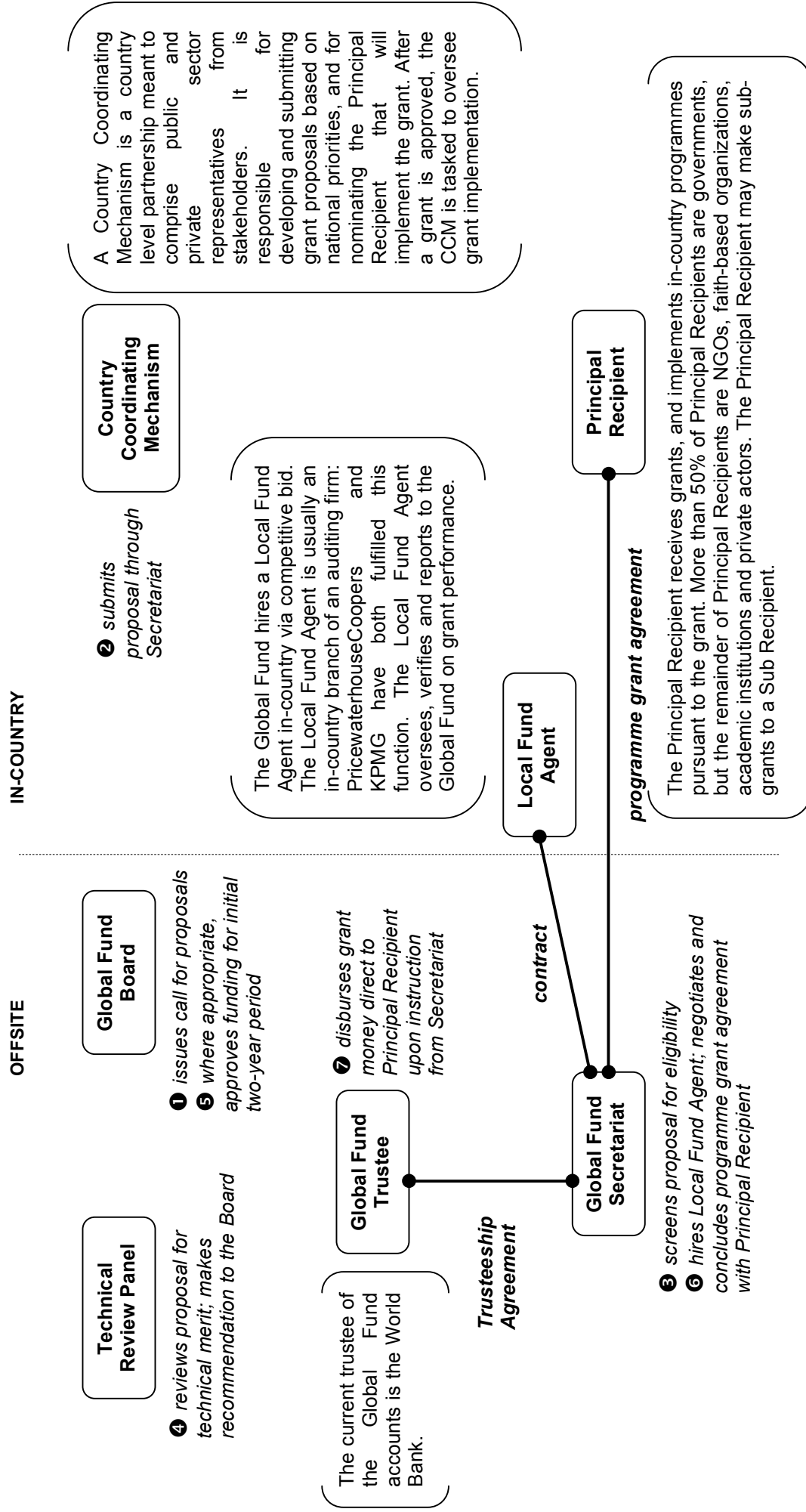
note 3

The current members of the Technical Review Panel are listed at The Global Fund, *TRP Members*, <http://theglobalfund.org/en/trp/members/?lang=en> (last visited: Mar. 8, 2009).

note 4

The current membership of the Technical Evaluation Review Group is set out at The Global Fund, *TERG Membership 2009*, http://theglobalfund.org/documents/terg_membership_secretariat.pdf (last visited: Mar. 9, 2009).

Fig 2. Aspects of the Global Fund grant-making process*



* The information here is drawn from The Global Fund, *Core Structures*, <http://theglobalfund.org/en/structures/?lang=en> (last visited: Feb. 26, 2009) and The Global Fund, *Who We Are, What We Do*, <http://www.theglobalfund.org/en/publications/whoweare/?lang=en> (last visited: Mar. 9, 2009).