

# **Annual Report on Privileges and Immunities**

## **49<sup>th</sup> Board Meeting**

GF/B49/10

10 – 11 May, Ha Noi, Viet Nam

### **Board Information**

The purpose of this paper is to report to the Board on the Secretariat's progress to secure privileges and immunities for the Global Fund.

# Executive Summary

## Context

To date, 22 countries have conferred privileges and immunities (“P&Is”) on the Global Fund: Afghanistan, Burkina Faso, Côte d’Ivoire, Eswatini, Ethiopia, Gabon, Georgia, Kenya, Lesotho, Liberia, Malawi, Moldova, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Switzerland, the United States, Togo, Uganda, and Zimbabwe.<sup>1</sup> In addition, four countries have signed but not yet ratified the Agreement on Privileges and Immunities of the Global Fund (the “P&I Agreement”): Burundi, Guinea Bissau, Moldova, and Montenegro.<sup>2</sup>

The Board has recognized that there is a strong business case for privileges and immunities (“P&Is”). This is true for the Global Fund, donor countries and countries implementing Global Fund grants, even though the Global Fund does not have offices in implementing countries. The Board has historically supported Secretariat efforts to expand adoption of privileges and immunities (see Annex 2). And the Ethics and Governance Committee (“EGC”) recently endorsed the Secretariat’s proposed updated strategies to advance P&I adoption and implementation in Grant Cycle 7 (“GC7”). This paper updates the Board on recent developments.

With guidance from EGC, the Secretariat has adopted the strategies referenced in GF/EGC20/09 to expand P&I adoption. The Secretariat has focused engagement on countries with especially strong business cases for P&Is (for example, based on portfolio size, potential for regional leverage, countries with a signed but not yet ratified P&I Agreement, representation on Board or EGC, or special circumstances such as country specific risks, substantial tax recoveries, political momentum). The Secretariat has also continued engagement with other countries to advance P&I adoption. The Secretariat has finally continued efforts to implement P&Is in countries that have conferred them on the Global Fund.

## Conclusions

Recently, two additional countries—Gabon and Sao Tome and Principe—have conferred P&Is on the Global Fund. One additional country—Guinea Bissau—has signed the P&I Agreement and expressed its intent to ratify. A key lesson learned is that engagement on P&I adoption is most effective when it is responsive to relevant interests in country and leverages the convergence of those interests with Global Fund priorities and activities. Advancing P&I adoption in country requires a high level of effort sustained over time. The same is true for P&I implementation, which is not an automatic consequence of P&I adoption. Committing this level of effort will require the Secretariat to balance tradeoffs between advancement of P&Is and other priorities (for example, those related to grantmaking), and to determine where time is most effectively spent.

## Input Received

The Secretariat provided EGC with an update on its progress to advance P&I adoption and implementation at EGC’s March 2023 meeting. EGC acknowledged the business case for P&Is, expressed support for the importance of the push for expanded adoption and implementation, and recognized the level of effort required.

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<sup>1</sup> As of 17 April 2023.

<sup>2</sup> *Id.*

## What is the topic of this update?

1. Countries can confer P&Is on the Global Fund in one of two ways. *First*, they may sign (and ratify, where required by domestic law) the “P&I Agreement”, a treaty which entered into force on 19 April 2019 and is registered at the United Nations Treaty Section. *Second*, they may enact domestic legislation and/or execute a bilateral agreement with the Global Fund.
2. Currently, 22 countries have conferred P&Is on the Global Fund: Afghanistan, Burkina Faso, Côte d'Ivoire, Eswatini, Ethiopia, Gabon, Georgia, Kenya, Lesotho, Liberia, Malawi, Moldova, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Switzerland, the United States, Togo, Uganda, and Zimbabwe. In addition, four countries have signed but not yet ratified the P&I Agreement: Burundi, Guinea Bissau, Moldova, and Montenegro.
3. The Secretariat's strategy to expand P&I adoption and implementation, which was endorsed by the EGC, describes both the business case for P&Is and the costs of their absence, while acknowledging that the pursuit of P&Is can be time and labor intensive with uncertain results.
4. As the Board recognized, there is a strong business case for P&Is.<sup>3</sup> This is true for both the Global Fund and countries implementing Global Fund grants, even though the Global Fund does not have offices in implementing countries.
5. P&Is provide Global Fund officials, staff, programs, and resources with essential protections, including:
  - a. Protecting against resource diversion and ensuring maximum resources are directed to Global Fund programs.
  - b. Immunizing the Global Fund from legal process in country.
  - c. Protecting Global Fund property and assets (e.g., grant funds and assets procured using grant funds), “wheresoever located and by whomsoever held,” from legal process, seizure, confiscation or interference.
  - d. Ensuring tax and customs duty exemptions and speedy customs clearance.
  - e. Facilitating travel of the Global Fund's governance officials, experts, and staff, to enable in-country engagement on program implementation.
  - f. Enabling the Global Fund to operate with a comparable level of protections as those enjoyed by partner international organizations.
6. The above protections also benefit implementing countries. In particular:
  - a. Maximizing Global Fund resources directed to program implementation saves lives in implementing countries. P&Is protect against having resources diverted to nonprogrammatic purposes, whether costs of defending in-country litigation or payment of taxes or customs duties. Implementing countries also have an interest in avoiding

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<sup>3</sup> See Annex 2.

non-compliant expenses related to taxes or duties that ultimately must be repaid or potentially deducted from their allocations.

- b. Additionally, P&Is can remove administrative bottlenecks associated with the importation of health products, and thus advance timely and effective program implementation.
  - c. In-country missions conducted by the Secretariat also support program implementation. P&Is facilitate these missions by providing critical protections for Global Fund officials, staff and experts in country, including repatriation rights in times of crisis. These protections are increasingly important considering the political context in certain countries where Global Fund-financed programs are implemented. P&Is also provide for expedited visa issuance, an area where delays in the past have prevented the timely participation of Global Fund officials to country missions.
7. Donor countries also have an interest in conferring P&Is on the Global Fund. The protections P&Is provide also accrue in donor countries – for example, the immunity from legal process and the protection of funds in Global Fund bank accounts. And donor countries’ conferral of P&Is on the Global Fund is a clear message of support of the broader effort to expand P&I adoption including in implementer countries.
8. Both the Global Fund and implementing countries bear the costs of not having P&Is. For example:
- a. Without P&Is, both the Global Fund and implementing countries bear the cost of in-country litigation. This is a substantial risk both in terms of costs of defense and with respect to operations in country. For example, a claimant could sue the Global Fund in a third country because of the size of the Global Fund grant portfolio and the possibility to seize Global Fund grant funds in the country and serve court documents and compel individuals (including Board members and Global Fund staff) through domestic court processes. Litigation, either because of pending matters or adverse decisions, can also prevent the Global Fund from complying with decisions from its governance bodies, and cause tensions with specific expectations or requirements from donors.
  - b. In one implementing country, approximately US\$ 4 million in health products were delayed at a port of entry because domestic authorities failed to timely renew the applicable administrative privileges relating to imports of goods procured through Grant Funds. Ultimately, the health products cleared customs, but with several months delay, and only after the Principal Recipient was charged substantial demurrage costs. As the privileges still have not been renewed, these bottlenecks will continue to occur as additional health products are imported.

## What is the current status?

9. In October 2022, EGC endorsed the Secretariat’s proposed strategies to expand P&I adoption. These strategies are outlined in the presentation [GF/EGC20/09](#). Recognizing that P&I adoption goes hand in hand with P&I implementation, EGC also acknowledged the importance of implementing P&Is in countries where agreements are in force.
10. With respect to expanding P&I adoption, EGC supported the Secretariat’s proposal to focus engagement on countries with especially strong business cases for P&Is.<sup>4</sup> Countries were prioritized because they presented either particular opportunity or need for P&Is, based on the

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<sup>4</sup> Bangladesh, Belize, Benin, Bosnia Herzegovina, Burundi, Cameroon, Central African Republic, Democratic Republic of Congo, Djibouti, Gabon, Ghana, Guinea Bissau, India, Indonesia, Madagascar, Montenegro, Nepal, Nigeria, Papua New Guinea, Philippines, Sierra Leone, South Africa, South Sudan, Tanzania, Tunisia and Vietnam.

following characteristics: portfolio size, potential for regional leverage, countries with a signed but not yet ratified P&I Agreement, representation on Board or EGC, or special circumstances (ex. country specific risks, substantial tax recoveries, political momentum).

11. A key feature of engagement with priority countries is the early engagement of the government decision-maker on P&Is—usually the Ministry of Foreign Affairs. To that end, most priority countries received allocation letters that included a request for the country’s Ministry of Foreign Affairs to commit in writing to advancing P&I adoption in country. The allocation letters requested that P&I commitment letters arrive before or with the country’s GC7 funding request.
12. More broadly, the Secretariat continues to engage with both priority and non-priority countries on P&I adoption. This engagement is bespoke and keyed to moments of opportunity to emphasize the Global Fund’s and the country’s joint interest in P&I adoption (for example, if a country requests a structural programmatic change relevant to P&Is, such as a transfer to a government PR, or a particularly supportive government audience on mission).

## **Are we progressing as expected?**

13. Since October 2022 two additional countries (Gabon and Sao Tome and Principe) have signed and ratified the P&I Agreement and a third (Guinea Bissau) has signed with the intent to ratify.
14. In addition, following the March 2023 EGC discussion on P&Is, the African Constituency Bureau (“ACB”) expressed interest in discussing the importance of expanding P&I adoption and implementation at its April 2023 annual meeting.
15. Recent efforts affirm the lesson that engagement on P&I adoption is most effective when it is responsive to relevant interests in country and leverages the convergence of those interests with Global Fund priorities and activities. They demonstrate the importance of engaging the right stakeholders, namely, the Ministry of Foreign Affairs and/or other decisionmakers and influence-holders in country. And they finally show that such engagement is most effective when it is ongoing, and when it can thus build momentum.
16. Three examples illustrate the above points in both priority and non-priority countries. As these examples show, successful engagement on P&I adoption requires significant and sustained efforts over time:
  - a. In one priority country, the Country Team invested significant time and efforts to emphasize and affirm the importance and benefit of P&Is to program implementation. When this country was identified as a priority country, the Country Team continued its efforts by explaining the implications of being prioritized. This engagement, combined with the CCM’s support, as well as Legal’s multiple engagements with the Ministry of Foreign Affairs (providing detailed explanation on the P&Is and addressing specific questions relating to immunities of Global Fund staff) enabled the country to subsequently sign the P&I Agreement before the issuance of the allocation letter.
  - b. In one (non-priority) country, the Country Team invested significant time and efforts to prioritize this topic in discussions with the country, emphasizing the importance and benefit of P&Is to the Principal Recipient (Ministry of Health) and the Global Fund, and providing a detailed explanation of the P&I Agreement. The Minister of Health (and CCM Chair) then secured political engagement by mobilizing the Ministries of Finance and Foreign Affairs for discussions on this topic. This high-level political engagement

provided an opportunity to immediately address detailed questions from the country, including both substantive questions related to the interpretation of specific provisions (especially related to taxes and immunities of Global Fund staff) and procedural questions relating to ratification. The P&I Agreement was signed during the mission and subsequently ratified.

- c. In another (priority) country, the Country Team prioritized P&Is during a country mission and was able to secure a direct engagement with the Ministry of Foreign Affairs. This initial engagement paved the way for further discussions with the Ministry of Foreign Affairs. Shortly after the issuance of the allocation letter, which included a request to provide a written political commitment from the Ministry of Foreign Affairs to grant P&Is to the Global Fund, the Ministry of Foreign Affairs issued a Note Verbale confirming its agreement to confer P&Is to the Global Fund.
17. As these examples demonstrate, advancing P&I adoption in country requires a high level of effort sustained over time, especially on the part of the Country Team and especially when on mission or otherwise directly engaging with in-country stakeholders. Committing this level of effort will require Country Teams to balance tradeoffs between advancement of P&Is and other priorities (for example, those related to grantmaking), and to determine where time is most effectively spent. The answer to this question may vary by country context.
18. In addition, as other examples make clear, negotiating P&I adoption can be challenging even when employing the above strategies:
19. Some countries expressed general support for the premise of granting the Global Fund P&Is but noted their inability to do so through adoption of the P&I Agreement. Often, the reason given is that the Global Fund is not seen as a traditional international organization and/or that it has no in-country presence. However, such countries may be (and, in the past, have been) able to confer P&Is on the Global Fund through a bilateral agreement. Where there are apparent legal barriers to adopting P&Is, it is not clear that any level of effort will progress discussions further.
  - a. A recent mission to a priority country revealed that progress needed to be, and could be, made in person much more effectively than remotely. The opportunity to engage in-person with key stakeholders provided necessary clarity and insight into the complex process to be navigated before the government can confer P&Is to the Global Fund and allowed the identification of specific legal requirements and bottlenecks which had been unclear despite previous attempts to advance the P&I discussion.
  - b. In another priority country, P&I prioritization remains subject to further review of local legal requirements, which may limit the granting of P&Is to international organizations with an in-country presence and require legislation exempting the Global Fund from this limitation. That country also presents challenges related to identifying and engaging with government decision-makers. That country will likely require significant sustained engagement on this front from senior Global Fund representatives.
20. Finally, it bears mentioning that the Global Fund at times operates in countries without a legitimate government. In such cases, P&Is may provide critical protections. However, such contexts also make it difficult to negotiate their adoption, or to execute agreements with de facto authorities.
21. P&I adoption creates new opportunities for implementation. But while P&I adoption is a significant milestone in a country, recent experiences make clear that ensuring that P&Is are in

fact implemented, and yield practical benefit in country, requires consistent follow-on engagement by the Secretariat.

22. As a threshold matter, the Secretariat must engage in baseline-setting discussions with the country to determine which P&Is are automatically operationalized through existing channels in country, and how to ensure that the relevant government ministries are made aware of the Global Fund's privileged status and the scope of the P&Is afforded because of it.
23. For example, in one country, through direct engagement with the Ministry of Foreign Affairs, including with the Office of Legal Affairs and the Directorate of Diplomatic Privileges and Host Country Affairs, the Global Fund was given assurance that its privileged status was already recognized in the following areas:
  - a. Funds Flow: There are no concerns in terms of restrictions related to the flow of Global Fund funds, within and coming into/out of the country.
  - b. Assets: There are no issues relating to search, seizure, requisition, confiscation, expropriation, or other interference with respect to Global Fund-financed assets.
  - c. Staff Immigration Processes: The Directorate of Diplomatic Privileges and Host Country Affairs within the Ministry of Foreign Affairs is sensitized to the Global Fund's status and is working on mechanisms to facilitate relevant immigration processes (e.g., issuance of visas that confer the necessary protections to Global Fund staff and other organs of the Global Fund).
24. However, even in countries where P&Is are widely recognized and conferred on eligible organizations, bespoke engagement can still be required to realize the full benefit of the P&Is conferred on the Global Fund.
  - a. For example, in the above-referenced country, the Global Fund's P&Is confer tax exemption on Global Fund-supported goods and services, including those provided/received by locally incorporated organizations that have neither tax-exempt status nor the recourse to request it. Therefore, the Global Fund had to liaise between relevant governmental entities and those organizations to ensure that its tax exemption is implemented fully.
25. Engagement on implementation is necessarily country-specific, and sometimes in-country challenges make it difficult, especially without an in-country presence. As one example:
  - a. Notwithstanding substantial Government support for the **conferral** of P&Is in one country (one of the Global Fund's largest High Impact Africa portfolios), implementation of the P&I Agreement has proved more challenging. The country had limited experience in granting P&Is to organizations without in-country presence, thus requiring continued effort by government stakeholders to facilitate implementation. Additionally, it has been difficult to mobilize sustained attention due to competing priorities for in-country actors, particularly with respect to Global Fund tax exemption, staff visas and travel to the country.
26. The above examples demonstrate two lessons. First, government buy-in on adoption of P&Is does not automatically translate to buy-in on implementation. Second, implementation of P&Is requires Secretariat engagement tailored to country needs and baselines—an effort that, like the bespoke engagement most effective in advancing P&I adoption, is effort-intensive and thus implicates tradeoffs with respect to effort spent on other priority areas including grantmaking.

## **What are the implications for our outlook and plans?**

27. EGC and the Secretariat will continue to work to expand adoption and implementation of P&Is through implementation of the endorsed strategies.
28. EGC and the Secretariat expect to measure progress against the number of priority and non-priority countries conferring P&Is on the Global Fund and committing to do so. In addition, progress can be measured by identifying challenges that have been resolved through P&I implementation.
29. Based on EGC input, the Secretariat will also consider additional opportunities for leveraging external support, including possibly through reviving the Privileges and Immunities Advisory Group, and discuss these opportunities with the EGC in its upcoming meetings.
30. EGC and the Secretariat appreciate the Board's ongoing support and guidance on this issue and will continue to provide the Board with progress updates.



## Annexes

The following items can be found in Annex:

- Annex 1: Relevant Past Board Decisions

### Annex 1 – Relevant Past Board Decisions

Relevant past Decision Point	Summary and Impact
<b>GF/B39/EDP04: Review of the terms of reference and renewal of the term and composition of the PIAG (June 2018)</b>	The Board approved the review of the terms of reference and renewal of the term and composition of the Privileges and Immunities Advisory Group (“PIAG”) and requested the EGC to select and appoint the members of the PIAG and to inform the Board of the outcome of the selection process.
<b>GF/B32/EDP12: Terms of Reference of the Privileges and Immunities Advisory Group (March 2015)</b>	The Board approved the Terms of Reference of the Privileges and Immunities Advisory Group, a dedicated group of donor and implementer representatives to identify strategies and advocate for the acquisition of privileges and immunities for the Global Fund.
<b>GF/B32/DPO6: Privileges and Immunities (November 2014)</b>	The Board acknowledges past decisions on privileges and immunities and further requests: the Secretariat to dedicate required resources for the acquisition of privileges and immunities; the FOPC and the Audit and Ethics Committee to oversee jointly the acquisition of privileges and immunities, and report on progress to the Board on an annual basis; and 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.