



Thirty-Second Board Meeting Privileges and Immunities of the Global Fund

PRIVILEGES AND IMMUNITIES

Purpose:

1. This paper outlines how the absence of privileges and immunities exposes the Global Fund to a variety of risks. It identifies the instruments to secure privileges and immunities, and updates the Board on current progress.
2. The decision point presented at the end of the paper reflects the joint recommendation of the Audit and Ethics Committee as well as the Finance and Operational Performance Committee. The decision point requests the Board to reaffirm its support for obtaining privileges and immunities by endorsing a series of measures to enhance current efforts by the Secretariat.

EXECUTIVE SUMMARY

- 1 Due to the absence of privileges and immunities in both donor and implementer countries, the Global Fund is exposed to a broad set of risks.
- 2 The Board has previously affirmed the importance of states according privileges and immunities to the Global Fund, either through the application of relevant domestic legislation or signing of the Board-endorsed Agreement on Privileges and Immunities.
- 3 To date, eight states have signed the Board-endorsed Agreement on Privileges and Immunities, and the Secretariat is continuing its efforts to secure privileges and immunities in a greater number of states.
- 4 Based on analysis provided by the Secretariat, and related discussions at meetings in September, October and November 2014, the Audit and Ethics Committee (the “AEC”) and the Finance and Operational Performance Committee (the “FOPC”) expressed support for raising the discussion on privileges and immunities at the Board level to develop concrete actions that will enhance the Secretariat’s work in this area.
- 5 Accordingly, this paper presents a decision point that the AEC and FOPC jointly recommend to the Board for approval.

BACKGROUND

- 6 In 2009, the Board agreed to recommend that states consider granting the Global Fund privileges and immunities through the following channels:¹
 - a. Applying legislation to confer upon the Global Fund the privileges and immunities ordinarily provided to international organizations; or
 - b. Signing of the Board-endorsed Agreement on Privileges and Immunities (the “P&I Agreement”).
- 7 The Board affirmed its support of the Secretariat’s efforts to obtain privileges and immunities in 2010, noting that privileges and immunities are necessary for the Global Fund to effectively exercise its functions and efficiently use its resources to deliver its mission.² In affirming the need for privileges and immunities, the Board encouraged states represented on the Board to support and facilitate the Secretariat’s efforts to secure privileges and immunities.
- 8 The P&I Agreement, which is to be signed by states, accords the Global Fund juridical personality, under which it has the capacity to contract, acquire and dispose of property or assets, and institute legal proceedings. The privileges and immunities extend to the Global Fund, its assets, archives and officials acting in their official capacity. Furthermore, it provides tax exemptions for goods, supplies, materials, equipment, services or funds introduced into, acquired, or used in a country as part of, or in conjunction with, funding provided under a Global Fund grant.
- 9 Upon the tenth instrument of ratification, acceptance or approval, the P&I Agreement comes into force. States express consent to be bound by an international agreement such as the P&I Agreement in numerous ways depending on national legislation. Typically, the executive branch executes the agreement followed by parliamentary ratification.

¹ As adopted by the Board in December 2009 under Board decision point GF/B20/EDP04.

² As adopted by the Board in December 2010 under Board decision point GF/B22/DP21.

Timelines can vary depending on parliamentary schedules, so continued engagement with relevant counterparts such as the Ministry of Foreign Affairs are crucial.

- 10 To date eight countries have signed the Board-endorsed P&I Agreement. These countries are Ethiopia, Georgia, Ghana, Moldova, Montenegro, Rwanda, Swaziland and most recently Uganda. The United States and Switzerland have separately, prior to the Board's endorsement of the P&I Agreement, accorded privileges and immunities to the Global Fund.³
- 11 In addition to the P&I Agreement, the new Framework Agreement, which the Global Fund will sign with host countries for all new grants under the current funding model, serves as an added tool to secure privileges and immunities from additional states. Under the Framework Agreement, the host country is required to provide tax exemptions, or, if taxes are levied and paid, reimbursements of such amounts. Failure to provide such exemptions or reimbursements could result in withholdings of disbursements or deductions of grant amounts. Tax exemptions are a priority matter for the Secretariat, but they represent one aspect of privileges and immunities. As such, the Framework Agreements also stipulate that host-country grantees must take all appropriate and necessary actions to ensure the Global Fund is accorded privileges and immunities within three years of signing the Framework Agreement.

DISCUSSION

- 12 The absence of privileges and immunities may hinder the Global Fund's ability to:
 - a. Protect and maximize the impact of Global Fund resources;
 - b. Deliver life-saving commodities in a timely and efficient manner;
 - c. Conduct safe field activities; and
 - d. Ensure transparency and oversight over grants.

At Risk: Protecting and maximizing the impact of Global Fund resources

- 13 In the absence of privileges and immunities, assets, income and property of the Global Fund and the programs it finances can be subject to taxation and other currency restrictions. Consequently, grant funds are not fully optimized or directed towards programmatic investments to fight the three diseases.
- 14 Within jurisdictions where the Global Fund lacks privileges and immunities, the Global Fund can be sued, and Global Fund assets will not be immune from enforcement measures following an adverse judgment. Consequently, in view of this risk, the Global Fund is unable to open bank accounts in countries where it does not possess privileges and immunities.
- 15 The inability to open bank accounts in a broader set of countries limits the means for mitigating foreign-exchange risks as certain foreign-exchange transactions may require a local bank account. Furthermore, certain private donors prefer or require contribution modalities that would allow a donation payment to remain in their country. The options

³ Privileges and immunities have been accorded to the Global Fund by the United States in 2006, under the International Organizations Immunities Act of the United States of America (22 United States Code 288 and 288f-6), and by Switzerland in 2004, through the Headquarters Agreement between the Global Fund and Swiss Federal Council.

for facilitating these types of contributions become limited when the Global Fund is unable to open local bank accounts.

- 16 Being subject to legal process and enforcement also becomes a hindrance to the Global Fund's recovery efforts when litigation is used to prevent, delay or divert such efforts to pursue recoveries.

At Risk: Timely and efficient delivery of life-saving commodities

- 17 Health products and other imported goods for programs financed by the Global Fund can be subject to customs duties, procedures and delays. These delays impact critical activities because of the time it can take for goods and products to clear customs. Such delays can have added financial implications given the cost of maintaining shipments at ports of entry while customs matters are being addressed. Furthermore, program implementation is impacted when life-saving commodities do not reach patients according to schedule.

- 18 Also, imported health products and other goods may face customs duties, taxes and other charges upon their entry into an implementer country. These added levies reduce the amount of grant funds available for critical procurement needs.

At Risk: Safety of field activities

- 19 The presence of Global Fund staff in implementer countries is growing as engagement, collaboration and partnership are fundamental principles and enablers under the current access-to-funding, grant-management and assurance models. With the demands of staff presence in country rising, at times in environments where the populations served and activities supported may be criminalized, the lack of privileges and immunities jeopardizes staff security and may inhibit field activities.

- 20 Even as staff travel in their official capacities, they lack immunity from legal proceedings and detention, including other threats to their safety and effectiveness. For example, staff traveling on personal passports without privileges and immunities may be blocked or delayed from entering or exiting a country. They also face the risk of prosecution, detention and other physical threats and intimidation.

- 21 The threat of detention and prosecution can further reduce the ability of the Global Fund to send its staff to places where they will be seen as proponents of activities, interventions and key affected populations that might be criminalized by governments.

- 22 As in-country presence is also a key element of obtaining assurance over grant activities and expenditures, the lack of privileges and immunities to protect staff also threatens to limit or inhibit the mechanisms that can be utilized to increase assurance over programs.

At Risk: Transparency and oversight of grants

- 23 Without privileges and immunities, the Global Fund's archives, data and working documents are not immune from potential search and seizure by government entities. As such, confidential information and records—including evidence collected in an investigation or audit—could be accessed, compelled for disclosure, or confiscated.

- 24 Additionally, the threat of litigation can also impede or compromise the Global Fund's ability to obtain information and oversight of grant programs. This threat raises security concerns that may inhibit the Global Fund from continuing activities in country, such as verifications, site visits and other programmatic engagement or reviews.

RECOMMENDATION

- 25 Efforts to secure privileges and immunities in a greater number of countries has been hindered because of an overall de-prioritization of privileges and immunities, sub-optimal entry points to countries, failure to leverage diplomatic and political channels, and a lack of dedicated resources to manage communications and follow-up efforts. To bring greater attention to this issue, the Secretariat explained the risks associated with the lack of privileges and immunities to the AEC and FOPC to seek support for raising discussions at the Board level.
- 26 Upon review and discussion, the AEC and FOPC acknowledged that without privileges and immunities, the Global Fund's resources, staff and mission are exposed to serious risks and challenges. Given many of the hindrances to greater progress in securing privileges and immunities could be addressed through concrete action or statements by the Board, the AEC and FOPC decided to recommend that the Board:
- a. Re-affirm the importance of states according privileges and immunities to the Global Fund through domestic legislation or signing of the Board-endorsed P&I Agreement;
 - b. Acknowledge the Secretariat's efforts to hold host-country grantees accountable for taking all appropriate and necessary actions to provide the Global Fund with privileges and immunities within a three-year period;
 - c. Request the Secretariat to dedicate appropriate resources towards obtaining privileges and immunities;
 - d. Establish regular reporting to the Board on the status of efforts to secure privileges and immunities, under the oversight of the AEC and FOPC; and
 - e. Leverage stakeholder relationships to identify additional strategies or advocacy plans to obtain privileges and immunities, under the guidance of the Chair and Vice Chair of the Board.

DECISION

Decision

- 27 Based on the discussion above, the AEC and FOPC jointly recommend the following decision point to the Board for approval.

Decision Point: GF/B32/DP06: Privileges and Immunities

1. The Board acknowledges:

- a. The absence of privileges and immunities exposes the Global Fund's resources, staff and mission to serious risks and challenges;***
- b. The importance of states, particularly implementing country governments, to accord privileges and immunities to the Global Fund through either applying domestic legislation or executing the Board-endorsed multilateral Agreement on Privileges and Immunities; and***

- c. The Secretariat's efforts to require host-country grantees to take all appropriate and necessary actions to ensure the Global Fund is accorded privileges and immunities within three years from the effective date of a Framework Agreement signed between the Global Fund and host-country grantees.**
- 2. To further ensure progress in protecting the Global Fund through privileges and immunities, the Board requests:**
- a. The Secretariat to dedicate required resources for the acquisition of privileges and immunities for the Global Fund;**
- b. The Finance and Operational Performance Committee and the Audit and Ethics Committee to oversee jointly the acquisition of privileges and immunities for the Global Fund, and report to the Board on an annual basis on implementing and donor countries that have and have not provided such protection to the Global Fund; and**
- c. The Board Leadership to constitute a dedicated group of donor and implementer representatives to identify strategies and advocate for the acquisition of privileges and immunities for the Global Fund.**