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Partner Capture in Public International Organizations

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Partner Capture in Public International Organizations

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PARTNER CAPTURE IN PUBLIC INTERNATIONAL ORGANIZATIONS

*Christopher G. Bradley**

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I. INTRODUCTION: “PARTNER CAPTURE” AND THE CHANGING FACE OF INTERNATIONAL ORGANIZATIONS

In the last decade, public-private partnerships—jointly funded and executed collaborative projects between public international organizations and private corporations or foundations—have proliferated. Cash-strapped international organizations find donors’ offers of aid irresistible, and donors have discovered that working with experienced and respected “public international organizations” (that is, international organizations answerable primarily or exclusively to public

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entities, usually states¹) offers significant logistical and symbolic benefits. While this trend has been recognized, and some concomitant accountability and legitimacy concerns have been noted, legal scholarship on the rise of international public-private partnerships remains scant. Worse, the organizations have failed to set up adequate safeguards against capture by partners whose interests may not align with those of international organizations and their members or constituents. Taking lessons from U.S. administrative and regulatory law, this Article outlines the need for—and a workable proposal for—such safeguards. It focuses on the United Nations (U.N.), the most visible and universal of public international organizations. But this Article's framework applies to other organizations, such as the World Bank and the International Monetary Fund, subject to this danger—a danger that this Article coins the term “partner capture” to describe.

The Article unfolds in four parts.

Part I discusses the changes that public-private partnerships have wrought on the landscape of international organization funding and describes, as an example, the expanding partnership activities of the United Nations. The U.N. recently established an Office for Partnerships, which grew out of a decade of extensive contact with Ted Turner's U.N. Foundation.² The U.N.'s experience illustrates the importance partners can have, not simply on specific projects but also in bringing large-scale structural change to organizations.

Part II unpacks the concept at the heart of this Article: partner capture. Drawing on principles of bureaucratic behavior and political economy familiar from the U.S. administrative law context, Part II identifies problematic aspects of the U.N.'s current partnership activities. It notes the inadequacy of current accountability structures to deal with partner capture problems, and it shows that the stakes are sufficiently high that the U.N. and other public international organizations should aggressively address partner capture.

Part III proposes an institutional solution for the U.N. It then argues that such a solution could be implemented in other organizations, to ensure that partnerships serve the interests not just of private partners but also of organizations and their members or constituents. More

1. For this customary terminology and on public international organizations as distinct objects of study, see JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 1-57 (2005).

2. U.N. Secretary-General, *United Nations Office for Partnerships: Rep. of the Secretary-General*, Summary, U.N. Doc. A/62/220 (Aug. 10, 2007) [hereinafter *Office for Partnerships 2007 Report*], available at http://www.un.org/partnerships/Docs/A_62_220_Aug2007.pdf.

specifically, an independent review bureau within the U.N. Office for Partnerships—roughly on the model of the U.S.’s Office of Management and Budget and various Inspectors General—should be created. The proposed Office of Independent Review would provide both retrospective evaluation and prospective guidance, independently assessing partnership initiatives proposed or already undertaken by U.N. entities, with the goals of developing best practices, guarding against agenda distortions, and monitoring for abuse by partners and their agents.

Part IV concludes by noting that new approaches such as those suggested by this Article form an important part of an ongoing, and healthy, expansion of the sources and structures of international law. Traditional international law doctrines and theories are inadequate to describe and organize the activities of quickly expanding networks of public and private entities operating across national borders. Drawing on domestic analogues with a long history in theory and practice furnishes one promising avenue for the development of effective legal solutions to new and complex problems.

II. THE RISE OF PARTNERSHIPS: PRIVATE MONEY AND ORGANIZATIONAL CHANGE

Public and private entities have long acted in partnership,³ but on the international level, a swift and sharp increase in collaboration can be dated to September 18, 1997. On that date, American media mogul Ted Turner announced his intention to make a huge donation to the U.N.—up to one billion dollars, to be made in ten annual gifts of about one hundred million dollars each.⁴

3. This fact is particularly notable in the domestic policy sphere. For an account and critique of the growth of certain types of partnerships, including public funding of privately-run prisons and schools, see Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003). She concludes with a recommendation in accordance with the conclusions of this Article: “Rather than trumpeting privatization or marching against it, scholars and activists should demand closer study of the strengths and weaknesses of existing accountability mechanisms that govern private markets, governmental bodies, and nonprofits, as well as of the new opportunities and dangers posed by collaborations across these sectors.” *Id.* at 1262-63.

4. U.N. Secretary-General, *United Nations Fund for International Partnerships: Rep. of the Secretary General*, ¶ 1, U.N. Doc. A/53/700 (Nov. 24, 1998) [hereinafter UNFIP Preliminary Report], available at http://www.un.org/partnerships/Docs/relationship_a-53-700.pdf. The most substantive discussion of the Foundation’s activities to date remains Stacy Williams’ prescient Note, *A Billion Dollar Donation: Should the United Nations Look a Gift Horse in the Mouth?*, 27 GA. J. INT’L & COMP. L. 425 (1999) (concluding, with some caveats, that it should not). As she explains, Turner could not donate directly to the U.N. because such contribution is contrary to the U.N. Charter. *Id.* at 435-36 (citing U.N. Charter art. 17, para. 2, art. 3, art. 4, para. 1).

Turner's gift—which represented a large contribution even by the standards of the United Nations, the world's most important international organization, and a relatively well-funded one⁵—attracted considerable press attention and a quick response from U.N. officials. Within months, Turner established the United Nations Foundation (Foundation), organized as a charity under U.S. law, to receive and administer his gift.⁶ The Foundation acted in concert with the U.N.'s Secretary-General and Advisory Committee on Administrative and Budgetary Questions to establish a dedicated “interface” organization for Turner's Foundation.⁷ This interface organization was and is called the U.N. Fund for International Partnerships (UNFIP).⁸ A formal agreement between the Foundation and the U.N. sealed this basic relationship, and the parties agreed on initial procedures for distribution of Foundation funding.⁹

Turner's announcement came at a propitious time for the U.N., which was in the grips of a financial and political crisis.¹⁰ Its largest donor-state, the U.S., had been withholding dues for partisan political reasons, and stood over one billion dollars in arrears.¹¹ Following this lead, other member-states refused to remain current on dues, and the lack of financial support threatened to hamper the organization's ability to accomplish its mission—and thus to exacerbate its political problems.¹²

Turner desired to support the U.N.'s substantive work, but he also intended his gift to be used to advocate for the U.N. both in the United States and abroad.¹³ Through the gift, Turner asserted that the U.N.

5. The Foundation's total gifts each year have amounted to slightly less than ten percent of the core U.N. operating budget, although this budget is supplemented by numerous special programs and assessments. MARGARET P. KARNS & KAREN A. MINGST, *INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE* 133 (2004) (reporting “U.N. System Expenditures”).

6. See I.R.C. 501(c)(3); *U.N. Foundation*, THE CENTRAL EMERGENCY RESPONSE FUND, <http://www.unfoundation.org/donate/cefr.html> (“As a 501(c)(3) public charity, contributions made to the UN Foundation are tax deductible for U.S. donors.”) (last visited Nov. 15, 2010).

7. *UNFIP Preliminary Report*, *supra* note 4, ¶¶ 3, 6.

8. *Id.* Summary. The original name of the fund was the “United Nations International Partnership Trust Fund.” *Id.*

9. *Id.* Annex. The agreement was signed on June 12, 1998. *Id.* ¶ 13.

10. See, e.g., KARNS & MINGST, *supra* note 5, at 135-36.

11. *Id.* (“In the late 1990s, the U.N. faced by far its most serious financial crisis. . . . The United States was by far the biggest debtor, owing \$1.6 billion. The financial crisis . . . illustrated the tension between demands for governance and institutional weakness.”).

12. See *id.* at 135-37.

13. UNITED NATIONS FOUNDATION, *UNITED NATIONS FOUNDATION AT FIVE YEARS* 7 (2003) [hereinafter U.N. FOUNDATION AT FIVE YEARS].

deserved to be taken seriously, and, more subtly, indicated that donating to and through it might bring some of the benefits major philanthropists seek—including easy publicity, the infrastructure and experience crucial to interventions in troubled regions and on large scales, and enough normative legitimacy to cover more flexible, free, and aggressive project design.¹⁴

As they have from the start, Turner and his close associates wield immense power through the Foundation. The Foundation is run by a Board of Directors and a small executive staff; Timothy Wirth, former Representative and Senator from Colorado, has served as the first and only President of the Foundation,¹⁵ and Turner remains the Chairman of the Board.¹⁶ Even aside from his preeminent place in the institutional structure of the Foundation, Turner's continued importance to the venture is assured because he is not legally bound to continue providing the funding he has promised to the Foundation.¹⁷ The initial plan to offer ten annual gifts of one hundred million dollars each would have brought Turner's role in bankrolling Foundation activities to an end in

14. See Inge Kaul, *Exploring the Policy Space Between Markets and States: Global Public-Private Partnerships*, in *THE NEW PUBLIC FINANCE: RESPONDING TO GLOBAL CHALLENGES* 231 (Inge Kaul & Pedro Conceicao eds., 2006) (discussing some benefits of working with public organizations, including: "economies of scale," "visible impact," "a delivery network in place," "protect[ing] the company against the potential risks," and "reputation spillover" ("[b]eing seen as an accepted peer of a respected public actor in a sustained partnership [which is] . . . an effective, relatively low-cost way of signaling social or environmental concern")). Kaul comments, regarding this last reason:

Partnering with a public agent may . . . confer a social license to operate on the private corporation. This motivation undoubtedly explains the increase in private to public contracting out of projects in which private agents lack the support of local communities, as is the case with many oil companies and other corporations in the extractive industries.

Id.

15. Timothy E. Wirth, *Disinfectants, Nudes, and Other Adventures*, 13 *COLO. J. INT'L ENVTL. L. & POL'Y* 15, 15 n.aal (2002).

16. U.N. Foundation, ABOUT UNF, OUR BOARD, <http://www.unfoundation.org/about-unf/our-board> (last visited Nov. 16, 2009).

17. It is of course conceivable that a remedy sounding in contract or promissory estoppel might be available against Turner if he failed to pay promised sums, especially on a specific project where a partner had relied on promised Foundation funding. But I have found no document suggesting he is bound to pay up to the overall goals, and his statements on the subject seem sufficiently conditional, at least on his continued financial success, that the pledge seems likely more a moral than a legal obligation. (Indeed, as noted, Foundation funding has already changed significantly in its substance from the initially announced gift structure.) See Mary Francis Budig et al., *Pledges to Non-Profit Organizations: Are They Enforceable and Must They Be Enforced?*, 27 *U.S.F. L. REV.* 47, 51-85 (1992) (outlining various theories of the "enforceability of charitable pledges" from case law and secondary sources, noting ongoing doctrinal confusion, but tentatively identifying a trend toward enforcement of promises that meet certain conditions, even in absence of consideration or reliance, on public policy grounds).

2008, but as this cutoff approached, his strategy shifted.¹⁸ Now he is highly “leveraging” Foundation funding with donations from other partners, so that his remaining donations (he has given just under seven hundred million dollars so far¹⁹) can be spread out over another ten years.

Thus, Turner retains close control over the Foundation. It could be characterized as a charitable alter ego of Turner, not meaningfully separate from him, subject only to the minimal legal constraints required for charitable organizations to maintain tax-exempt status. In this way, the Foundation resembles the Gates Foundation, in that not just the founder’s *wealth* but also the founder’s (or in the case of Bill and Melinda Gates, the founders’) *vision* remains crucial to the foundation’s activities.²⁰ There is nothing particularly surprising, and certainly nothing perverse, about this arrangement. Both the U.N. Foundation and the Gates Foundation are widely recognized as responsible, professional, and in many ways exemplary;²¹ the impact of their ten-figure contributions to global issues is impressive and enduring. In addition, their transparency regarding decisionmaking and finances and their use of evaluative mechanisms for assessing the effects of their activities²² are admirable compared to most foundations. They have helped establish a high bar for best practices in major, internationally-oriented philanthropies. But caution is warranted when instead of simply donating their own money, they influence the policy decisions and

18. Caroline Preston, *Ten Years Later, Turner’s U.N. Fund Continues to Evolve*, CHRON. OF PHILANTHROPY, June 12, 2008, at 1, available at http://www.globalproblems-globalsolutions-files.org/pdf/articles/cp_6122008.pdf.

19. *Id.* at 1-2.

20. Editorial, *What has the Gates Foundation Done for Global Health?*, 373 LANCET 1577 (2009) (criticizing the Gates Foundation’s lack of transparency in goal-setting, as the organization is dominated by the “whimsical governance principle” of following Gates family preferences).

21. They maintain and publicize their relatively transparent finances, they submit themselves to independent evaluation, and they espouse an ethos of responsiveness to criticism. See, e.g., UNFIP Preliminary Report, *supra* note 4, Annex. Even so, further scrutiny remains of utmost importance, all the more so because, as one expert puts it, “the new ethos of openness has obscured to some extent serious critical evaluations of foundation performance. With their tremendous resources directed outward [i.e., to project a professional, objective, and competent image], foundations now control their image more fully than ever before. . . . [O]penness and professionalism hardly guarantee that foundation resources are being used effectively and creatively.” Peter Frumkin, *Private Foundations as Public Institutions: Regulation, Professionalization, and the Redefinition of Organized Philanthropy*, in PHILANTHROPIC FOUNDATIONS: NEW SCHOLARSHIP, NEW POSSIBILITIES 69, 94 (Ellen Condliffe Lagemann ed., 1999).

22. See, e.g., UNFIP Preliminary Report, *supra* note 4, Annex.

dramatically rearrange the priorities of public international organizations such as the U.N.

The Foundation's U.N. liaison, UNFIP, operates under some supervision by the U.N. UNFIP is run by a Board of Advisors appointed by the Secretary-General and chaired by a Deputy Secretary-General.²³ The Board consists of U.N. officials and a few independent members from academia, foundations, and development organizations.²⁴ As with other U.N. agencies, UNFIP faces occasional audits, and its programs remain subject to U.N. accounting guidelines.²⁵ Its operations were once subject to criticism by the U.N. Advisory Committee on Administrative and Budgetary Questions (interestingly, the criticism came out in favor of *less* procedural caution in grant decisions).²⁶ It provides yearly reports to the General Assembly. Recently, a new overarching entity, the U.N. Office for Partnerships, has emerged to take over the role of general partnership-liaison office for the U.N., a role previously played by UNFIP.²⁷ And because the Office for Partnerships appears to be taking on more of the general partnership work once coordinated through UNFIP,²⁸ it may develop increased supervisory capacity over UNFIP. But for the moment, the two organizations seem hardly distinct at all, sharing significant staff and functions. (This Article's proposed Office of Independent Review could be housed in the Office for Partnerships, and because the partnership office seems to be

23. See U.N. Fund for International Partnerships: Advisory Board, <http://www.un.org/partnerships/YAdvisoryBoardPage.htm> (last visited Nov. 16, 2010).

24. *Id.*

25. See U.N. Secretary-General, *Financial Regulations and Rules of the United Nations: Secretary-General's Bulletin*, U.N. ST/SGB/2003/7 (May 9, 2003).

26. U.N. Secretary-General, *United Nations Fund for International Partnerships: Rep. of the Secretary General*, ¶ 41, U.N. Doc. A/58/173 (Aug. 18, 2003) [hereinafter *UNFIP Fifth Year Report*] (The ACABQ "observed that UNFIP's monitoring process appeared to be onerous and bureaucratic and that the time had come to assess and streamline the whole process."), available at <http://www.un.org/partnerships/Docs/fifthA-58-173.pdf>.

27. The first report issued in the name of the Office for Partnerships explained its evolution as a function of the unexpected success of the partnership model initially established by Turner's philanthropy. *Office for Partnerships 2007 Report*, *supra* note 2, ¶ 1 ("[O]wing to the success of UNFIP partnerships activities and Robert E. Turner's philanthropic donation which paved the way for increased private sector engagement in United Nations causes, there has been an increasing demand for partnership advisory services by the Organization, State and non-State actors. This has led to the evolution of the United Nations Office for Partnerships, which manages UNFIP, UNDEF as well as Partnership Advisory Services and Outreach."). *Id.* The Office for Partnerships did not release a report at all in 2009, or thus far in 2010; at the time of writing, the 2007 report, released in 2008, remains the most recently available report.

28. See U.N. Secretary-General, *United Nations Office for Partnerships: Rep. of the Secretary-General*, ¶ 63, U.N. Doc. A/63/257 (Aug. 8, 2008) [hereinafter *2008 Report*], available at <http://www.un.org/partnerships/Docs/english.pdf>.

currently evolving, the timing is right for the introduction of new, structural accountability mechanisms such as this Article proposes.)

Thus, despite these forms of rudimentary oversight, both UNFIP and the Office for Partnerships hold enviable positions. Their work is done under color of the full authority of the U.N., but both have been almost entirely delegated the authority to make tactical or operational decisions concerning their partnerships, subject to a mere shadow of possible correction.

As far as strategic goals, the mandate of the Foundation/UNFIP partnership was strikingly broad from the beginning—to support “U.N. causes.”²⁹ This is a practically limitless mandate given the wide scope of U.N. activities. The Foundation decided that its key focus areas would be “children’s health, women and population issues, environmental protection, and human rights/conflict prevention,”³⁰ and these remain its top priorities. Within these categories, it has developed narrower “programme frameworks” to describe the types of initiatives it is likely to support.³¹ Despite the amount of money involved, decisionmaking apparently remains relatively informal. Foundation and UNFIP officials vet proposals from U.N. agencies and other partners, and the Foundation’s Board makes final funding decisions.³² U.N. agencies have aggressively pursued Foundation funding from the start, and the process is competitive.³³ As the direct liaison within the U.N. system, UNFIP secures the movement of funds from the Foundation to agencies and other implementing entities, as well as insuring financial accountability from funding recipients.³⁴

29. U.N. FOUNDATION AT FIVE YEARS, *supra* note 13, at 7.

30. *Id.* at 13. The final area, involving humanitarian aid and conflict prevention, developed latest and was only gradually formalized. See *UNFIP Fifth Year Report*, *supra* note 26, ¶ 1 (describing this area as an “evolving strategy”).

31. See, e.g., U.N. Secretary-General, *United Nations Fund for International Partnerships: Rep. of the Secretary-General*, U.N. Doc. A/54/664/Add.2 (Mar. 2, 2000) [hereinafter *Population and Woman Program Framework*] (offering the framework for the “Population and Women” initiative).

32. The Secretary-General, *United Nations Fund for International Partnerships: Rep. of the Secretary-General*, ¶ 48, U.N. Doc. A/57/133 (July 2, 2002) [hereinafter *UNFIP Fourth Year Report*].

33. See, e.g., The Secretary-General, *United Nations Fund for International Partnerships: Rep. of the Secretary General*, ¶ 13, U.N. Doc. A/55/763 (Feb. 5, 2001) [hereinafter *UNFIP Third Year Report*], available at http://www.un.org/partnerships/Docs/thirdyear_a-55-763.pdf.

34. U.N. Secretary-General, *United Nations Fund for International Partnerships: Rep. of the Secretary-General*, ¶ 54, U.N. Doc. A/60/327 (Nov. 15, 2005) (“As the administrative vehicle in the United Nations to support grant-making by the United Nations Foundation, UNFIP is responsible for approving the project documents submitted by United Nations implementing partners, requesting annual contributions for projects from the United Nations Foundation and making cash

Even early on, “the Foundation consider[ed] . . . raising new funds . . . among its primary activities,”³⁵ and spoke of “leveraging additional resources.”³⁶ The Five-Year Report of the Foundation asserted that from the first meetings, a “new kind of philanthropic enterprise was envisioned—a hybrid combining the missions of grantmaking, public affairs, and resource mobilization,”³⁷ which was focused on the “central ideas of partnership, leverage, and advocacy.”³⁸ As noted, the success of these efforts and the consequent alteration in the frequency and amount of Turner’s donations³⁹ means that as the tenth year of the Foundation came and went, Turner’s contributions did not run dry. The remainder of Turner’s billion-dollar gift is to be spread out and “leveraged”—that is, used to solicit new partners who will add support.⁴⁰ The goal is to squeeze at least two billion dollars’ worth of work from Turner’s one billion dollar donation.⁴¹

The importance of UNFIP and the Foundation in building the U.N.’s partnership capacity is unquestionable. It reflects the remarkable amount of influence that a large, well-publicized, and savvily administered gift can have, even on an organization as sprawling as the U.N. From its earliest reports, UNFIP proclaimed its interest in evolving into a broader partnership liaison office.⁴² As it passed its tenth anniversary, it accomplished the goal, spawning the Office for

remittances to the implementing partners.”) [hereinafter *UNFIP Seventh Year Report*], available at <http://www.un.org/partnerships/Docs/seventhA-60-327.pdf>; Memorandum of Understanding Between the United Nations Fund for International Partnerships and the __ [Party name to be filled in], art. VI.4 (“Relation between the parties”), http://www.un.org/unfip/docs/UNFIP_MODEL_MOU.pdf [hereinafter Sample Memorandum]. (“Implementation and Use of Funds”) (“To the extent possible and consistent with U.N. Regulations and Rules, UNFIP shall recover and return to the Foundation all misused funds.”). *Id.*

35. U.N. Secretary-General, *United Nations Fund for International Partnerships: Rep. of the Secretary-General*, ¶ 29, U.N. Doc. A/54/664 (Dec. 10, 1999) [hereinafter *UNFIP Second Year Report*] (“The UNFIP/[Foundation] effort has evolved considerably over the course of its second year of operations.”), available at http://www.un.org/partnerships/Docs/secondyear_a-54-664.pdf.

36. *Id.*

37. U.N. FOUNDATION AT FIVE YEARS, *supra* note 13, at 19.

38. *Id.*

39. Preston, *supra* note 18, at 1-2.

40. *Id.*

41. See Press Release, U.N. Foundation, Ted Turner’s United Nations Foundation Delivers \$1 Billion to U.N. Causes, Foundation Makes New Commitment to Leverage Another \$1 Billion U.N. Press Release (Oct. 10, 2006), available at http://www.unfoundation.org/media_center/press/2006/pr_101006.asp.

42. See, e.g., *UNFIP Third Year Report*, *supra* note 33, ¶ 46 (“The UNFIP-[Foundation] partnership has evolved considerably over the course of its third year of operation.”); *UNFIP Second Year Report*, *supra* note 35, ¶ 25 (“The UNFIP/[Foundation] effort has evolved considerably over the course of its second year of operations.”).

Partnerships to which some of its roles are now entrusted. As noted, the Office for Partnerships is now the gateway provider of partnership expertise to potential entities in the U.N. and outside of it.⁴³ But with several overlapping staff and officers between UNFIP and the Office for Partnerships, UNFIP's deep involvement in the project of building U.N. partnerships remains clear.⁴⁴ Furthermore, the Office for Partnerships' advising capacity was built while it was part of UNFIP.⁴⁵ In a 2004 report, UNFIP noted that it "is increasingly becoming a service provider to the United Nations system in its facilitator role with private companies and civil society. Particularly in the last two years, there has been a significant increase in the number of enquiries for partnership assistance."⁴⁶ This trend has held. The number of "substantive enquiries" surpassed four hundred only two years later,⁴⁷ and by 2007, the number was "almost 700."⁴⁸

In sum, and largely thanks to Turner and his organization, the U.N. is increasingly trusted by potential donors and partners and viewed as a reliable conduit for philanthropic investment. UNFIP and now the Office for Partnerships point to their experience in administering over a billion dollars' worth of total gifts through Foundation partnerships, most of the funding of which did not come from the Foundation itself

43. UNFIP's eighth report explained that "[t]he partnership with the United Nations Foundation has enabled UNFIP to evolve into the partnership office of the United Nations. It provides advisory and facilitation services to United Nations system organizations and a one-stop shopping centre for potential external partners with the United Nations." U.N. Secretary-General, *Nations Fund for International Partnerships: Rep. of the Secretary-General*, ¶ 52, U.N. Doc. A/61/189 (July 27, 2006) [hereinafter *UNFIP Eighth Year Report*], available at <http://www.un.org/partnerships/Docs/UNFIP%202005%20Report%20-%20A-61-189.pdf>. The Office of Partnerships, in the second report issued under its own name, used similar language to describe its role. See *2008 Report*, *supra* note 28, ¶ 15.

44. See *id.* Annex I.

45. For instance, UNFIP was involved in tsunami relief efforts in 2005-2007, when "[t]he United Nations Foundation . . . leveraged significant partner funding by expanding its fiduciary role in partnerships with organizations such as the American Red Cross and other charitable and commercial entities and by facilitating direct contribution from the general public." *UNFIP Eighth Year Report*, *supra* note 43, ¶ 45. This work seems to have been accomplished in large part simply by making the managerial, accounting, and development resources of the Foundation and UNFIP available to partners and donors. UNFIP's capacity proved useful in other situations: "In light of its ability to provide fast track programme management processes and expeditious administrative support and oversight, UNFIP was tasked with the establishment and executive management of the new fund for democracy-building efforts worldwide, UNDEF." *UNFIP Eighth Year Report*, *supra* note 43, ¶ 70; see also *id.* ¶¶ 49-50.

46. U.N. Secretary-General, *United Nations Fund for International Partnerships: Rep. of the Secretary-General*, ¶ 55, U.N. Doc. A/59/170 (July 23, 2004) [hereinafter *UNFIP Sixth Year Report*], available at <http://www.un.org/partnerships/Docs/sixthA-59-170.pdf>.

47. *UNFIP Eighth Year Report*, *supra* note 43, ¶ 52.

48. *2008 report*, *supra* note 28, ¶ 5.

but from its many partners.⁴⁹ The U.N.'s partnership capacities now include the coordination of U.N. entities with governments, for-profit, and nonprofit actors; the administration of large scale financing and logistics for global projects; and, just as importantly, the provision of U.N. bona fides and largely favorable publicity to donors and partners.⁵⁰ All of this capacity—which has been well noted in the donor/partner pool, judging from the precipitous rise in “substantive enquiries”⁵¹—derives ultimately from Turner’s gift and the U.N.’s active embrace of it. Established partnerships like that between the Foundation and UNFIP provide tested and reliable models, and the Foundation has not hesitated to claim its share of credit for the evolving partnership model. Timothy Wirth noted about his organization that “[w]e have become . . . a kind of broker for the increasing number of people in the private sector who want to engage with the UN.”⁵² Institution building may be just as lasting a legacy as the substantive projects of the Foundation, and the Foundation and UNFIP have adjusted their methods and aims in light of this fact. They have, in essence, realized that the role of “influential partnership broker” represents a significant enhancement even over the role of “well-heeled partner.” As they approached their tenth year, UNFIP and the Foundation reconceived their role to be one of facilitation and coordination of additional partnerships.⁵³

In sum, the Foundation/UNFIP partnership has initiated changes in the nature, organization, and functioning of the U.N., as in similarly situated international organizations. The change has the potential to help the U.N. achieve some of its most ambitious goals—but also to make the organization vulnerable to capture. Powerful partners play a significant and increasing role in the work of the U.N. and on the international stage more generally. And partnership facilitators have gained a toehold within the hierarchy of organizations.

49. *Id.* ¶ 28.

50. *Id.* ¶¶ 2–4.

51. *UNFIP Eighth Year Report*, *supra* note 43, ¶ 52.

52. Timothy E. Wirth, Remarks Before the U.S. Institute of Peace Task Force on the United Nations (Apr. 25, 2005) (transcript available at http://www.globalproblems-globalsolutions-files.org/unf_website/PDF/speeches/USIPremarks.pdf).

53. *UNFIP Eighth Year Report*, *supra* note 43, ¶ 66 (“The difference in the level of grant approvals between the seventeenth [\$46.3 million] and the eighteenth [\$1.5 million] funding rounds [the 2005 funding rounds] reflects a new way of operating by the United Nations Foundation. Rather than invest exclusively in projects or programmes, the United Nations Foundation Board decided to consolidate future investments by thematic area and use their core resources to build partnerships and lead advocacy campaigns in support of key themes.”).

These developments are evaluated from a critical perspective in the following Part of this Article. For now, it suffices to note that the Foundation's development and relations with the U.N. have challenged the U.N. system to evolve. Partnership activities are increasingly important within the U.N. Foundation/UNFIP activities have had the effect of bringing about significant growth in the U.N.'s capacity to provide legal and logistical support to multi-party efforts involving new types of hybrid entities and coordinated teams (public/private, profit/nonprofit). Some of these changes were anticipated at the establishment of the Foundation and UNFIP, and still more have arisen, with unanticipated strength, over time. Apart from substantive contributions to the environment, security, children's health, and reproduction/population issues, Turner has contributed both procedural templates and a measure of goodwill for partnership-type activities with the U.N. system and among potential partners.

This Part has focused on Turner's gift, and the remarkable short- and long-term effects it has had on the U.N. The Foundation, however, is not a lone actor. It provides only one important example of a much broader phenomenon: a sharp rise in public-private partnerships in public international organizations.⁵⁴ Numerous public international organizations, especially those dealing with development, have in their own ways heightened their engagement with partners.⁵⁵ But the

54. See Kaul, *supra* note 14, at 219 (developing elaborate definition and classification of global public-private partnerships, based on empirical work); *id.* at 239-41 (answering the question of whether the phenomenon of public-private partnerships is a "[f]ad or fixture?" in favor of the latter); Ian Broadwater & Inge Kaul, *Global Public-Private Partnerships: The Current Landscape* (United Nations Development Programme/Office of Development Studies Working Paper, Feb. 2005) (discussing evidence of the rise of partnerships).

55. For instance, the World Health Organization (WHO), the public health arm of the U.N., which currently lists "Enhancing Partnerships" as one of its six top agenda items. See THE WHO AGENDA, <http://www.who.int/about/agenda/en/index.html> (last visited Nov. 1, 2010). They have also faced, and introduced some protections against, reputational costs arising from their partnership activities. See, e.g., Press Release, WHO, Statement of the World Health Organization on Allegations of Conflict of Interest and "Fake" Pandemic (Jan. 22, 2010), available at http://www.who.int/mediacentre/news/statements/2010/h1n1_pandemic_20100122/en/index.html ("WHO recognizes that global cooperation with a range of partners, including the private sector, is essential to pursue public health objectives today and in the future. Numerous safeguards are in place to manage conflicts of interest or perceived conflicts of interest among members of WHO advisory groups and expert committees."). See also Thomas C. Dawson & Gita Bhatt, The IMF and Civil Society Organizations: Striking a Balance (2001), IMF Policy Discussion Paper, available at <http://www.imf.org/external/pubs/ft/pdp/2001/pdp02.pdf>; International Monetary Fund, Factsheet: The IMF and Civil Society Organizations, <http://www.imf.org/external/np/exr/facts/civ.htm> (last visited Nov. 1, 2010). In addition, dozens of U.N. entities, particularly the larger ones, are developing their own specialized partnership offices and capacities. See, e.g., International Labour Office (ILO) Committee on Technical Cooperation, Public-Private Partnerships, GB.301/TB/1 (Jan.

Foundation's relationship with the U.N. was an early model for—and instigator of—this wider phenomenon of global partnerships, and it provides an apt illustration of benefits and possible drawbacks of the emerging partnership paradigm.

III. PROBLEMS OF “PARTNER CAPTURE”

This Part presents dangerous downsides, for public international organizations, of the sharp rise of public-private partnerships, a rise illustrated here by the example of the partnership activities of the U.N. and Turner's U.N. Foundation. This Article coins “partner capture” as a general term to describe the dangers of a headlong rush into partnerships.

The term partner capture derives from the concept of “agency capture” in the U.S. regulatory and administrative context, but as will become clear, partner capture covers a broader range of bureaucratic pathologies than agency capture. The analysis here looks to a range of principles concerning the behavior of public agencies, interest groups, and other actors in regulatory processes—principles initially identified by legal scholars, economists, and political scientists writing in the areas of public choice, political economy, and administrative law.⁵⁶

28, 2008), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_090364.pdf. See also Alison Kamhi, Note, *Private Funding for Public Justice: The Feasibility of Donations to the Cambodian Tribunal*, 48 HARV. INT'L L.J. 581 (2007) (applying lessons from other public-private partnerships, including U.N. Foundation, to the international tribunal set up to prosecute Khmer Rouge leaders; emphasizing financial transparency and the need to prevent donor manipulation of tribunal operations).

56. For introductions to the relevant concepts, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW & PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991), especially at 12-37 (“Interest Groups and the Political Process”), and 116-44 (“Integrating Public Choice and Public Law”); Michael E. Levine & Jennifer Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990). For examples of “agency capture” and related concepts integrated into focused scholarly studies, see, for example, Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1064-69 (1990) (discussing standard “capture theory”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2339-46 (2001) (outlining theories in the course of an assessment of a trend in greater presidential control of executive agencies); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 448-52 (1988); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 336-39 (1974) (casting some doubt on suspicions of bureaucratic incompetence); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (providing critical historical overview of major trends, theories, and results of the first several “stages” of U.S. administrative legal structure, with a focus on judicial review); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 121-26 (1996) (modeling structures of decisionmaking applicable to U.S. government actors). For an influential, more expansive account, see JERRY L.

This Part focuses on several distinct dimensions of partner capture: (A) *agenda distortion*, that is, the potentially disruptive agenda-setting power that heightened partnership activity brings with it; (B) *intra-organization rivalries*, i.e., the structural effects that the competition for partnership funds and for control of joint activities might have on the organization as a whole; (C) *reputational risks* that flow from certain alliances or activities; and (D) *erosion of legal immunity* that might result from actions taken in concert with partners or with their agents.

The theoretical basis of this critique is drawn from scholarship on agency failure and bureaucratic design initially developed to explain the pathologies of the modern administrative and regulatory state. The application of these primarily public choice insights to international actors, such as international organizations, has been attempted only in fits and starts. However, as this Article demonstrates, there is an ongoing need for political economic analysis of international organizations, international law, and global governance, particularly in the hyper-politicized, big business of development.⁵⁷ As international law—or what is better termed the law, regulation, and administration of “global governance” regimes—continues to develop at the instigation of non-traditional (i.e., non-state) actors and in non-traditional (i.e., non-treaty and non-“customary international law”) forms, it will continue to demand the attention of legal scholars wielding legal tools appropriate to complex, novel, and evolving problems. Scholars, for instance those proposing a set of core accountability principles forming an emergent

MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997) (extensive, contextualized application of public choice concepts in U.S. government structure and function, with a focus on administrative agencies, and with a normative push for extensive delegation, and well-developed checks).

57. See, e.g., Roland Vaubel, *A Public Choice View of International Organization*, in THE POLITICAL ECONOMY OF INTERNATIONAL ORGANIZATIONS: A PUBLIC CHOICE APPROACH 27, 36-40 (Roland Vaubel & Thomas D. Willett eds., 1991) (discussing political economy of international agencies' behavior as regards governments and interest groups); Roland Vaubel, *The Political Economy of the International Monetary Fund: A Public Choice Analysis*, in THE POLITICAL ECONOMY OF INTERNATIONAL ORGANIZATIONS, *supra*, at 204 (providing an example of international organization behavior under conditions of expensive oversight, arguing that staff self-interest determines at least certain organization policies); Darren G. Hawkins et al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in DELEGATION & AGENCY IN INTERNATIONAL ORGANIZATION 41 (Darren G. Hawkins et al. eds., 2006) (introducing basic concepts of principal-agent theory as applied to international organization). These are merely some starting-points; the remainder of the essays in both of the cited volumes provide useful frameworks and case studies. See also Philip Jones, *Taking Self-Interest into Account: A Public Choice Analysis of International Cooperation*, in THE NEW PUBLIC FINANCE: RESPONDING TO GLOBAL CHALLENGES 304 (Inge Kaul & Pedro Conceicao eds., 2006) (providing background on international public choice, and on partnerships and other global collaborative forms); *id.* at 314-15 (discussing bureaucratic behavior).

“global public law” or “global administrative law,” have emphasized the need for process-based protections, interest-based analyses, and attention to internal institutional rules and accountability structures.⁵⁸ This Article’s account of partner capture provides a concrete example supporting these scholars’ intuitions. The Article’s proposal is an example of how academic observations can be applied in practice.

For the purposes of this Article, a key analogy is between public international organizations and the traditional agents that much administrative law seeks to control: the executive agencies responsible for regulating in the public interest in their given fields. This analogy is apt because *public* international organizations—by contrast to many other NGOs and international organizations, and to private entities—exist to advance the interests of their member-states, with responsibility delegated to them by these states on the basis of their expertise and ability to aggregate disparate interests in favor of collectively feasible and efficient solutions. This ideal is never fully attained, but without a sense that international organizations operate on a basis of expert analysis responsive to the interests and aims of the member-states, their effectiveness and credibility are greatly undermined.⁵⁹

To further elaborate the dominant analogy of this Article, private partners such as the Foundation are akin to interest groups in traditional administrative law, in that they are entities that operate in the general field of an organization’s concern but on the basis of interests that are

58. See Benedict Kingsbury, *International Law as Inter-Public Law*, in MORAL UNIVERSALISM AND PLURALISM 167 (Henry R. Richardson & Melissa S. Williams eds., 2009) (“I argue that international law should be theorized as the law between public entities outside a single state . . . I focus . . . on the entities whose practice counts in making international law, on the processes whereby these entities make international law, and some implications about the content of international law.”); Benedict Kingsbury, Richard B. Stewart & Nico Krish, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 34-35 (2005) (“Internal Mechanisms Adopted by Global Institutions for Participation and Accountability”); Benedict Kingsbury et al., *Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 L. & CONTEMP. PROBS. 1, 5 (2005) (“Global Administrative Law encompasses the legal mechanisms, principles, and practices . . . that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make. . . . This field of law is described as ‘global’ rather than ‘international’ to reflect . . . its foundation in normative practices, and normative sources, that are not encompassed with standard conceptions of ‘international law.’”); ALVAREZ, *supra* note 1, at 109-83 (“(Re) Introducing International Institutional Law”), 184-256 (“The Varied Forms of International Institutional Law”); see also *supra* note 57.

59. See Mona M. Lyne et al., *Who Delegates? Alternative Models of Principals in Development Aid*, in DELEGATION & AGENCY IN INTERNATIONAL ORGANIZATION, *supra* note 57, at 3 (emphasizing the complexity, when dealing with international organizations, of specifying the principal whom the agent should obey).

not necessarily aligned with the public interest, the interest of the international organization in question, or the interest of its constituents (usually member-states). As the literature on agency failure suggests, preserving the functioning of public bureaucracies requires careful attention to pathologies that will naturally develop in agencies, not due to bad faith on the part of agency officers but simply due to institutional pressures and predictable self-interested, utility-maximizing preferences.

The questions that this Part seeks to answer are: What sort of distorting effects the “pull” of private partnership money might have on the activities of public international organizations? What are the dangers of partner capture?

A. *Agenda Distortion*

This sketch of partner capture problems for public international organizations begins with *agenda distortion*. This problem is the most pressing and most difficult to detect pathology likely to arise from partnership arrangements. As the following discussion shows, agenda distortion is pervasive, in that the other forms of distortion contribute to agenda distortion inefficiencies in an organization, which distract it from the goals it would otherwise pursue.

The example of the U.N. and Ted Turner’s U.N. Foundation is again useful. The operations of the Foundation, UNFIP, and the U.N. agencies “partnering” with them are far from separate. They are thoroughly entangled. The Foundation wields an immense amount of influence over project selection. “Projects and activities were identified in conformity with the Foundation’s strategic objectives,”⁶⁰ notes one report. Another provides that “[e]ach Project Document shall be consistent with the terms and conditions of the corresponding project proposal package approved by the Foundation.”⁶¹ And of course final decisionmaking regarding funding remains in the hands of the Foundation’s Board of Directors.⁶² The agenda-setting and gatekeeper power of the Foundation is indubitable, and that is hardly surprising, as the Foundation supplies (or otherwise arranges) the lion’s share of

60. *UNFIP Seventh Year Report*, *supra* note 34, ¶ 1.

61. Sample Memorandum, *supra* note 34, art. II.2 (“Project Documents”).

62. *UNFIP Fourth Year Report*, *supra* note 32, ¶ 48. Also of interest: “Member States will recall that the programme framework on sustainable energy and climate change was endorsed by the UNFIP Advisory Board and the [Foundation] Board of Directors in late 2000 and was formally circulated by UNFIP to United Nations system partners in June 2001.” *UNFIP Fifth Year Report*, *supra* note 26, ¶ 25. There does not seem to be any opportunity for comment or change by U.N. agencies or the General Assembly.

financing for most projects. While UNFIP offers assurances that its procedures seek to “ensure the full participation of all stakeholders in decisionmaking,”⁶³ the “participation of all stakeholders” will only go so far if final decisions are subject to approval by the Foundation’s board. All reasonable actors will attend carefully to that board’s preferences. Its priorities will dominate.

The agenda distortion fear is not that the partner or its agents will actively exploit the international organization’s activities for personal gain—although the Oil-for-Food debacle of the 1990s, in which widespread incompetence combined with shrewd corruption led to scandal, serves as a reminder that organizations must remain vigilant against extreme abuses.⁶⁴ The primary fear, rather, is that actors with sufficient money or influence may skew the goals of the organization away from the priorities its member-states and officers would otherwise prefer, and turn it instead toward the goals prized by that focused, motivated, external actor.⁶⁵ This danger is more acute when, as with the U.N., it may be quite difficult to know when the organization’s activities are being distorted. The mandate of the U.N. is extremely broad.⁶⁶ Agencies and officers have significant discretion to choose the activities they consider the best use of U.N. resources. It is this balancing of priorities that partners might affect, and in a way not even necessarily detectable to the decisionmakers themselves, over time. There are many arguably appropriate actions it could take in every area of global policy, and under current arrangements, its partners are likely to exercise disproportionate influence in determining which of the many available opportunities win out. Partners have a megaphone that can drown out the sounds of the other interests whispering in the ear of agency decisionmakers. Compounding this fear is the likelihood that, given the contrast between this broad mandate and the limited personnel and capacity of the U.N., initial “capture” would be magnified as bureaucratic inertia sets in. That is, once an area becomes a focus, an agency develops expertise, contacts, and interest in that narrow area, and it will pursue projects in that area again.⁶⁷

63. *UNFIP Fourth Year Report*, *supra* note 32, ¶ 49.

64. SIMON CHESTERMAN, THOMAS M. FRANCK & DAVID P. MALONE, *LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTS & COMMENTARY* 558-63 (2008).

65. For comments and bibliography on agenda setting, see FARBER & FRICKEY, *supra* note 56, at 38-42 and accompanying notes.

66. U.N. Charter art. 1. For an analysis generally in line with that offered here, see Williams, *supra* note 4, at 447-49 (endorsing caution by U.N. in accepting partners and partnerships).

67. Brennen Jensen, ‘Winging It’ for World Peace: Additional Donors and a Knack for Teamwork Have Helped Ted Turner’s U.N. Charity Thrive, *CHRON. OF PHILANTHROPY*, Feb. 22,

The Foundation is but the tip of the iceberg, and by comparison to other partners it is a model of transparency and philanthropic idealism. UNFIP, and now its counterpart, the Office for Partnerships, seems motivated to secure funding from as many—and as wealthy—sources as possible.⁶⁸ These activities put the U.N. at great risk of manipulation by organizations upon whose funding it will become dependent if it wants to continue growing and expanding its own range of partnership projects. The long list of corporate partners inevitably raises suspicions concerning the motives and legitimacy of the cooperation of multinational corporations with the U.N. Partnerships have been made with many of the largest and most powerful companies in the world, including Exxon,⁶⁹ Citigroup,⁷⁰ Wal-Mart,⁷¹ Marvel Comics,⁷² and Coca-Cola.⁷³ Such partners, along with respected philanthropic foundations such as the Rockefeller Foundation,⁷⁴ supply both expertise and a great deal of money, and are thus indispensable to the trend toward partnership.⁷⁵ A partnership with Vodafone, for instance, was intended to strengthen emergency communication capacity.⁷⁶ An advantage of this type of model, as always with the involvement of private funding in public ventures, is the increased efficiency that results from a private corporation, which may be more results- and service-oriented than bureaucratic, politicized U.N. agencies. That said, such corporations lay careful global strategies that include consideration of how philanthropic outlays can enhance business opportunities, and how they may yield less tangible benefits as well. To embark on mutually beneficial partnerships

2007, available at <http://www.philanthropy.com/free/articles/v19/i09/09002201.htm> (“The United Nations Foundation doesn’t just give money to the United Nations, it helps shape the projects inside the United Nations,” says Claudia Rosett, journalist-in-residence at the Foundation for the Defense of Democracies, a Washington think tank. She adds, “The problem with that is that nobody elected Ted Turner. He’s just rich.”).

68. *UNFIP Eighth Year Report*, *supra* note 43, ¶ 53.

69. *Id.* ¶ 16.

70. *UNFIP Seventh Year Report*, *supra* note 34, ¶ 44.

71. *2008 Report*, *supra* note 28, ¶ 26.

72. *Id.* ¶ 21.

73. *UNFIP Eighth Year Report*, *supra* note 43, ¶ 34 (“in tsunami-affected areas of Thailand, Sri Lanka, Indonesia and the Maldives.”).

74. *UNFIP Fourth Year Report*, *supra* note 32, ¶ 41.

75. As of the end of 2005, “[t]he cumulative amount of co-financing from other funding partners [aside from the Foundation] was \$360.4 million, or more than one third of all approved grants.” *UNFIP Eighth Year Report*, *supra* note 43, ¶ 1.

76. *Id.* ¶ 60 (“The partnership of the advisory committee of the Vodafone Group Foundation and United Nations Foundation/UNFIP held its first meeting in October 2005. . . . The partnership’s primary goal is to combine Vodafone funding, knowledge and technology with United Nations Foundation funding, relationships and programmatic expertise.”).

is precisely the goal, and a laudable one, but it must be remembered that with active business entities, partnership discussions should be more “arm’s length” than might be necessary with dedicated philanthropic organizations whose interests are more likely to be aligned with those of the U.N. The proposed Office of Independent Review in Part III of this Article would help guarantee non-captured review of proposed partnerships.

Is there any reason to think that agenda distortion concerns are anything more than a theoretical concern? Unfortunately, agenda distortion would be difficult to detect in many cases, because it enters at such a deep, structural level, of a decisionmaking process marked by considerable discretion. Accordingly, it is a main argument of this Article that structural problems demand structural solutions, because ad-hoc solutions cannot work when individual distortions are difficult or impossible to detect as they arise.⁷⁷

Still, several examples illustrate that agenda distortion is a very real issue. One established facet of agenda distortion emerges from the “pull” of outsized foundation funding, and another from the lack of sufficiently specific “legislative” guidance from the U.N. member-states empowered to give it.

The activities of the Gates Foundation provide the first example. The Foundation, the largest in the world, endowed by the fortunes of both Bill Gates and, recently, Warren Buffett,⁷⁸ has been active in the realm of global health policy (among many other areas). It has sought out creative, broad-based technical approaches to large-scale problems, and has been lauded for its results-based, analytical approaches.⁷⁹ It partners with numerous organizations, including the WHO.⁸⁰ However, it has also attracted bitter criticism for its tendencies to take aggressive

77. In this, it is no different from agency capture. See, e.g., *Protecting the Public Interest: Understanding the Threat of Agency Capture, Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Judiciary Comm.*, 111th Cong. 5-8 (2010) (statement of Nicholas Bagley, Assistant Professor of Law, University of Michigan Law School), available at <http://judiciary.senate.gov/pdf/08-03-10%20Bagley%20Testimony.pdf> (explaining that “[t]he central problem with agency capture is that it is neither easily identifiable nor readily falsifiable.”).

78. Timothy L. O’Brien & Stephanie Saul, *Buffett to Give Bulk of His Fortune to Gates Charity*, N.Y. TIMES, June 26, 2006, at A1.

79. The Gates’ Foundation’s willingness to explore risky possibilities, in particular, is consistent with experts’ conceptions of what foundations can uniquely add to policy problem-solving. See Frumkin, *supra* note 21, at 69 (“If successful, foundations can serve as laboratories for experimentation where new and controversial ideas can be put to the test.”).

80. See Donald G. McNeil, Jr., *Gates Foundation’s Influence Criticized*, N.Y. TIMES, Feb. 16, 2008.

action without taking account of the systemic effects of its projects.⁸¹ Its vast resources make its priorities and chosen approaches, practically speaking, irresistible to scientists and organizations in the global medical arena, and have often left dissenters out in the cold.⁸² That the Gates Foundation has arguably used its power for the most part rationally and innovatively hardly relieves the worry stimulated by its disproportionate and unaccountable power over the global development agenda in the arenas it chooses to enter.

Another specifically grounded version of the “capture” criticism of the Foundation and its U.N. counterparts has been presented by the influential conservative academic Mary Ann Glendon, a Harvard law professor who has, among other positions, served as the head of the Vatican’s delegation to the Fourth U.N. Women’s conference in 1995.⁸³ In 1999, Glendon wrote that “economic pressures . . . may aggravate the danger of capture of U.N. agencies by well-financed special interests,” and she cited Turner’s then-young Foundation as an example: an endowment that, upon further examination, “looks less like a gift and more like a take-over bid aimed at U.N. agencies with privileged access to vulnerable populations.”⁸⁴ This suggestion was accompanied by biting personal criticism of both Turner and Foundation head Timothy Wirth for their alleged passion for population control of the poor.⁸⁵

81. *Id.*

82. *Id.* (recounting bitter criticism, leveled by WHO's chief of malaria, of Gates Foundation malaria policy's effect on other research, treatment, and prevention efforts in the field); Robert E. Black et al., *Accelerating the Health Impact of the Gates Foundation*, 373 LANCET 1584, May 9, 2009 (noting Foundation's outside influence in global health policy arena, encouraging move to less risky, more efficiently lifesaving strategies); Ann Danaiya Usher, *Dispute Over Pneumococcal Vaccine Initiative*, 374 LANCET 1879 (discussing charities, including Gates-related entities, engaging in distortion of reports and pursuing illogical solutions); David McCoy et al., *The Bill & Melinda Gates Foundation's Grant-making Programme for Global Health*, 373 LANCET 1645, May 9, 2009 (analyzing and criticizing Gates Foundation grant-making practices). *See especially id.* at 1650 (“All the key contributors to global health have an association with the Gates Foundation through some sort of funding arrangement. Coupled with the large amount of money involved, these relations give the foundation a great degree of influence over both the architecture and policy agenda of global health.”).

83. *See* Barbara Crossette, *Vatican Picks U.S. Woman As Delegate to U.N. Parley*, N.Y. TIMES (Aug. 25, 1995), at A3; “Biography,” <http://glendonbooks.com/biography.html> (last visited Nov. 13, 2009).

84. Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. JURIS. 1, 11 (1999).

85. She wrote:

A case in point is CNN founder Ted Turner’s \$1 billion “gift” to the U.N. announced in the fall of 1997. . . . [T]his infusion of funds would have ranked behind the annual contributions of only the U.S., Japan, and Germany. The news seemed too good to be true. It was. It soon appeared that the U.N. would not have control over the funds.

The more alarmist edge of Glendon's critique falls short,⁸⁶ and has not been borne out in the decade since it was written. Wirth's leftward leanings are no secret,⁸⁷ but no evidence points to his being far out of the mainstream. As for Turner, he explored direct contribution to the U.N. but was not "as an individual, able to directly donate to the United Nations."⁸⁸ As noted, a significant amount of Foundation funding goes directly into U.N.-wide publicity and promotion. And, importantly, most current Foundation projects are in line with existing U.N. priorities and lack strong political overtones.

The "women and population" portfolio is, however, politically sensitive, and it drives Glendon's critique. UNFIP's description of the project runs thus:

Projects [in the "women and population portfolio"] approved in 2004 focused on promoting the participation rights of adolescent girls, supporting policy advocacy relating to reproductive health, improving the quality of reproductive health care, and strengthening the capacity of the United Nations to ensure a steady supply of essential reproductive health supplies to developing countries worldwide.⁸⁹

Rather, its agencies would be required to submit proposals for approval by a foundation headed by a man Mr. Turner chose because "he thinks as I do." The man . . . is former U.S. State Department official Timothy Wirth, who spearheaded the aggressive U.S. population control agenda at the 1994 Cairo conference. Wirth has been so zealous in advocating population control that he has even praised China, with its coercive one-child-per-family policy, for its "very, very effective high-investment family planning." As for Mr. Turner, he told a California audience in 1998 that in the post-Cold War world, "The real threat is no longer an army marching on us, it's people infiltrating us, you know, people that are starving."

Id.

86. For one, Glendon understates Wirth's qualifications by failing to mention his service in the United States Senate. Wirth, *supra* note 15, at 15 n.aal. Her further claims largely lack documentary support; the sources provided for the fragmentary, out-of-context quotations of Turner and Wirth are insufficient. The China quotation is pulled from a *Weekly Standard* attack, itself unsourced, on several Clinton administration figures, including Wirth; the quotation is a mere fragment there as well. Jeffrey Gedmin, *Clinton's Touchy-Feely Foreign Policy*, WEEKLY STANDARD, May 13, 1996, at 19. The Turner quotation about the "real threat" is from a *New Yorker* "Talk of the Town" fluff piece, and seems to be overblown rhetoric—Turner is a notorious loose cannon in his public comments—used to advance his position on nuclear proliferation, not developing-world population control. Ann Bardach, *Turner in 2000? The Media Mogul Converts Some Rich People*, NEW YORKER, Nov. 23, 1998, at 37.

87. See, e.g., Timothy E. Wirth, President, The United Nations Foundation, *The Need for Philanthropic Advocacy*, Global Philanthropy Forum Conference on Borderless Giving (June 6, 2003).

88. Jensen, *supra* note 67.

89. UNFIP *Seventh Year Report*, *supra* note 34, ¶ 15.

The efforts have taken place in India, Kyrgyzstan, Mauritania, Nepal, Peru, and the United Republic of Tanzania.⁹⁰ The Foundation, UNFIP, and their partner agencies have also embarked upon “reproductive health care” initiatives in Kosovo.⁹¹ UNFIP reports have asserted that “[r]eliable access to contraceptives and other commodities, such as condoms, HIV/AIDS test kits and equipment for emergency obstetric care, is a fundamental requirement for reproductive health.”⁹²

Components of this initiative offend some on moral grounds, but those offended currently appear to be a minority—a fact for which the Foundation bears no blame. Its projects remain within the mainstream of international aid efforts, efforts in this case apparently designed to empower young women (for whom early marriage or child-bearing are strongly correlated with destitution) and protect those at grave medical risk from HIV/AIDS and other diseases.⁹³ In the face of the situation of young women in states lacking readily available medical facilities or counseling services, Foundation activities hardly reveal a desire to “buy” the U.N. for nefarious purposes.

That said, it is true that UNFIP notes religious or morally based objections only dismissively: “Obstacles to achieving equality include . . . harmful traditional, religious and cultural beliefs.”⁹⁴ Glendon is right that the Foundation’s activities have enhanced the functioning of the U.N.’s pre-existing policies and activities in the area she finds objectionable. Glendon here provides an example of precisely the sort of agenda distortion partner capture that this Article suggests will arise. She accurately identifies an area of agenda influence that the Foundation has had over U.N. programs, in one of its chosen areas of emphasis. Further, the Foundation’s involvement and its promise of independent funding may have lowered the U.N.’s responsiveness to concerns such as those Glendon and others might raise, tilting the scales away from political sensitivity and toward active intervention.⁹⁵

90. *Id.* ¶ 18.

91. *UNFIP Fourth Year Report*, *supra* note 32, ¶ 12.

92. *UNFIP Seventh Year Report*, *supra* note 34, ¶ 17.

93. *UNFIP Eighth Year Report*, *supra* note 43, ¶ 20 (“Young women in Africa aged 15 to 24 are two and a half times more likely to be infected by HIV/AIDS than young men of the same age. With the rapid spread of the epidemic in Africa, young married girls are now the group most vulnerable to infection by older, sexually active husbands.”).

94. *Population and Woman Program Framework*, *supra* note 31, ¶ 24; *see also id.* ¶ 43 (“Additional constraints include opposition to aspects of reproductive health.”).

95. In this case, even the name of the program, “women and population,” might seem—as if masking some quasi-Malthusian plot—to view aid to women instrumentally, as a means to the end of population control, and thus this name seems out of place in light of the practical human needs being fulfilled, which might incidentally ease some global population difficulties, but which is

While most observers might favor the tilt in this case, future “tilting” might swing the other way, and to much more extreme positions than the largely mainstream ones pursued by the Foundation. Substantive outcomes do not excuse procedural sloppiness. Safeguards against extremism should be desirable to all.

In the end, although Glendon unfairly attacks Turner’s “gesture” as a mere “take-over bid,” it is hard to argue with the claim that the shift to partnership funding and activities represents, in Glendon’s words, a sort of “testing for the U.N. if its prestige and organizational resources are not to be, literally, for sale.”⁹⁶ Glendon’s point supports the argument that, in the partnership context, U.N. entities may be willing to approach their tasks differently, if not always on a substantive policy level then at least on the level of rhetoric and process, when given cover by partners. If this is true, this is a loss of independence that should worry international organizations.

All this admitted, and with agenda distortion worries given full airing, the question still arises: How does partner capture distortion differ from the types of agenda distortion already built into U.N.? The U.N.’s “democracy deficit” is often discussed, without any remedy in sight.⁹⁷ And, by contrast to many inscrutable actors within the U.N. (including its most powerful body, the Security Council), the Foundation transparently promulgates annual reports and publicizes its aims,⁹⁸ making them easy to subject to public discussion. While the danger of capture may be endemic to the U.N., it may not be fatal to the U.N.’s overall effectiveness, including in partnership situations. If the choice is between, on the one hand, carefully policing the U.N.’s partnerships for manipulation or self-dealing but allowing the partnerships to continue, or

absolutely certain to lead to other desirable outcomes such as opportunities for education and employment as well as lowered risks of abuse and disease. A better chosen name might give a more accurate impression of the types of programs that the Foundation, the U.N., and their partners have supported—programs which are largely unobjectionable, and desperately needed. This is the way the “programme framework” presents the issue, with humanitarian concerns foremost, followed by a note that population issues are secondary benefits that would lead to long-term humanitarian benefits. See, e.g., *Population and Woman Program Framework*, *supra* note 31, ¶ 22 (“Helping to fulfil [sic] the human rights of adolescent girls is an area of emphasis both because of the improvements it can make in the lives of individual girls, and because of its important consequences for human and economic development.”).

96. Glendon, *supra* note 84, at 11.

97. See THOMAS D. ZWEIFEL, *INTERNATIONAL ORGANIZATIONS AND DEMOCRACY: ACCOUNTABILITY, POLITICS, AND POWER* 59-84, 82 (2006) (concluding that absent significant international political restructuring, “the U.N. is likely to remain as it is today: not a quasi-government, but a place where sovereign states can negotiate their interests.”).

98. *UNFIP Preliminary Report*, *supra* note 4, ¶ 23, Annex.

on the other hand greatly restricting the mandate and capabilities of the U.N. to enter partnership, who could in good conscience choose the latter? Partners bring a lot to the table. And U.N. entities address too many urgently pressing needs to restrict involvement in such situations. While it may be true that much of the private funding behind such efforts would still be dedicated to aid even without U.N. involvement (e.g., by the Red Cross), both the scope of the U.N. as an organization and the inclusive global ideals it represents militate in favor of it being an umbrella organization for aid efforts where possible. Any solution to partner capture problems should take care not to hinder the positive aspects of partnerships when it seeks to curb the negatives.

One solution to agenda distortion would be to ramp up the “legislative” guidance given by the General Assembly, the Security Council, and other relevant member committees within the U.N. system, to “executive” actors in U.N. agencies and the Secretariat.⁹⁹ This solution would evoke a different set of administrative law principles, under which U.N. agencies would merely be “transmission belts” for putting “legislative” guidance into action.¹⁰⁰ However, this possible solution seems likely to face the same unhappy fate suffered by the analogous U.S. model: near-total neglect. This solution would involve a much greater commitment by members to funding the programs they specify, because foundations and other entities will be less likely to participate if their input is not as central to decisionmaking. It would also require significant steps to be taken toward the development of more representative models within the U.N., for instance, the development of weighted voting mechanisms to deal with the democracy deficit and ground decisions in popular will. These are steps that might make many states uncomfortable, and would in any case require member-states to overcome inertia to a degree that seems unlikely. Thus this option remains only a distant possibility.

99. See James Q. Wilson, *The Bureaucracy Problem*, PUBLIC INTEREST, Winter 1967 at 3, 8 (“When we define our goals, we are implicitly deciding how much, or how little, of a bureaucracy problem we are going to have. A program with clear objectives, clearly stated, is a program with a fighting chance of coping with each of the many aspects of the bureaucracy problem. Controlling an agency is easier when you know what you want.”).

100. See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 88 N.Y.U. L. REV. 437, 440 (“The traditional model’s answer was to treat the agencies essentially as subordinate adjudicatory bodies that are subject to close statutory and judicial control. Administrative law functioned as a ‘transmission belt’ to legitimate the exercise of regulatory authority by ensuring, via judicial review, that particular impositions on private persons had been statutorily authorized by the democratically elected legislature.”).

In the end, there remains a very present danger of capture, of distortion of priorities, and of myopic focus on the pet causes of a given donor, particularly one as powerful as the Foundation. There is no need to hold a Pollyannaish view of human nature or motivations. Strategic behavior is inevitable. Some U.N. agencies may pull punches in their criticisms of multinational corporations either because the agencies currently receive funding or because they hope to be part of Foundation/UNFIP partnerships. Protections can be instituted against retaliation for such criticism, and this Article proposes a crucial structural protection, but the problem is always likely to persist to some degree. We may doubt that UNFIP and Office for Partnerships guidelines, which claim as their “purpose . . . to facilitate the formulation and implementation of co-operation between the United Nations and the business community in a manner that ensures the integrity and independence of the Organization,”¹⁰¹ will be entirely successful at policing the activities of these sprawling, active organizations. The current structure is ripe for manipulation, as it relies on a small number of agenda-setting decisionmakers, at least some of whose main qualification for the job is their willingness to put up money. It is detailed analysis, competing political or philanthropic advocacy for other positions and agendas, and most of all, structural changes such as those proposed in Part III of this article, that will blunt the influence of any actors who would seek to overturn the proper priorities of an organization like the U.N., while still harnessing partnerships’ great capacity for furthering U.N. goals.

B. Intra-Organization Rivalries

The previous section dealt with the way in which external actors (the Foundation and its staff, Vodafone, Exxon, and so on) might manipulate the partnership relationship to impose their priorities on the U.N. agencies engaged in partnership activities, thereby distracting them from more pressing activities. It asserted that structural changes are the appropriate first steps for the U.N. to take.

This section deals with another potentially negative effect of greatly increased partnership activities, namely the way such partnerships can lead to strategic behavior on the part of entities or individuals within the

101. U.N. Secretary-General, *Guidelines on Cooperation Between the U.N. and the Business Community* (July 17, 2000), at 1 (Section II.6), available at http://www.un.org/unfip/docs/Guidelines_on%20UN_Business%20Cooperation.pdf [hereinafter *Guidelines on Cooperation*].

organization, utilizing partnerships as opportunities for aggrandizement of themselves and their offices within the organization. This empire-building is especially worrisome in sprawling, relatively ill-defined bureaucracies like the U.N., but it will be a factor that any organization should consider before engaging with powerful partners.

In the case of the U.N., for example, there are two directions in which the rivalries can develop: There is (1) the *vertical rivalry* by which the Office of the Secretary-General, which plays the most important managerial role in the U.N.'s partnerships, could seek to consolidate its power over the organization by enhancing the prominence of partnership activities, an arena where it exerts disproportionate control; and (2) the *horizontal rivalry* by which entities or individuals within the U.N. could seek to aggrandize themselves, exert pressure on peer entities, and so on, by using their relationship to partners and exploiting the unique opportunities that high-powered partnerships present.

As a backdrop, note that in considering whether rivalries will significantly disturb an organization's health, the size of potential partnership activities is crucial. The potential for partnerships must exert a significant "gravitational pull," relative to the size and cohesiveness of the organization, before the intra-organizational rivalry effects are likely to reach a worrisome dimension. In the case of the U.N., the size of partnerships relative to the size and cohesiveness gives grounds for worry. Despite its visibility and sweeping mandate, the budget of the U.N. is modest, compared to the budgets of the governments of sovereign states or even municipalities—famously, the U.N.'s core operating budget is less than that of the Tokyo Fire Department.¹⁰² The core budget was approximately \$1.25 billion in 2001, and the entirety of additional resources from both voluntary and assessed contributions, for core, peacekeeping, and other agency activities, was less than ten billion dollars in 2000.¹⁰³ In view of these figures, Turner's gift, originally announced at approximately one hundred million dollars per year,¹⁰⁴ is large. Further, partnership funding is for discretionary purposes, whereas basic expenses and overhead consume most of the core budget. Finally, in recent years the Foundation's funding has been more than doubled by the involvement of

102. See, e.g., KARNs & MINGST, *supra* note 5, at 137. On U.N. financing more generally, see CHESTERMAN ET AL., *supra* note 64, at 201-34.

103. KARNs & MINGST, *supra* note 5, at 133.

104. UNFIP *Preliminary Report*, *supra* note 4, ¶ 1.

other financial and operational partners.¹⁰⁵ Little wonder then that the competition for grants has been stiff.¹⁰⁶

In view of increasing partnership activities, and the increasingly accepted role of partnerships in U.N. operations, there is little doubt that partnership funding exerts “gravitational pull” on the operation of U.N. actors. In competing for partnership funding, agencies seem less and less “agents” of member-states than policy entrepreneurs fulfilling independent mandates. The increasing numbers of partnership applications evinces the pull of partnerships, and the resultant horizontal rivalry concern is that U.N. agencies will sell out, or at least water down, their agenda in order to attain or retain the alliances with partners that bolster their place in the U.N. system—to the detriment of other agencies who would opt to forego some partners in order to preserve their mission. Such rivalries might make coordinated efforts and multifaceted projects even harder than they already are within the fragmented U.N. system.

Again, as with the agenda distortion discussed in the previous section, such problems would be hard to detect (no one will admit this, and it would be hard to prove), therefore again this Article argues that structural safeguards such as those presented in Part III should be implemented. Intra-organizational rivalry problems are a manifestation of well-known agenda coordination (“system-wide coherence”) problems within the U.N. system, which have drawn extensive high level attention in the last decade, including multiple General Assembly resolutions, a report from the Secretariat, and findings from a high-level expert panel.¹⁰⁷

To a degree, UNFIP has already admitted its pull over U.N. agencies, as when it noted that “the U.N. Foundation has sought to help to bring the U.N. community together, fostering cooperation within and among agencies, and especially supporting U.N. efforts to encourage collaboration in the field.”¹⁰⁸ The claim is striking: an actor external to the organization claims responsibility for rearranging relationships among actors within that organization. Stated optimistically, the Foundation may bring more rather than less unity, compared to the

105. 2008 report, *supra* note 28, ¶ 28.

106. See, e.g., *UNFIP Third Year Report*, *supra* note 33, ¶ 13.

107. See U.N. Secretary-General, *Follow-up to General Assembly Resolution 63/311 on System-Wide Coherence Related to Operational Activities for Development: Rep. of the Secretary-General*, U.N. Doc. A/64/589 (Dec. 22, 2009), available at http://www.un.org/ga/president/64/development_activities221209.pdf (essays analyzing history and theory of U.N. Secretariat).

108. U.N. FOUNDATION AT FIVE YEARS, *supra* note 13, at 14.

chaotic existing state of affairs within the U.N. And the claim is plausible, given that the U.N. has long been known to struggle along as a set of “warring fiefdoms.” As with the agenda distortion problem, it is possible that rivalry problems were already so pervasive that partnership pressures actually strengthen the organization by providing focus and rewarding at least rudimentary cooperation. As outlined below, a virtue of the proposed Office of Independent Review is that it would not dampen these positive partnership effects but would enhance them by promoting more attention to potential efficiencies of inter-agency cooperation.

By contrast to the difficulty of establishing where and when horizontal rivalry pathologies have developed, there is little doubt that the increasing prominence of partnerships has had vertical rivalry effects, for better or for worse. Simply put, partnership activities significantly expand the power, within the U.N. system, of the Secretary-General, and it strains credulity to think that the Secretariat has not, as a consequence, actively fostered the trend to partnership. The Secretariat relies on few certain sources of power under the U.N. Charter, and it has been up to individual Secretaries to shape the office.¹⁰⁹ Kofi Annan staked out clear ground for himself and his office, taking up much space in the public eye. He argued that the work of the Secretary, and thus the work of the organization for which he was the “chief administrative officer,”¹¹⁰ was hindered by inadequate support from member-states, the Security Council, and the General Assembly.¹¹¹ The Secretariat need not be a mere figurehead; rather, it has shown promise of being an entity that could take on an important coordination and agenda-setting role within the system.

The Foundation, UNFIP, and the Office for Partnerships, are strongly aligned with the Secretariat. As a matter of legal positioning, as noted above, the UNFIP was “[d]esigned as the operational arm of the

109. See CHESTERMAN ET AL., *supra* note 64, at 132-60 (summarizing responsibilities and capacities of the Secretary-General, pointing out tensions between conceptions of the office as more “secretary” or more “general”); KARNs & MINGST, *supra* note 5, at 119-20 (noting the role of occupants of the office and offering a brief account of its developments and current status); SECRETARY OR GENERAL? THE UN SECRETARY-GENERAL IN WORLD POLITICS (Simon Chesterman ed., 2007).

110. U.N. Charter art. 97.

111. See, e.g., U.N. Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All: Rep. of the Secretary-General*, U.N. Doc. A/59/2005 (Mar. 21, 2005); CHESTERMAN ET AL., *supra* note 64, at 143-51 (appealing for greater resources and autonomy to be given to the Secretariat); KARNs & MINGST, *supra* note 5, at 137 (noting ways, including partnerships, in which Kofi Annan sought to use his position to “creative[ly]” put the U.N. on better financial footing).

Secretary-General in its partnership with the United Nations Foundation.”¹¹² The report on UNFIP’s 2004 operations noted revealingly “with the unprecedented response to the global commitments of the Millennium Declaration and the Millennium Development Goals from the private sector and civil society leaders all over the world, *the Office of the Secretary-General will be increasingly accountable for facilitating their engagement and that of other constituencies.*”¹¹³

Time and again UNFIP and Office for Partnerships documents refer to the “priorities of the Secretary-General,”¹¹⁴ or to action taken “[i]n direct response to the Secretary-General’s call-to-action,”¹¹⁵ or to “a commitment that is consistent with the emphasis placed by the Secretary-General.”¹¹⁶ Documents refer to other agencies (UNDP, UNICEF, WHO, etc.), but always within the rubric of broad direction from the Secretary-General.

By contrast, the main U.N. membership body, the General Assembly, as well as its associate committees, receives much different mention in partnership documents:

Designed as the operational arm of the Office of the Secretary-General in its partnership with the United Nations Foundation, UNFIP . . . continues to work with the intergovernmental machinery, including the General Assembly and the Economic and Social Council. UNFIP remains committed to playing a vital role in global partnership development within the Secretariat.¹¹⁷

The phrase “intergovernmental machinery” revealingly sounds like a burden to be shrugged off—an obstructive, rusty bureaucratic apparatus compared to the energy and flexibility of the Secretary-General and UNFIP. UNFIP reports and other partnership-related documents demonstrate that the Economic and Social Council and the General Assembly are marginal actors at best in partnership activities. Member-states, particularly the powerful and rich ones who enjoy holding the purse-strings and calling the shots for the U.N., may eventually become uncomfortable with the expansion of partnership activities if this trend broadens; they might even, in a sort of vicious cycle, view increased

112. *UNFIP Seventh Year Report*, *supra* note 34, ¶ 59.

113. *Id.* (emphasis added).

114. *Id.* ¶ 37.

115. *UNFIP Fourth Year Report*, *supra* note 32, ¶ 38.

116. *UNFIP Sixth Year Report*, *supra* note 46, ¶ 36.

117. *UNFIP Eighth Year Report*, *supra* note 43, ¶ 73.

partnership funding as an excuse to shift funding away from the U.N., to more responsive international organizations or to domestic organs.¹¹⁸

As noted above, the extremely broad mandate of the U.N. provides the perfect opportunity for entities and individuals to steer the day-to-day work in the direction they desire.¹¹⁹ In this case, it is strongly in the interest of the Secretary-General, who is otherwise dependent on the whims of member-state diplomacy and politics, to build mechanisms of funding and support that will allow his office to direct the broad and crucial work of the U.N. effectively.

The Secretariat's emerging priorities in this arena accord with a growing understanding among policy experts that development and security are linked not only to traditional "public goods" like legal systems but also to investment and private sector involvement.¹²⁰ As a result, "[t]he relationship with the business community has become more important as the role of business in generating employment and wealth through trade, investment and finance has grown and as U.N. member states have increasingly stressed the importance of private investment in development."¹²¹ Many partnerships serve the interests of the individual U.N. actors involved, whose role within the organization is strengthened by the emphasis on partnerships. This is particularly true for those who, like the Secretary-General or Deputy Secretary-General, are positioned to exercise agenda-setting power to coordinate disparate activities and pursue coherent policies. The virtues of coordination, particularly in light of the ineffectiveness and hyper-politicization of the Security Council and General Assembly, may outweigh the downsides of the "vertical rivalry" distortions that come from increasing partnership activities. That granted, rivalries remain another dimension on which abuses can occur, and structural safeguards again are necessary.

C. *Reputational Risk*

Even if the U.N. preserves its agenda and maintains structural balance in the face of increased, centrifugal partnership pressures, can it

118. See, e.g., KARNs & MINGST, *supra* note 5, at 137 ("Fundamentally . . . states are reluctant to see the U.N.'s dependence on them for its financing reduced too much because that would reduce their ability to control what the U.N. does."). The distortive effects of certain member-states may, of course, equal or eclipse the distortions produced by partnership activities, but proposing remedies for the intractable problem of member-state manipulation of the U.N. exceeds the scope of this Article.

119. See U.N. Charter art. 1.

120. See Kamhi, *supra* note 55, at 587-88.

121. Guidelines on Cooperation, *supra* note 101, § I(3) at 1.

withstand the pressure on its reputation and legal status presented by its many alliances? The concern has been present from the start of the rise in partnerships. The original Foundation agreement with the U.N. features a section providing rules for use of the name and emblem of the U.N., a concern also manifested in more recent “Guidelines on Cooperation.”¹²² The Foundation drafted “Good Governance Policies” that show explicit awareness of need to guard against “reputational risk to the UN” in light of the Foundation’s “partnership commitment to the UN.”¹²³ The concern reflected consistently in legal documents from the origins of the Foundation and UNFIP down to the present is for the responsibility, reputation, and independence of the U.N. Current “Guidelines on Cooperation” used in structuring partnerships emphasize that “[a]rrangements should not diminish the U.N.’s integrity, independence and impartiality.”¹²⁴

In tension with this caution, however, are the many public documents (statements, speeches, press releases, reports) trumpeting the U.N.’s partners and activities.¹²⁵ The U.N. benefits from the publicity, in that it presents itself as a dynamic organization efficiently leveraging private funds to fight the world’s fight; on the other hand, the partners benefit far more, on the symbolic level. The link with the U.N. and its “blue helmet” credibility provides an enormous boost to multinationals whose reputations are not always spotless. The U.N. does not appear to have taken due account of the fact that, in addition to its experience and capacity, the U.N.’s reputation is a key part of what it brings to partnerships—and what it stands to lose.¹²⁶ This is another sphere in

122. *Id.* § V at 2-3. The potential for embarrassment due to the U.N. Foundation’s name has caused some adjustment in the Foundation’s operations already. In addition to aid activities, the Foundation engages in substantial public advocacy, and UNFIP has broadened its involvement in Foundation work by recruiting other organizations to partner with the Foundation. The Foundation’s advocacy takes place most under the auspices of its “sister organization” the Better World Campaign, which it describes as a “vocal cheerleader[] for the United Nations and its causes.” U.N. Foundation at Five Years, *supra* note 13, at 21. The Better World Campaign might better be described as an arm of the Foundation rather than as a sister organization, because it is indistinguishable from the Foundation in all but name. A distinct name was presumably necessitated by the unseemliness of an organization called the U.N. Foundation, the name of which might make it appear to be an arm of the U.N., cheerleading for the U.N. Early on, this advocacy yielded fruit in the form of payment by the U.S. of much of its overdue debt to the U.N. *Id.* at 22.

123. U.N. Foundation Good Governance Policies § 4, http://www.globalproblems-globalsolutions-files.org/gpgs_files/unf_website/PDF/Governance_Policies_and_Procedures.pdf (last visited Nov. 19, 2009).

124. Guidelines on Cooperation, *supra* note 101, § IV at 2.

125. See Preston, *supra* note 18, at 1-2.

126. On a theoretical level, it bears mentioning that the governments of member-states may consider reputational damage to the U.N. as damage to their interests mostly because as the U.N. is

which an Office of Independent Review's assessment of potential partners and partnerships should be required before that reputation is put at stake. The fear is that partnership activities, if hindered by some unforeseen catastrophe or by corruption, may expose the U.N. to devastating reputational harm, the cost of which will be borne primarily not by the partner but by the U.N. The fallout from such an incident could significantly impede the organization's ability to pursue its mandate, including its entering into other partnerships.

These fears have not been realized—if they had, something like the proposals in this Article would certainly have been implemented already. But the potential is undoubtedly present. It takes little digging to discover certain inconsistencies in partnership activities. In 2008, for instance, just before the United Nations Development Fund for Women put out a report favorably discussing a class-action lawsuit that accuses Wal-Mart of pervasive gender discrimination,¹²⁷ the Office for Partnerships released a report lauding a partnership with Wal-Mart:

In 2007, under the guidance and support of the UNOP, Wal-Mart became increasingly engaged in supporting United Nations causes, especially the efforts of the United Nations Development Fund for Women (UNIFEM) to end violence against women. Wal-Mart has committed its intent to collaborate with the United Nations on the issue of gender-based violence and on specific needs for women in the workplace environment, specifically in large factories and major suppliers of Wal-Mart throughout the world.¹²⁸

The Office for Partnerships made no mention of the lawsuit, noted so prominently in a UNIFEM publication, that surely provided inspiration for Wal-Mart's sudden spate of philanthropy in the arena of women's issues.

robbed of reputational capital, and that will both, of course, hamper the future effectiveness of the organization, but also will limit the available reputational capital that the governments can use in making the organization "an alibi or scapegoat" for tough policy decisions and activities that are unpopular domestically. See Jones, *supra* note 57, at 307 ("If the agencies' activities damage electoral support, they are inclined to blame international agencies.").

127. ANNE MARIE GOETZ ET AL., PROGRESS OF THE WORLD'S WOMEN 2008/2009, WHO ANSWERS TO WOMEN? 66 (2009) (Discussion titled: "Seeking to Hold Wal-Mart Accountable for Gender Discrimination"). The case is *Dukes v. Wal-Mart*, most recently affirmed in part and remanded in part upon en banc rehearing by the U.S. Circuit Court of Appeals for the Ninth Circuit, at 603 F.3d 571 (9th Cir. 2010).

128. 2008 Report, *supra* note 28, ¶ 26.

D. *Erosion of Legal Immunity*

Damage to the U.N. from partnerships gone bad might be more than symbolic or reputational; partnerships test the bounds of the U.N.'s legal immunity in countries in which it operates. The original agreement between the U.N. and the Foundation specifies that partnerships should not threaten the U.N.'s immunity,¹²⁹ mentioning the issue twice:

29. The parties hereby acknowledge and agree that the Foundation is an entity established under United States law and separate and distinct from the United Nations and that it shall not be considered, for any purposes whatsoever, as having a legal status connected with or dependant upon the United Nations. The personnel, agents or contractors of the Foundation shall not be considered in any respect or for any purposes whatsoever as being the employees or agents of the United Nations, nor shall any personnel, representatives or other affiliates of the United Nations be considered, for any purposes whatsoever, as being employees or agents of the Foundation.

...
32. Nothing in or relating to this Agreement shall be deemed a waiver, express or implied, of any of the privileges and immunities of the United Nations, including its principal and subsidiary organs.¹³⁰

Similarly, the Office for Partnerships' "Sample Memorandum of Understanding" asserts that a partner organization "shall not be considered as an agent of the UNFIP,"¹³¹ seeking thus to avoid legal complications arising out of agency relationship.

While there do not seem to have been any controversial situations as of yet, these conclusory statements that partnership does not compromise U.N. immunity or subject it to liability risks might not avail, should a cause of action arise from the work of a partner. Although public international organizations are generally well-protected by immunity doctrines from most forms of liability in domestic courts, and although the U.N. operates under an even more favorable set of immunities than most other international organizations (it is protected by

129. See *UNFIP Preliminary Report*, *supra* note 4, ¶ 12 (noting that the Advisory Committee on Administrative and Budgetary Questions specifically requested a change to the agreement to preserve this immunity).

130. *Id.* Annex.

131. Sample Memorandum, *supra* note 34, art. V.

a separate immunity agreement¹³²), the more attenuated the control of organizations over their agents, and the more they share control with partners, the more they risk exposing themselves and their employees to liability. Most courts remain reluctant to pierce jurisdictional immunity of international organizations and their employees directly, but some are willing creatively to circumvent that immunity where necessary.¹³³ The doctrinal rationales for immunity weaken as an organization becomes more closely entangled with private actors, wanders further from its core activities, or appears to have already bartered away some of the independence that immunity doctrine is in part intended to assure.¹³⁴

132. On the immunity and legal responsibility of the U.N., see CHESTERMAN ET AL., *supra* note 64, at 515-39 (“Immunity and Responsibility”); on international organization immunity generally, see Chanaka Wickremasinghe, *Immunity Enjoyed by Officials of States and International Organizations*, in INTERNATIONAL LAW 387, 404-11 (Malcolm D. Evans ed., 2003); AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS (2000) (providing detailed cases and discussion of rationales and holdings regarding immunity of international organizations); KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS 114-25, 208-19 (2002) (discussing, from a remedies perspective, the application and rationale of immunity doctrines); Davinia Abdul Aziz, *Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria*, 6 INT’L ORG. L. REV. 383, 409 (2009) (arguing, after helpful analysis based on a particular type of partnership, that privileges and immunities “for global public-private partnerships should be strictly streamlined to purpose”).

133. WELLENS, *supra* note 132, at 120 (“Issues concerning the immunity of international organisations are primarily matters of international law . . . but the decision as to its scope normally rests solely with the forum state.” (footnotes omitted)); REINISCH, *supra* note 132, at 174-75 (presenting some case law bearing on the issue of immunity extended to those exercising delegated authority and contractors, making clear that the law remains unsettled and untested). Alleged international human rights violations provide an example of the increased perceived need for access. For discussion and case law, see *id.* at 281-305; see also *id.* at 321 nn.12-13 (citing cases in which “attempts [were made] to challenge measures of international organizations before international human rights organs,” and characterizing these cases as “witness[ing] [a] growing tendency of trying to hold international organizations accountable.”).

134. See WELLENS, *supra* note 132, at 125 (“Allowing claims brought against international organisations to be litigated would not only contribute to another public perception of international organizations, but also certainly substantially improve their accountability regime.”); REINISCH, *supra* note 132, at 233 (“The paramount rationale for granting immunities to international organizations . . . lies in securing their independence and guaranteeing their functioning.”). Reinisch comments:

[I]n assessing whether or not domestic courts should refrain from adjudicating disputes involving international organizations, policy considerations, in particular the following two, should be taken into account more closely:

1. the prevailing rationale for abstention, on the one hand, is the necessity for ensuring that international organizations are able to fulfill their functions independently without any outside influence; and

2. on the other hand, it seems to be crucial that the vindication of ‘civil rights and obligations’ of private parties vis-à-vis international organizations as well as of international organizations themselves is sufficiently guaranteed.

Id. at 392.

One worrisome case, for example, could arise if a nominal employee of a public international organization were to work so closely with a partner that a court considered the employee to be an agent of the partner, beyond the scope of the organization's immunity protections. As with other public international organizations, the U.N.'s liability shield is thick—but not, perhaps, as wide as it might hope. At the very least, the legal theories underlying “partnership” of this nature should be elaborated in official documents and followed in practice.

Of course, the Office for Partnerships already has an incentive to minimize any legal and reputational impact: “bad” partnerships, attracting negative attention or eroding U.N. immunities, would prove costly to the Office that approved them. Still, the collective cost to the U.N. as a whole would vastly outweigh any costs to the individual officers reprimanded or fired; the risk of reputational or liability costs of the Office's over-promotion of partnerships is largely externalized on the entire U.N. system. Practically speaking, it is far from apparent that given its apparent pro-partnership orientation, the Office has due awareness of the grave risks here outlined, nor does it necessarily have the resources to address them.

IV. A PROPOSAL: THE OFFICE OF INDEPENDENT REVIEW

The Foundation and UNFIP have proclaimed again and again that their relationship has changed the way the work of the U.N. is conceived both within the U.N. and among non-governmental actors in the for-profit and non-profit realms.¹³⁵ Their claim is no exaggeration, although the previous Part argues that the rise of partnerships carries risks in addition to rewards. The U.N.'s experience with the Foundation and many other partners has brought significant growth in its capacity for partnerships, and this shift falls in line with the widespread rise of civil society and private sector influence in the international law and policy of development, security, and regulatory coordination. By contrast, the aid community historically had little trust in the U.N. to serve as an efficient, innovative, or reliable conduit for funding and projects.¹³⁶ Long overdue, this change may hold great promise for more efficient, accountable, and politically-insulated aid activities in the future.

135. U.N. FOUNDATION AT FIVE YEARS, *supra* note 13, at 11.

136. See CHESTERMAN ET AL., *supra* note 64, at 372 (noting the preference, among “[w]ealthy countries,” for non-U.N. institutions for their “development funding”). “[T]he U.N. system and its agencies were simply never trusted by the donor community to the extent that the [World] Bank and the [International Monetary] Fund were.” *Id.* at 373.

As part of this broad change, legal controls should continue to evolve, to allow room for this sort of adaptation while remaining true to the basic commitments and values enshrined in the Charter and other fundamental documents. No new institutional structure can completely eradicate this tension, and continued change and contestation should be expected as part of the natural process of adapting a large public institution to a changing world. Still, there are strong steps that could and should be taken by the U.N.—as by other similar organizations—to streamline partnership activities and guard against their pitfalls.¹³⁷ This Part proposes one important step—the establishment of an Office of Independent Review (OIR)—and explains what the mandate of this new entity should be.

This paper proposes that the OIR be tasked with the following responsibilities: (1) similarly to the U.S. Office of Management and Budget (especially its Office of Information and Regulatory Affairs),¹³⁸ analyze proposed partnerships and produce organizational impact reports to enhance cooperation across agencies and to coordinate various partnership efforts so that they efficiently advance strategic goals; (2) develop best practices for partnership agreements and activities, by evaluation of previous partnership efforts; (3) similarly to U.S. Inspectors General,¹³⁹ investigate and report on allegations of malfeasance and other manipulation or exploitation by U.N. entities or their partners; (4) ensure the compatibility of partnership ideas and their means of execution with U.N. ideals and goals, by prospective review of proposed partnerships; (5) insist on as much transparency as is feasible,

137. As discussed in this Part, the implementation of these steps would be in line with steps taken of late by other international organizations to bolster accountability. See, e.g., Kingsbury, Stewart & Krisch, *supra* note 58, at 34-35 (“Internal Mechanisms Adopted by Global Institutions for Participation and Accountability”). Here as elsewhere on the global arena, uncritically embracing the free-form intervention of private partners might not be efficient from a policy perspective. See, e.g., David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294 (2006) (critiquing another form of public-private collaboration—informal, horizontal network-based administrative rule (“best practices”) development—in the domestic and global spheres).

138. Of course, these organizations are themselves hardly immune from criticism. See generally GELLHORN & BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS 609-25, 638-58, 698-705 (Strauss et al. eds., rev.10th ed. 2003) (basic documentary history of OMB and OIRA, and some critique); STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 68-72 (1993) (basic explanation and critique of role of OMB and OIRA in modern regulatory process).

139. See generally Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of the Inspector General*, 35 CAL. W. L. REV. 243, 243-52 (1999) (basic history of offices of the inspectors general in federal agencies); PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993) (extensive history of inspectors-general movement up to the early 1990s).

from U.N. entities and partners; (6) solicit and take account of comments from affected parties and members of the public concerning partnerships; and (7) regularly review the overall role of partnerships within the U.N. system to ensure that partnerships, and the possibility they present for institutional rivalry and aggrandizement, do not distract the Secretariat or individual agencies from their prescribed roles—or from pursuing the most efficient fulfillment of these roles.

To ensure independence in these activities, the OIR would have to be sealed off from the rest of the Office for Partnerships, in terms of its hiring, staffing, procedures, and substantive judgments. Its head would have to answer either to the Secretary-General directly—or, given the worries about Office of the Secretary-General aggrandizement, to another high-level official or entity unaffiliated with the other U.N. partnership entities. Further, in order to maintain its own credibility and accountability, most of its work should be made public, subject to confidentiality considerations.

Because its tasks are heavily oriented toward accountability, the OIR would liaise with existing U.N. entities responsible for monitoring and improving U.N. operations, for instance the Office of Internal Oversight Services,¹⁴⁰ Board of Auditors,¹⁴¹ Joint Inspection Unit,¹⁴² and Evaluation Group.¹⁴³ But it should be separate from these entities,

140. UNITED NATIONS OFFICE OF INTERNAL OVERSIGHT SERVICE, <http://www.un.org/Depts/oios/> (last visited Oct. 1, 2010) (“The Office assists Member States and the Organization in protecting its assets and in ensuring the compliance of programme activities with resolutions, regulations, rules and policies as well as the more efficient and effective delivery of the Organization’s activities; preventing and detecting fraud, waste, abuse, malfeasance or mismanagement; and improving the delivery of the Organization’s programmes and activities to enable it to achieve better results by determining all factors affecting the efficient and effective implementation of programmes.”).

141. UNITED NATIONS BOARD OF AUDITORS, <http://www.un.org/auditors/board/> (last visited Oct. 1, 2010) (“[T]he accounts and management operations of the United Nations and its Funds and Programmes are required to be audited and reported on periodically by independent external auditors [i.e., the Board of Auditors].”).

142. The Joint Inspection Unit of the U.N. System, About JIU, <http://www.unjiu.org/en/about.htm> (last visited Oct. 1, 2010) (“The Unit is composed of not more than eleven Inspectors appointed by the General Assembly on the basis of their special experience in national or international administrative and financial matters They are mandated to provide an independent view through inspection and evaluation aimed at improving management and methods and at achieving greater coordination between organizations.”).

143. About U.N. Evaluation Group, <http://www.uneval.org/about/index.jsp?ret=true> (last visited Oct. 1, 2010) (“UNEG . . . has 43 members. Membership is institutional with the Units responsible for evaluation in the UN system, including the specialized agencies, funds, programmes and affiliated organisations, eligible for membership. These Units should have, or aspire to have, the required professional knowledge, experience and responsibility for evaluation as defined by the UNEG Norms and Standards for Evaluation (2005).”).

which are spread thin, have been subject to embarrassment and criticism of their own,¹⁴⁴ and are primarily focused on post-hoc evaluation or ex ante establishment of general principles rather than being incorporated, structurally, in real-time decisionmaking. OIR's unique focus and role in partnership decisions would best be preserved by maintaining its independence from these organs as well.

Finally, while its opinion would naturally carry weight, nothing is to say that the OIR should necessarily have veto power over partnership activities; rather, its opinions should be viewed as persuasive authority, with ultimate decisionmaking in tough cases left up to higher-level officials. Cumulatively over time, OIR reports likely *would* be persuasive, and its role as independent evaluator would cheapen monitoring costs by member-states and lead to more effective oversight of the U.N.'s exercise of delegated powers.¹⁴⁵

OIR's partnership-restricting, "gatekeeper" function should be balanced by its project-generative capacity. Ideally, OIR's analyses would stimulate partnership ideas by suggesting directions in which there is untapped potential for some types of donors to work with U.N. partners. Agenda creep would then work in favor of U.N. interests rather than against them, which is the current risk.

An additional project-generative side of the proposed OIR procedures is that member-state government entities might respond to heightened accountability and rationality in partnerships by greater willingness to commit resources and expertise to partnerships. By contrast, without the assurance, the "political cover," provided by a credible independent review, government entities might face legal or policy obstacles to involvement in partnerships. Removing the taint or suspicion of partnership might encourage partnerships while rooting out manipulative or distortive actors or projects and discouraging "bad behavior" by partners and agencies.

An important question is why these functions must be delegated to a new office rather than simply promulgated among existing entities and coordinated by the existing Office for Partnerships. In support of this objection is the fact that creation of a new office is a classically

144. See CHESTERMAN ET AL., *supra* note 64, at 540-97.

145. As a policy matter, of course, I do not argue or suggest that states, as members of the General Assembly, necessarily make better policy than private foundations and other partners, or than the Office of the Secretariat. But structurally, as the U.N. is currently organized, member-states bear responsibility for U.N. agenda-setting and project management, so enhancing their effectiveness in this role is a goal that internal U.N. law, such as that proposed here, should pursue. Of course, the proposal has other benefits, as noted, that go beyond accountability to member-states.

inefficient, bureaucratic way of compounding the existing bureaucratic risks and inefficiencies:¹⁴⁶ a cure worse than the disease.

After all, there have not been any serious, public problems with partnerships so far, despite over ten years of intensive partnership efforts. U.N. agencies have been put on notice that they should remain wary of possible problems arising from partnership activities.¹⁴⁷ Additionally, since its inception, the Foundation/UNFIP partnership has been well-documented, transparent, and perhaps even too bureaucratic in setting its guidelines.¹⁴⁸ Its actions seem to have been diligently tailored so that it could serve as a trustworthy model, to give assurance that money funneled through U.N. programs and partnerships would not be wasted or ill-spent:

As we have worked to secure new partnerships, we also serve as an effective steward of resources for UN causes and have established secure systems of financial accountability and oversight with the care and transparency necessary to satisfy all participants. As a result, the UN Foundation has won a reputation as a flexible, responsible conduit for funding UN causes.¹⁴⁹

So it is true in many ways that “Ted Turner’s visionary approach now serves as a model for other partners to engage in United Nations causes.”¹⁵⁰ For instance, drafters of partnership agreements are referred to U.N. Foundation agreements and procedures as a model.¹⁵¹ Indeed, as noted, the practices of the Foundation and its U.N. facilitators have facilitated a huge growth in partnerships.

The fact that so much has gone *right* so far is a tribute to the transparency and publicity of partnership activities over more than a decade, as well as the care and responsibility exercised by the U.N. and Foundation officials. Their practices send a message that these organizations are seeking to be legally above-board, accountable, and clear about the terms of their relationships. Institutionally, as was noted

146. See, e.g., PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 1-31 (1995) (introducing unintended consequences, in U.S. government, of well-meaning application of “principles of administration” as (failed) antidote to government sprawl and loss of accountability).

147. Guidelines on Cooperation, *supra* note 101, § VII(19)(b) at 4 (“Within each [U.N.] organization, a focal point should be nominated to ensure transparency, learning and a better understanding of the role and objectives of business and to ascertain whether they are compatible with the goals of the UN.”).

148. See *Fifth Year Report*, *supra* note 26, ¶ 11.

149. U.N. FOUNDATION AT FIVE YEARS, *supra* note 13, at 75.

150. *UNFIP Sixth Year Report*, *supra* note 46, ¶ 66.

151. Guidelines on Cooperation, *supra* note 101, Annex 2 at 6.

in Part II, the increase in partnerships may have *improved* the efficient functioning of the U.N. by encouraging salutary rivalries among agencies for good, new ideas, as well as funneling power to the Secretariat, which can most effectively coordinate activities. (In this respect, the proposed OIR differs from the U.S. Office of Management and Budget, which at least in part exists to further the agenda-setting and policymaking power of the chief executive.¹⁵²)

These objections to the creation of a separate office are powerful, and perhaps for some organizations of less scope and sprawl than the U.N., ad-hoc solutions would be enough. But for an organization such as the U.N., accountability must be structurally built in, or it cannot be meaningfully present for the long term. There are too many ways in which problems of agenda distortion, destructive rivalries, and even reputational and legal liabilities, can hide themselves for a time or forever. As the deterioration they cause goes undetected, the problems can pile up—the processes of agenda distortion, reputation decline, and structural malformation are problems that once entrenched are difficult to reverse. The operative general principle here is that problems that cannot be detected and corrected as they arise must be addressed by preemptive, structural safeguards. Furthermore, to rely on self-policing, or policing by partners, ignores the very nature of the problem of “partner capture,” which is that the incentives for partners, and for their U.N. contacts, will be precisely to pursue the sort of dangerous behavior outlined in the previous Part of this Article. Only a truly independent office would have the incentive both to become fully informed about the effects of individual partnerships on the U.N. as a whole and to act on that information—ultimately, to ensure that U.N. resources are indeed *leveraged* by partnership activities, not *diverted* by them.

The OIR should not be established solely out of fear or suspicion of outside entities that might “infect” the U.N. or any other international organization with alien priorities. Of course, the U.N. should aggressively protect itself against corruption, capture, or self-entrenchment, and the OIR would have capacity for such protection. But more than simple policing is needed. The OIR would provide a focal point for consideration of the directions in which growth can and should occur. Ultimately, the goal of the U.N. as of all international organizations should be to ascertain the best ways in which activities can be conceived, organized, and funded—whether by governments or by

152. See GELLHORN & BYSE'S ADMINISTRATIVE LAW, *supra* note 138, at 615.

private partnerships or by some other way as-yet-undeveloped—to advance its lofty mandate.

V. CONCLUSION

The rise of public-private partnerships has proven a boon to public international organizations, whose broad mandates but limited budgets lead them too often to disappoint public expectations. But the enthusiastic response of these organizations should be tempered with an awareness of the new types of responsibilities incumbent on the organizations when extending their reach with partnerships. Lessons from similar situations encountered by other bureaucracies may be a key to adjusting to this new role effectively. Both philanthropies and international organizations have passed through several stages of evolution already, and as both sets of players shift into increasingly important roles on the global stage, a further step toward rational structure, coordination, and evaluation is merited.

As this Article has demonstrated, both the partner capture problem and its solution connect with a broader movement in international law, which has begun to recognize that new forms of effective global regulation and governance cannot be allowed to outstrip the implementation of the safeguards against abuse that have developed in domestic law. Legal guidelines and high-minded mandates are not in themselves enough; rather, international actors must establish soundly designed accountability institutions and mechanisms to keep pace with increasing delegations of responsibilities to international organizations and networks. This discussion of how to prevent partner capture supplies one example of the potential of international law to develop beyond its traditional sources and forms and to become more effective by drawing on domestic analogues, grounded in theory and practice, that can provide reliable guidance in addressing new challenges.