THE PRIVATIZATION OF DEVELOPMENT ASSISTANCE: SYMPOSIUM OVERVIEW

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I. INTRODUCTION

Privately initiated financing is an increasingly prominent feature of assistance provided to developing countries.[1] Two of the most obvious examples are intra-familial remittances and grants from private foundations.[2] There are, however, many other innovative ways in which private actors can participate in channeling funds to developing countries on concessional terms (that is to say, on terms that are more favorable than those available in commercial markets). For example, private actors might purchase goods from a firm that has joined the Product (RED) partnership[3] and promised to transfer a share of the revenue from the sale of labeled items to the Global Fund to fight AIDS in Africa.[4] They might invest in bonds issued by the International Finance Facility for Immunization, which enables the issuers to accelerate disbursement of funds to support immunizations against easily preventable diseases.[5] Alternatively, they might make a tax-deductible donation to a development project through GlobalGiving's novel

1. *See* Jean-Michel Severino & Olivier Ray, *The End of ODA: Death and Rebirth of a Global Public Policy* 5-6 (Ctr. for Global Development Working Paper No. 167, 2009), *available at* http://www.cgdev.org/files/1421419_file_End_of_ODA_FINAL.pdf.

2. For an overview of remittance flows, see HUDSON INSTITUTE, THE INDEX OF GLOBAL PHILANTHROPY AND REMITTANCES 2009 (2009), *available at* https://www.hudson.org/files/documents/Index%20of%20Global%20Philanthropy%20and%20Remittances%202009.pdf.

3. (RED)™, Fight AIDS in Africa, http://www.joinred.com/Home.aspx (last visited Apr. 11, 2010).

4. The Global Fund to Fight AIDS, Tuberculosis and Malaria, http://www.theglobalfund.org/en/ (last visited Apr. 11, 2010).

5. International Finance Facility for Immunisation, http://www.iff-immunisation.org/ (last visited Apr. 11, 2010).

online platform.[6] Or they might make a microloan through Kiva, which has pioneered a form of peer-to-peer microfinance, and allows lenders to select the recipients of the loans they fund.[7] Yet another option is to purchase carbon credits from a firm in a developing country on the so-called voluntary market, which amounts to remunerating the firm for reducing its emissions of greenhouse gases.[8]

The Hudson Institute estimates that, as of 2007, remittances from OECD donor nations amounted to $145 billion, and philanthropy totaled at least $49 billion. These figures compare to $107 billion in Official Development Assistance ("ODA") in the same year.[9] In the United States, private philanthropy alone was one and one-half times greater than ODA.[10] In this issue of the *New York University Journal of International Law and Politics*, which was preceded by a two-day Symposium, an interdisciplinary group of lawyers, economists, political scientists, and political philosophers consider the ramifications of this phenomenon, which we have labeled "The Privatization of Development Assistance."

The discussions at the Symposium involved two distinct modes of analysis. First, there were efforts to map the existing landscape in order to get a sense of the scale of private flows, the kinds of actors involved, and how flows through private channels interact with comparable flows through publicly sponsored channels. Those mapping exercises were complemented—often in the same paper—by a second kind of analysis aimed at exploring the policy implications of the privatization of development assistance. Rather than take existing modes of governance and regulatory frameworks as given, the contributions operating in this mode examined how those regimes might be reformed to improve performance in terms of criteria such as accountability, legitimacy, donor or investor satisfaction, and improved development outcomes.

6. GlobalGiving, http://www.globalgiving.org (last visited Apr. 11, 2010).

7. Kiva — Loans that Change Lives, http://www.kiva.org (last visited Apr. 11, 2010).

8. See, for example, the services offered by Carbonfund.org, http://www.carbonfund.org (last visited Apr. 11, 2010).

9. Heidi Metcalf, *The Privatization of Assistance in International Development*, 42 N.Y.U. J. INT'L L. & POL. 1093 (2010).

10. Metcalf, *supra* note 9, at 1097.

II. Mapping the Terrain

Some contributions to the Symposium made efforts to map particular kinds of private flows. For instance, Ketkar and Ratha examined the phenomenon of "diaspora bonds," debt instruments issued by a country to members of its overseas diaspora.[11] Because the purchase of these instruments is motivated in part by patriotism, they can often be sold at a premium in good times and bad, and thus provide a relatively cheap and reliable source of external finance to the issuing countries.[12] In a similar vein, in their presentation at the Symposium, Conning and Morduch both described and analyzed the potential impact of what they call "social investment," a category defined broadly to include many sorts of financing designed to generate positive but below-market financial returns for investors.

The most comprehensive mapping exercise, however, is found in Heidi Metcalf's article, *The Role of Private Aid in International Development*.[13] Drawing on the Hudson Institute's pioneering *Index of Global Philanthropy and Remittances*, Metcalf documents the growth in private forms of development assistance and the range of actors supplying it. She also argues that those flows exhibit certain important advantages as compared with ODA, claiming that private actors are better informed about beneficiaries' needs, more nimble and innovative, less risk-averse, and less politically sensitive, and so for all these reasons are better suited to serving the needs of both providers and recipients of financing.[14] Thus Metcalf cautions against changes in the governance or regulation of private flows that might undermine its distinctive advantages and reproduce the inflexibility and inefficiencies of ODA.

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11. *See generally* Suhas Ketkar & Dilip Ratha, *Development Finance via Diaspora Bonds*, *in* INNOVATIVE FINANCING FOR DEVELOPMENT 59 (Suhas Ketkar & Dilip Ratha eds., 2009). To give a sense of the magnitude of these transactions, India and Israel have jointly raised over $36 billion using these bonds (the first Israeli bond was issued in 1951 and the first Indian bond in 1991). *Id.* at 59.

12. *Id.* at 60-61.

13. Metcalf, *supra* note 9 at 1091.

14. Metcalf, *supra* note 9, at 1107. *See also* Raj M. Desai & Homi Kharas, *The California Consensus: Can Private Aid End Global Poverty?*, SURVIVAL, Aug.-Sept. 2008, at 155,158-159, 161 (2008) (noting the many advantages of private aid channels over their public counterparts).

Desai and Kharas also undertake a relatively comprehensive mapping exercise but provide a slightly different perspective on the relationship between public and private flows from Metcalf. They present evidence that funds flowing through online platforms such as GlobalGiving and Kiva are not motivated by the same factors as ODA: In contrast to publicly disbursed funds, privately generated flows, and specifically those attributed to individuals, are less influenced by country-specific factors or risks (like GDP per capita or the quality of country institutions). Instead, individuals are influenced by project-specific factors (the purposes for which the funds will be used, and the amounts needed), and focus more on the people receiving the assistance (gender is a particularly important factor) than on the political or social conditions in countries the recipients inhabit.[15] The authors conclude: "This indicates that private aid and official aid are *complementary*: official aid supports countries, private aid supports people. With different preferences, formal coordination between these different donors may not be needed. Instead, each needs to understand when and how it can partner with the other to meet differing objectives."[16]

To our eyes, Metcalf, on the one hand, and Desai and Kharas on the other hand, come to different conclusions on the question of whether private flows serve as substitutes or complements for ODA. Answering this question is important. Substitutability implies that increased private flows reduce the marginal value of ODA, whereas complementarity implies that they increase the marginal value of ODA. The distinction has important policy implications. For instance, if the two kinds of flows are substitutes, then states ought to reduce their levels of ODA as private flows increase, and vice versa. If, however, the two kinds of capital flows are complements, then states ought to increase levels of ODA as private flows increase, and vice versa.

15. Raj M. Desai & Homi Kharas, *Democratizing Private Aid: Online Philanthropy and International Development*, 42 N.Y.U. J. INT'L L. & POL. 1140 (2010).

16. Raj M. Desai & Homi Kharas, *Do Philanthropic Citizens Behave Like Governments?* 1 (Wolfensohn Ctr. for Development Working Paper No. 12, 2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/10_kiva_global_giving_kharas/10_kiva_global_giving_kharas.pdf (emphasis added).

At first blush the question of whether private and public flows serve as substitutes or complements for one another seems to merit additional research. However, this approach to framing the research question was challenged by some participants in the Symposium who questioned the value of using the public/private distinction to map flows of development assistance. For instance, in his oral remarks Mitchell Kane suggested that channeling funds to developing countries involves at least two distinct functions: financing and allocation. Each of these functions can be performed by either public or private actors or even by a combination of actors drawn from both sectors. Kane asserted that in practice public-private combinations are probably more common than is usually recognized. For example, on account of the tax deduction for charitable donations, philanthropists effectively allocate a combination of private and public funds when they make donations to U.S. charities that work in developing countries. Similarly, public financing is often allocated in part by private actors, as when the United States Agency for International Development (USAID) retains private contractors to deliver services.[17] Finally, as Rutsel Martha stressed in his remarks, many organizations, including hybrid organizations such as the Global Alliance for Vaccination and Immunisation (GAVI), and even international organizations such as the International Fund for Agricultural Development (IFAD), rely on combinations of public and private actors to perform both financing and allocation functions.[18]

Taking a slightly different tack, in his oral address William Easterly also questioned the significance of the public/private distinction. He argued that even if it is possible to identify ac-

17. Matthew Baca proposes yet another variant, in which a multilateral organization selects private firms to implement projects that help developing countries adapt to climate change and then compensates them with emission allowances instead of money. *See* Matthew Baca, *Call for a Pilot Program for Market-Based Adaptation Funding*, 42 N.Y.U. J INT'L L. & POL. 1337 (2010) (describing the mechanics of the aforementioned proposal).

18. *See* Global Alliance for Vaccines and Immunisation [GAVI], About the GAVI Alliance, http://www.gavialliance.org/about/in_finance/index.php/ (last visited Apr. 14, 2010). On IFAD co-financing, see Int'l Fund for Agricultural Development, Cofinancing of IFAD Projects, http://www.ifad.org/operations/projects/cofinancier/index.htm (last visited Apr. 14, 2010). On public/private partnerships generally, see Severino & Ray, *supra* note 1, at 14-15.

tors who clearly belong to one sector or the other, one should not expect organizations' performance to differ systematically based on that distinction alone. Specifically, he argued that there is little reason to believe that private actors such as large foundations or private corporations are more knowledgeable than public actors about the needs of the beneficiaries they intend to serve; he further explained that without such knowledge, the effectiveness of assistance is uncertain at best. Similarly, he finds no basis for assuming that such private actors are any more likely to seek feedback from beneficiaries than public actors. To the contrary, Easterly suggested that the incentives in place for suppressing negative feedback about development projects are comparably strong for both public actors (needing to sustain tax-payer support) and private actors (needing to sustain a positive public image), and that this impairs project assessment. As a result of inadequate evaluation, improvement in the provision of assistance to those in need is stunted.[19] Easterly contrasted institutional forms of giving, private and public, from personal forms of giving, such as remittances, where both knowledge of the beneficiaries' needs and the incentives to ensure that available funds address those needs effectively are high and favor a positive assistance outcome.

One way of interpreting Easterly's remarks is to say that the performance of public and private actors is endogenous to the applicable governance and regulatory frameworks. This view suggests that there is a deep connection between the exercise of mapping the phenomenon and the second purpose of the Symposium, namely, analyzing the governance and regulation of private participation in development assistance. We now turn to that second set of issues.

III. Governance and Regulation

Contributions to the Symposium considered different aspects of the governance and regulation of privatized development assistance. Some participants focused on the role of in-

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19. *Cf.* Devesh Kapur & Dennis Whittle, *Can the Privatization of Foreign Aid Enhance Accountability?*, 42 N.Y.U. J. Int'l L. & Pol. 1149 (2010) ("As a result [of the time delay inherent in many evaluation processes], it is often too late to act on information about impact on beneficiaries because the relevant activities are completed or too far advanced to be effectively modified.").

formation technologies and organizations' self-imposed commitments to transparency. Others examined specific forms of regulation, including binding legal mechanisms and various privately sponsored alternatives. They examined the ability of those forms of regulations to protect the interests of both providers and recipients of funds, and to advance broader public interests.

In their paper, *Can the Privatization of Foreign Aid Enhance Accountability?*, political scientist Devesh Kapur and GlobalGiving CEO and co-founder Dennis Whittle focus on the role that information technologies play in the governance of private development assistance. They claim that dissemination of information through social media sites such as Twitter and Facebook, or through watchdog groups like Charity Navigator and GiveWell, has the potential to change the flow of accountability so that it moves not only upward (for instance, toward managers and shareholders, and national and/or supranational regulators) but also downward, toward the beneficiaries of aid and small/individual donors. At the same time the authors caution that providing too much information might have perverse effects, highlighting both the direct costs of transmitting information and the risk of deterring donors who prefer to delegate the tasks of vetting and analyzing projects.[20]

Kapur and Whittle's focus on mechanisms for facilitating and controlling the flow of information resonated with a number of participants. The idea of paying sustained attention to "governance by information" is consistent with an increasingly widespread recognition among scholars of global governance of both the value of information and the importance of the mechanisms for generating and disseminating it.[21] At the Symposium there was a general call for more and better data capable of being used to link specific financial flows to particular social and economic outcomes. We believe that more attention needs to be paid to the roles that both public and pri-

20. *Id.* at 1169-70.

21. For other explorations of the topic of governance by information, see Armin von Bogdandy & Matthias Goldmann, *The Exercise of International Public Authority through National Policy Assessment*, 5 INT'L ORGS. L. REV. 241 (2008); Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Indicators as a Technology of Global Governance* (Inst. for Int'l Law and Justice, Working Paper No. 2010/2, 2010), *available at* http://www.iilj.org/publications/documents/2010-2.Davis-Kingsbury-Merry.pdf.

vate actors can play in generating and distributing that kind of data.[22] For instance, since information is the quintessential public good, it seems natural to expect public actors to play a significant role in its production. On this view, near the end of the Symposium, Dennis Whittle invited participants to imagine a future in which both public and private development assistance flow through an integrated marketplace in which financing is matched with ideas for development projects.[23] Free flows of information would be critical to the success of a marketplace of this sort, and public actors could play a significant role in sustaining the channels for those information flows.

Other participants examined mechanisms for regulating private development that fall into relatively traditional legal categories, such as the existing bodies of law concerning consumer protection, international finance, charitable solicitation, and taxation. For example, Ketkar and Ratha not only described the use of diaspora bonds to date, but also discussed the kind of contract enforcement regime that would facilitate additional offerings. A recurring theme in this set of contributions was the need to design regimes that account for the needs of both the providers and the recipients of financing. For example, in her presentation, Deborah Burand analyzed developments in embedding consumer protection principles into the financing contracts that direct more commercial sources of funding to microfinance providers. She highlighted the consumer protection challenges that come with providing financial services to the world's poor, including significant information asymmetry issues that can arise as a result of language barriers, illiteracy (including financial), and other factors.

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22. *See* Severino & Ray, *supra* note 1, at 17 ("The result is that [ODA analysis] measures things that are not remotely relevant to what really matters: capturing what people or institutions dedicate to a specific end, and confronting it to costs or outcomes."); *see also* Metcalf, *supra* note 9, at 1103 ("Understanding private aid flows and what works will allow for more effective distribution of resources, reveal gaps and needs, and result in accountability, collaboration, or healthy competition.").

23. Dennis Whittle, CEO and Co-Founder, GlobalGiving.com, Address at the 15th Annual Herbert and Justice Rose Luttan Rubin International Law Symposium: The Privatization of Development Assistance (Dec.4-5, 2009), *available at* http://netvideo.nyu.edu:8080/ramgen/nyutv/20091205_Rubin-Symposium_Panel6.rv, at 37:00-38:04.

Christian Barry and Eric Zolt, by contrast, focused on tax policy. Building on empirical literature documenting the positive contributions that remittances can make to development, Barry seeks to adjust tax policy to provide favorable tax treatment for remittances to inhabitants of poor countries. In his paper, *Why Remittances to Poor Countries Should Not Be Taxed*, Barry proposes granting migrants who remit funds either a tax break or a tax credit in the hopes of stimulating increased flows. He argues that such measures would serve to fulfill (to some degree) the moral burden borne by the governments of developed countries as a result of having contributed to, failed to alleviate, and possibly even benefitted from, widespread poverty and suffering in poor countries.[24] In a similar vein, Eric Zolt's remarks examined possible justifications and mechanisms for adjusting the U.S. tax regime to provide deductions for donations to charities operating overseas.[25]

The last three papers (which include our own) emphasized the difficulty of fitting new and innovative forms of private development assistance into traditional regulatory models. In *Peer-to-Peer Financing for Development: Regulating the Intermediaries*, Kevin Davis and Anna Gelpern address the question of how best to regulate organizations—the best known of which may currently be Kiva and GlobalGiving—that intermediate "peer-to-peer" financing for development. The authors struggle with the question of whether these actors are most analogous, for regulatory purposes, to charities or financial institutions. They ultimately conclude that where the transaction involves providing some sort of a financial return to the provider of funds, even if that return does not include interest, the analogy to financial institutions is appropriate. Accordingly, they argue that some peer-to-peer intermediaries should be subject to regulation similar to that imposed on financial institutions in order to protect the interests of both providers and recipients of financing, as well as the broader interests of the communities in which those actors are located.

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24. Christian Barry & Gerhard Øverland, *Why Remittances to Poor Countries Should Not Be Taxed*, 42 N.Y.U. J. INT'L L. & POL. 1181 (2010).

25. Davis and Gelpern also touch on this issue. *See* Kevin E. Davis & Anna Gelpern, *Peer-to-Peer Financing For Development: Regulating the Intermediaries*, 42 N.Y.U. J. INT'L L. & POL. 1209 (2010).

Sarah Dadush focuses on a different form of private financing, namely financing generated through cause-related marketing as exemplified by the Product (RED) campaign. Treating Product (RED) as a case study, she finds that this form of financing operates in a non-transparent fashion that puts not only consumers but also consumer trust in philanthropy at risk. She concludes that charities regulation offers some useful tools for ensuring greater levels of transparency and accountability among programs like Product (RED). More specifically, she recommends that entities that cross the line from commerce into philanthropy should be subject to the same (or similar) regulations applicable to actors more commonly recognized as operating in the charities arena, such as professional fundraisers or co-venturers. Increased transparency would give regulators access to information necessary for carrying out their consumer protection function and would also contribute to better governance of the cause-related marketing industry. Enhanced transparency would also give consumers (via the filters of the media, watchdog groups, and academia) more information about the true impact of their charitable purchasing decisions.[26]

Finally, in her analysis of the regulation of microfinance institutions (MFIs), Michelle Paul also struggles with whether they should be governed more like charities or for-profit actors.[27] She argues for permitting MFIs to adopt a new hybrid organizational form that provides some of the tax benefits traditionally conferred exclusively upon nonprofits, while relaxing the constraint on distributing profits to providers of capital, a defining feature of nonprofit organizations.[28]

IV. Conclusion

Much more research needs to be done on both existing forms of private involvement in development assistance and how alternative forms of governance and regulation might reshape current practices. We continue to believe that this ex-

26. Sarah Dadush, *Profiting in (RED)*, 42 N.Y.U. J. Int'l L. & Pol. 1269 (2010).

27. Michelle S. Paul, *Bridging the Gap to the Microfinance Promise: A Proposal for a Tax-Exempt Microfinance Hybrid Entity*, 42 N.Y.U.J. Int'l L. & Pol. 1383 (2010).

28. *Id.* at 1417-25.

ercise will benefit from the kind of multidisciplinary approach represented at the Symposium. However, we hope that lawyers and law students in particular will tackle some of these questions. Lawyers specialize in crafting governance regimes and developing new regulatory models. We urge them to apply those skills to develop institutions that are successful not only in terms of traditional criteria such as efficiency, accountability, and transparency, but also in terms of their impact on the needs and aspirations of recipients of financing in the developing world.