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### Responsibility of hybrid public-private bodies under international law: A case study of global health public-private partnerships

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## **4. IMMUNITY FROM THE JURISDICTION OF DOMESTIC COURTS**

As explained in the preceding chapter, the absence of legal personality of global health public-private partnerships under international law means that these partnerships fall outside the framework of responsibility under international law. This ability to escape responsibility under international law may cause one to wonder whether responsibility is better found in domestic legal systems. The obstacle with this avenue, however, is that despite domestic law being applicable to these partnerships, these partnerships, in certain instances, enjoy immunity from the jurisdiction of domestic courts. The paucity of responsibility for the acts of partnerships, whether domestically or internationally, then leaves one searching for alternatives. Possible alternatives include state responsibility and/or the responsibility of international organizations in relation to the acts of partnerships and these alternatives will be explored in forthcoming chapters.

This chapter begins by describing the immunity from the jurisdiction of domestic courts of global health public-private partnerships, specifically the Roll Back Malaria Partnership (RBM) and the Stop TB Partnership (Stop TB) (representing formal partnerships or alliances) and the GAVI Alliance (GAVI) and the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) (representing separate organizations). Comparisons will then be made between the immunity of these partnerships and the immunity of international organizations, focusing specifically on the sources of immunity, the rationale of functional necessity and the need for access to a court or alternative means of dispute resolution. This chapter concludes by opining on how to approach the immunity from the jurisdiction of domestic courts of global health public-private partnerships, especially considering the gap in responsibility under international law in relation to acts of these partnerships.

### **4.1. THE IMMUNITY OF PARTNERSHIPS**

A review of the immunity from the jurisdiction of domestic courts of formal partnerships or alliances, specifically RBM and Stop TB, and separate organizations, specifically GAVI and the Global Fund, will now be made with a view to providing a better understanding of the immunity from the jurisdiction of domestic courts of global health public-private partnerships more generally. Analogies are then drawn with international organizations in relation to the sources of immunity, the rationale of functional necessity and the need for access to a court or alternative means of dispute resolution and are necessary in order to make suggestions as to how to deal with the immunity of global health public-private partnerships from the jurisdiction of domestic courts.

#### **4.1.1. Formal Partnerships or Alliances**

Formal partnerships or alliances are described as highly structured and recognizable entities. These partnerships do not, however, have legal status, domestically or internationally, and instead operate through the legal entity of an international organization acting as its host.<sup>1</sup> The staff, funds, properties and assets of these partnerships are further immune from the jurisdiction of domestic courts via the hosting international organization.

##### **4.1.1.1. RBM**

RBM is hosted by the WHO<sup>2</sup> and it is this hosting relationship with the WHO which leads to immunity from the jurisdiction of domestic courts for RBM. The Memorandum of Understanding between the Roll Back Malaria Partnership and the World Health Organization Concerning Hosting, Secretariat and Administrative Service (RBM MoU) provides that staff of the RBM Secretariat shall be considered staff of the WHO and also officials of the WHO for the purpose of obtaining privileges and immunities under

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<sup>1</sup> Gian Luca Burci, 'Public/Private Partnerships in the Public Health Sector' (2009) 6 *International Organizations Law Review* 359, 367

<sup>2</sup> Memorandum of Understanding between the Roll Back Malaria Partnership and the World Health Organization Concerning Hosting, Secretariat and Administrative Services, 15 December 2006, arts 2.1, 2.2, 7 <<http://www.rollbackmalaria.org/docs/MoU.pdf>> accessed 2 June 2012 (RBM MoU)

international law.<sup>3</sup> It further provides that the privileges and immunities of the WHO and its staff shall apply to the RBM Secretariat staff, funds, properties and assets supplied to or for the use of RBM within the ambit of the RBM MoU.<sup>4</sup> Provision exists in the RBM MoU for the possibility of RBM terminating its hosting arrangement with the WHO and transferring it to another partner of RBM or of RBM establishing itself as a separate legal entity.<sup>5</sup> At the moment, however, RBM continues to operate within the auspices of the WHO. A detailed consideration therefore needs to be had to the immunity of the WHO from the jurisdiction of domestic courts.

According to the Constitution of the World Health Organization,<sup>6</sup> the WHO enjoys in the territory of each member state such “privileges and immunities as may be necessary for the fulfillment of its objective and for the exercise of its functions.”<sup>7</sup> In other words, its privileges and immunities are based on functional necessity.<sup>8</sup> The Constitution does not specify what these privileges and immunities entail but instead leaves it to be described in a separate agreement to be prepared by the WHO in consultation with the Secretary-General of the United Nations and concluded between the member states.<sup>9</sup> This separate agreement is the Convention on the Privileges and Immunities of the Specialized Agencies (Convention).<sup>10</sup>

The Convention states that specialized agencies (including the WHO), their property and assets enjoy immunity from every form of legal process except where such immunity has been expressly waived.<sup>11</sup> The phrase – every form of legal process – is broadly

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<sup>3</sup> *ibid* art 3.2

<sup>4</sup> *ibid* art 3.8

<sup>5</sup> *ibid* art 10

<sup>6</sup> Constitution of the World Health Organization (adopted 22 July 1946, entered into force 7 April 1948). (Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirty-ninth and Fifty-first World Health Assemblies (Resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) entered into force 3 February 1977, 20 January 1984, 11 July 1994 and 15 September 2005 respectively and are incorporated in the present text.) Basic Documents, Forty-fifth edition, Supplement, October 2006 <[http://www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf)> accessed 2 June 2012

<sup>7</sup> *ibid* art 67(a)

<sup>8</sup> See Section 4.2.2

<sup>9</sup> Constitution of the WHO (n 6) art 68

<sup>10</sup> Convention on the Privileges and Immunities of the Specialized Agencies (adopted 21 November 1947, entered into force 2 December 1948) 33 UNTS 261

<sup>11</sup> *ibid* s 4

interpreted to include legal processes before domestic authorities, whether judicial, administrative or executive.<sup>12</sup> This interpretation combined with the absence of exceptions (other than waiver) hints that the immunity of specialized agencies is, practically, absolute. However, later in the Convention, functional necessity is alluded to: “The provisions of the Convention in relation to any specialized agency must be interpreted in the light of the functions with which that agency is entrusted by its constitutional instrument.”<sup>13</sup>

The Convention further holds that specialized agencies must cooperate with the authorities of the member states in order to facilitate the proper administration of justice, ensure the observance of police regulations and prevent the occurrence of abuses in relation to the privileges and immunities granted.<sup>14</sup> Further, if a state considers there has been such an abuse then the state and the specialized agency will consult to determine whether an abuse has, in fact, occurred and if so, will attempt to ensure that no repetition of the abuse occurs. If either party is not satisfied with the outcome of these consultations then the issue shall be submitted to the International Court of Justice (ICJ). If the ICJ decides that such an abuse has occurred then the state has the right to withhold the privilege or immunity abused from the specialized agency.<sup>15</sup> Furthermore, the specialized agency must provide for appropriate modes of settlement for disputes arising out of contracts or other disputes of a private nature to which the specialized agency is a party.<sup>16</sup> With regard to employment disputes, the WHO has recognized the jurisdiction of the International Labour Organization Administrative Tribunal (ILOAT), which deals with complaints of non-observance of staff regulations and terms of appointment of officials.<sup>17</sup>

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<sup>12</sup> ILC, ‘The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat’ (1967) II Yearbook of the International Law Commission (1967) 224

<sup>13</sup> Convention on the Privileges and Immunities of the Specialized Agencies (n 10) s 34

<sup>14</sup> *ibid* s 23

<sup>15</sup> *ibid* s 24. There is, to date, no record of this having occurred for the WHO (List of Advisory Proceedings referred to the Court since 1946 by date of introduction <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4>> accessed 2 June 2012)

<sup>16</sup> Convention on the Privileges and Immunities of the Specialized Agencies (n 10) s 31

<sup>17</sup> Membership <<http://www.ilo.org/public/english/tribunal/membership/index.htm>> accessed 2 June 2012; The Tribunal <<http://www.ilo.org/public/english/tribunal/about/index.htm>> accessed 2 June 2012

The immunity of the WHO from the jurisdiction of domestic courts, antecedently described, applies, according to the RBM MoU, to the staff, funds, properties and assets of RBM.<sup>18</sup>

#### **4.1.1.2. Stop TB**

Stop TB is also hosted by the WHO<sup>19</sup> and it is this hosting relationship with the WHO which, as with RBM, leads to the immunity from the jurisdiction of domestic courts for Stop TB. The staff of Stop TB are considered officials of the WHO and are, consequently, accorded the same privileges and immunities as officials of the WHO.<sup>20</sup> Stop TB enjoys the privileges and immunities set out in the Convention on the Privileges and Immunities of the Specialized Agencies, which governs the privileges and immunities of the WHO. The immunity of Stop TB from the jurisdiction of domestic courts is thus identical to the immunity of RBM from the jurisdiction of domestic courts, described above, and needs no repeating.

#### **4.1.2. Separate Organizations**

Separate organizations are described as legal entities under domestic law, such as a non-profit company or trust, that operate internationally.<sup>21</sup> These partnerships are not, like formal partnerships or alliances, hosted by an international organization; instead, they function autonomously. Separate organizations are, in certain states, immune from the jurisdiction of domestic courts.

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<sup>18</sup> RBM MoU (n 2) arts 3.2, 3.8

<sup>19</sup> About Us <<http://www.stoptb.org/about/>> accessed 2 June 2012

<sup>20</sup> Stop TB Partnership, Request for Proposals, Independent Evaluation of the Global Stop TB Partnership, 20 March 2007, 15 <<http://www.stoptb.org/assets/documents/news/announcements/RFP20Mar.pdf>> accessed 2 June 2012

<sup>21</sup> Burci (n 1) 367-368

### 4.1.2.1. GAVI

GAVI was established in 2000 and, in the beginning, it was hosted by the United Nations Children's Fund (UNICEF).<sup>22</sup> It was also granted privileges and immunities through this hosting relationship. In 2009, however, GAVI was no longer being hosted by nor receiving privileges and immunities through UNICEF. It became a foundation and an international institution under Swiss law<sup>23</sup> and obtained privileges and immunities in Switzerland.<sup>24</sup>

#### 4.1.2.1.1. Switzerland

GAVI and the Swiss Federal Council signed a headquarters agreement – Agreement between the GAVI Alliance and the Swiss Federal Council in order to determine the legal status of the GAVI Alliance in Switzerland (Headquarters Agreement)<sup>25</sup> – in July 2009 and it became applicable, retroactively, 1 January 2009.<sup>26</sup> In the Headquarters Agreement, GAVI is guaranteed autonomy and freedom of action by the Swiss Federal Council<sup>27</sup> and is granted privileges and immunities in Switzerland. Of concern here is

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<sup>22</sup> Origins of GAVI <<http://www.gavialliance.org/about/mission/origins/>> accessed 2 June 2012; Press Release WHO/GAVI, Children's Immunization Campaign Launched at World Economic Forum, 31 January 2000 <<http://www.who.int/inf-pr-2000/en/pr2000-GAVI.html>> accessed 2 June 2012

<sup>23</sup> GAVI Alliance Statutes, 29-30 October 2008, art 1 <[http://www.gavialliance.org/resources/GAVI\\_Alliance\\_Statutes.pdf](http://www.gavialliance.org/resources/GAVI_Alliance_Statutes.pdf)> accessed 2 June 2012; Governance and legal structures <<http://www.gavialliance.org/about/governance/legal-structures/>> accessed 2 June 2012; The Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (Host State Act), 22 June 2007 <<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/dipl/diplin.Par.0009.File.tmp/Host%20State%20Act.pdf>> accessed 2 June 2012; Host State Act website <<http://www.eda.admin.ch/eda/en/home/topics/intorg/chres/reslaw.html>> accessed 2 June 2012; GAVI Press releases, GAVI recognized as an international institution, 23 June 2009 <<http://www.gavialliance.org/library/news/press-releases/2009/gavi-recognised-as-international-institution/>> accessed 2 June 2012. Also, GAVI has public charity status in the United States.

<sup>24</sup> Agreement between the GAVI Alliance (Global Alliance for Vaccines and Immunization) and the Swiss Federal Council in order to determine the legal status of the GAVI Alliance in Switzerland, 1 January 2009 (on file with author); Host State Act (n 23); Host State Act website (n 23); GAVI recognized as an international institution (n 23)

<sup>25</sup> Agreement between the GAVI Alliance and the Swiss Federal Council (n 24)

<sup>26</sup> *ibid* art 32

<sup>27</sup> *ibid* art 2

that GAVI is accorded immunity from the jurisdiction of domestic courts in Switzerland, except in the case of waiver.<sup>28</sup>

GAVI is also granted privileges and immunities in Switzerland under the Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (Host State Act).<sup>29</sup> The Host State Act was adopted by the Swiss Parliament on 22 June 2007.<sup>30</sup> On 7 December 2007, the Swiss Federal Council adopted the Ordinance to the Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (Host State Ordinance), which sets out the rules for implementation of the Host State Act.<sup>31</sup> The Host State Act and the Host State Ordinance entered into force 1 January 2008.<sup>32</sup> GAVI was the first ‘international institution’ to receive recognition under this piece of Swiss legislation.<sup>33</sup>

The Host State Act brings together, in a clear framework, legal rules in the area of host state policy. Of note here is that it regulates the granting of immunity from the jurisdiction of the domestic courts in Switzerland. Such immunity is, according to the Federal Department of Foreign Affairs of Switzerland, based on treaties and customary international law.<sup>34</sup>

Immunity from the jurisdiction of domestic courts may be granted under the Host State Act to the following entities: intergovernmental organizations; international institutions; quasi-governmental international organizations; diplomatic missions; consular posts;

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<sup>28</sup> *ibid* art 5. Other exceptions include: civil liability proceedings for damages caused in Switzerland by a vehicle belonging to it or used on its behalf; seizure ordered by a court on treatments, salaries or other emoluments due by GAVI or any of its officials; a counter claim directly linked to a procedure set by GAVI; and execution of an arbitral award. (*ibid* art 5)

<sup>29</sup> Host State Act (n 23); Host State Act website (n 23); GAVI recognized as an international institution (n 23)

<sup>30</sup> Host State Act website (n 23); Host State Act (n 23)

<sup>31</sup> Host State Act website (n 23); Ordinance to the Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (Host State Ordinance), 7 December 2007

<<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/dipl/diplin.Par.0010.File.tmp/Host%20State%20Ordinance.pdf>> accessed 2 June 2012

<sup>32</sup> Host State Act website (n 23)

<sup>33</sup> GAVI recognized as an international institution (n 23)

<sup>34</sup> Host State Act website (n 23)



permanent missions or other representations to intergovernmental organizations; special missions; international conferences; secretariats or other bodies established under an international treaty; independent commissions; international courts; arbitration tribunals; or other international bodies.<sup>35</sup> The immunity of these entities is set out as being in relation to legal proceedings.<sup>36</sup> The scope of this immunity is to be determined on a case by case basis while keeping in mind international law, the international obligations of Switzerland, international practice and the beneficiary's legal status and importance of its role in international relations.<sup>37</sup>

The Host State Act then proceeds to set out the general requirements that the above entities must meet in order to be accorded immunity from the jurisdiction of domestic courts within the ambit of this legislation. These include that it has its headquarters or a branch located in Switzerland or carries out its activities in Switzerland; its purposes are non-profit and of international concern; it carries out activities in the area of international relations; and its presence in Switzerland is of special interest to Switzerland.<sup>38</sup> GAVI meets these general requirements. It has its headquarters in Switzerland. Its purposes are non-profit and of international concern; its stated purpose is to promote health by providing vaccines and the means to deliver vaccines, facilitating the research and development of vaccines and strengthening health care systems and civil society groups.<sup>39</sup> Its activities are carried out on a global scale and thus in the area of international relations. Finally, the presence of GAVI in Switzerland is of special interest to Switzerland. On the occasion of GAVI signing the Headquarters Agreement with the Swiss Federal Council and the inclusion of GAVI as an international institution within the Host State Act, the Head of the Diplomatic and Consular Law Section of the Department of Foreign Affairs in Switzerland stated that it is “fortunate that such [a]

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<sup>35</sup> Host State Act (n 23) art 2

<sup>36</sup> *ibid* art 3

<sup>37</sup> *ibid* art 4

<sup>38</sup> *ibid* art 6

<sup>39</sup> GAVI Statutes (n 23) art 2

prestigious and innovative organization[ ] in the field of health ha[s] chosen to establish [its] headquarters [in Switzerland].”<sup>40</sup>

More specific requirements are set out for international institutions, quasi-governmental international organizations, international conferences, secretariats or other bodies established by international treaty, independent commissions, international courts, arbitration tribunals, other international bodies and eminent persons carrying out an international mandate.<sup>41</sup> GAVI is formally categorized as an international institution, for the purposes of the Host State Act, and therefore the specific requirements in relation to international institutions are of relevance.<sup>42</sup>

An international institution, in order to be accorded immunity from the jurisdiction of domestic courts under the Host State Act, must meet the following requirements. It must have structures on par with an intergovernmental organization; perform functions of a governmental nature or functions normally assigned to an intergovernmental organization; and enjoy recognition in the international legal order, in particular under a treaty, a resolution of an intergovernmental organization or a policy document adopted by states.<sup>43</sup> GAVI has structures on par with an intergovernmental organization; it has a Board, a Secretariat, an Executive Committee, Auditors, Standing Board Committees and Advisory Committees.<sup>44</sup> Its functions are of a governmental or intergovernmental nature in that it tackles global health issues that are normally regarded as in the domain of states and international organizations. It is seen, in certain respects, as stepping into the shoes of states and international organizations in the area of the regulation of global health. Finally, GAVI enjoys recognition in the international legal order. A resolution of the General Assembly of the United Nations on global health and foreign policy, for

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<sup>40</sup> Address given by Mrs. Evelyne Gerber, Head of the diplomatic and consular law section of the Department of Foreign Affairs on the occasion of the inauguration of GAVI in Geneva, 17 September 2009 <[http://fr.gavialliance.org/resources/Speech\\_Gerber\\_ENG\\_final.doc](http://fr.gavialliance.org/resources/Speech_Gerber_ENG_final.doc)> accessed 2 June 2012

<sup>41</sup> GAVI Statutes (n 23) arts 7-15

<sup>42</sup> GAVI recognized as an international institution (n 23)

<sup>43</sup> Host State Act (n 23) art 7

<sup>44</sup> GAVI Statutes (n 23) art 8

example, has expressly recognized the contribution of GAVI in the field of global health.<sup>45</sup>

GAVI does not have immunity from the jurisdiction of domestic courts relying on rules of international law. Switzerland, by signing the Headquarters Agreement and allowing an international institution as so defined to fall within the Host State Act, has enabled GAVI to obtain immunity from the jurisdiction of its domestic courts. The Host State Act has thus expanded on the groups of entities covered by immunity from the jurisdiction of domestic courts in Switzerland, beyond that normally accepted in international law.

The Headquarters Agreement also deals with the prevention of abuse. It provides that GAVI and the Swiss authorities must cooperate to facilitate the satisfactory administration of justice, ensure police regulations are observed and prevent abuse of the privileges and immunities granted. It further provides that all persons benefiting from these privileges and immunities must respect the law and regulations of Switzerland.<sup>46</sup> The Swiss Federal Council, according to the Host State Act, shall also monitor compliance with the terms of the immunities granted and if it finds non-compliance, take necessary measures. Measures might include revoking the immunities granted or rescinding the relevant agreements.<sup>47</sup> GAVI is also obligated, under the Headquarters Agreement and the Host State Act, to adopt appropriate measures for the settlement of disputes arising out of contracts to which it is a party and other private law disputes.<sup>48</sup>

#### **4.1.2.2. The Global Fund**

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<sup>45</sup> UNGA Res 63/33 ‘Global health and foreign policy’ (27 Jan 2009) UN Doc A/RES/63/33

<sup>46</sup> Agreement between the GAVI Alliance and the Swiss Federal Council (n 24) art 24

<sup>47</sup> Host State Act (n 23) art 31

<sup>48</sup> Agreement between the GAVI Alliance and the Swiss Federal Council (n 24) art 25; Host State Act (n 23) art 28

The Global Fund was established in 2002 as a foundation under Swiss law.<sup>49</sup> At its establishment, the Global Fund signed an Administrative Services Agreement with the WHO. In addition to providing that the WHO would provide the Secretariat for the Global Fund, it also extended the privileges and immunities enjoyed by the WHO to the Global Fund.<sup>50</sup> Effective 1 January 2009, the Administrative Services Agreement with the WHO was terminated and the Global Fund became administratively autonomous.<sup>51</sup> But with this also came the termination of privileges and immunities extended to the Global Fund through the WHO. The Global Fund was, however, by this time, enjoying privileges and immunities in Switzerland and the United States through other arrangements.<sup>52</sup> The Global Fund is, at the time of writing, working on extending its immunity to other jurisdictions as well<sup>53</sup> and has recently done so in Moldova, Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia.<sup>54</sup>

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<sup>49</sup> Our History <<http://www.theglobalfund.org/en/about/whoweare/history/>> accessed 2 June 2012; The Global Fund to Fight AIDS, Tuberculosis & Malaria By-Laws, 21 November 2011, art 1 <<http://www.theglobalfund.org/en/about/structures/board/>> accessed 2 June 2012

<sup>50</sup> Global Fund to Fight AIDS, Tuberculosis and Malaria, Report of the Second Meeting of the Board, GF/B2/13 version 2, 22-24 April 2002, 14 May 2002, 38 <<http://www.theglobalfund.org/en/board/meetings/second/>> accessed 2 June 2012; The Global Fund to Fight AIDS, Tuberculosis and Malaria, Fifth Board Meeting, Report of the Governance and Partnership Committee, Annex 6, Update on Legal Status for the Global Fund, 5-6 June 2003, 3 <<http://www.theglobalfund.org/en/board/meetings/fifth/documents/>> accessed 2 June 2012

<sup>51</sup> The Global Fund Press Release, The Global Fund becomes an Administratively Autonomous Institution as of 2009, 19 December 2008 <[http://www.theglobalfund.org/en/mediacenter/pressreleases/The\\_Global\\_Fund\\_becomes\\_an\\_administratively\\_autonomous\\_institution\\_as\\_of\\_2009/](http://www.theglobalfund.org/en/mediacenter/pressreleases/The_Global_Fund_becomes_an_administratively_autonomous_institution_as_of_2009/)> accessed 2 June 2012

<sup>52</sup> Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in view of determining the legal status of the Global Fund in Switzerland, 13 December 2004 <[www.theglobalfund.org](http://www.theglobalfund.org)> accessed 2 June 2012; An act to extend certain privileges, exemptions, and immunities to international organizations and to the officers and employees thereof, and for other purposes, 59 Stat. 669, 79<sup>th</sup> Congress, Dec. 29. 1945 <<http://www.ipu.org/finance-e/PL79-291.pdf>> accessed 2 June 2012 (International Organizations Immunities Act or IOIA)

<sup>53</sup> The Global Fund, Report of the Twenty-Second Board Meeting, Twenty-Third Board Meeting, 11-12 May 2011, GF/B23/2, 27 <<http://www.theglobalfund.org/en/board/meetings/twentythird/documents/>> accessed 2 June 2012

<sup>54</sup> The template of this agreement can be found at The Global Fund, Twentieth Board Meeting, 9-11 November 2009, GF/B20/4 Attachment 1, Annex A: Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria <<http://www.theglobalfund.org/en/board/meetings/twentieth/documents/>> accessed 2 June 2012. A copy of the actual agreement is not available to the public. See The Global Fund Press Release, Moldova Signs Agreement to Grant Privileges and Immunities to the Global Fund, 28 September 2010 <[http://www.theglobalfund.org/en/mediacenter/pressreleases/Moldova\\_signs\\_agreement\\_to\\_grant\\_privileges\\_and\\_immunities\\_to\\_the\\_Global\\_Fund/](http://www.theglobalfund.org/en/mediacenter/pressreleases/Moldova_signs_agreement_to_grant_privileges_and_immunities_to_the_Global_Fund/)> accessed 2 June 2012; E-mail from Joseph Chiu, Legal Officer, the Global Fund to Fight AIDS, Tuberculosis and Malaria to author (27, 29 July and 2 August 2011 and 29 May 2012). The Global Fund might also have privileges and immunities, on a case-by-case basis, in a Host Country pursuant to a Program Grant Agreement between the Global Fund and a Principal Recipient (See

#### 4.1.2.2.1. Switzerland

On 13 December 2004, the Swiss Federal Council signed a headquarters agreement with the Global Fund – Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in view of determining the legal status of the Global Fund in Switzerland (Headquarters Agreement).<sup>55</sup> In the Headquarters Agreement, the Swiss Federal Council guarantees to the Global Fund independence and freedom of action.<sup>56</sup> It also grants to the Global Fund privileges and immunities in Switzerland on par with those of international organizations.<sup>57</sup> Of interest here is the immunity of the Global Fund from the jurisdiction of the domestic courts in Switzerland. According to the Headquarters Agreement, the Global Fund enjoys, in Switzerland, immunity from every form of legal process, except in the case of waiver.<sup>58</sup> The phrase – every form of legal process, as explained above, is to be interpreted broadly.<sup>59</sup>

The Headquarters Agreement also sets out precautionary provisions in what seems to be an attempt to counterbalance this broad grant of immunity. It deals with the prevention of abuse by providing that the Global Fund must cooperate with authorities in Switzerland to facilitate the proper administration of justice, ensure police regulations are observed and prevent abuse in connection with the privileges and immunities granted. It

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the template for a Program Grant Agreement between the Global Fund and a Principal Recipient, art 40(b) <[www.theglobalfund.org/documents/lfa/LFA\\_StandardGrantAgreement\\_Form\\_en/](http://www.theglobalfund.org/documents/lfa/LFA_StandardGrantAgreement_Form_en/)> accessed 2 June 2012: “The Principal Receipt will use its best efforts, upon the request of the Global Fund, to secure recognition by the Host Country of the Global Fund as an institution to which the privileges and immunities normally granted to international organizations apply.”)

<sup>55</sup> Agreement between the Swiss Federal Council and the Global Fund (n 47)

<sup>56</sup> *ibid* art 2

<sup>57</sup> The Global Fund Press Release, Global Fund Gains Privileges and Immunities Similar to International Organizations, 13 December 2004 <[http://www.theglobalfund.org/en/mediacenter/pressreleases/Global\\_Fund\\_gains\\_privileges\\_and\\_immunities\\_similar\\_to\\_international\\_organizations/](http://www.theglobalfund.org/en/mediacenter/pressreleases/Global_Fund_gains_privileges_and_immunities_similar_to_international_organizations/)> accessed 2 June 2012

<sup>58</sup> Agreement between the Swiss Federal Council and the Global Fund (n 52) art 5. Other exceptions include: civil liability proceedings for damages caused in Switzerland by a vehicle belonging to it or operating on its behalf; seizure by court order of salaries, wages and other emoluments owed by the Global Fund to one of its officials; a counter claim directly related to principal proceedings initiated by the Global Fund; and application of an arbitration award. (Agreement between the Swiss Federal Council and the Global Fund (n 52) art 5)

<sup>59</sup> Text to n 12

further provides that all persons enjoying these privileges and immunities must abide by the laws and regulations of Switzerland.<sup>60</sup> The Global Fund is also obligated, according to the Headquarters Agreement, to provide for appropriate methods of settlement of disputes arising out of contracts and of a private law nature to which it is a party.<sup>61</sup>

#### 4.1.2.2.2. United States

In the United States, the Global Fund began to enjoy the privileges and immunities provided by the International Organizations Immunities Act (IOIA)<sup>62</sup> after it met two requirements. The first requirement was that the international organization had to be one in which the United States participates.<sup>63</sup> In May 2003, Congress authorized the United States to participate in the activities of the Global Fund and designated the Global Fund an international organization for the purposes of the IOIA.<sup>64</sup> The second requirement was that the international organization must be designated by an appropriate Executive Order of the President of the United States as being entitled to enjoy the privileges and immunities provided in the IOIA.<sup>65</sup> On 13 January 2006, Executive Order 13395 was made designating the Global Fund a public international organization entitled to enjoy the privileges and immunities provided in the IOIA.<sup>66</sup>

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<sup>60</sup> Agreement between the Swiss Federal Council and the Global Fund (n 52) art 24

<sup>61</sup> *ibid* art 25

<sup>62</sup> IOIA (n 52)

<sup>63</sup> *ibid* s 1

<sup>64</sup> 22 USC §7622: Participation in the Global Fund to Fight AIDS, Tuberculosis and Malaria, §7622 (b)(1),(2) <<http://www.gpo.gov/fdsys/pkg/USCODE-2006-title22/pdf/USCODE-2006-title22-chap83-subchapII-sec7622.pdf>> accessed 2 June 2012; ‘International Organizations: The United States Extends the International Organizations Immunities Act to the Global Fund to Fight Aids, Tuberculosis and Malaria’ (22 January 2006) Juscogens.net, Recent Developments in International Law <[http://www.juscogens.net/orgs/global\\_fund\\_to\\_fight\\_aids\\_tuberculosis\\_and\\_malaria/](http://www.juscogens.net/orgs/global_fund_to_fight_aids_tuberculosis_and_malaria/)> accessed 2 June 2012

<sup>65</sup> IOIA (n 52) s 1

<sup>66</sup> Executive Order 13395 of January 13, 2006 Designating the Global Fund To Fight AIDS, Tuberculosis and Malaria as a Public International Organization Entitled To Enjoy Certain Privileges, Exemptions, and Immunities, 13 January 2006 , s 1 <<http://www.gpo.gov/fdsys/pkg/FR-2006-01-19/pdf/06-554.pdf>> accessed 2 June 2012; 22 USC §288f-6: Global Fund to Fight AIDS, Tuberculosis and Malaria; extension of privileges, exemptions, and immunities <<http://www.gpo.gov/fdsys/pkg/USCODE-2009-title22/pdf/USCODE-2009-title22-chap7-subchapXVIII-sec288f-6.pdf>> accessed 2 June 2012

The IOIA is an act extending privileges and immunities to international organizations. ‘International organization’, for the purpose of the IOIA, means an international organization in which the United States participates and which has been designated through an Executive Order of the President of the United States as being entitled to enjoy the privileges and immunities set out in the IOIA.<sup>67</sup> The meaning of international organization in the IOIA thus differs from the meaning of international organization provided in the International Law Commission’s (ILC) Articles on the Responsibility of International Organizations<sup>68</sup> and relied on in this research.<sup>69</sup> An international organization, according to the ILC, is “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.”<sup>70</sup> An international organization, according to the IOIA, has no objective criteria; it is defined as depending on certain actions of the government of the United States.<sup>71</sup> This enables the IOIA to consider as international organizations entities that would not otherwise be considered as international organizations under rules of international law. A case on point is the Global Fund. The IOIA has thus broadened the notion of international organization beyond its normal understanding under international law and, in turn, expanded on the entities protected by immunity from the jurisdiction of domestic courts in the United States, beyond that usually accepted under international law.

The President is also authorized, by appropriate Executive Order, to withhold, withdraw, condition or limit any of the privileges and immunities provided to any international organization. Further, the President is authorized to revoke the designation of international organization by reason of abuse by an international organization or its officers and employees of the privileges and immunities, or for any other reason.<sup>72</sup>

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<sup>67</sup> IOIA (n 52) s 1

<sup>68</sup> Articles on the Responsibility of International Organizations, UNGA Res 66/100, Annex (27 Feb 2012) (Articles on the Responsibility of International Organizations or ARIO)

<sup>69</sup> See Chapter 1, Section 1.1.2

<sup>70</sup> ARIO (n 68) art 2(a)

<sup>71</sup> Text to n 67

<sup>72</sup> IOIA (n 52) s 1

The immunity from the jurisdiction of the domestic courts of the United States that an international organization enjoys under the IOIA is set out as follows: “International organizations ... shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity.”<sup>73</sup>

There are many opinions as to the meaning and consequences of this section. International organizations, according to the IOIA, are to enjoy the same immunity from suit and every form of judicial process as enjoyed by foreign governments. At the time the IOIA was adopted, in 1945, foreign governments enjoyed absolute immunity. In 1976, the absolute immunity enjoyed by foreign governments, however, changed to a restrictive immunity with the adoption of the Foreign Sovereign Immunities Act (FSIA).<sup>74</sup> As a result, there are diverging opinions on how to interpret this section. On the one hand, it is argued that international organizations enjoy absolute immunity since at the time the IOIA was adopted, foreign governments enjoyed absolute immunity.<sup>75</sup> On the other hand, it is argued that international organizations enjoy restrictive immunity since foreign governments now enjoy restrictive immunity.<sup>76</sup> These diverging opinions will not be explored now; instead, a later section of this chapter focusing on functional necessity will further investigate this matter.<sup>77</sup> It is, however, observed and acknowledged, at this stage, that this debate between absolute immunity and restrictive immunity under the IOIA extends to the context of the Global Fund as well.

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<sup>73</sup> *ibid* s 2(b)

<sup>74</sup> An act to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes, 90 Stat. 2891, 94<sup>th</sup> Congress, Oct. 21, 1976 <[http://archive.usun.state.gov/hc\\_docs/Foreign%20Sovereign%20Immunities%20Act%20PL94-583.pdf](http://archive.usun.state.gov/hc_docs/Foreign%20Sovereign%20Immunities%20Act%20PL94-583.pdf)> accessed 2 June 2012 (Foreign Sovereign Immunities Act or FSIA)

<sup>75</sup> See Richard J. Oparil, ‘Immunity of International Organizations in United States Courts: Absolute or Restrictive?’ (1991) 24 *Vanderbilt Journal of Transnational Law* 689, 689; Eric De Brabandere, ‘Immunity of International Organizations in Post-conflict International Administrations’ (2010) 7 *International Organizations Law Review* 79, 89-91; Note, ‘Jurisdictional Immunities of Intergovernmental Organizations’ (1982) 91(6) *The Yale Law Journal* 1167, 1167

<sup>76</sup> See Thomas J. O’Toole, ‘Sovereign Immunity Redivivus: Suits Against International Organizations’ (1980) 4 *Suffolk Transnational Law Journal* 1, 11-12; Frances Wright Henderson, ‘How Much Immunity for International Organizations?: *Mendaro v. World Bank*’ (1985) 10 *North Carolina Journal of International Law and Commercial Regulation* 487, 491; Note, *Jurisdictional Immunities* (n 75)

<sup>77</sup> See Section 4.2.2



#### 4.1.2.2.3. Moldova, Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia

The most recent grants of privileges and immunities to the Global Fund have come from Moldova, Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia<sup>78</sup> via the Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria (Agreement).<sup>79</sup> The Agreement sets out that the Global Fund shall be accorded, by each of the states that are party to the Agreement, immunity from every form of legal process, except if such immunity has been expressly waived.<sup>80</sup> Again, the phrase – every form of legal process – is broadly interpreted.<sup>81</sup>

It is further recommended that the Global Fund cooperate with the authorities of states to enable the proper administration of justice, ensure the observance of police regulations and prevent the occurrence of abuses in relation to the privileges and immunities granted.<sup>82</sup> The Global Fund is also obliged to provide for appropriate modes of settlement of disputes arising out of contracts and of a private nature to which it is a party.<sup>83</sup>

This Agreement has, however, not yet entered into force. It shall enter into force two weeks following the date of deposit of the tenth instrument of ratification.<sup>84</sup> At present, Moldova has signed and ratified and Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia have signed.<sup>85</sup> The hope, according to the Executive Director of the Global Fund, is that other states will sign and ratify as “[t]his will facilitate the Global Fund’s work and enable [it] to function in similar ways to other international organizations.”<sup>86</sup> The Global Fund Board also emphasized the need to obtain privileges and immunities

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<sup>78</sup> Moldova Signs Agreement (n 54); E-mail from Joseph Chiu (n 54)

<sup>79</sup> Agreement on Privileges and Immunities of the Global Fund (n 54)

<sup>80</sup> *ibid* art 2

<sup>81</sup> Text to n 12

<sup>82</sup> Agreement on Privileges and Immunities of the Global Fund (n 54) art 4(6)

<sup>83</sup> *ibid* art 6(i)

<sup>84</sup> *ibid* art 8(3)

<sup>85</sup> Moldova Signs Agreement (n 54); E-mail from Joseph Chiu (n 54)

<sup>86</sup> Moldova Signs Agreement (n 54)

and urged stakeholders to support efforts to secure privileges and immunities.<sup>87</sup> It is thus conceivable that, in the future, other states will sign and ratify this Agreement, causing it to enter into force.

#### **4.2. ANALOGIZING TO THE IMMUNITY OF INTERNATIONAL ORGANIZATIONS**

There are no recorded instances of claims being brought against RBM, Stop TB, GAVI or the Global Fund in domestic courts and, consequently, no recorded instances of them invoking immunity from the jurisdiction of domestic courts. This naturally makes it difficult to figure out how the immunity of these partnerships works in practice. It is useful then to make analogies with practice in relation to the immunity of international organizations. Such analogies are logical since formal partnerships or alliances, such as RBM and Stop TB, obtain immunity through hosting arrangements with an international organization – the WHO<sup>88</sup> – and separate organizations, such as GAVI and the Global Fund, obtain immunity as a result of being considered ‘international institutions’ and ‘international organizations’ in certain states.<sup>89</sup>

This section sets out the sources of law of the immunity of international organizations, the rationale of functional necessity underlying grants of immunity to international organizations and, finally, the need of access to a court or alternative means of dispute resolution when international organizations are granted immunity. Comparisons between international organizations and global health public-private partnerships in relation to these topics provide insight into whether the sources of immunity of partnerships are similar to those of international organizations; whether functional necessity, as with international organizations, justifies grants of immunity to partnerships and whether access to courts or alternative means of dispute resolution need to be considered in the context of partnerships, as is done in the context of international organizations.

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<sup>87</sup> Report of the Twenty-Second Board Meeting (n 53) 27

<sup>88</sup> RBM MoU (n 2); Request for Proposals (n 20)

<sup>89</sup> Host State Act (n 23); Agreement between the Swiss Federal Council and the Global Fund (n 52); IOIA (n 52); Agreement on Privileges and Immunities of the Global Fund (n 54)

### 4.2.1. Sources

The sources of the immunity of international organizations from the jurisdiction of domestic courts are found in domestic law and international law (treaty or custom) that is incorporated or transformed as part of the domestic legal order.<sup>90</sup> An overlap between these sources and the sources of the immunity of global health public-private partnerships from the jurisdiction of domestic courts provides a base for making comparisons between them.

#### 4.2.1.1. Domestic Law

A state sometimes has domestic legislation that grants privileges and immunities to international organizations in that state. A common means a state does this is by specifying which types of international organizations qualify for privileges and immunities and granting privileges and immunities to an entity depending on whether or not they meet the necessary qualifications.<sup>91</sup> A few examples are the IOIA<sup>92</sup> in the United States, the International Organisations Act 1968<sup>93</sup> in the United Kingdom and the Privileges and Immunities Act<sup>94</sup> in Kenya. Switzerland operates in a slightly different manner; it has enacted the Host State Act<sup>95</sup> which provides a legal framework with regard

<sup>90</sup> August Reinisch, *International Organizations Before National Courts* (CUP 2000) 134, 136, 139

<sup>91</sup> Jan Klabbers, *An Introduction to International Institutional Law* (CUP 2009) 149; August Reinisch, 'The International Relations of National Courts: A Discourse on International Law Norms on Jurisdictional and Enforcement Immunity' in August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations: Liber Amicorum Hanspeter Neuhold* (Eleven International Publishing 2007) 289, 297

<sup>92</sup> IOIA (n 52)

<sup>93</sup> International Organisations Act 1968, Chapter 48 <[http://www.legislation.gov.uk/ukpga/1968/48/pdfs/ukpga\\_19680048\\_en.pdf](http://www.legislation.gov.uk/ukpga/1968/48/pdfs/ukpga_19680048_en.pdf)> accessed 2 June 2012. Amended by International Organisations Act 1981, Chapter 9 <[http://www.legislation.gov.uk/ukpga/1981/9/pdfs/ukpga\\_19810009\\_en.pdf](http://www.legislation.gov.uk/ukpga/1981/9/pdfs/ukpga_19810009_en.pdf)> accessed 2 June 2012 and International Organisations 2005, Chapter 20 <[http://www.legislation.gov.uk/ukpga/2005/20/pdfs/ukpga\\_20050020\\_en.pdf](http://www.legislation.gov.uk/ukpga/2005/20/pdfs/ukpga_20050020_en.pdf)> accessed 2 June 2012

<sup>94</sup> The Privileges and Immunities Act, Chapter 179, Revised Edition 2010 (1984) <<http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/PriviligesandImmunitiesCap179.pdf>> accessed 2 June 2012

<sup>95</sup> Host State Act (n 23)

to privileges and immunities for select institutional (and individual) beneficiaries.<sup>96</sup> Certain partnerships in the area of global health have obtained privileges and immunities through these kinds of domestic legislation. GAVI, for example, has privileges and immunities in Switzerland through the Host State Act and the Global Fund, as another example, has privileges and immunities in the United States through the IOIA.

A state, further, sometimes enacts domestic legislation that grants privileges and immunities to a particular international organization in that state. The Organization for Security and Cooperation in Europe (OSCE), for example, does not have (yet) legal personality under international law<sup>97</sup> and, as a result, does not have privileges and immunities under international law.<sup>98</sup> States thus enacted domestic legislation granting privileges and immunities to the OSCE.<sup>99</sup> Partnerships in the area of global health have not obtained privileges and immunities through this kind of domestic legislation but certain partnerships in the area of global health have obtained privileges and immunities through bilateral agreements with certain states that are presumably governed by domestic law. GAVI and the Global Fund, for example, have signed headquarters agreements with Switzerland – the Agreement between the GAVI Alliance and the Swiss Federal Council in order to determine the legal status of the GAVI Alliance in Switzerland<sup>100</sup> and the Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in view of determining the legal status of

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<sup>96</sup> *ibid*

<sup>97</sup> See Chapter 3, Section 3.3

<sup>98</sup> A Draft Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE, proposed in the Fifteenth Meeting of the Ministerial Council, Madrid, 29 and 30 November 2007, would have given the OSCE international legal personality and privileges and immunities under international law but it has not yet been adopted. (See Sonya Brander, 'Making a credible case for a legal personality for the OSCE' (March-April 2009) OSCE Magazine 18, 20-22; Henry G. Schermers and Niels M. Blokker, *International Institutional Law – United within Diversity* (5<sup>th</sup> edn, Martinus Nijhoff Publishers 2011) 991-992)

<sup>99</sup> See, for example, Dutch Act of 31 October 2002 on the legal personality, privileges and immunities of the High Commissioner on National Minorities (Wet van 31 oktober 2002, houdende bepalingen inzake rechtspersoonlijkheid, privileges en immuniteiten van de Hoge Commissaris inzake Nationale Minderheden (Wet HCNM)), Staatsblad, Jaargang 2002 Nr 580 <<https://zoek.officielebekendmakingen.nl/zoeken/staatsblad>> accessed 2 June 2012. Other examples can be found in OSCE Permanent Council, Decision No 383: Report on OSCE Legal Capacity and on Privileges and Immunities to the Ministerial Council, PC.DEC/383, 26 November 2000 <[www.osce.org/pc/24379](http://www.osce.org/pc/24379)> accessed 2 June 2012

<sup>100</sup> Agreement between the GAVI Alliance and the Swiss Federal Council (n 24)

the Global Fund in Switzerland<sup>101</sup> – giving GAVI and the Global Fund privileges and immunities in Switzerland. These agreements are bilateral in nature between a foundation, i.e. GAVI or the Global Fund, and a state, i.e. Switzerland. Also, the governing law of these agreements is not specified but is presumed to be the domestic law of Switzerland.

It would be remiss to make generalizations based on these instances since only certain states have such legislation and agreements and, further, application of such legislation and agreements occurs on a case-by-case basis. It is, however, necessary to note that these instances do exist and form a base by which global health public-private partnerships obtain immunity from the jurisdiction of domestic courts.

#### 4.2.1.2. International Law

Treaty law sources of privileges and immunities for international organizations come in the form of the treaties constituting international organizations,<sup>102</sup> privileges and immunities treaties applicable to (certain) international organizations<sup>103</sup> and/or bilateral headquarters and host agreements to which international organizations are a party.<sup>104</sup> Also, the International Law Commission, as a result of its work on the representation of states in their relations with international organizations, prepared draft articles on this topic, which included provisions on the privileges and immunities of international

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<sup>101</sup> Agreement between the Swiss Federal Council and the Global Fund (n 52)

<sup>102</sup> Felice Morgenstern, *Legal Problems of International Organizations* (Grotius Publications Limited, 1986) 5; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 90; Reinisch, *International Relations of National Courts* (n 91) 297. For example, the Constitution of the WHO (n 6) art 67(a)

<sup>103</sup> Morgenstern (n 102) 5; Higgins (n 102) 90; Reinisch, *International Relations of National Courts* (n 91) 297. For example, the Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 and the Convention on the Privileges and Immunities of the Specialized Agencies (n 10)

<sup>104</sup> Morgenstern (n 102) 5; Higgins (n 102) 90; Reinisch, *International Relations of National Courts* (n 91) 297. For example, the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (US-UN) (adopted 26 June 1947, entered into force 21 October 1947) 11 UNTS 11

organizations.<sup>105</sup> The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character was consequently adopted on 13 March 1975<sup>106</sup> and will enter into force on the thirtieth day following the date of deposit of thirty-five instruments of ratification or accession.<sup>107</sup> It has, however, not yet entered into force since it has, to date, only thirty-four parties.<sup>108</sup>

Do public-private partnerships in the area of global health also resort to these types of agreements in order to obtain privileges and immunities? RBM and its hosting organization, the WHO, signed a memorandum of understanding – the RBM MoU<sup>109</sup> – which holds that staff of the RBM Secretariat are staff of the WHO and also officials of the WHO for the purposes of obtaining privileges and immunities under international law.<sup>110</sup> It further extends the privileges and immunities of the WHO and its staff to the RBM Secretariat staff, funds, property and assets.<sup>111</sup> Stop TB also has the WHO as its hosting organization however, unlike RBM, it does not have an agreement in writing that the privileges and immunities of the WHO extend to Stop TB. There is, nonetheless, an agreement between them that staff of Stop TB are officials of the WHO and are, accordingly, granted the same privileges and immunities under international law.<sup>112</sup>

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<sup>105</sup> ILC, Representation of States in their relations with international organizations – Summary <[http://untreaty.un.org/ilc/summaries/5\\_1.htm](http://untreaty.un.org/ilc/summaries/5_1.htm)> accessed 2 June 2012

<sup>106</sup> Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (adopted 13 March 1975) Doc. A/CONF.67/16

<sup>107</sup> *ibid* art 89

<sup>108</sup> Representation of States in their relations with international organizations – Summary (n 105). It has not yet entered into force because, *inter alia*, it has been interpreted as not giving the host state of the international organization enough protection (Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 682). The second part of the topic on the representation of states in their relations with international organizations – status, privileges and immunities of international organizations and their officials, experts and other persons engaged in their activities who are not representatives of states – is no longer being pursued due to the lack of acceptance of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. (ILC, Status, privileges and immunities of international organizations, their officials, experts, etc. – Summary <[http://untreaty.un.org/ilc/summaries/5\\_2.htm](http://untreaty.un.org/ilc/summaries/5_2.htm)> accessed 2 June 2012; UNGA Res 47/33 (1992) GAOR 44<sup>th</sup> Session Supp 49, 287)

<sup>109</sup> RBM MoU (n 2)

<sup>110</sup> *ibid* art 3.2

<sup>111</sup> *ibid* art 3.8

<sup>112</sup> E-mail from Anant Vijay, Stop TB Partnership to author (11 April 2010); Request for Proposals (n 20)

As the staff of RBM and Stop TB are considered officials of the WHO, they obtain privileges and immunities through Article VI of the Convention on the Privileges and Immunities of the Specialized Agencies (Convention). Section 19 of the Convention, in particular, states that officials of specialized agencies, i.e. the WHO, are “immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.”<sup>113</sup>

RBM and Stop TB, without legal status under domestic or international law, operate only within the auspices of the WHO. Actions of RBM and Stop TB are considered actions of the WHO. RBM and Stop TB, for reasons to be explained in a later chapter on the responsibility of international organizations in relation to the acts of partnerships, are agents of the WHO.<sup>114</sup> As agents of the WHO, these partnerships have the same privileges and immunities under international law as the WHO.

An analogy can be made to the situation of special rapporteurs, as agents, of the United Nations. In the Advisory Opinion – *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*<sup>115</sup> – the ICJ determined that the privileges and immunities applicable to experts on missions were also applicable to special rapporteurs.<sup>116</sup> It held that it did not matter whether the person was remunerated, had signed a contract or was assigned a task over a short or long period of time. It focused not on these aspects but rather on the nature of the mission.<sup>117</sup> Later, in the Advisory Opinion – *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*,<sup>118</sup> the ICJ was deciding whether the exclusive authority to determine whether words were spoken by a special rapporteur in the course of a mission of the United Nations rested with the Secretary-General of the

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<sup>113</sup> Convention on the Privileges and Immunities of the Specialized Agencies (n 10) s 19

<sup>114</sup> See Chapter 6, Section 6.1.1

<sup>115</sup> *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989] ICJ Rep 177

<sup>116</sup> *ibid* para 55

<sup>117</sup> *ibid* para 47

<sup>118</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62

United Nations.<sup>119</sup> In reaching its decision, it held that the special rapporteur, as an agent of the United Nations, was entitled to immunity from the jurisdiction of domestic courts.<sup>120</sup> The privileges and immunities of RBM and Stop TB, in an analogous way, arise through an international organization – the WHO – and thus, indirectly, through a treaty constituting an international organization, i.e. the Constitution of the WHO, and a privileges and immunities treaty applicable to certain international organizations, i.e. the Convention on the Privileges and Immunities of the Specialized Agencies.

The Global Fund obtains privileges and immunities under the Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria.<sup>121</sup> This agreement is multilateral in nature; thus far, signed and ratified by Moldova and signed by Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia.<sup>122</sup> It has not yet entered into force but shall enter into force two weeks following the date of deposit of the tenth instrument of ratification.<sup>123</sup> The governing law of this agreement is not specified but the agreement does state that an arbitral tribunal, in settling differences, shall reach a decision based on rules of international law.<sup>124</sup> This agreement thus constitutes a privileges and immunities treaty applicable, specifically, to the Global Fund.

In addition to treaty law, another possible source of immunity from the jurisdiction of domestic courts for international organizations is customary international law. This may be an important source for example where no treaty is in place, where a treaty that is in place does not contain an immunity clause or where a treaty is in place and contains an immunity clause but there is debate as to scope. Further, if a treaty is in place but is not

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<sup>119</sup> *ibid* para 20

<sup>120</sup> *ibid* paras 52, 56. See also paras 60-61. A case in the United States – *Bisson v United States* – involved a claim brought against, among others, the World Food Programme (WFP) for injuries sustained by an employee of WFP while working in Iraq. The court held that the WFP was not an international organization and instead considered part of the United Nations and the Food and Agricultural Organization (FAO) and, accordingly, entitled to the same immunity from the jurisdiction of domestic courts as these international organizations. (*Bisson v United Nations and ors*, Decision on a report and recommendation of a US Magistrate Judge, Case no 06-6352 (SDNY 2008); ILDC 889 (US 2008), 11 February 2008, Decision paras 1, 4, 15 <[www.oxfordlawreports.com](http://www.oxfordlawreports.com)> accessed 2 June 2012)

<sup>121</sup> Agreement on Privileges and Immunities of the Global Fund (n 54)

<sup>122</sup> Moldova Signs Agreement (n 54); E-mail from Joseph Chiu (n 54)

<sup>123</sup> Agreement on Privileges and Immunities of the Global Fund (n 54) art 8(3)

<sup>124</sup> *ibid* art 7



applicable in domestic law because it has not been (sufficiently) incorporated or transformed in domestic law then one may need to consider whether immunity arises through customary international law.<sup>125</sup>

There is, however, debate on whether such a rule of customary international law exists. This debate is seen in both the decisions of domestic courts and the writings of scholars. Certain domestic courts have held that the immunity of international organizations from the jurisdiction of domestic courts is customary international law. The District Court of Maastricht in the Netherlands held in *A.P.F. Eckhardt v. European Organization for the Safety of Air Navigation (Eurocontrol)*<sup>126</sup> that relying on customary international law, Eurocontrol is entitled to immunity from the jurisdiction of domestic courts.<sup>127</sup> Later, the Supreme Court in the Netherlands held in *A.S. v. Iran-United States Claims Tribunal*<sup>128</sup> that in those instances where there is no treaty in place, an international organization is entitled to immunity from the jurisdiction of domestic courts following “unwritten international law.”<sup>129</sup> Other domestic courts have, however, held to the contrary, i.e. that the immunity of international organizations from the jurisdiction of domestic courts is not customary international law. The Italian Court of Cassation held in *Pistelli v. European University Institute*<sup>130</sup> that the customary rule *par in parem non habet iurisdictionem* did not apply to international organizations and that the immunity of international organizations from the jurisdiction of domestic courts could only be gleaned from agreements such as a treaty constituting the international organization or a headquarters agreement between the international organization and its host state.<sup>131</sup> This holding was

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<sup>125</sup> Higgins (n 102) 92; Reinisch, *International Organizations Before National Courts* (n 90) 145; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2<sup>nd</sup> edn, CUP 2005) 344

<sup>126</sup> *A.P.F. Eckhardt v European Organization for the Safety of Air Navigation (Eurocontrol)*, District Court of Maastricht, 12 January 1984 Institute’s Collection, No 2338 (English translation in 16 NYIL (1985) 464)

<sup>127</sup> *ibid* 470

<sup>128</sup> *A.S. v Iran-United States Claims Tribunal*, Supreme Court, 20 December 1985, RvdW (1986) No 20, NJ (1986) No 438 (English translation in 18 NYIL (1987) 357)

<sup>129</sup> *ibid* 360-361. See *Mendaro v the World Bank*, 717 F 2d 610 (DC Cir 1983) 5 <<http://vlex.com/vid/susana-mendaro-world-reconstruction-38433709>> accessed 2 June 2012

<sup>130</sup> *Pistelli v European University Institute*, Appeal judgment, No 20995; ILDC 297 (IT 2005) Guida al diritto 40 (3/2006) (in Italian), 28 October 2005, Decision – English translation <[www.oxfordlawreports.com](http://www.oxfordlawreports.com)> accessed 2 June 2012

<sup>131</sup> *ibid* para 9

later confirmed by the Italian Court of Cassation in *Drago v. International Plant Genetic Resources Institute (IPGRI)*.<sup>132</sup>

Scholars further opine as to the existence of customary international law in relation to the immunity of international organizations from the jurisdiction of domestic courts. Some scholars argue that the immunity of international organizations from the jurisdiction of domestic courts is customary international law.<sup>133</sup> Those scholars who concede that the immunity of international organizations from the jurisdiction of domestic courts is customary international law often continue by arguing that the scope of such immunity nonetheless remains open to question.<sup>134</sup> Others scholars are more skeptical arguing that customary international law in relation to the immunity of international organizations from the jurisdiction of domestic courts does not exist or exists only in limited circumstances.<sup>135</sup>

The varying opinions of both domestic courts and scholars linger and indicate that the debate has not yet reached its end. The most reasonable position seems to be holding that the immunity of international organizations from the jurisdiction of domestic courts is customary international law while also recognizing that the scope of this immunity is not settled. If the scope of this immunity is not settled, however, then it remains difficult to decide on what this customary international law means in practice.

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<sup>132</sup> *Drago v International Plant Genetic Resources Institute (IPGRI)*, Final appeal judgment, n 3718 (Court of Cassation, All Civil Sections); ILDC 827 (IT 2007); Giustizia Civile Massimario, 2007, 2, 19 February 2007 <[www.oxfordlawreports.com](http://www.oxfordlawreports.com)> accessed 2 June 2012

<sup>133</sup> See Frederick Rawski, 'To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations' (2002) 18 Connecticut Journal of International Law 103, 106; Amerasinghe (n 125) 344-345; Reinisch, *The International Relations of National Courts* (n 91) 297

<sup>134</sup> See Reinisch, *International Organizations Before National Courts* (n 90) 145-146; Brownlie (n 108) 680; Klabbers, *An Introduction* (n 91) 148-9

<sup>135</sup> See Peter Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status* (Martinus Nijhoff 1994) 147; Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Virginia Journal of International Law 53, 98; Ige F. Dekker and Cedric Ryngaert, 'Immunity of International Organisations: Balancing the Organisation's Functional Autonomy and the Fundamental Rights of Individuals' (2011) *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* 138 – Making Choices in Public and Private International Immunity Law 83, 90

The analysis on whether or not customary international law exists in relation to the immunity of global health public-private partnerships from the jurisdiction of domestic courts varies depending on the partnership under scrutiny. Customary international law is indirectly relevant for formal partnerships or alliances, such as RBM and Stop TB, as agents of the WHO.<sup>136</sup> These partnerships are hosted by the WHO and are extended immunity from the jurisdiction of domestic courts through the WHO. To the extent customary international law is relevant to the immunity of the WHO from the jurisdiction of domestic courts, customary international law will also be relevant to the immunity of RBM and Stop TB from the jurisdiction of domestic courts. The above debate on customary international law in relation to international organizations therefore applies in the context of these partnerships as well and bears no repeating.

Customary international law is, however, not relevant for separate organizations, such as GAVI and the Global Fund. These partnerships are not subjects of international law<sup>137</sup> and therefore are not covered by customary international law. Also, the immunity of GAVI and the Global Fund from the jurisdiction of domestic courts arises from domestic legislation, agreements with states and treaties created to apply to these partnerships.<sup>138</sup> The fact that these partnerships require such legislation, agreements and treaties in order to obtain immunity from the jurisdiction of domestic courts is further evidence that these partnerships are not entitled to immunity from the jurisdiction of domestic courts under customary international law.<sup>139</sup>

After describing the sources of the immunity of international organizations and global health public-private partnerships from the jurisdiction of domestic courts, the question of

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<sup>136</sup> See Chapter 6, Section 6.1.1

<sup>137</sup> See Chapter 3

<sup>138</sup> See Sections 4.2.1.1 and 4.2.1.2

<sup>139</sup> GAVI and the Global Fund were, however, once extended immunity from the jurisdiction of domestic courts through international organizations. The Global Fund had privileges and immunities through an Administrative Services Agreement with the WHO while GAVI had privileges and immunities through its hosting relationship with UNICEF. It is conceivable that while these arrangements were in place, customary international law was of, indirect, relevance to these partnerships, in the same way as it is for RBM and Stop TB. However, the fact that after these arrangements were terminated, these partnerships were subsumed by domestic legislation, agreements with states and treaties created to apply to these partnerships in order to gain immunity from the jurisdiction of domestic courts indicates that customary international law is no longer of, indirect, relevance to these partnerships.

the scope of such immunity as set out in these sources remains. The next section therefore explores the scope of immunity from the jurisdiction of domestic courts based on the rationale of functional necessity, in relation to both international organizations and global health public-private partnerships.

#### 4.2.2. Functional Necessity

States were, in the beginning, entitled to absolute immunity. Bringing a state within the jurisdiction of the courts of another state in relation to any activity of a state was thought to be an interference with its sovereignty.<sup>140</sup> States needed to be able to conduct politics freely.<sup>141</sup> Absolute immunity was thus the rule. The increasing power of states, the increasing number of disputes involving states and the increasing importance of the rule of law, however, led to restrictive immunity.<sup>142</sup> States are now entitled to immunity from the jurisdiction of the domestic courts of other states for acts which are of a governmental nature (*acta jure imperii*) but not for acts which are of a commercial nature (*acta jure gestionis*).<sup>143</sup>

The *acta jure imperii* / *acta jure gestionis* distinction is, however, seen as inapplicable to the immunity of international organizations from the jurisdiction of domestic courts. Applying this distinction to international organizations would assimilate them to states, which is considered inappropriate.<sup>144</sup> The rationale supporting the immunity of international organizations from the jurisdiction of domestic courts instead focuses on

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<sup>140</sup> Emmanuel Gaillard and Isabelle Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass' (2002) 51 *International and Comparative Law Quarterly* 1, 1-2

<sup>141</sup> Jan Klabbers, 'The General, the Lords, and the Possible Ends of State Immunity' (1999) 68 *Nordic Journal of International Law* 85, 88

<sup>142</sup> Gaillard and Pingel-Lenuzza (n 140) 1-2

<sup>143</sup> R. van Albeek, *The Immunity of States and their Officials in the Light of International Criminal Law and International Human Rights Law* (E.M. Meijers Instituut 2006); Hazel Fox, *The Law of State Immunity* (2<sup>nd</sup> edn, OUP 2008)

<sup>144</sup> Higgins (n 102) 93. See Morgenstern (n 102) 6; Amerasinghe (n 125) 321-322; De Brabandere, *Immunity of International Organizations* (n 75) 89; Schermers and Blokker (n 98) 1032-1033. Cf Gaillard and Pingel-Lenuzza (n 140) 5

functional necessity.<sup>145</sup> International organizations are entitled to immunity from the jurisdiction of domestic courts to the extent necessary to exercise their functions and fulfill their purposes.<sup>146</sup>

Public-private partnerships in the area of global health also rely on a rationale of functional necessity when being granted immunity from the jurisdiction of domestic courts. Formal partnerships or alliances, such as RBM and Stop TB, obtain immunity through the host organization – the WHO – which relies on the functional necessity rationale in relation to the grant of immunity. The Constitution of the WHO holds that “[t]he Organization shall enjoy in the territory of each Member such privileges and immunities as may be *necessary for the fulfilment of its objective and for the exercise of its functions*.”<sup>147</sup> Also, the Convention on the Privileges and Immunities of the Specialized Agencies, covering the WHO, holds that “[t]he provisions of the Convention in relation to any specialized agency must be *interpreted in the light of the functions* with which that agency is entrusted by its constitutional instrument.”<sup>148</sup> Separate organizations, such as GAVI and the Global Fund, obtain immunity through domestic legislation, agreements with states and treaties created to apply to these partnerships and functional necessity is the underlying rationale for these partnerships as well. GAVI states that it “enjoys privileges and immunities similar to those enjoyed by other intergovernmental organisations,”<sup>149</sup> presumably on the same basis, while the Global Fund “reiterates the importance of states granting ... such privileges and immunities as

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<sup>145</sup> Other possible rationales for judicial abstention can be found in Reinisch, *International Organizations Before National Courts* (n 90) 233-251

<sup>146</sup> Josef L. Kunz, ‘Privileges and Immunities of International Organizations’ (1947) 41(4) *American Journal of International Law* 828, 847; Higgins (n 102) 93; Bekker (n 135); Amerasinghe (n 125) 321-322; Reinisch, *International Organizations Before National Courts* (n 90) 205, 233-238; Klabbers, *An Introduction* (n 91) 132-137; Laurence Boisson de Chazournes, ‘Concluding Remarks – Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies’ (2009) 6 *International Organizations Law Review* 655, 663; Thomas Henquet, ‘International Organisations in the Netherlands: Immunity from the Jurisdiction of the Dutch Courts’ (2010) LVII *Netherlands International Law Review* 267, 276-284; Dekker and Ryngaert (n 135) 92-97

<sup>147</sup> Constitution of the WHO (n 6) art 67(a) (emphasis added)

<sup>148</sup> Convention on the Privileges and Immunities of the Specialized Agencies (n 10) s 34 (emphasis added)

<sup>149</sup> GAVI recognized as an international institution (n 23)

are *necessary for the effective exercise of its functions* and efficient use of its resources.”<sup>150</sup>

Functional necessity is however open to interpretation<sup>151</sup> and has led to much debate, especially as to whether functional necessity leads to restrictive or absolute immunity. On the surface, functional necessity appears to be a way to restrict immunity however in practice, functional necessity tends to lead to absolute immunity.<sup>152</sup> The logic behind this tendency is as follows: if functional necessity means restricting the immunity of an international organization to those acts that are necessary to function then all acts of an international organization end up being covered by immunity since an international organization can only act in accordance with its functions.<sup>153</sup> This concern potentially exists in the context of global health public-private partnerships as well. Partnerships are entities created to perform certain functions and therefore can only act in accordance with these functions. All acts of a partnership are therefore linked to its functions and, as a result, relying on functional necessity to grant immunity to these partnerships could lead to such immunity being absolute.

A non-exhaustive look at cases before domestic courts reveals how functional necessity is being applied in practice. In relation to global health public-private partnerships, it is hard to speak in terms of practice since the immunity of these partnerships from the jurisdiction of domestic courts has not yet been invoked. Only predictions can be made. These predictions are informed by considering how functional necessity has been dealt

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<sup>150</sup> Report of the Twenty-Second Board Meeting (n 53) (emphasis added)

<sup>151</sup> Reinisch, *International Organizations Before National Courts* (n 90) 205. See August Reinisch and Ulf Andreas Weber, ‘In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, The Individual’s Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement’ (2004) 1 *International Organizations Law Review* 59, 63

<sup>152</sup> Reinisch and Weber (n 151) 59, 64

<sup>153</sup> *ibid* 63; Gaillard and Pingel-Lenuzza (n 140) 10; Cedric Ryngaert, ‘The Immunity of International Organizations Before Domestic Courts: Recent Trends’ (2010) 7 *International Organizations Law Review* 121, 146; August Reinisch, ‘Privileges and Immunities’ in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 132, 138-139; Eric De Brabandere, ‘Immunity as a guarantee for institutional autonomy: A functional perspective on the necessity of UN immunity in post-conflict administrations’ in Richard Collins and Nigel D. White (eds) *International Organizations and the Idea of Autonomy* (Routledge 2011) 278, 281-282

with in the context of the immunity of international organizations from the jurisdiction of domestic courts.

Case law reveals that even though the consensus is that the *acta jure imperii* / *acta jure gestionis* distinction does not apply in the context of international organizations, this distinction nonetheless finds its way into discussions on the functional necessity of international organizations. A case of the Kenyan Court of Appeal – *Tononoka Steels Limited v. Eastern and Southern Africa Trade and Development Bank*<sup>154</sup> – involved Tononoka Steels bringing a claim for breach of contract in relation to the repudiation of a facility agreement and the Bank responding it has immunity from the jurisdiction of domestic courts. The court recognized that the immunity of the Bank from the jurisdiction of domestic courts was of functional necessity but stated that this was in relation to “multinational functions” and not “private functions”.<sup>155</sup> It held that since the Bank was acting as a private bank, and thus outside its mandate and objectives, then the matter was commercial in nature and the Bank was not entitled to immunity from the jurisdiction of domestic courts.<sup>156</sup> The Supreme Arbitrazh Court of Russia, in a case involving the International Inter-State Broadcasting Company ‘MIR’,<sup>157</sup> held that MIR enjoys immunity from the jurisdiction of domestic courts based on functional necessity. It interpreted this to mean that MIR has immunity from suit in relation to activities pursuing goals set out in its charter but has no immunity from suit in relation to other commercial activities.<sup>158</sup>

In the United States, international organizations obtain immunity from the jurisdiction of domestic courts through the IOIA. The IOIA states: “International organizations ... shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by

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<sup>154</sup> *Tononoka Steels Limited v Eastern and Southern Africa Trade and Development Bank*, Appeal judgment, 2 EA 536 (CAK); ILDC 1283 (KE 1999), 13 August 1999, Decision <[www.oxfordlawreports.com](http://www.oxfordlawreports.com)> accessed 3 June 2012

<sup>155</sup> *ibid* para 36

<sup>156</sup> *ibid* paras 18, 30, 37, 51, 55, 59

<sup>157</sup> *International Inter-State Broadcasting Company ‘MIR’*, Decision on ‘nadzor review’, No 13111/03; ILDC 27 (RU 2004), 20 January 2004, Decision – English translation <[www.oxfordlawreports.com](http://www.oxfordlawreports.com)> accessed 3 June 2012

<sup>158</sup> *ibid* para 12

foreign governments.”<sup>159</sup> There are contrasting opinions on how to interpret this section.<sup>160</sup> Do international organizations enjoy absolute immunity since at the time the IOIA was adopted, foreign governments enjoyed absolute immunity?<sup>161</sup> Or do international organizations enjoy restrictive immunity since foreign governments now enjoy restrictive immunity?<sup>162</sup>

Courts in the United States have managed to avoid this debate. This has been done by categorizing most disputes as internal and administrative in nature, often relating to matters of employment, rather than commercial in nature. Internal and administrative disputes are protected by immunity whether absolute immunity or restrictive immunity is applicable. Any discussion as to whether absolute immunity or restrictive immunity applies in relation to internal and administrative disputes is thus moot.<sup>163</sup> In *Broadbent v. Organization of American States*,<sup>164</sup> staff members of the Organization of American States (OAS) were dismissed and alleged a breach of contract.<sup>165</sup> The Court of Appeals for the District of Columbia did not decide whether absolute immunity or restrictive immunity applied. It held that it did not need to make such a decision since in relation to employment disputes, which are internal and administrative in nature rather than commercial in nature, the OAS was immune from suit, regardless of whether absolute immunity or restrictive immunity applied.<sup>166</sup> It also made reference to and relied on the functional necessity of granting international organizations immunity from the jurisdiction of domestic courts.<sup>167</sup> *Mendaro v. World Bank*<sup>168</sup> involved a claim of sexual harassment and discrimination brought by a former employee of the World Bank.<sup>169</sup> The Court of Appeals for the District of Columbia upheld the immunity of the World Bank from the jurisdiction of domestic courts, in relation to the internal administration of its

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<sup>159</sup> IOIA (n 52) s 2(b)

<sup>160</sup> See Section 4.1.2.2.2

<sup>161</sup> See n 75

<sup>162</sup> See n 76

<sup>163</sup> Oparil (n 75) 696-7, 704

<sup>164</sup> *Broadbent v Organization of American States*, 628 F 2d 27, 8 January 1980

<sup>165</sup> *ibid* paras 1, 4

<sup>166</sup> *ibid* paras 24, 34, 37

<sup>167</sup> *ibid* para 33

<sup>168</sup> *Mendaro v the World Bank* (n 129)

<sup>169</sup> *ibid* 2-3



civil servants, on the basis of functional necessity.<sup>170</sup> Later, in *Novak v. World Bank*,<sup>171</sup> the immunity of the World Bank from the jurisdiction of domestic courts was again upheld in relation to an employment dispute involving allegations of age discrimination and conspiracy to deter, by intimidation and harassment, prosecution of actions. It was held that the allegations did not concern external commercial activities but instead internal personnel practices.<sup>172</sup> *Boimah v. United Nations General Assembly*<sup>173</sup> involved a claim of discrimination brought by a temporary worker, who was later dismissed, at the United Nations.<sup>174</sup> The court stated that it is not clear whether the IOIA, by setting out that international organizations have the same immunity as foreign governments, intended to confer to international organizations the absolute immunity foreign governments enjoyed at the time the IOIA was adopted or the restrictive immunity foreign governments now enjoy. The court did not, however, need to decide on this issue. It held that the United Nations is immune from suit regardless of whether absolute immunity or restrictive immunity is applied since a relationship of employment between an international organization and its staff is not commercial in nature. The self-regulation of matters of employment was seen as essential to its functions and necessitated immunity from the jurisdiction of domestic courts.<sup>175</sup>

As courts in the United States have been able to avoid the debate as to whether absolute immunity or restrictive immunity applies to international organizations under the IOIA, scholars are left to postulate and there are supporters on both sides.<sup>176</sup> It is not proposed here to resolve this debate but instead to merely highlight that it exists and extends to other entities classified as international organizations within the IOIA, including the Global Fund.

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<sup>170</sup> *ibid* 5-6, 10

<sup>171</sup> *Novak v World Bank*, No. 81-1329 (D.D.C. Dec. 21, 1983) cited in Oparil (n 75) 699

<sup>172</sup> *ibid*

<sup>173</sup> *Boimah v United Nations General Assembly*, 664 F. Supp. 69 Dist. Court, ED New York 1987, 24 July 1987

<sup>174</sup> *ibid* 70

<sup>175</sup> *ibid* 71. See also *Chiriboga v International Bank for Reconstruction and Development*, 616 F. Supp. 963 (1985); *Tuck v Pan American Health Organization*, 668 F. 2d 547 (1981); *Morgan v International Bank for Reconstruction and Development*, 752 F. Supp. 492 (1980)

<sup>176</sup> See n 75 and n 76

It is clear from these cases in the United States that international organizations are generally protected by immunity from the jurisdiction of domestic courts in relation to employment matters. This trend is observed elsewhere in the world as well. In the Netherlands, the District Court of Maastricht, in *Eckhardt*,<sup>177</sup> held that Eurocontrol is entitled to immunity from the jurisdiction of domestic courts for the operation of its public service and that decisions of appointment and dismissal of employees are performed in the exercise and administration of its public service.<sup>178</sup> Subsequently, the Supreme Court in the Netherlands, in *A.S.*,<sup>179</sup> held that an international organization is not subject to the jurisdiction of the domestic courts with respect to disputes that are immediately connected to the performance of the tasks of the organization. Employment disputes involving persons who play an essential role in the work of the international organization were considered immediately connected to the performance of the tasks of the international organization.<sup>180</sup> In *Killeen v. International Centre of Insect Physiology and Ecology*,<sup>181</sup> the High Court of Nairobi in Kenya stated that an activity, in this case a contract of employment, which fell within the operations of the international organization and was necessary in order to fulfill the purposes of the international organization, was protected by immunity from the jurisdiction of domestic courts.<sup>182</sup> The court distinguished this case from *Tononoka Steels*<sup>183</sup> on the basis that *Tononoka Steels* involved activities of a commercial nature whereas this case involved a contract of employment.<sup>184</sup> The Italian Court of Cassation, in *Drago*,<sup>185</sup> made a distinction between types of employment relationships. Employment relationships of an institutional nature and employment relationships of a commercial nature were differentiated and it was held that immunity from suit extends to the former but not to the latter.<sup>186</sup>

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<sup>177</sup> *Eckhardt* (n 126)

<sup>178</sup> *ibid* 468, 470

<sup>179</sup> *A.S.* (n 128)

<sup>180</sup> *ibid* 360-361

<sup>181</sup> *Killeen v International Centre of Insect Physiology and Ecology*, First instance, Civil Case 1737 of 2002; ILDC 77 (KE 2005), 27 May 2005, Decision <[www.oxfordlawreports.com](http://www.oxfordlawreports.com)> accessed 3 June 2012

<sup>182</sup> *ibid* para 9

<sup>183</sup> *Tononoka Steels* (n 154)

<sup>184</sup> *Killeen* (n 181) para 8

<sup>185</sup> *Drago* (n 132)

<sup>186</sup> *ibid* para 6.2

Case law on this topic that covers matters besides those relating to employment is rare. An example is, however, *Mothers of Srebrenica v. The State of the Netherlands and the United Nations*,<sup>187</sup> a decision of the Hague Court of Appeal in the Netherlands. The surviving relatives of men murdered in the genocide in Srebrenica, i.e. the Mothers of Srebrenica, brought a claim against the United Nations for the loss incurred by them. It was argued that the United Nations had failed to prevent the genocide, contrary to promises made and legal obligations.<sup>188</sup> The court upheld the immunity of the United Nations from the jurisdiction of domestic courts based on a reasoning of functional necessity. It emphasized the special role of the United Nations, in comparison to other international organizations, in maintaining and restoring international peace and security and held that if the United Nations did not enjoy immunity from suit then it would be exposed to claims with the possible purpose of obstructing and preventing its actions. It stated that the United Nations has the broadest immunity possible.<sup>189</sup> It is questionable however whether the reasoning in this case extends to other international organizations besides the United Nations since the unique position of the United Nations, in relation to other international organizations, was stressed.

This decision of the Hague Court of Appeal in the Netherlands was recently upheld by the Supreme Court of the Netherlands.<sup>190</sup> The Supreme Court stated that the United Nations has the most far-reaching immunity.<sup>191</sup> And while it did mention that the basis

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<sup>187</sup> *Mothers of Srebrenica v The State of the Netherlands and the United Nations* (Appeal Court in The Hague) 30 March 2010, Case No 200.022.151/01 (English translation at <[www.vandiepen.com/en/international/srebrenica/proceedings-the-hague.html](http://www.vandiepen.com/en/international/srebrenica/proceedings-the-hague.html)> accessed 3 June 2012). The United Nations did not appear in court and was noted in default; its right to immunity from the jurisdiction of domestic courts was argued by the Netherlands. See Riccardo Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law, The Place of Human Rights* (OUP 2012) 71, fn 150

<sup>188</sup> *Mothers of Srebrenica* (Court of Appeal) (n 187) para 1.1

<sup>189</sup> *ibid* para 5.7

<sup>190</sup> *Mothers of Srebrenica v The State of the Netherlands and the United Nations* (Supreme Court of the Netherlands) 13 April 2012, First Division, 10/04437, EV/AS (English translation at <<http://www.rechtspraak.nl/Organisatie/Hoge-Raad/Supreme-court/Summaries-of-some-important-rulings-of-the-Supreme-Court/Pages/Ruling-Dutch-Supreme-Court-Mothers-of-Srebrenica.aspx>> accessed 3 June 2012). Again, the United Nations did not appear in court and was noted in default; its right to immunity from the jurisdiction of domestic courts was argued by the Netherlands. See *Mothers of Srebrenica v The Netherlands and the United Nations*, Final appeal judgment, LJN: BW 1999; ILDC 1760 (NL 2012) 13 April 2012 <[www.oxfordlawreports.com](http://www.oxfordlawreports.com)> (forthcoming)

<sup>191</sup> *Mothers of Srebrenica* (Supreme Court) (n 190) para 4.2

for and scope of this immunity aimed to ensure that the United Nations is able to function independently,<sup>192</sup> it did not undertake the same level of analysis on functional necessity as did the Court of Appeal.

It is a challenge to make generalizations based on the above case law, especially beyond the context of matters of employment. However, it does seem that the rationale of functional necessity is normally relied on (even if the lingo of being commercial in nature (or not) is also invoked). Also, the tendency is for the acts of an international organization to be interpreted as necessary to exercise its functions and fulfill its purposes thereby leading to a grant of (absolute) immunity. It is further reasonable to predict that situations involving global health public-private partnerships will be interpreted in the same way in those states where these partnerships have immunity from the jurisdiction of domestic courts.

This analysis of functional necessity, both in the context of international organizations and global health public-private partnerships, reveals that in terms of limiting the immunity of these entities and, as a result, opening up the possibility of bringing claims against these entities, functional necessity is not living up to its potential. The outcome tends to be that acts of international organizations, and predictably acts of global health public-private partnerships, are interpreted as functionally necessary resulting in (absolute) immunity. This outcome is problematic as it affects the right of access to a court.

#### **4.2.3. Access to a Court or Alternative Means of Dispute Resolution**

The flip side of a grant of immunity from the jurisdiction of domestic courts is a denial of access to a court. This section discusses the tension between the right to immunity from the jurisdiction of domestic courts and the right to access to a court<sup>193</sup> and further

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<sup>192</sup> *ibid*

<sup>193</sup> See Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 10 (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into

explores how the availability of alternative remedies plays a role in determining whether or not immunity from the jurisdiction of domestic courts should be granted. Analogies will again be made to the situation of international organizations as the situation of global health public-private partnerships in relation to these matters is still developing.

The tension between the right to immunity from the jurisdiction of domestic courts and the right to access to a court is obvious. An individual with a claim against a partnership has a right of access to a court but a grant of immunity protects the partnership from the jurisdiction of domestic courts, thereby hindering this right.<sup>194</sup> Access to a court is considered a fundamental right.<sup>195</sup> But is the right to immunity from the jurisdiction of domestic courts an “implicit exception”<sup>196</sup> to the right to access to a court? Phrased differently, is the right to access to a court absolute or can the right to access to a court be limited by the right to immunity from the jurisdiction of domestic courts?

The case which is most often cited to explicate the above-described tension is a case of the European Court of Human Rights (ECtHR) – *Case of Waite and Kennedy v. Germany*.<sup>197</sup> Richard Waite and Terry Kennedy were British nationals who were placed at the disposal of the European Space Agency (ESA) to perform services at the European Space Operations Centre in Germany. After being terminated from this employment, they tried to bring a claim in German courts against the ESA however the ESA invoked its immunity. A claim was eventually brought to the ECtHR against Germany alleging a violation of Article 6(1) of the European Convention of Human Rights (ECHR), covering the right of access to a court. The ECtHR held that the right of access to a court is not absolute and may be limited.<sup>198</sup> It further held that a limitation must not, however,

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force 23 March 1976) 999 UNTS 171 art 14(1) (ICCPR); Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 art 6(1) (European Convention on Human Rights or ECHR)

<sup>194</sup> Reinisch, *The International Relations of National Courts* (n 91) 298

<sup>195</sup> Erika de Wet, ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’ (2006) 19 *Leiden Journal of International Law* 611, 620; *ibid* 281

<sup>196</sup> Reinisch, *The International Relations of National Courts* (n 91) 283

<sup>197</sup> *Case of Waite and Kennedy v Germany* App no 26083/94 (ECtHR, 18 February 1999). See *Case of Beer and Regan v Germany* App no 28934/95 (ECtHR, 18 February 1999)

<sup>198</sup> *Waite and Kennedy* (n 197) para 59

restrict or reduce the access to a court in such a way or an extent that the “very essence of the right is impaired.”<sup>199</sup> Also, a limitation must pursue a “legitimate aim” and there must be “proportionality between the means employed and the aim sought to be achieved.”<sup>200</sup>

In this case, the ECtHR found that the grant of immunity from the jurisdiction of domestic courts had a legitimate aim in that it ensured the functioning of the ESA without interference.<sup>201</sup> As to proportionality, the ECtHR held that “a material factor” in deciding whether a grant of immunity from the jurisdiction of domestic courts is in accordance with the ECHR is whether “reasonable alternative means” are available to protect the rights in the ECHR.<sup>202</sup> In this case, reasonable alternative means were held to exist – the ESA had an Appeals Board and there was also the possibility of filing a claim relying on the German Provision of Labour (Temporary Staff) Act.<sup>203</sup> It is noteworthy, however, that these reasonable alternative means were alluded to but not assessed.<sup>204</sup> Nonetheless, as a result of a finding of a legitimate aim and proportionality between the means employed and the aim sought to be achieved, the very essence of the right of access to a court was held not to be impaired in this case.<sup>205</sup>

The reasoning of *Waite and Kennedy* has been subsequently applied and interpreted by other courts. The focus of courts tends to be on the proportionality aspect, rather than the legitimate aim aspect. The legitimate aim of granting immunity to an international organization from the jurisdiction of domestic courts is to protect the functioning and independence of the international organization and this easily applies to most international organizations. Proportionality is another matter. A material factor relied on to decide on proportionality is the availability of alternative means of dispute resolution but this varies depending on the international organization under scrutiny. Alternative means of dispute resolution must, regardless, be effective. They must operate according

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<sup>199</sup> *ibid*

<sup>200</sup> *ibid*

<sup>201</sup> *ibid* para 63

<sup>202</sup> *ibid* para 68 (emphasis added)

<sup>203</sup> *ibid* paras 69-70

<sup>204</sup> *Reinisch and Weber* (n 151) 79; *De Wet* (n 195) 620-621

<sup>205</sup> *Waite and Kennedy* (n 197) para 73

to principles of fair trial and due process including being independent and impartial and also offer the opportunity to appeal and the ability to enforce.<sup>206</sup> If alternative means of dispute resolution are not available and effective then it is argued that immunity from the jurisdiction of domestic courts should not be granted, otherwise the right of access to a court would be denied.<sup>207</sup>

Is this the consensus? Alternative means of dispute resolution were referred to in *Waite and Kennedy* as a material factor in determining whether or not to grant immunity from the jurisdiction of domestic courts but material factor does not have the same connotation as prerequisite.<sup>208</sup> How has the need for alternative means of dispute resolution in the context of granting immunity from the jurisdiction of domestic courts been interpreted in practice? A complete review of all relevant cases is not manageable here and substantive reviews have been undertaken elsewhere.<sup>209</sup> A few illustrative examples will, however, be provided.

In *Pistelli*,<sup>210</sup> the Italian Court of Cassation upheld the immunity from the jurisdiction of domestic courts of the European University Institute making reference to the possibility of turning to a commission established pursuant to the Convention Setting up a European University Institute or turning to the Court of Justice of the European Communities as alternative means to resolve disputes between this international organization and its employees.<sup>211</sup> In a later decision of the Italian Court of Cassation, *Drago*,<sup>212</sup> immunity from the jurisdiction of domestic courts was denied to the international organization because there was no impartial and independent alternative means to resolve disputes with employees.<sup>213</sup> In *H.B., E.P. and K.S. v. International Service for National*

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<sup>206</sup> Gaillard and Pingel-Lenuzza (n 140) 11-12. See Reinisch and Weber (n 151) 101

<sup>207</sup> Gaillard and Pingel-Lenuzza (n 140) 11-12; Reinisch and Weber (n 151) 68; Ryngaert (n 153) 132-3; Pavoni (n 187) 103-104

<sup>208</sup> Ryngaert (n 153) 134; De Brabandere, Immunity of International Organizations (n 75) 94-95; Pavoni (n 187) 104

<sup>209</sup> Reinisch, International Organizations Before National Courts (n 90); Ryngaert (n 153); Pavoni (n 187)

<sup>210</sup> *Pistelli* (n 130)

<sup>211</sup> *ibid* para 14.2

<sup>212</sup> *Drago* (n 132)

<sup>213</sup> *ibid* para 6.8

*Agricultural Research (ISNAR)*,<sup>214</sup> the District Court of the Hague stated that everyone is entitled, under international law, to an effective legal process and if the legal process set out in the staff regulations is not effective then this court needs to take jurisdiction over the matter.<sup>215</sup> An effective legal process was however available in this case and ISNAR's immunity from the jurisdiction of domestic courts was upheld.<sup>216</sup> A Belgian court held in *Siedler v. Western European Union* that the alternative means of dispute resolution available to a terminated employee of an international organization seeking compensation did not offer guarantees inherent to a fair and equitable legal process. The grant of immunity from the jurisdiction of domestic courts therefore breached the right of access to a court.<sup>217</sup> In *Mendaro*,<sup>218</sup> the Court of Appeals for the District of Columbia in the United States found an international organization – the World Bank – immune from the jurisdiction of domestic courts in relation to the claim of a former employee, even though there was no effective grievance procedure in place within the World Bank, at that time.<sup>219</sup>

It is conceded that cases balancing the right to immunity from the jurisdiction of domestic courts with the right to access to a court (and the availability and effectiveness of alternative means of dispute resolution) most often involve disputes in relation to employment matters. The case of *Mothers of Srebrenica*,<sup>220</sup> at the Court of Appeal, is, however, a recent example of such a balancing being applied outside the context of employment matters and relating to other matters, notably the prohibition of genocide. In *Mothers of Srebrenica*, the Court of Appeal balanced the United Nations' right to immunity from the jurisdiction of domestic courts and the claimants' right to access to a court and, in doing so, considered the availability of alternative means of dispute resolution. It concluded that the United Nations had failed to provide alternative means

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<sup>214</sup> *H.B., E.P. and K.S. v. International Service for National Agricultural Research (ISNAR)*, District Court of the Hague, 13 February 2002, NIPR (2004) No. 268 (English translation in 35 NYIL (2004) 453)

<sup>215</sup> *ibid* 457

<sup>216</sup> *ibid* 458

<sup>217</sup> *Siedler v Western European Union*, Appeal judgment, Journal des Tribunaux 2004, 617; ILDC 53 (BE 2003) 17 September 2003 <[www.oxfordlawreports.com](http://www.oxfordlawreports.com)> accessed 3 June 2012; De Wet (n 195) 630; Ryngaert (n 153) 136

<sup>218</sup> *Mendaro* (n 129)

<sup>219</sup> *ibid* 1-2, fn 41

<sup>220</sup> *Mothers of Srebrenica* (Court of Appeal) (n 187)



of dispute resolution but also concluded that a claim could be brought against the perpetrators of the genocide and possibly the persons responsible for them and/or against the Netherlands.<sup>221</sup> It then held that in this case the right of access to a court of the claimants is not violated if the right to immunity from the jurisdiction of domestic courts of the United Nations is allowed.<sup>222</sup>

The case of *Mothers of Srebrenica*,<sup>223</sup> at the Supreme Court, however noted that while in *Waite and Kennedy* a balancing between the right to immunity from the jurisdiction of domestic courts and the right to access to a court was considered relevant in the context of international organizations, there is no reason to assume that this reference to international organizations also included the United Nations, especially in relation to its activities involving peace and security.<sup>224</sup> The immunity from the jurisdiction of domestic courts of the United Nations is absolute and member states of the United Nations are obliged to respect this immunity, even in the face of competing obligations, such as those arising under the right to access to a court.<sup>225</sup> The Supreme Court thus held that the Court of Appeal erred in relying on the criteria of *Waite and Kennedy* in deciding whether the right to access to a court of the claimants prevailed over the right to immunity from the jurisdiction of domestic courts of the United Nations.<sup>226</sup> It further relied on a holding of the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*:<sup>227</sup> “The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress.”<sup>228</sup> It translated this holding, relating to the immunity of a state, to the immunity of the United Nations. It held that even though the immunity of the United

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<sup>221</sup> *ibid* paras 5.11-5.12. See André Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’ (2011) 9 *Journal of International Criminal Justice* 1143, 1154; Pavoni (n 187) 107

<sup>222</sup> *Mothers of Srebrenica* (Court of Appeal) (n 187) para 5.13

<sup>223</sup> *Mothers of Srebrenica* (Supreme Court) (n 190)

<sup>224</sup> *ibid* para 4.3.3

<sup>225</sup> *ibid* para 4.3.6

<sup>226</sup> *ibid* para 4.3.5

<sup>227</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* (Judgment) [2012] ICJ Rep 1

<sup>228</sup> *ibid* para 101. See *Mothers of Srebrenica* (Supreme Court) (n 190) para 4.3.13

Nations should be distinguished from the immunity of a state, the difference is not such that a ruling on the interaction between the immunity of the United Nations and the right of access to a court should vary from the ruling of the ICJ on the interaction between the immunity of a state and the right of access to a court.<sup>229</sup> This holding thus eliminates the need for a balancing between the right to immunity from the jurisdiction of domestic courts and the right to access to a court in the context of claims involving the United Nations but does not eliminate the need for such a balancing in the context of claims involving other international organizations.

*Mothers of Srebrenica*, at the Court of Appeal, was mentioned in this research in order to demonstrate that considerations of access to a court and alternative means of dispute resolution in deciding whether to allow immunity from the jurisdiction of domestic courts may be made outside the context of employment matters and inside the context of human rights matters as well.<sup>230</sup> The usefulness of this demonstration remains, regardless of *Mothers of Srebrenica*, at the Supreme Court. The Supreme Court varied from the Court of Appeal in that it decided that a balancing between the right to immunity from the jurisdiction of domestic courts and the right to access to a court is not appropriate in relation to the United Nations. This variation was not, however, made based on the fact that the situation involved human rights matters, rather than employment matters, and thus the demonstrative value of the holdings of the Court of Appeal in this research stands. Other cases serving as precedents in this regard are, however, scarce.

It is thus conceivable that global health public-private partnerships could be involved in cases balancing the right to immunity from the jurisdiction of domestic courts with the right to access to a court in relation to employment matters but also in relation to other matters such as breaches of the right to life and right to health, which are of concern in this research. The case law in this regard is, however, limited and making concrete observations is therefore a challenge.

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<sup>229</sup> *Mothers of Srebrenica* (Supreme Court) (n 190) para 4.3.14

<sup>230</sup> See Pavoni (n 187) 112

An inquiry into the availability of alternative means of dispute resolution in deciding whether or not to grant immunity from the jurisdiction of domestic courts appears to be the norm. Considering further whether these alternative means of dispute resolution are, in actuality, effective varies on a case by case basis and makes any generalization challenging. It is argued here, however, that considering effectiveness thoroughly is imperative in deciding whether or not to grant immunity. If alternative means of dispute resolution are not effective and immunity is granted then a claimant is left without a means to resolve the dispute thereby infringing on the right of access to a court.<sup>231</sup>

Public-private partnerships in the area of global health are supposed to provide for alternative means of dispute resolution. RBM and Stop TB obtain immunity from the jurisdiction of domestic courts through the WHO and the WHO is obliged, pursuant to the Convention on the Privileges and Immunities of the Specialized Agencies, to provide for appropriate modes of settlement for disputes arising out of contracts or other disputes of a private nature to which it is a party.<sup>232</sup> The WHO has recognized the jurisdiction of ILOAT, which deals with employment disputes<sup>233</sup> but there is no permanent dispute settlement mechanism set up to deal with disputes of a contractual or private nature. It is presumed that the settlement of such disputes will occur on an *ad hoc* basis and therefore an exploration into the availability and effectiveness of alternative means of dispute resolution will also occur on an *ad hoc* basis.

GAVI is obligated under the Agreement between the GAVI Alliance and the Swiss Federal Council in order to determine the legal status of the GAVI Alliance in Switzerland and the Host State Act to adopt appropriate measures for the settlement of disputes arising out of contracts to which it is a party and other private law disputes.<sup>234</sup> The Global Fund is obliged, according to the Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in view of

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<sup>231</sup> See Karel Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap' (2004) 25 Michigan Journal of International Law 1159, 1162-1163; Henquet (n 146) 295; Ryngaert (n 153) 144

<sup>232</sup> Convention on the Privileges and Immunities of Specialized Agencies (n 10) s 31

<sup>233</sup> See text to n 17

<sup>234</sup> Agreement between the GAVI Alliance and the Swiss Federal Council (n 24) art 25; Host State Act (n 23) art 28

determining the legal status of the Global Fund in Switzerland, to provide for appropriate methods of settlement of disputes arising out of contracts and of a private law nature to which it is party.<sup>235</sup> Further, according to the Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria, signed and ratified by Moldova and signed by Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia, the Global Fund is obligated to provide for appropriate modes of settlement of disputes arising out of contracts and of a private nature to which it is a party.<sup>236</sup> There are no permanent dispute settlement mechanisms set up for either GAVI or the Global Fund to deal with disputes of a contractual or private nature. It is presumed that such disputes will be settled on an *ad hoc* basis and thus investigation into whether alternative means of dispute settlement are available and effective will also be done on an *ad hoc* basis.

If a global health public-private partnership is granted immunity from the jurisdiction of a domestic court, it is foreseeable that it will face debate as to whether such immunity is compatible with the right of access to a court. The aforementioned alternative means of dispute resolution that these partnerships are supposed to provide may then come under scrutiny as to their availability and effectiveness. Such scrutiny cannot be undertaken at this time since these partnerships do not have permanent dispute settlement mechanisms. Instead, such scrutiny will be undertaken on an *ad hoc* basis as circumstances arise requiring a dispute settlement mechanism to be established.

### 4.3. CONCLUDING REMARKS

It is anticipated that the controversies that arise in relation to granting immunity to international organizations from the jurisdiction of domestic courts will also arise in relation to granting immunity to global health public-private partnerships from the jurisdiction of domestic courts. The sources of immunity for partnerships are, to an extent, comparable in nature to the sources of immunity for international organizations.

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<sup>235</sup> Agreement between the Swiss Federal Council and the Global Fund (n 52) art 25

<sup>236</sup> Agreement on Privileges and Immunities of the Global Fund (n 54) art 6(i)

Moreover, the rationale for granting immunity to partnerships is the same rationale for granting immunity to international organizations – functional necessity. It is further reasonable to assume that once a partnership is granted immunity, it will, similar to an international organization, be confronted with arguments that this immunity breaches the right of access to a court, if alternative means of dispute resolution are not available and effective.

As international organizations play an increasing role in the lives of individuals, positively but also negatively, suggestions are being made as to ways to curtail the immunity of international organizations from the jurisdiction of domestic courts, in order to ensure those injured by them are not left without a remedy. It has been suggested to extend the *acta jure imperii* / *acta jure gestionis* distinction to the context of international organizations.<sup>237</sup> It is contended, however, that this distinction (or a variation) is, in fact, already being considered within the ambit of functional necessity.<sup>238</sup> It is further contended that applying this distinction does not sufficiently address the situation of an international organization violating human rights, which is of concern in this research. As an example, providing medication is one of the possible functions and purposes of a global health public-private partnership. Should immunity from the jurisdiction of domestic courts be accorded to a partnership when the partnership provides medication that is damaging to the life and health of a population in order to protect these functions and purposes?

Another suggestion, made by Michael Singer, is to place human rights in priority in decisions on the immunity of international organizations from the jurisdiction of domestic courts. He suggests that if a claimant is alleging a breach of human rights then the domestic court should take jurisdiction over the matter. If, on the other hand, a breach of human rights is not alleged by the claimant then the domestic court should not take jurisdiction over the matter, if it is necessary to exercise purposes and functions.<sup>239</sup>

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<sup>237</sup> Gaillard and Pingel-Lenuzza (n 140) 5, 9-10

<sup>238</sup> See Section 4.2.2

<sup>239</sup> Singer (n 135) 162-3. Singer, however, makes an exception for the United Nations: “special considerations govern the United Nations, which by virtue of its unique history and status merits

This suggestion could equally be made in the context of global health public-private partnerships. It, however, goes beyond even restrictive immunity. It extends further than a consideration of *acta jure imperii* versus *acta jure gestionis* and advocates giving preference to access to courts, especially when breaches of human rights are at issue. This is commendable from the viewpoint of human rights<sup>240</sup> and perhaps as international organizations, and global health public-private partnerships, continue to play a greater role in the lives of individuals, positively and negatively, this suggestion will find reflection in practice. But for now, it remains *lex ferenda*.

As public-private partnerships increasingly regulate matters of global health, they increasingly impact, positively and possibly also negatively, the rights of individuals, including the rights to life and health. The gap in responsibility under international law in relation to the acts of these partnerships, arising from the absence of legal personality under international law outlined in the previous chapter, should cause states to re-think granting immunity to these partnerships from the jurisdiction of domestic courts, especially where alternative means of dispute resolution are not available and effective. Otherwise, a lacuna of responsibility emerges.

The gap in responsibility under international law in relation to the acts of global health public-private partnerships, due to the lack of legal status of these partnerships under international law, and the immunity certain global health public-private partnerships are granted from the jurisdiction of domestic courts provokes a search for other avenues to deal with responsibility in relation to the acts of these partnerships. The following chapters therefore explore the possibility of holding states and/or international organizations, as partners and/or hosts, responsible under international law in relation to the acts of global health public-private partnerships.

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jurisdictional immunity even in cases alleging that it has violated human rights, no other organization is exceptional in this way.” (Singer (n 135) 163). See *Mothers of Srebrenica* (Supreme Court) (n 190) paras 4.3.7-4.3.14. See also Pavoni (n 187) 98-99 who suggests using *jus cogens* as a conflict principle in disputes between human rights and the immunity of international organizations from the jurisdiction of domestic courts.

<sup>240</sup> See Reinisch, *International Organizations Before National Courts* (n 90) 287, 289-290