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# Jam v. IFC: Developments in International Organizations Immunity and the Promise of Human Rights Approaches


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# Introduction

*Jam v International Finance Corporation* is considered a landmark case in the evolution of international organizations' immunity in the United States. The incorporation of sovereign immunity standards within the International Organizations Immunities Act will have a lasting impact on the way in which domestic courts in the United States administer justice against IOs, with the latter finally applying to IOs the same *jure imperii/jure gestionis* distinction which is used to determine whether a state is acting in a private capacity for the purposes of upholding, or denying, its immunity from suit. And while the impact *Jam* will have on future US case law, as well as its shortcomings, will be explored throughout this thesis, what truly makes *Jam* such an important case to discuss is the very *real* stories of injustice that led to the case itself. To this day, the local communities of Gujarat, India, are suffering from the disastrous environmental effects of the construction and operation of the Tata Mundra power plant, whose project was funded by the IFC through a $450 million loan to Coastal Gujarat Power Limited (CGPL), despite the organization knowing full well about the plant's extreme environmental and social risks.

The culture of unaccountability surrounding international organizations, especially as it pertains to multilateral development banks (MDBs), has led to a myriad of cases just like *Jam*, with local communities being denied access to justice on the presumption of 'protecting the independent functioning' of international organizations. In *Jam*, up until the Supreme Court's decision, as well as on remand from it (as will be explored throughout the thesis, *Jam* still left much work to be done for victims to actually be afforded access to justice in cases against IOs), the local fishers and farmers looking for remedy for the injuries they incurred were left without any means for demanding such remedy, which leaves us with the dire realisation that, even in the face of environmental injustice and an evident violation of the human right to a fair trial, the protection of international organizations from any possible form of accountability is held as essential above all else.

This thesis, therefore, through an analysis of the *Jam* decision, its impact on future US courts' decisions and the steps still to be taken from it, will argue for a reconciliation of the divergence between IO immunity, as conceptualised under a 'functional necessity' rationale, and individuals' right to seek a remedy in the form of an approach to IO immunity that takes into consideration access to justice as a limiting factor in the

attribution of immunity to international organizations, so that communities such as those asking for justice against the IFC in *Jam* can be provided with the remedy they deserve.

In particular, Chapter 1 will provide the theoretical framework necessary for the subsequent analysis of the *Jam* decision through a discussion of various aspects related to the legal concept of 'jurisdictional immunity'. In Section 1.2, the nature of jurisdictional immunity will be examined, with a focus on jurisdictional immunity being a "derogation from jurisdiction" and thus not *exempting* an IO enjoying immunity from being subject to the law within said jurisdiction, on the procedural character of immunity and its separation from substantive law, as well as on jurisdictional immunity's 'hybrid' placement between the international and national legal systems.

In Section 1.3, the different purposes of jurisdictional immunity will be analysed, with an emphasis on the differences between the rationale for state immunity and the rationale for IO immunity, as well as a brief excursus on the concept of "functionalism" and some of the issues related to its utilisation as a rationale for IO immunity.

In Section 1.4, a delineation of the different legal sources of IO immunity will be carried out, which, apart from the provisions contained in constituent instruments, comprise multilateral treaties specifically concluded to provide IOs with a detailed privileges and immunities regime, and bilateral treaties, usually in the form of "headquarter agreements". The question of whether a customary international rule concerning IO immunity exists will discussed – while pointing to the difficulties related to the emergence of any customary international rule in this field – as well as the possibility for IO immunities to be included in domestic legislation, with a significant number of states granting designated IOs privileges and immunities regardless of any international obligation to that end, will be cited. Finally, in Section 1.5, the scope of IO immunity, which depends on the specific wording utilised within the various applicable sources of IO immunity, as well as on issues of interpretation, is discussed, following Reinisch's categorisation, with immunities being referred to as either functional, absolute, quasi-sovereign, or specifically restricted.

In Chapter 2, the Supreme Court's decision in *Jam v International Finance Corporation*, the subject of this thesis, will finally be touched upon, preceded by a discussion on the evolution of US rules regarding immunity, from the adoption of the International Organization Immunities Act in 1945 to that of the Foreign Sovereign Immunities Act in

1976, as well as on the controversies born thereafter concerning the possible impact of the FSIA's enactment on IO immunity. Said controversies, regarding the restrictive (based on the *jure imperii/jure gestionis* distinction) FSIA standard of state immunity possibly applying to international organizations for the purposes of the IOIA, are exemplified by the different stances taken within US courts throughout the years following the FSIA's adoption, addressed in Section 2.1.1. The discussion of US case law on IO immunity will range from the explicit refusal by the court in *Broadbent* to decide on whether the FSIA's standards would apply to international organizations, to the Circuit split between *Atkinson*, granting IOs the same "virtually absolute immunity" accorded to foreign sovereigns in 1945, at the time of the IOIA's adoption, and *OSS Novalka*, which recognised the reference canon's relevance to the interpretation of the IOIA, which would therefore incorporate "any subsequent change to the immunity of foreign sovereigns".

Finally, in Section 2.2, *Jam v International Finance Corporation* will first be introduced by discussing the facts pertaining to the case and its procedural history leading up to the 2018 Supreme Court's decision, in order to set the stage for an analysis of the majority opinion, which establishes the "same immunity" provision – through the use of the reference canon – as continuously linking IO immunity to the law of foreign sovereign immunity. In addition, the court dispels a number of concerns expressed by the IFC regarding the functional purpose of IO immunity being threatened by an incorporation of the FSIA's restrictive standards, as well as the possibility of IOs being exposed to excessive litigation in the aftermath of Jam.

In contrast to the majority's textualist approach to the interpretation of the IOIA, Justice Breyer's dissenting opinion will be analysed, which highlights a more purpose-based approach leading to an interpretation of the IOIA as solely incorporating the sovereign immunity standards applicable in 1945, and critiques the alleged threat to multilateralism posed by a restriction of IO immunity opening the doors to litigation against IOs in domestic courts. Finally, a discussion of the *Jam* decision on remand will reveal the ultimate upholding of the IFC's immunity in the D.C. District Court, as a further reminder of the necessity of the access-to-justice-based approach to IO immunity outlined in Chapter 3.

In fact, Chapter 3, which will conclude this thesis by proposing an alternative to the functional necessity framework for IO immunity, will open with an analysis of some of

the major implications and points of contention concerning *Jam v IFC*. Firstly, the relationship between international law and domestic law in the aftermath of *Jam* will be discussed, by addressing the Court's inconsistent treatment of treaty regimes granting narrower immunities than the IOIA, the difficult identification of self-executing treaties, and the relevance of customary international law for future litigation in the United States.

The analysis will then touch upon the concerns regarding the application to IOs of the FSIA's exception to state immunity and the alleged irreconcilability of the *jure imperii/jure gestionis* distinction with a functionalist approach to IO immunity, which not only inflate the presumed "technical challenges" arising from an incorporation of exceptions to State immunity into IO immunity frameworks, but also fail to consider the unclearness regarding whether functional immunity for IOs actually has any place within general international law and the consequent absence of sufficient grounds to argue that IO immunity could not be restricted for *acta jure gestionis*, as is the case for State immunity.

Before addressing the possibility for access to justice to become grounds for limitations to IO immunity, a mention will be made of the deterrent effect of *Jam*, with IOs possibly being pushed towards taking preventative action, in the form of seeking to avoid harm and strengthening their internal remedial mechanisms, in order to avoid the risk of liability before domestic courts. Finally, in Section 3.2, a proposal for access to justice considerations to be taken into account for the determination of IO immunity will be advanced, taking as a point of departure the steps left to be taken from *Jam*'s *de facto* enlargement of private parties' access to justice as an 'accidental' consequence of the IOIA's incorporation of the FSIA's restrictive standards of immunity, without an actual mention being made as to the right to seek a remedy of the plaintiffs in question.

Therefore, through an analysis of the 'reasonable alternative means' requirement for IO immunity established in *Waite and Kennedy* by the European Court of Human Rights, and on the basis of its drawbacks, this thesis will be concluded by a delineation of a 'right-to-an-effective-remedy' approach, as a desirable way of determining IO immunity, through a two-folded test examining IOs' internal dispute settlement mechanisms and their procedural and substantial effectiveness, so as to guarantee individuals' right to seek a remedy when affected by the actions of international organizations.

# 1. International Organizations Immunity: A Theoretical Framework

Having seen, in this thesis' Introduction, how the current treatment of jurisdictional immunities contributes to a general culture of unaccountability surrounding IOs, as well as the material harms resulting from it, as exemplified by the injuries suffered by the local communities affected by the Tata Mundra power plant project, *Jam*'s relevance to the law of international organizations becomes significantly more apparent. However, because of the controversial nature of various aspects of jurisdictional immunities, especially as they pertain to international organizations and the differences between the latter and state immunity, a general understanding of the nature, purpose and scope of IO's immunity, as well as their place within the US legal framework, is in order before the Supreme Court's decision in *Jam* can be thoroughly analysed in the subsequent Chapters.

## 1.1 The Nature of Jurisdictional Immunity

Before delving into the specificities of jurisdictional immunities as applied to international organizations, it should be made clear precisely what jurisdictional immunities entail, for states and IOs alike.

As Okeke plainly describes, jurisdictional immunity "bars a national court from subjecting certain legal persons to judicial process or adjudicating their legal relations[1]". When covered by immunity, a foreign sovereign or IO is assumed to be exempt from the exercise of jurisdiction of the state where the proceedings would take place. In other words, immunity is a "derogation from a national court's jurisdiction that renders domestic law unenforceable"[2].

What this definition suggests is that for immunity to even be an issue, the *a priori* existence of jurisdiction for the court in question must be considered[3], defined as the "power to administer justice"[4], whether it be in the form of an issuing of "warrants of arrest … the arrest and detention of person, investigation and inquiry or inquest, the

[1] Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations*, vol. 1 (Oxford University Press, 2018).
[2] Okeke.
[3] Arrest Warrant of 11 April 2000 Judgment (Democratic Republic of Congo v. Belgium) (I.C.J. 2002).: "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction".
[4] Sompong Sucharitkul, UN International Law Commission Special Rapporteur on Jurisdictional Immunities of States and Their Property, '2nd Report on Jurisdictional Immunities of States and Their Property /: By Mr. Sompong Sucharitkul, Special Rapporteur.', 9 June 1980,.

provision of security for costs, interim measures or injunction, attachment of property or freezing of assets, as well as other procedural steps before and during the hearing and trial by a court of law"[5].

However, the derogation from jurisdiction that immunity grants should not be seen as an exemption from the law operating within said jurisdiction[6]. The issue of whether immunity should be granted is decided *in limine litis*, before taking into consideration the case's merits and, therefore, independently of any substantive matter. In fact, "if the defendant State chooses to waive immunity, the action will proceed to a hearing and judgment. The grant of immunity is to be seen *not as qualifying a substantive right but as a procedural bar on national courts' power to determine rights*.[7]"

The separation between immunity rules and substantive law is essential to the nature of immunity itself. The very point of immunity is to "protect a foreign state that is entitled to it from being subjected to the jurisdiction of courts […], protection which would be meaningless were the foreign state forced to wait until the action is resolved on the merits to vindicate its rights not to be in court at all[8]". A consequence of immunity's precedence over any consideration of merit is that, in the event of an immunity claim, the court is unable to carry on with the trial until a decision is made on whether the defendant enjoys immunity under the court's jurisdiction[9]. Furthermore, it is the defendant itself who bears the burden of proof that it has an entitlement to immunity, and, after that, the plaintiff's burden to bring forward evidence to the contrary[10].

On the procedural character of immunity, Rossi provides meaningful insight: immunity rules have no bearing on substantive law, exemplified, as stated above, by the fact that the enjoyment of jurisdictional immunity within a certain jurisdiction does not exempt whoever enjoys such immunity from the substantive laws of the forum state. Vice versa, substantive law has no direct effect on immunity rules[11]. *Jurisdictional immunities* sheds light on this strict separation; the ICJ opined that the upholding of immunity should be

[5] Sucharitkul.
[6] Pierfrancesco Rossi, International Law Immunities and Employment Claims: A Critical Appraisal (Hart Publishing, 2021).
[7] Mcelhinney v. Ireland, No. 7192/04, 59887/08, 1203/09, 35037/09, 49032/09, 17989/10, 23264/11, 36887/11, 7190/15 (ECtHR [GC] 21 November 2001)., emphasis added
[8] Cassirer v. Kingdom of Spain, 616 F. 3d 1019 (Court of Appeals, 9th Circuit 2010).
[9] Okeke, Jurisdictional Immunities of States and International Organizations.
[10] Okeke.
[11] Rossi, International Law Immunities and Employment Claims.

independent of the fact that the case concerned violations of *jus cogens*, whose place at the apex of the international hierarchy of sources would suggest a prevailing – on substantive grounds – over rules of state immunity. In its refusal to deny Germany of its sovereign immunity, the Court argued that *jus cogens*' high value had no effect in overriding immunity rules, since its substantive nature does not give rise to any direct conflict with immunity rules.[12] This categorical reliance on the procedural nature of immunity rules has, unsurprisingly, received criticism, and immunity's effects on the proper exercise of certain substantive rights have a bearing on some courts' decisions for considerations of 'access to justice' to bear onto immunity law[13]. Considerations on the human right of access to justice in relation to international organizations immunity will be further analysed in Chapter 3.

Finally, another essential characteristic of jurisdictional immunity is its 'hybrid' placement between the international and national legal systems. Despite being a rule of international law, jurisdictional immunity is applied within national courts and it is still a matter of controversy the way in which international rules of immunity should be applied within domestic courts, as well as the extent to which domestic courts can supplement lacking international immunity regimes (as shall be discussed in the context of the Supreme Court's decision in Jam, where the immunities accorded by the IOIA were held as being only "default rules", without prejudice to IOs' constituent treaties specifying a different level of immunity)[14].

While this aspect of jurisdictional immunities will be further discussed in this Chapter's section on the sources of law governing international organizations immunity, it is convenient at this time to point out the Anglo-American legal tradition's recognition of international rules as necessitating of incorporation into domestic law. The mode of incorporation differs depending on whether the state in question adopts a monist or dualist system in regard to international law. In the monist system, an international treaty enters the domestic legal order upon ratification by the State, while in the dualist system, the

[12] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) (I.C.J. 2012); Rossi, *International Law Immunities and Employment Claims*.
[13] *See* Waite & Kennedy v. Germany, No. 26083/94 (Eur. Ct. H.R 1999), para. 52: "a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them *reasonable alternative means* to protect effectively their rights under the Convention [emphasis added]"; Rossi, *International Law Immunities and Employment Claims*.
[14] Okeke, Jurisdictional Immunities of States and International Organizations.

treaty only becomes a part of domestic law following the creation of subsequent implementing legislation.[15]

In the case of state immunity, however, it is important to note that – as the ICJ in *Jurisdictional Immunities* acknowledged – customary international law is its primary source of law, leading national courts, in the absence of domestic legislation incorporating said customary norms, to simply apply customary international law in its stead.. While there still is a vigorous debate over the precise *scope* of the customary obligation to grant foreign states immunity in specific circumstances, most States generally recognise that the overall distinction between state acts over which jurisdiction may be exercised and state acts which warrant state immunity lies in the division between *acta jure imperii* and *acta jure gestionis*, with jurisdiction being exercised over the latter; a court can lawfully exercise its jurisdiction over a foreign state's acts when those acts may be performed by any private entity[16].

However, I have only made reference to *state* immunity; that is because international organizations immunity possesses a much less ample amount of state practice to draw from. In fact, the existence of customary international law in regard to international organizations immunity is a largely debated matter, as will be discussed in the Section on IO immunity's sources of law, later in this Chapter.

## 1.2 The Purpose of Jurisdictional Immunity

As will appear clearer throughout this paper, the purpose of immunity has been grounds for most of the controversies surrounding the interpretation of certain immunity rules and treaty regimes, with functionalist arguments often being used to grant IOs a broader scope of immunity, even in the presence of more restrictive provisions. For this reason, in order to shed light on the evolution of IO immunity and possible future legal steps, it is first paramount to provide a general understanding of functionalism as a rationale for IO immunity.

Seen as this paper's analysis evolves in particular within the confines of the US legal framework, according to which the immunity of international organizations is articulated

[15] Okeke.
[16] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening); Okeke, *Jurisdictional Immunities of States and International Organizations*.

on similar grounds as that of states, further clarification on the rationale for state immunity and its theoretical separation from the rationale for IO immunity should prove useful.

### 1.2.1 State Immunity

Despite the United States tradition of considering state immunity as "a matter of grace and comity on the part of the United States[17]", the rationale for state immunity is more generally understood to be found in the "sovereignty principles of independence, equality and dignity of States[18]", as encapsulated by the Latin maxim *par in parem non habet imperium*. The position for disregarding considerations of comity was pointed out by the ICJ in *Jurisdictional Immunities*, in which sovereign immunity was considered to be "governed by international law and … not a mere matter of comity[19]". The basis for the application of the principle of sovereign equality in immunity matters can be traced back to the view of a foreign sovereign's sovereignty as comparable to that of the local sovereign. This consideration has been translated in practice as courts declining jurisdiction because of the notion that imposing judgment on a foreign sovereign, who personifies his State, and thus equally sovereign, would be an insult to his "regal dignity"[20]. On the matter, the European Court of Human Rights held that "sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.[21]"

Widely accepted in civil law and common law European countries alike throughout the 19th century, and later as a principle of customary international law on the basis of solid

[17] Verlinden BV v. Central Bank of Nigeria, 461 US 480 (Supreme Court 1983). The concept of considerations of "grace and comity" as justifications for sovereign immunity can be traced back to the US Supreme Court Chief Justice Marshall's opinion in *Schooner Exchange v. Mc Faddon* (1812), in which, despite the term "comity" not being explicitly used, the granting of state immunity was justified on the grounds of the US's consent and political considerations.
[18] Okeke, Jurisdictional Immunities of States and International Organizations.
[19] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening); Riccardo Pavoni, 'AN AMERICAN ANOMALY? ON THE ICJ'S SELECTIVE READING OF UNITED STATES PRACTICE IN JURISDICTIONAL IMMUNITIES OF THE STATE', *The Italian Yearbook of International Law Online* 21, no. 1 (2011): 143–59.
[20] Okeke, Jurisdictional Immunities of States and International Organizations.
[21] Okeke; Jones and Others v. the United Kingdom, No. 34356/06, 40528/06 (ECtHR 14 January 2014).

state practice[22], State immunity as a rule of international law has evolved through the decisions of domestic and international courts by relying on the rationale of *par in parem* considerations, of sovereignty, equality, comity and independence, and has been codified in national legislation by the United States through the enactment of the FSIA in 1976, by the United Kingdom in 1978, as well as by a number of other countries[23].

However, state immunity's shift from absolute to restrictive immunity, while continuously being justified by relying on the principle of sovereign equality of states[24], poses significant complications as to the explanatory power of the *par in parem* principle[25]. The reason why should be found in the fact that, as soon as areas of non-immunity are admitted within international law and sovereignty is no longer considered absolute, the forum and foreign state both have as much a reason to invoke their sovereignty to impose jurisdiction and to claim immunity respectively[26]. What Rossi makes clear with regard to the possible pitfalls of the theoretical justification for state immunity, is that there is a surprising gap in the evolution of international immunity law when it comes to state immunity, as compared to the changes in consensus that diplomatic immunity went through.

It should be noted that diplomatic immunity was traditionally justified on the basis of two theories: that of the representative character of diplomats and that of extraterritoriality[27]. While the theory of extraterritoriality, according to which immunity should be granted on the basis of an imagined position of the diplomat as never actually 'leaving' the sending state's territory and thus not bound by the receiving state's jurisdiction, has long been discarded as wildly untenable, as well as unreconcilable with the procedural nature of jurisdictional immunities, the theory of the representative character, according to which the diplomat is to be considered as a personification of the sending state[28], can be seen as a continuation of the *par in parem* principle, and thus liable to the same forms of criticism[29].

[22] Motoo Ogiso, UN International Law Commission Special Rapporteur on Jurisdictional Immunities of States and Their Property, 'Second Report on Jurisdictional Immunities of States and Their Property /: By Motoo Ogiso, Special Rapporteur.', 24 April 1989.
[23] Okeke, Jurisdictional Immunities of States and International Organizations.
[24] *See* Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening).
[25] Rossi, International Law Immunities and Employment Claims.
[26] Rossi.
[27] Rossi.
[28] *See* The Parlement Belge, LR 5 PD 197 (Court of Appeal 1878).
[29] Rossi, International Law Immunities and Employment Claims.

Of note, however, is the fact that diplomatic immunities *have* in fact evolved, and the current consensus surrounding them is that they theoretically rely on considerations of functional necessity (*ne impediatur legatio*)[30]. Functional necessity, as will soon be expanded upon, is the same theory at the basis of IO immunities (*ne impediatur officia*), a parallel which was made explicit in 1924 by Adatci and de Visscher, while discussing the League of Nations, whose immunity – they claimed – was meant to respect a functional interest, just like that at the basis of the modern connotation of diplomatic immunity[31]. Given that diplomatic and international organizations immunities share their theoretical grounding in functional considerations, it does seem peculiar that the rationale for state immunity still relies on the sovereign equality of states, when it could very well be justified in terms of functional necessity as well: state immunity exists so that states can proceed unimpeded in their endeavours to pursue public functions in foreign states[32]. Such a justification proves to be more adequate in a modern context, all while continuing to recognise the traditional roles that considerations of sovereign equality and comity have played in the facilitation of state functions by international law.

### 1.2.2 International Organizations Immunity

Having analysed state immunity's antiquated notions of sovereign equality and comity, it should come as even less of a surprise that IO immunity is *not* rooted in such notions, but rather is justified through a functional necessity rationale. In particular, international organizations require immunity for their independence to be preserved and to avoid state interference in the performance of their functions[33]. Notably, international organizations lack a territory, and thus any form of equal treatment with regards to other sovereigns, and their independent functioning is – ironically enough – completely dependent on their member states' restraint[34]. International organizations' dependence on their member states

[30] Rossi; 'Yearbook of the International Law Commission', 1955, vol II, 14, para. 21.: "II y a deux souverainetés en cause et il ne va pas de soi que l'une doit céder le pas à l'autre" ("There are two sovereignties at issue and it is not self-evident that one must give way to the other")
[31] Rossi, *International Law Immunities and Employment Claims*; M.M. Adatci and Charles de Visscher, 'Rapport Sur l'art. 7, al. 4: Privilèges et Immunités Diplomatiques Des Agents de La S.D.N.', in *Annuaire de L'Institut de Droit International*, 1924.
[32] Rossi, International Law Immunities and Employment Claims.
[33] Christopher P. Moore and Paul Kleist, 'Immunity for Multilateral Development Banks in the United States', in *Funding International Development Organizations: AIIB Yearbook of International Law 2021*, by Christopher Smith, Xuan Gao, and Thomas Dollmaier (Brill | Nijhoff, 2023).
[34] Moore and Kleist.

derives from the fact that, essentially, they are the "creatures of their members[35]": they are under the collective control of their members, from whom they receive their funding, and, while being legally granted international legal personality[36], their independence from member states is far from a clear matter.

While a number of organs, such as secretariats, are established within IOs for their independence to be preserved, the risk of interference is further prevented through the application of immunity rules for international organizations[37]. International organizations began to be set up by States to combat common problems and promote common interests on their behalf, so it should come as no surprise that functions bestowed upon IOs would necessitate autonomy and independence from the very states which founded them[38]. This independence would only be realised if member states sacrificed part of their sovereignty, granting IOs immunity from their jurisdiction, as being liable to litigation before domestic courts would indirectly put the operations of international organizations under the control of member states – through judicial means[39]. This "functional" rationale for immunity is perfectly encapsulated in the UN Charter, according to which the "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes[40]".

#### *1.2.2.1 "Functionalism"*

In order to truly grasp the meaning of "functional" immunities, a brief *excursus* on the concept of "functionalism", as a rationale for IO immunity, might be of use. On the origin and evolution of functionalism, Klabbers is an authoritative source:

> "[T]he term "function" [can be traced] back to the late 19th century writings of Georg Jellinek who … attributed a *Verwaltungszweck* to some kinds of cooperation between states. This was picked up by several others, most notably

[35] August Reinisch, 'Privileges and Immunities', in *The Oxford Handbook of International Organizations*, ed. Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (Oxford University Press, 2016).
[36] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, Rep. 174 (I.C.J. 1949); J. D. Fry, 'Rights, Functions, and International Legal Personality of International Organizations', 2018: "a closer reading … reveals that the ICJ's opinion has more to do with state parties bestowing functions and *rights* on the international institution for it to have international legal personality, rather than functions alone"
[37] Reinisch, 'Privileges and Immunities'.
[38] Okeke, Jurisdictional Immunities of States and International Organizations.
[39] Reinisch, 'Privileges and Immunities'.
[40] Art. 105, 'Charter of the United Nations', 1 UNTS XVI § (1945).

> by Paul Reinsch. For Reinsch, the outstanding characteristic of organizations was that they were assigned a function and, employing a fairly narrow definition of organization, he could confidently view those *functions as emanations of the common good*. Hence, function and moral appeal went hand in hand, culminating in Nagendra Singh's classic 1950s claim that *international organizations were considered to contribute to the* "*salvation of mankind* [emphasis added][41]".

Functionalism, therefore, can be said to fundamentally ground itself in the ultimate belief that international organizations *do* act in pursuance of a better world. The a-political nature of functionalism arises out of the notion that the operations of international organizations are simply substituting, for efficiency and costly purposes, those that would be carried out by the states themselves[42]. International organizations are viewed, from a moral point of view, as inherently benign entities; considering its sole commitment to its own functions, for an international organization to be considered morally objectionable, its functions would have to be wrongful themselves, leaving the states who set up the organization ultimately liable for having endowed it with wrongful functions[43]. The arguably problematic combination of moral and legal aspects attributable to functionalism will prove, throughout the evolution of case law on IO immunities, to implicitly permeate the discourse justifying the almost absolute immunity granted to international organizations on the basis of "functional necessity" considerations.

Functionalism being based on states delegating certain functions to IOs, which are created with the very purpose of performing said functions, and, therefore, states being participating members within IOs and IOs themselves having to answer to member states in the performance of their functions, reveals a fundamental flaw of functionalism: it lacks the means to address issues arising from external relations between IOs and third parties.

The problem of trying to apply the functionalist framework to IOs' relations with the outside world clearly manifests itself in functionalism's disinclination for issues of accountability: "under functionalism, it becomes well-nigh impossible to hold

[41] Jan Klabbers, 'The Transformation of International Organizations Law', *EJIL: Talk!* (blog), 18 August 2015, https://www.ejiltalk.org/the-transformation-of-international-organizations-law/; J. Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', *European Journal of International Law* 26, no. 1 (1 February 2015): 9–82, https://doi.org/10.1093/ejil/chv009.
[42] Klabbers, 'The EJIL Foreword'.
[43] Klabbers.

international organizations accountable to those other than their own member states[44]". Recalling the previously mentioned moral aspects of functionalism, as well as its inherent reliance on member states assigning and controlling the functions of IOs, it seems unsurprising how, even in the face of grave violations of international law, the expansionist potential of functionalism, with states granting almost absolute immunity when most acts can be attributed to a specific function, has managed to ascribe near-impunity to international organizations[45].

The "unintentional" transformation of functional immunity into *de facto* absolute immunity[46] will prove clearer when analysing the scope of jurisdictional immunities as they are applied by national courts. However, before delving into this and other topics, it might be of use to restate the functional purpose of IO immunities for clearness sake. On the topic of the functional necessity rationale underlying immunities, the Supreme Court of Canada held that:

> "[An international] organization must operate on the territory of a foreign state and through individuals who have nationality and is therefore vulnerable to interference, since it possesses neither territory nor a population of its own. This reality makes immunity essential to the efficient and independent functioning of international organizations. It also shapes the immunities and privileges that are granted to international organizations.[47]"

As was discussed throughout this section, international organizations are set up by states to perform specific functions on their behalf and in their common interest, meaning IOs need to be free to perform said functions autonomously and without interference from their member states[48]. Thus, to avoid any possibility of interference by member states or disruption to their operations, IOs are granted jurisdictional immunity before domestic courts. Since this immunity is grounded in a functional rationale, it shall apply only to the extent necessary for the performance of the IOs' functions[49]. Just how that extent shall be

[44] Klabbers, 'The EJIL Foreword'.
[45] Klabbers, 'The Transformation of International Organizations Law'.
[46] See Rishi Gulati, 'The Nature of Institutional Immunities', in Access to Justice and International Organisations: Coordinating Jurisdiction between the National and Institutional Legal Orders, 1st ed. (Cambridge University Press, 2022), 131–67, https://doi.org/10.1017/9781108946377; Rossi, International Law Immunities and Employment Claims; Reinisch, 'Privileges and Immunities'.
[47] Amaratunga v. Northwest Atlantic Fisheries Organization, [2013] 3 SCR 866 (Supreme Court of Canada 2013); Gulati, 'The Nature of Institutional Immunities'.
[48] Gulati, 'The Nature of Institutional Immunities'.
[49] Gulati.

determined depends on how the scope of immunity is approached by courts, and how different sources of law regarding IO immunities are considered and interpreted, all of which will be analysed further in the subsequent sections of this Chapter.

## 1.3 The Legal Sources of the Immunity of International Organizations

The attribution by courts of privileges and immunities to international organizations relies on a number of different treaties. The variety of sources from which the scope of an IO's immunity can be gleamed stems from the fact that there is no one international instrument which can be applied for every international organization, since the International Law Commission was stopped in its tracks, in 1992, before it could finalise its draft convention[50].

The most detailed provisions can usually be found within multilateral or bilateral treaties specifically concluded to provide an international organization with an adequate immunity regime, since constituent instruments, while themselves oftentimes including provisions related to immunities, tend to only provide in general terms for "functional immunities"[51]. Hardly any such instrument explains what is meant by the term immunity "necessary for the functioning" of an international organization[52]."

As for multilateral treaties, we can find prominent examples in the conventions detailing the privileges and immunities of the UN and its specialised agencies, the General Convention and the Specialised Agencies Convention[53]. Just as the UN tends to set the example for other international organizations to follow, in this regard too the UN conventions proved to be a solid framework for other multilateral treaties dealing with immunities of IOs[54].

As for bilateral treaties, these usually consists of either "headquarters agreements" between the international organization and the state where it is headquartered, or

[50] Rossi, International Law Immunities and Employment Claims.
[51] Reinisch, 'Privileges and Immunities'.
[52] August Reinisch, 'Immunity of Property, Funds, and Assets', in *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary*, ed. August Reinisch, First edition, Oxford Commentaries on International Law (Oxford, United Kingdom: Oxford University Press, 2016).
[53] Reinisch, 'Privileges and Immunities'.
[54] Rossi, International Law Immunities and Employment Claims.

agreements between the IO and a non-host state within which the organization operates frequently[55].

For the provisions within these treaties to be applied appropriately, the principle of *lex specialis* applies: wherever there are bilateral agreements in place, those should be applied over multilateral treaties, and in the absence of either of these types of agreements, IO constitutions are utilized as sources from which to adjudicate on immunity matters[56].

While immunities are usually accorded through these different types of agreements, the question has come up within scholarship as to whether international organizations can be considered to enjoy immunity under customary international law. Arguments in support of the existence of customary international obligations with respect to immunities have been summarised by Rossi as threefold: firstly, there are – or perhaps were, in the earlier stages of discourse surrounding international organizations immunity[57] – those who view organizations as common organs of their member states, which would mean that suing an international organization would correspond to suing its member states, a matter which would thus fall within the law of state immunity[58]. However, this perspective falls apart when one considers that international organizations are autonomous from their member states, and they possess legal personality of their own, separate from states[59].

Another argument in support of a customary international obligation towards immunity regards precisely the fact that states have recognised the international legal personality of IOs and that immunity would result directly from that[60]. Against this point it can be argued that personality and immunity are inherently different concepts, with immunity possibly being granted even to IOs whose international personality is not ascertained[61].

Finally, it has been proposed that a norm of customary international law with respect to immunity can be said to have arisen out of state practice and *opinio juris* to that end, but this theory too is scarcely substantiated by evidence, since, not only are cases dealing with IO immunity not frequent enough, but wherever they arise the courts' responses are

[55] Reinisch, 'Immunity of Property, Funds, and Assets'.
[56] Rossi, International Law Immunities and Employment Claims.
[57] Michael Wood, 'Do International Organizations Enjoy Immunity under Customary International Law?', in *Immunity of International Organizations*, ed. Niels Blokker and Nico Schrijver, Legal Aspects of International Organization, volume 55 (Leiden Boston: Brill Nijhoff, 2015).
[58] Rossi, International Law Immunities and Employment Claims.
[59] Rossi.
[60] Rossi.
[61] Rossi.

not necessarily analogous[62]. With regard to this last point, Sir Michael Wood, whose study is considered an authoritative source on the matter, has argued against the existence of a customary international obligation towards immunity in the following terms:

> "[A]part from treaties, there does not appear to be a great deal of practice or *opinio juris* on the immunity of international organizations. And while there are many treaties dealing with the matter, their significance for the generation of a rule of customary international law seems questionable. *Such domestic case-law as does exist is often inconclusive, and not carefully reasoned, and at the same time reveals a wide range of contrasting views*. The International Court of Justice has not spoken on the matter; and the sparse writings are likewise inconsistent and inconclusive [emphasis added][63]"

Perhaps the most serious argument in favour of the existence of a norm of customary international law with regard to IO immunity relies exactly on what Wood mentioned to be a large presence of treaties dealing with the issue, since "it is generally recognized that treaties may be a reflective of pre-existing rules of customary international law; generate new rules and serve as evidence of their existence; or, through their negotiation processes, have a crystallizing effect for emerging rules of customary international law[64]". However, it is still largely unclear whether the treaties adopted warrant the emergence of norms of customary international law; the fact that IOs and states continue to enter into international agreements outlining immunities seems to suggest that there is not a "general practice accepted as law[65]". To the contrary, the presence of a concerted effort to continue to address immunity issues through treaties could indicate the absence of a sense of legal obligation (*opinio juris*) on the part of states that immunity shall be enjoyed by IOs under customary international law[66].

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[62] Rossi.
[63] Wood, 'Do International Organizations Enjoy Immunity under Customary International Law?'; Niels Blokker, 'Jurisdictional Immunities of International Organisations – Origins, Fundamentals and Challenges', in *The Cambridge Handbook of Immunities and International Law*, ed. Tom Ruys, Nicolas Angelet, and Luca Ferro, 1st ed. (Cambridge University Press, 2019), 185–200.
[64] Michael C. Wood, UN International Law Commission Special Rapporteur on the Formation and Evidence of Customary International Law, 'First Report on Formation and Evidence of Customary International Law /: By Michael Wood, Special Rapporteur', 17 May 2013.
[65] 'Statute of the International Court Of Justice' (1945), Art.38(1)(b); The requirements are further explained in 'Identification of Customary International Law', in *Yearbook of the International Law Commission 2018, Vol. II, Part 2*, by United Nations International Law Commission, Yearbook of the International Law Commission (United Nations, 2023).
[66] Wood, 'Do International Organizations Enjoy Immunity under Customary International Law?'

Besides the sources already mentioned, IO immunities can also be included in domestic legislation[67], with some states unilaterally granting privileges and immunities to specific IOs regardless of whether the state is under an international obligation to do so[68]. This goes further than the 'enabling legislation' passed by states adopting a dualist approach to the incorporation of treaty law, since it is at times enacted by states adopting a monist approach as well, as a way of solidifying their stance towards IO immunity[69]. Furthermore, it is often the case for non-member states of a specific international organization to implement specific domestic legislation granting immunity to that IO, in the event a bilateral agreement between the non-member state and the IO is not in place[70].

Since *Jam* deals with the US Supreme Court's interpretation of the US International Organizations Immunities Act (IOIA), it should be noted that the principle of *lex specialis* mentioned with regards to treaties and constituent instruments applies here as well: as the Court pointed out, the immunities outlined in the IOIA "are only default rules. […] [T]he organization's charter can always specify a different level of immunity[71]"

## 1.4 Scope of Jurisdictional Immunity

As has been discussed in the previous section, international organizations immunities are mostly outlined within certain treaty provisions, be it as part of multilateral or bilateral treaties or of constituent instruments. Consequently, the ability to determine the scope of an IO's immunity is essentially a matter of interpretation of the pertinent treaty provisions, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[72]". The jurisdictional immunity that international organizations are endowed with varies depending on the organization in question and on the specific treaty being considered, even though it is possible to identify certain common standards in scope across these different sources.

[67] Reinisch, 'Privileges and Immunities'.
[68] Rossi, International Law Immunities and Employment Claims.
[69] Reinisch, 'Privileges and Immunities'.
[70] Reinisch.
[71] Jam v. Intern. Finance Corp., 139 S. Ct. 759 (Supreme Court 2019), 14; Rossi, *International Law Immunities and Employment Claims*.
[72] 'Vienna Convention on the Law of Treaties', 1155 U.N.T.S § (1969); Okeke, *Jurisdictional Immunities of States and International Organizations*.

While different authors favour different perspectives[73], Reinisch's categorisation appears to be the most effective, with immunities to be referred to as either functional, absolute, quasi-sovereign, or specifically restricted[74].

### 1.4.1 Functional Immunity

As has been analysed in the 'Purpose of jurisdictional immunity' section, the theoretical rationale for IOs immunity relies on a "functional necessity" argument. And, in fact, as regards the scope of the immunity of most international organizations, immunities "necessary for [their] functioning" is stated in most of their constituent instruments[75]. However, hardly any of these constituent instruments explain exactly what is meant by immunity "necessary for the functioning" of the IO, and how the interpretation of functional immunities is carried out actually varies quite a lot, with some more specific multilateral and bilateral treaties outlining IO immunities often providing for essentially "absolute immunity"[76], as shall be discussed in the following sub-section.

However, it is important to reinforce the existence of a distinction between the functional *rationale* for IO immunity, which essentially applies to every international organization, as has already been discussed with regard to the purpose of jurisdictional immunity, and the *stricto sensu* functional *scope* of IO immunity to be found within a significant number of constituent treaties, since, in the absence of a specific treaty outlining an IO's immunity, a domestic court might find itself obliged to determine an international organization's immunity from said constituent treaty[77]. The problem, in this case, is the inconsistency in interpretation that results from the inherent vagueness of the provisions outlining functional immunities.

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[73] *See* Okeke, *Jurisdictional Immunities of States and International Organizations*: While Okeke's extensive study on the immunities of IOs was utilised as a source of research for this paper, he takes a more conservative – or perhaps, excessively optimistic – approach towards the functional "promise" of immunity, which will be largely disregarded here because of a difference in stance towards "functionalism". He claims that distinguishing between absolute and restrictive immunity as it pertains to IOs immunity would take away from the fundamentally "functional" basis of immunity. However, for the purpose of this paper and the critical approach it adopts towards "functionalism" and its practical uses, it appears important to consider this distinction more deeply (*See* also Gulati, 'The Nature of Institutional Immunities'.)

[74] Reinisch, 'Privileges and Immunities'.

[75] Reinisch.

[76] Rossi, International Law Immunities and Employment Claims.

[77] Rossi.

Not every author agrees on this point; Gulati, for example, responds to Reinisch's, and Klabber's[78], criticisms of the functional scope of IO immunities as described within constituent instruments in straightforward – while perhaps simplistic – terms: while the reasons for an IO's existence certainly do not provide adequate grounds for establishing immunity, an IO's specific functions, such as peacekeeping for the UN or lending for MDBs, can be gleamed from its constituent instruments[79]. While there is a contrasting argument to be made regarding exactly *what* the all-encompassing protection of an IO's functions practically entails in terms of human rights protection, access to justice considerations and the like, as will be analysed with respect to the consequences of *Jam*, in the meantime it seems important to underline that, in practice, the protection of IOs acting in pursuance of their purposes, does often result in courts granting a sort of "blanket immunity" to said IOs[80]. As an example of this widespread behaviour, Rossi cites the Austrian Supreme Court's protection of OPEC's immunity[81], on the grounds that "IOs are functional entities and therefore all their acts are necessarily connected to their functions[82]".

Apart from the criticisms that may be advanced with regards to the perceivably inherent vagueness of functional immunity provisions, a subsequent step in the determination of the scope of IO immunities poses significant problems: after determining whether an IO's action should be attributable to one of its functions, thus falling within the scope of the IO's "functional immunity", the court assessing whether said IO should be granted immunity ought to determine whether the particular act actually hinders the IO's ability to execute its mandated functions[83]. On this second point, even Gulati admits to the confusion pervading national courts as to whether immunity should be granted, and that most courts' practice seems to point to a general upholding of immunity regardless of an actual justification[84].

[78] Klabbers, 'The EJIL Foreword'.: "Often enough, constituent documents may refer to a variety of goals or purposes (some of them perhaps conflicting), and there might be a discrepancy between the formal task of an institution and the reasons for its creation"
[79] Gulati, 'The Nature of Institutional Immunities'.
[80] Rossi, International Law Immunities and Employment Claims.
[81] Company Baumeister Ing Richard L v O, 10 Ob 53/04y, ILDC 362 (Austrian Supreme Court 14 December 2004).
[82] Rossi, International Law Immunities and Employment Claims.
[83] Gulati, 'The Nature of Institutional Immunities'.
[84] Gulati.

On the question of whether imposing jurisdiction *effectively* hinders IOs' ability to execute their functions, Rossi claims that courts' interpretation of functional immunity provisions as essentially allowing IOs to enjoy almost-absolute immunity disregards the fact that, even in the face of an act executed in the pursuance of an IO's functions, the exercise of jurisdiction with respect to that act does not necessarily pose an obstacle to the efficient and independent functioning of the IO in question: "[t]he fact that an [IO] may perform an act in furtherance of its purposes … does not imply that it requires jurisdictional immunity for that act[85]".

### 1.4.2 Absolute Immunity

Despite the functional immunity provisions of most constituent instruments being themselves often interpreted by courts (when no more detailed treaty on immunity can be applied) to grant a sort of blanket immunity to IOs, absolute immunity can also be treaty-based, as many more specific privileges and immunities agreements provide for the international organizations they address to be immune from jurisdiction under any circumstance[86].

This sort of absolute immunity can be found within the texts of the General Convention and the Specialised Agencies Convention, outlining the immunities of the UN and its specialised agencies, which have already been mentioned as paramount examples of multilateral treaties detailing the immunities of IOs in a more specific manner than is done in their constituent instruments[87]; the General Convention and the Specialised Agencies Convention both specify that the IOs they represent "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity[88]". This same absolute standard of immunity has been adopted under other privileges and immunities agreements, as well as in a number of headquarters agreements[89].

[85] Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', *Virginia Journal of International Law* 36, no. 1 (1996 1995): 163; Rossi, *International Law Immunities and Employment Claims*.
[86] Reinisch, 'Privileges and Immunities'.
[87] Reinisch.
[88] 'Convention on the Privileges and Immunities of the United Nations' (1946) Art II(2); *See also* 'Convention on the Privileges and Immunities of the Specialized Agencies' (1947) Art III(4).
[89] Reinisch, 'Privileges and Immunities'.

Bordin, in this following passage, which efficiently summarises the points mentioned in the preceding sub-sections, explains the widening in scope of IO immunities to "downright absolute" lengths in terms of an extension of functionalist thinking:

> "Functionalism offers a justification for treaty regimes that are far more protective than the customary rules that applies to States. Several constituent instruments enact functionalism into law by providing that IOs shall enjoy the immunities necessary for the fulfilment of their purposes. Such 'functional immunities' are sometimes bolstered by supplementary treaties and headquarters agreements envisaging 'immunity from every form of legal process', the upshot being that among the parties to those treaties the immunities to which the organization is entitled are not merely functional but downright absolute. And that is all done in the name of functionalism […][90] ."

### 1.4.3 Quasi-sovereign Immunity

A more restrictive standard of immunity may emerge from some immunity instruments and agreements, either as upholding the same standards required for state immunity or as a specific restriction to be applied on the basis of the IO in question's area of operation, as is often the case with international financial institutions[91].

As it pertains to quasi-sovereign immunity, while the fact that IO immunity and state immunity are rooted in different theoretical grounds, provisions purposely applying to IOs immunity standards analogous to those of states are at times found within certain immunity instruments and agreements[92].

The most crucial example, especially as it pertains to this paper, is the United States' International Organizations Immunities Act (IOIA), according to which international organizations whose immunity is covered by the IOIA "shall enjoy the same immunity from suit … as is enjoyed by foreign governments[93]". This provision has caused a divergence in interpretations throughout US case law, with the predominant interpretation (until *Jam*) being that the provision granted absolute immunity as was granted to foreign

[90] Fernando Bordin, 'To What Immunities Are International Organizations Entitled under General International Law? Thoughts on Jam v IFC and the "Default Rules" of IO Immunity', *QIL QDI* (blog), 5 July 2020, [emphasis added].
[91] Reinisch, 'Privileges and Immunities'.
[92] Rossi, International Law Immunities and Employment Claims.
[93] 'International Organizations Immunities Act', 22 U.S.C. § 288a(b) (1945).

states when the IOIA was enacted in 1945, before the codification of the Foreign Sovereign Immunities Act (FSIA), which would change sovereign immunity to its current restrictive standard[94]. This divergence in interpretation, however, was resolved in *Jam*, where the Supreme Court favoured a restrictive interpretation of the IOIA provision[95]. The US Supreme Court's ruling in *Jam* will be discussed in the following Chapters.

### 1.4.4 Specifically Restricted Immunity

Finally, provisions within a number of immunity instruments delineate exactly what activities fall outside of the scope of IOs' official activities covered by immunity[96]. These "exceptions" to immunity, however, are still based on a largely functionalist rationale, as is the case for most MDBs' constituent instruments, which usually do not provide for immunity when it comes to the banks' lending operations, since the existence of immunity in these instances would constitute an obstacle with regards to the organization's creditworthiness[97]. The constituent instrument for the International Bank for Reconstruction and Development (IBRD), commonly known as the World Bank, for example, provides for immunity of very limited scope:

> "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members.[98]"

The purpose of this sort of restricted immunity, which is replicated in almost identical terms by the IFC's Articles of Agreement, has to be found in the negative consequences that would arise out of a general immunity for the activities of international financial institutions, as Treichl and Reinisch have explained in the following terms: "if the partners of IFIs in financial transactions were precluded from bringing claims against the institution, the latter's promises would amount to nothing on the capital market". The functionalist rationale underlying even this type of specifically restricted immunity will

[94] Reinisch, 'Privileges and Immunities'.
[95] Rossi, International Law Immunities and Employment Claims.
[96] Reinisch, 'Privileges and Immunities'.
[97] Reinisch.
[98] 'Articles of Agreement of the International Bank for Reconstruction and Development', 27 December 1945.

appear clearer when discussing *Mendaro v World Bank*[99] in the next Chapter, and the "corresponding benefit test" that was applied to the IO with regards to the decision of whether its immunity should be upheld or not[100].

## 1.5 Conclusion

The theoretical framework for jurisdictional immunities outlined in this Chapter, along with all the interpretative doubts that pertain to the field, provide the necessary background for an informed analysis of the *Jam v International Finance Corporation* Supreme Court decision that will be carried out in Chapter 2. By analysing the nature, purpose, scope and legal sources of IO immunity, the foundations for the problems giving rise to the tortuous evolution of US case law on the matter, leading up to *Jam*, are exposed. In particular, the concept of "functionalism", described in this Chapter both as a rationale for IO immunity and as strictly a 'measure' of the scope of IO immunity, will be of exceptional relevance, as to its application and the problems deriving from it, throughout the rest of this thesis.

[99] Mendaro v. World Bank (Court of Appeals, Dist. of Columbia Circuit 25 May 1983).
[100] Yohei Okada, 'The Immunity of International Organizations before and after Jam v IFC: Is the Functional Necessity Rationale Still Relevant?', *QIL QDI* (blog), 5 July 2020, http://www.qil-qdi.org/the-immunity-of-international-organizations-before-and-after-jam-v-ifc-is-the-functional-necessity-rationale-still-relevant/.

# 2. A New Standard for IOs? The Immunity of IOs Throughout US Case Law and *Jam v IFC*

## 2.1 The Evolution of US Rules Regarding Immunity

In recent years, we have witnessed an increasing amount of scholarly attention being given to the privileges and immunities of international organizations, as well as a steadily rising number of cases dealing with the immunity of said organizations[101]. Such a finding might seem puzzling at first, especially considering that the legal framework surrounding the privileges and immunities of international organizations in domestic courts has not been significantly altered in the United States since 1976, when the FSIA was enacted. Before delving into the judicial history of IOs' immunity in the US, therefore, a brief overview of the legal framework surrounding immunity in the United States as well as an analysis of the effects the development of international organizations has had on their interaction with the American legal system seem to be in order.

Today, the statutory framework regarding IO immunity in the United rests on both constituent and bilateral treaties specific to single organizations, as well as on the IOIA[102]. The IOIA, and its relationship with the FSIA, however, only come into play whenever specific treaty provisions regarding a certain IO's immunity are absent[103]. Furthermore, it is exactly the relationship between the IOIA and the subsequently adopted FSIA that have caused controversy among scholars and judges alike, precisely because of the reasons underlying the IOIA's adoption and the difficult reconciliation between those and the changes in immunity brought about by the FSIA.

The history of international organizations' immunity in the United States begins in 1945, with the adoption of the International Organizations Immunities Act (IOIA). The reasons for this statute's enactment rest on the particular climate that was forming in the US as regards multilateralism and international organizations[104]. With the founding of the

[101] David P. Stewart and Ingrid Wuerth, 'The Jurisdictional Immunities of International Organizations: Recent Developments and the Challenges of the Future', in *The Restatement and Beyond*, by David P. Stewart and Ingrid Wuerth (Oxford University Press, 2020), 411–32, https://doi.org/10.1093/oso/9780197533154.003.0020.
[102] Charles H Brower, 'United States', in *The Privileges and Immunities of International Organizations in Domestic Courts*, ed. August Reinisch (Oxford University Press, 2013), 0, https://doi.org/10.1093/acprof:oso/9780199679409.003.0017.
[103] Stewart and Wuerth, 'The Jurisdictional Immunities of International Organizations'.
[104] Desiree LeClercq, 'A RULES-BASED APPROACH TO JAM'S RESTRICTIVE IMMUNITY: IMPLICATIONS FOR INTERNATIONAL ORGANIZATIONS', *HOUSTON LAW REVIEW*, 2020.

United Nations, which the US was fully supportive of, the possibility came about for the UN headquarters to be located in the United States[105]. In order to facilitate the emplacement of the UN headquarters on US ground, the US government decided to enact the IOIA, as a further safeguard to IOs' immunity, especially in light of the spread of "functional necessity" doctrine for the protection of IOs' independence[106]. In particular, what prompted the drafting of the IOIA was a report following the San Francisco Conference of 1945 submitted by the Secretary of State to the US President, which highlighted the need to adopt adequate immunity legislation to ensure the UN's independence expressed in the Charter, an issue of particular importance to the US since the organization would likely be headquartered in the United States[107].

The US attitude towards the UN and the protection of its autonomy from member states' interference can be gleamed from the following observation made by the US delegation to the UN:

> "The United Nations, being an organisation of all of the member states, is clearly not subject to the jurisdiction or control of any one of them and the same will be true for the officials of the Organisation. The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has a seat … The United States shares the interest of all Members in seeing that no state hampers the work of the Organisation through the imposition of unnecessary local burdens[108]."

The generous immunity granted by the IOIA can be attributed to the fact that the statute provided IOs with "the same immunity from suit and every form of judicial process as enjoyed by foreign governments[109]", which at the time corresponded to virtually absolute immunity, since foreign sovereign immunity – absent a statute regulating it – still relied on customary international law. However, even in 1945, some differences still existed between the immunities granted to IOs and those granted to foreign governments. The reason for this similar-but-not-identical relationship between the two rests on the rationale

[105] LeClercq.
[106] George B Adams, 'Plain Reading, Subtle Meaning: Rethinking the IOIA and the Immunity of International Organizations', *FORDHAM LAW REVIEW* 81 (2012).
[107] Adams.
[108] 'The Charter of the United Nations: Hearings Before the Committee on Foreign Relations, United States Senate, 79th Congress' (U.S. Government Printing Office, 1945).
[109] 'International Organizations Immunities Act', 22 U.S.C. § (1945).

for granting IOs immunity: while sovereign immunity is grounded in considerations of comity and sovereign equality, the immunity of IOs, based instead – as the Third Restatement of 1986 as well points out – on functional necessity, was meant as a partial surrender of sovereignty on the part of the US in order to participate in said international organizations, which would also serve American "self-interest" as further protection to organizations not located in the US, but which the US was nevertheless member to.[110] Furthermore, international organizations' immunity entailed a number of limitations not attributed to sovereign immunity. For example, while foreign diplomatic officers were granted full immunity from suit in the United States, the immunity of IOs' officers and officials was limited to acts performed in their official capacity[111]. Another characteristic peculiar to international organizations' immunity was the ability for the President to limit the immunities granted by the IOIA, whether to avoid an abuse of IO immunity or to waive said immunity when it concerned commercial activities[112].

Apart from the slight differences already applying to these two types of immunity, sovereign immunity would nevertheless be going through significant changes throughout the following years, thus affecting international organizations immunity through the IOIA and the academic discourse surrounding it. The shift in sovereign immunity from absolute immunity to a new restrictive approach began with the State Department and was later codified in the 1976 Foreign Sovereign Immunities Act (FSIA).

In 1952, due to the rising tendency among foreign governments to engage in commercial activities with private parties, the US State Department, through the publication of the "Tate Letter", implemented a more restrictive approach to foreign sovereign immunity, since the previously applied absolute immunity standard was increasingly leading to impunity for governments in the face of breaches of contractual obligations[113]. This new restrictive theory of immunity, therefore, distinguished between acts performed by foreign states in their official capacity (*acta jure imperii*), which would still be covered by immunity, and instances in which foreign states were acting in the same capacity as a

[110] Adams, 'Plain Reading, Subtle Meaning: Rethinking the IOIA and the Immunity of International Organizations'.
[111] Adams.
[112] Adams.
[113] LeClercq, 'A RULES-BASED APPROACH TO JAM'S RESTRICTIVE IMMUNITY: IMPLICATIONS FOR INTERNATIONAL ORGANIZATIONS'.

private party (*acta jure gestionis*), which, in order to protect foreign sovereigns' private contractual partners from injury, would not be covered by immunity[114].

The 1976 FSIA would reaffirm the principles expressed in the Tate Letter, officially codifying restrictive immunity for foreign states, as well as removing the role of the executive from sovereign immunity decisions, which would thereafter be the sole prerogative of the judicial branch[115].

And, while the FSIA fixed many of the doubts regarding foreign sovereign immunity, its avoidance of the topic of IO immunity was a catalyst for the interpretative problems surrounding the IOIA's reference to "the same immunity … as is enjoyed by foreign governments[116]". These problems were further exacerbated by the developments surrounding international organizations: while the IOIA's absolute approach to immunity could perhaps be justified in the first years of its existence, due to the relative small number of organizations and restricted scope of their operations, the emergence of new wide-reaching IOs as well as the increasing scope and significance of their activities was leading to a significant rise of claims against IOs' conduct in domestic courts, the nature of which seemed often difficult to reconcile with an absolute approach to IOs immunity[117].

In light of these two developments, US courts, in the decades following the FSIA's enactment, have attempted to reconcile the two legal regimes of the IOIA and the FSIA through a number of different interpretations, as the judicial history described below will demonstrate. Out of this debate, and because of the prominent presence of international organizations headquartered in the United States, a large number of decisions have been rendered applying the IOIA, out of which two categories in particular seem to be causing the most difficulty and producing the most controversy: (a) cases regarding activities which are core to the very function of the international organization on trial, such as those challenging the behaviour of international financial institutions in their lending practices, which is the very backdrop to the *Jam v IFC* case, and (b) cases challenging IOs' employment practices, which have had a significant impact on human rights

[114] LeClercq.
[115] Adams, 'Plain Reading, Subtle Meaning: Rethinking the IOIA and the Immunity of International Organizations'.
[116] International Organizations Immunities Act, 1945.
[117] Stewart and Wuerth, 'The Jurisdictional Immunities of International Organizations'.

considerations within IO immunity and have been the most clear point of separation between the ECtHR's approach to IO immunity and its American counterpart. Both of these types of cases leading up to *Jam* will be the object of this section's analysis[118].

### 2.1.1 IO Immunity in United States Courts: From *Broadbent* to *OSS Novalka*

The first time the FSIA's impact on IOs immunity was addressed by a federal appellate court was in 1980, with the DC Circuit's ruling in *Broadbent v Organization of American States*[119]. The case concerned an employment claim from former OAS employees whom had been dismissed as a part of a "reduction in force[120]", which, they claimed, constituted a violation of OAS' rules and procedures[121]. Since the OAS and the US had not yet concluded a headquarters agreement detailing the organization's immunity, the decision fully depended on the court's interpretation of the IOIA[122]. While the OAS Administrative Tribunal had held that the OAS Secretary General had improperly dismissed the plaintiffs and granted them indemnity, the seven former employees were left unsatisfied and decided to bring the matter before the federal district court[123]. The DC district court initially held that the claim did indeed fall within the FSIA's definition of a commercial activity, meaning the case fell within its jurisdiction, but later reversed its decision, refusing to entertain jurisdiction on the basis that the IOIA only grants federal district courts jurisdiction over claims against IOs, while the FSIA grants jurisdiction only over claims against foreign States[124].

On appeal, the DC circuit upheld OAS immunity stating that – even if the court were to accept a restrictive interpretation of the IOIA in light of the FSIA – employment disputes concerned the internal administration of the OAS, a non-commercial activity to which the FSIA exception did not apply[125].

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[118] Stewart and Wuerth.
[119] Broadbent v. Organization of Am. States (Court of Appeals, Dist. of Columbia Circuit 17 September 1979); Adams, 'Plain Reading, Subtle Meaning: Rethinking the IOIA and the Immunity of International Organizations'.
[120] Broadbent v. Organization of Am. States, 628.
[121] David P. Stewart, 'Holding International Organizations Accountable: Recent Developments in U.S. Immunities Law', *King's Law Journal* 34, no. 3 (2 September 2023): 443–62, https://doi.org/10.1080/09615768.2023.2283230.
[122] Brower, 'United States'.
[123] Rossi, International Law Immunities and Employment Claims.
[124] Stewart, 'Holding International Organizations Accountable'.
[125] Stewart.

Despite the court in *Broadbent* explicitly refusing to decide on whether the FSIA's commercial activity exception could be applied to international organizations, a similar situation presented itself with *Mendaro*, from which the much debated 'corresponding benefit' test was coined.

The plaintiff in *Mendaro v World Bank*[126], Susana Mendaro, was a former World Bank researcher who claimed to have been the victim of sexual harassment and discrimination on the part of other Bank employees, as well as having been denied a promotion which was in line with the work she had been doing for the organization[127]. The matter was brought before the DC District Court under the 1964 Civil Rights Act, with the plaintiff arguing that, while it is true that the IOIA generally grants international organizations immunity from suits regarding employment matters, the World Bank's Articles of Agreement effectively waive the immunity from suit the Bank would otherwise enjoy under the IOIA[128]. She cited Article VII, section three of the Bank's Articles of Agreement in support of her argument, which states that "actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.[129]"

Mendaro further cited the two limitations to the provision, regarding suits brought by member states and actions claiming prejudgment attachment of the Bank's assets, as further evidence of the Bank's intention to waive its immunity and knowledge of how to limit said waiver[130]. The DC district court, however, rejected this interpretation and dismissed the action for lack of jurisdiction.

On appeal, the DC Circuit, in agreement with the district court's decision, held that the provision in the Bank's Articles of Agreement, while "somewhat clumsy and unartfully drafted", could not be interpreted as encompassing a waiver of immunity from employment claims for the purpose of the IOIA[131].

[126] Mendaro v. World Bank, 717.
[127] Klabbers, 'The EJIL Foreword'.
[128] Klabbers.
[129] 'Articles of Agreement of the International Bank for Reconstruction and Development', 27 December 1945.
[130] Mendaro v. World Bank, 717.
[131] Brower, 'United States'.

The court's reasoning followed a functionalist approach having to do with a sort of "cost-benefit" analysis of the exercise of jurisdiction over an IO[132]. The Bank was established to perform specific functions, and the purpose of its immunity "rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory.[133]" Therefore, the court found it be difficult to believe that an IO would waive immunity for employment claims, seen as such a waiver would require the Bank to administer the different employment policies of each of its member state, effectively hindering the execution of its functions.[134] This "corresponding benefit test" was described by the court as follows:

> "Since the purpose of [IO immunities] is to enable the organizations to fulfil their functions, applying the same rationale in reverse, it is likely that most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization's goal.[135]"

This approach led the court to distinguish between a waiver of immunity for activities "arising out of the Bank's external relations with its debtors and creditors[136]", whose functional necessity lies in the fact that the Bank's position and credibility within the lending markets would suffer if its financial partners were unable to bring claims against the Bank in domestic courts, and the absence of such a waiver for suits "arising out of the Bank's internal operations, such as its relationship with its own employees[137]", which would not entail a corresponding benefit to the organization in the performance of its functions[138].

The decision in *Mendaro* amounted, essentially, to blanket immunity for international organization with regard to labour claims[139]. In fact, it is not difficult to imagine how such an approach to immunity might result injustice, to the point of getting in the way of human rights guarantees; the Court in *Mendaro*, while expressing a degree of sympathy towards the plaintiff, did not take human rights into consideration within its decision[140]. In fact,

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[132] Rossi, International Law Immunities and Employment Claims.
[133] Mendaro v. World Bank, 717.
[134] Rossi, International Law Immunities and Employment Claims.
[135] Mendaro v. World Bank, 717.
[136] Mendaro v. World Bank, 717.
[137] Mendaro v. World Bank, 717.
[138] Okada, 'The Immunity of International Organizations before and after Jam v IFC'.
[139] Rossi, International Law Immunities and Employment Claims.
[140] Klabbers, 'The EJIL Foreword'.

the ‘corresponding benefit test’ continued to be applied in cases dealing with immunity from labour claims[141].

While the DC Circuit Court in both *Broadbent* and *Mendaro* sidestepped the question of which standard of immunity should apply after the adoption of the FSIA, by, respectively, upholding immunity under either standard and applying a “corresponding benefit” test to the IO’s constitutive waiver, the DC Circuit finally pronounced itself clearly on the issue of the relationship between the IOIA and the FSIA in *Atkinson v Inter American Development Bank*[142].

The case, decided in 1998, revolved around a garnishment proceeding brought by the former wife of an IADB employee, who had failed to pay the child support and alimony awarded in the divorce judgment[143]. The appellant trying to garnish her former husband’s salary would have caused few difficulties if the latter were employed by any other bank; however, the IADB is designated as an international organization for protection under the IOIA[144]. In fact, the trial court did initially dismiss the appellant’s action on the basis that the IADB was immunity from suit under the IOIA[145].

On appeal, the DC Circuit was therefore faced with the question of which standard of immunity should apply to the IADB under the IOIA, since it had already assumed that the organization had not waived its immunity under its constitutive document, by applying *Mendaro*’s ‘corresponding benefit’ test; it was clear that a garnishment proceeding could not in any way “benefit” the organization, and immunity was thus upheld[146].

In interpreting the scope of immunity provided to IOs under the IOIA, the court had to determine whether “Congress intended to incorporate in the IOIA post-1945 changes to the law governing the immunity of foreign sovereigns[147]”, which the appellant claimed to be the case[148]. In particular, the appellant invoked the ‘reference canon’ of statutory

[141] Rossi, International Law Immunities and Employment Claims.
[142] Atkinson v. Inter-American Development Bank (Court of Appeals, Dist. of Columbia Circuit 8 September 1998).
[143] Atkinson v. Inter-American Development Bank, 156.
[144] Atkinson v. Inter-American Development Bank, 156.
[145] Stewart, ‘Holding International Organizations Accountable’.
[146] LeClercq, ‘A RULES-BASED APPROACH TO JAM’S RESTRICTIVE IMMUNITY: IMPLICATIONS FOR INTERNATIONAL ORGANIZATIONS’.
[147] Atkinson v. Inter-American Development Bank, 156.
[148] Carson Young, ‘The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity under the IOIA’, *Texas Law Review* 95 (2017 2016): 889.

interpretation, according to which a statute "which refers to a subject generally adopts the law on the subject as of the time the law is enacted, [including] all the amendments and modifications of the law subsequent to the time the reference statute [i.e. the statute that makes the reference] was enacted[149]". The appellant argued that per the 'reference canon', and since the payment of wages constituted a 'commercial activity' for the purposes of the FSIA, the IADB was not entitled to immunity under the IOIA for the case in question.

While the court acknowledged the reference canon of statutory interpretation, it found its application unnecessary in the context of the relationship between the IOIA and the FSIA. Instead, it placed emphasis on the fact that "the IOIA sets forth an explicit mechanism for monitoring the immunities of designated international organizations: the President retains authority to modify, condition, limit, and even revoke the otherwise absolute immunity of a designated organization[150]". The court found the IOIA's reference to Presidential oversight to provide evidence that Congress "was content to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances[151]". To this end, the court cited as evidence a Senate Report on the IOIA, which attributed to the provision giving the President authority to modify an IO's immunity the function of "permit[ting] the adjustment or limitation of the privileges in the event any international organization should engage, for example, in activities of a commercial nature[152]". The report attributing the role of modifying immunities *in the case of commercial activities* to the President, in the court's opinion, substantiated the argument that responsibility for modifying the IOIA ultimately fell upon the President, acting through executive order, and not upon a continuously evolving body of law[153].

The inclusion of an explicit mechanism for the modification of IO immunities reserved for the Executive undermined the appellant's claim that the IOIA's reference to "the same immunity … as is enjoyed by foreign governments[154]" was meant by Congress as incorporating all subsequent changes to the law of sovereign immunity. The court thus ruled that international organizations, just as foreign sovereigns in 1945, are granted

[149] Atkinson v. Inter-American Development Bank, 156.
[150] Atkinson v. Inter-American Development Bank, 156.
[151] Atkinson v. Inter-American Development Bank, 156.
[152] Atkinson v. Inter-American Development Bank, 156. (quoting S.R.Rep. No. 861, 79th Cong., 1st Sess. 2 (1945))
[153] Adams, 'Plain Reading, Subtle Meaning: Rethinking the IOIA and the Immunity of International Organizations'.
[154] International Organizations Immunities Act, 1945.

"virtually absolute immunity[155]", with Presidential action being the sole manner by which an IO's immunity could be altered.

*Atkinson* remained the sole precedent through which one could interpret IOs immunity under the IOIA for over ten years, with courts continuously affording IOs absolute immunity from suit. However, a decision from an appeals court outside the district of Columbia offered a different interpretation in 2010 with its decision in *OSS Novalka, Inc. v European Space Agency*[156], claiming instead that Congress meant for the IOIA to "adapt with the law of foreign sovereign immunity[157]".

In *OSS Novalka*, the plaintiff, a New Jersey software development corporation, had brought proceedings against the European Space Agency, accusing the organization of breaching its licence agreements with OSSN by distributing software to third parties and by failing to compensate the corporation[158].

In response, the ESA invoked its absolute immunity from suit under the IOIA, which the district court ignored in favour of applying the 'corresponding benefit' test to find that the ESA had in fact waived its immunity through its constitutive documents[159].

On appeal, the Third Circuit held that discussing whether the IO's constitutive waiver could be applied in this case was superfluous, since the ESA was not entitled to absolute immunity under the IOIA in the first place[160].

Going against the DC Circuit's decision in *Atkinson*, the Third Circuit court in *OSS Novalka* found "nothing in the statutory language or legislative history that suggests that the IOIA provision delegating authority to the President to alter the immunity of international organizations precludes incorporation of any subsequent change to the immunity of foreign sovereigns[161]". The court thus recognised that the reference canon was too easily swept aside in *Atkinson* and unjustifiably substituted by the President's prerogative to regulate the immunity provided by the IOIA[162]. In fact, the Third Circuit

[155] Atkinson v. Inter-American Development Bank, 156.
[156] OSS Nokalva, Inc. v. European Space Agency (Court of Appeals, 3rd Circuit 29 June 2010).
[157] OSS Nokalva, Inc. v. European Space Agency, 617.
[158] Brower, 'United States'.
[159] Young, 'The Limits of International Organization Immunity'.
[160] Young.
[161] OSS Nokalva, Inc. v. European Space Agency, 617.
[162] Adams, 'Plain Reading, Subtle Meaning: Rethinking the IOIA and the Immunity of International Organizations'.

pointed out that the Senate report cited in *Atkinson* simply highlighted the kind of power the President had in modifying immunities, not whether that immunity, outside of presidential intervention, was "frozen" in time[163].

In support of its interpretation, the court cited documents indicating that both Congress and the Executive alike intended for the IOIA to develop *in tandem* with the FSIA[164]. In particular, the court quoted a 1980 letter from the State Department Legal Adviser:

The FSIA amended [U.S.] law by codifying a more restrictive theory of immunity subjecting foreign states to suit in U.S. courts ...By virtue of the FSIA, . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities[165].

Furthermore, the court pointed out that, if we were to follow *Atkinson*'s interpretation of IO immunity as not restricted by subsequent changes in foreign sovereign immunity, a "group of states acting through an international organization [would be] entitled to broader immunity than its member states [would] enjoy when acting alone[166]". In fact, a risk incurred by awarding international organizations broader immunity than foreign sovereigns is that it could encourage "foreign governments to evade legal obligations by acting through international organizations[167]"[168].

The decision in *OSS Novalka* seems like a huge leap forward with respect to the decisions analysed until now, with a US Court of Appeals interpreting the IOIA as incorporating the FSIA's standards of immunity for the first time[169]. However, it is important to point out that applying *OSS Novalka* universally would still not impact the outcomes of most cases regarding IOs in the United States: the UN would keep enjoying absolute immunity under the UN Convention on Privileges and Immunities, IFIs ("international financial institutions") would be liable to the same degree of jurisdiction as is provided for in their

[163] Adams.
[164] Brower, 'United States'.
[165] OSS Nokalva, Inc. v. European Space Agency, 617. (quoting Letter from Roberts B. Owen, Legal Adviser, Department of State, to Leroy D. Clark, General Counsel, Equal Employment Opportunity Commission (24 June 1980))
[166] OSS Nokalva, Inc. v. European Space Agency, 617.
[167] OSS Nokalva, Inc. v. European Space Agency, 617.
[168] Brower, 'United States'.
[169] Brower.

constitutive documents and, since employment matters do not qualify as a commercial activity, IOs would keep enjoying immunity from employment suits[170].

Despite the number of limitations surrounding *OSS Novalka*, the decision had given way to a broader discussion regarding the interpretation of the IOIA, with scholars and judges calling for an interpretation that would resolve the conflict between the D.C. and the Third Circuits[171]. That call would be answered by the Supreme Court in 2019, with its decision in *Jam v International Financial Corporation*, which we shall turn to now.

## 2.2 The End of Unaccountability? *Jam v International Financial Corporation*

By analysing a number of cases dealing with IO immunity in the United States, a common thread might have come into light: international organizations have mostly avoided accountability for actions which would have been considered actionable in court under most other circumstances. The debate that sparked from these decisions mostly revolved around the feeling of unfairness in the face of international organizations which have skirted their responsibilities in matters of labour law, environmental law, to the point of impeding the proper protection of human rights. The culture of unaccountability that pervaded international organizations, especially those operating in the financial sector, was handed a significant blow in *Jam*, the consequences of which have had, and will continue having, a significant impact on international organizations, and on international law theory more broadly.

The *Jam* lawsuit, which the Supreme Court ruled on in February 2019, arose out of the IFC's mishandling of the Tata Mundra power plant project in Gujarat, India, and the economic, environmental, and social damage that ensued from the latter. The clash between the IFC's insistence on retaining its jurisdictional immunity in the face of the harm caused by the project it funded, and the local community's need for remedy, caught the attention of the international community and of the general public more broadly, sparking a conversation on the accountability crisis regarding the IFC and similar IFIs, which had previously been subject to little scrutiny.

[170] Brower.
[171] *See* Judge Pillard's concurring opinion in Jam v. Intern. Finance Corp. (Court of Appeals, Dist. of Columbia Circuit 6 February 2017). (discussed in Section 2.2.2)

In particular, *Jam* revealed that projects funded by the IFC may often negatively affect local – poorer – communities, with little to no regard on the part of the organization, which has, for the majority of its existence, relied on its jurisdictional immunity to avoid accountability in US courts. The decision in *Jam* has certainly left room for international organizations to avoid accountability under a number of circumstances, but its impact on the law of IO immunity cannot be understated, as it will certainly create a new expectation among IOs that legal consequences for their activities is indeed possible, leading, perhaps, to a degree of harm-prevention on the part of IOs previously unheard of.

While the impact of *Jam* on the attitude of IFIs, as well as future litigation and possible human-rights considerations within US courts, will be topic of discussion in the next Chapter, the Tata Mundra project and the damage brought by it to local communities will be discussed in the following Section, so as to provide context for the Supreme Court's decision in *Jam*.

### 2.2.1 A Development Disaster: The Tata Mundra Power Plant

To understand the true impact *Jam* had on how IO immunity came to be understood in the United States, and to make sense of the Supreme Court decision that came of it, we have to draw a clear picture of the actual facts out of which the case arose, so as to put into perspective the claim that was brought forward by the local communities affected by the IFC-funded Tata Mundra power plant project.

Mundra, the coastal census town where the Tata Mundra power plant was built, is located within India's Kutch District[172]. Kutch, the largest district in Gujarat was up until recently an area abounding in natural resources, featuring rich marine biodiversity, and known for the salt desert covering 56% of its land[173]. This region has historically been an ecologically sensitive zone, where large-scale agriculture had never developed precisely because of the high salinity of its groundwater and arid conditions[174]. However, in a delicate balance that had been going on since the 17th century, local communities in Kutch had been fruitfully living off of the area's land and waters, practicing salt panning, small-

[172] Joanna Jandali, 'Jammed from Justice: How International Organization Immunity Enshrines Impunity', *ARIZONA STATE LAW JOURNAL*, 2023.
[173] Avery Letkemann et al., 'Holding International Finance Institutions Accountable for Environmental Injustice: A Case Study of the Tata Mundra Power Plant in Gujarat', in *Advancing Environmental Justice for Marginalized Communities in India* (Routledge, 2021).
[174] Letkemann et al.

scale farming and raising animals, as well as taking advantage of the region's wide tidal zone to practice a form of fishing known as *pagadiya*[175].

However, in 2001, a 7.7-magnitude earthquake struck the Kutch district, claiming the lives of tens of thousands of people and causing a devastating amount of damage to local infrastructure[176]. In the aftermath of the earthquake, the Indian government began granting tax incentives for the development of new industries so as to encourage private sector investment in the area[177]. The government's plan was successful and the region was rapidly transformed into an industrial hub, with the state of Gujarat contributing, as of 2017, to 18.4% of India's total industrial output, despite comprising only 5% of the country's population[178].

A result of the rapid industrialization of the Kutch District was the increased energy requirements that came with it, which the Indian government addressed by funding, in collaboration with the government of Gujarat, the so-called "24×7 Power for All" initiative, commissioning the development of nine 4000-MW Ultra Mega Power Plants across India[179]. Two of these power plants were located near Mundra, on the Kutch coastline. In particular, *Jam* addressed the impact on the local Kutch communities of one of these two plants: the Tata Mundra power plant. The Mundra Ultra Mega Power Project ("Tata Mundra power plant") was developed by Coastal Gujarat Power Limited (CGPL) with the help of the IFC, which approved a $450 million loan for the Tata Mundra plant in 2008[180].

This is where the International Financial Corporation comes in: the IFC is an international organization headquartered in Washington D.C. that "finances private-sector development projects in poor and developing countries around the world[181]". For the particular financing of the Tata Mundra project, as per its rules of procedure, the IFC conducted an environmental and social review of the project before approving the loan,

[175] 'During low tide, fishermen walk far out into the intertidal area to set up nets attached to sticks in the mud. At high tide, fish swim towards the algae-rich coastline to feed. As the water recedes, the fish get caught in the nets, allowing the fishermen to walk over and collect them' Letkemann et al.; Jandali, 'Jammed from Justice: How International Organization Immunity Enshrines Impunity'.
[176] Letkemann et al., 'Holding International Finance Institutions Accountable for Environmental Injustice'.
[177] Letkemann et al.
[178] Letkemann et al.
[179] Letkemann et al.
[180] Letkemann et al.
[181] Jam v. Intern. Finance Corp., 139 S. Ct.

which led to the project being labelled as a Category A loan[182]. A "Category A loan" is defined as "[b]usiness activities with potential significant adverse environmental or social risks and/or impacts that are diverse, irreversible, or unprecedented[183]." The IFC was therefore well aware – at the time of the loan's approval – of the "unacceptable environmental impacts[184]" the Tata Mundra project would likely trigger and carried on with its financing agreement, lending $450 million to CGPL for the development of the Tata Mundra power plant[185].

The results of the power plant's development have been, since the beginning of construction, predictably disastrous. Firstly, it must be pointed out that, despite the substantial amount of money thrown into the project, local communities have barely benefited, if at all, from the project[186]. Instead, what has befallen the local communities of the Kutch district are environmental, health and socio-economic harms.

As far as one of the most practiced forms of earning their livelihood – fishing – goes, the local communities have suffered the most from the thermal pollution caused by the plant: discharged water raising the surrounding seawater's temperature by 5-7°C has significantly reduced the quality and quantity of fish extracted in the area, forcing *pagadiya* fishers to venture further into the open sea to compensate for the loss[187]. Also, the dredging of intake and outfall channels for the power plant have cut off access to fishing grounds[188]. An unintended consequence has been the financial burden placed on local fishers of having to purchase small boats and other equipment needed for this different form of fishing they were drove to engage in[189]. Apart from threatening the livelihoods of residents, the dredging of intake and outfall channels has also been the cause of saltwater intrusions into the groundwater that once provided potable water for local communities. As a result of this, residents have been dependent on Tata for a steady supply of potable water, and, where that is unavailable, have had to start purchasing

[182] Jandali, 'Jammed from Justice: How International Organization Immunity Enshrines Impunity'.
[183] 'Environmental and Social Categorization', IFC, https://www.ifc.org/en/what-we-do/sector-expertise/sustainability/policies-and-standards/environmental-and-social-categorization.
[184] 'Budha Ismail Jam, et al v. IFC', EarthRights International, http://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/.
[185] Kate E Morrow, 'Development Disasters: Accountability and Remedy in International Development Projects', *American University Law Review* 70 (2020).
[186] Letkemann et al., 'Holding International Finance Institutions Accountable for Environmental Injustice'.
[187] Letkemann et al.
[188] Letkemann et al.
[189] Letkemann et al.

mineral water or resort to contaminated water, whose consumption brings with it serious health risks including kidney failure and cardiovascular diseases[190].

Another form of environmental degradation has been caused by the large amounts of coal dust and fly ash released by the power plant. From the burning of coal within the plant, coal dust from chimneys is dispersed over a large area inhabited by local communities, coating nearby homes, as well as contaminating fish laid out to dry and causing significant issues for the reproduction of livestock by settling on grazing lands[191]. Furthermore, the decline in air quality has brought along with it a drastic rise in respiratory illnesses, especially among children and the elderly[192].

The devastation brought to Kutch by the CGPL with the Tata Mundra power plant's development has significantly affected the area's economy: agriculture has become less and less profitable because of the significant decrease in quality, quantity and profits from agriculture activities, which has consequently led to local people selling their land or being displaced by the state for the benefit of industrial construction[193]. This displacement of local residents, coupled with the mass arrival in Kutch of younger men working for industry, has drastically altered the sociocultural fabric of the Kutch district, with a local women's organization expressing concern for the loss of opportunities for women to work outside the household and for women's safety in a place which is becoming more and more male-dominated[194].

The Tata Mundra power plant project has had a catastrophic impact on the local communities affected, and is a perfect example of what a failure to effectively communicate with and provide a basic standard of care for project-affected populations can result in. The IFC has a duty to identify, prevent and mitigate the impacts of the development projects it funds, and had in fact agreed to respect said duty in its loan agreement with CGPL, through the IFC's Performance Standards[195]. In fact, the IFC even established an Environmental and Social Action Plan in response to the CAO findings regarding the IFC's severe noncompliance with its Performance Standards (discussed in

[190] Letkemann et al.
[191] Letkemann et al.
[192] Letkemann et al.
[193] Jandali, 'Jammed from Justice: How International Organization Immunity Enshrines Impunity'.
[194] Letkemann et al., 'Holding International Finance Institutions Accountable for Environmental Injustice'.
[195] Michelle Harrison and Shannon Marcoux, 'Legal Risk and Accountability in Development Finance: Lessons from Jam v. International Finance Corporation', 2024.

the following section), through which the organization could compel the borrower's compliance with the environmental and social conditions of the loan agreement; the IFC would review the project's compliance with these standards before each payment of loan funds, in order to protect the local communities[196].

However, the IFC did not enforce the environmental and social conditions of the loan agreement and took no legal step to prevent further harm of the local population. In fact, the plaintiffs in *Jam* relied on the IFC's Performance Standards, and its general reputation as an international financial institution committing to environmental and social risk management, as proof of the existence of a standard of care owed to the plaintiffs[197]. The claim in *Jam*, as will be analysed in the next section, revolves around the fact that the IFC had failed to ensure that CGPL complied with the environmental and social standards of their loan agreement, with environmental, health, economic and social harms to the local communities resulting from the IFC's negligence[198].

### 2.2.2 Previous Procedural History: From Internal Dispute Resolution to the Supreme Court

*Jam* has had a long judicial history leading up to the Supreme Court opinion of 27 February 2019. The plaintiffs, the local trade union Machimar Adhikar Sangharsh Sangathan ("MASS"), first resorted to lodging a complaint with the IFC's Compliance Advisor Ombudsmen (CAO) in 2011[199].

The CAO was established by the IFC in 1999 with tasked it with "address[ing] complaints related to IFC ... Projects and … enhanc[ing] environmental and social outcomes of these Projects[200]." The CAO operates as an independent accountability mechanism, investigating possible wrongdoings on the part of the IFC as far as compliance with its environmental and social standards is concerned[201]. Any project-affected individual can lodge a complaint with the CAO, which can then proceed via dispute resolution or via compliance auditing and oversight[202].

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[196] Morrow, 'Development Disasters: Accountability and Remedy in International Development Projects'.
[197] Morrow.
[198] 'Budha Ismail Jam, et al v. IFC'.
[199] After community concerns expressed to Tata representatives had failed to be addressed
[200] 'IFC/MIGA Independent Accountability Mechanism (CAO) Policy', https://www.ifc.org/en/about/accountability/cao-policy-consultation.
[201] Jandali, 'Jammed from Justice: How International Organization Immunity Enshrines Impunity'.
[202] Jandali.

In the case of MASS's complaint, the CAO referred the claim to its ombudsman role for the matter to be handled through dispute resolution[203]. After meeting with community members and performing field visits, the CAO dispute resolution team assessed that the IFC had "failed to ensure the Tata Mundra project met the applicable environmental and social standards[204]". This assessment was however rejected by the IFC, which called for a full compliance audit of the project[205].

The CAO published its Audit Report in 2013, concluding that the IFC had failed to comply with its own environmental and social standards, specifically failing to consider how local communities would be affected in its project risk assessment, failing to provide environmental and social assessments proportionate to the project's risks, failing to communicate with project-affected communities failing to ensure that the CGPL avoided physical and economic displacement, and not providing compensation for those who were displaced[206]. The IFC, however, never properly responded to the CAO's findings, took no significant step to redress the damage caused, nor did it try to compel the loan recipient to prevent future harm[207].

With the CAO proving ineffective at providing redress for the damage caused to local communities, MASS tried seeking justice through litigation in US courts. Legal support came from EarthRights International, whose lawyers offered MASS pro-bono legal assistance after hearing of the devastating story of the Tata Mundra power plant during a World Bank Group Civil Society Forum in 2014[208]. The class action was officially filed in April 2015 in the District Court for the District of Columbia, claiming damages and injunctive relief for the IFC's negligence in lending funds to CGPL, whose handling of the power plant's construction and operation went against the IFC's Environmental and Social Action Plant, causing environmental, health, economic and social harm to local communities[209].

The IFC filed a motion to dismiss the claim arguing it was entitled to absolute immunity from suit under the IOIA, as well as arguing not to have waived its immunity through its

[203] Letkemann et al., 'Holding International Finance Institutions Accountable for Environmental Injustice'.
[204] 'Budha Ismail Jam, et al v. IFC'.
[205] Letkemann et al., 'Holding International Finance Institutions Accountable for Environmental Injustice'.
[206] Jandali, 'Jammed from Justice: How International Organization Immunity Enshrines Impunity'.
[207] Jandali.
[208] Letkemann et al., 'Holding International Finance Institutions Accountable for Environmental Injustice'.
[209] 'Budha Ismail Jam, et al v. IFC'.

Articles of Agreement and to have already provided access to justice for the plaintiffs to the "alternative means of recourse" represented by the CAO[210]. On the other hand, the plaintiffs argued that the "same" immunity provision contained in the IOIA should result in the IFC not being immune from suit as a result of the restrictive immunity granted to foreign sovereigns under the FSIA, which does not provide for immunity from suits arising out of commercial activities[211]. The plaintiffs also claimed that even if the IFC was immune under the IOIA, it had waived said immunity in its Articles of Agreement[212].

The D.C. Circuit court dismissed the case, ruling that the IFC was entitled to absolute immunity and had not waived its immunity. The decision relied on *Atkinson* in holding that the IFC, as an international organization, enjoyed "virtually absolute immunity" from suit under the IOIA. The plaintiffs thus appealed the D.C. Circuit's decision[213]. The Court of Appeals for the D.C. Circuit, however, affirmed the lower court's decision, despite sympathising with the plaintiffs' "dismal" situation[214]. In particular, Judge Pillard wrote a concurring opinion where she opined the D.C. Circuit had taken "a wrong turn" granting IOs absolute immunity, and that it should revisit the relationship between the IOIA and FSIA in future decisions[215].

A petition for a writ of *certiorari* was thus filed by the plaintiffs, asking the US Supreme Court to officially resolve the issue of IO immunity arising out the IOIA's statutory language[216]. The Supreme Court granted *certiorari*, limited, however, to the following question:

Whether the International Organizations Immunities Act – which affords international organizations the 'same immunity' from suit that foreign governments have, 22 U.S.C. para. 288a(b) – confers the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. paras. 1602-11[217]

[210] 'Budha Ismail Jam, et al v. IFC'.
[211] 'Budha Ismail Jam, et al v. IFC'.
[212] 'Budha Ismail Jam, et al v. IFC'.
[213] Dautaj, 'Immunity from Suit for International Organizations: The Judiciary's New Que of Separating Lawsuit Sheep from Lawsuit Goats', *Indiana Journal of Global Legal Studies* 27, no. 2 (2020): 207, https://doi.org/10.2979/indjglolegstu.27.2.0207.
[214] 'Budha Ismail Jam, et al v. IFC'.
[215] 'Budha Ismail Jam, et al v. IFC'.
[216] Dautaj, 'Immunity from Suit for International Organizations'.
[217] Richard L Herz et al., 'On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit', 2018.

In a 7-1 decision, the Supreme Court reversed the judgment of the Court of Appeals for the D.C. Circuit, holding that, through the IOIA "the Foreign Sovereign Immunities Act governs the immunity of international organizations[218]". The Supreme Court's decision, as well as Justice Breyer's dissenting opinion, will be thoroughly analysed in the following section.

### 2.2.3 Reversing *Atkinson* and the IOIA's Incorporation of the FSIA: The Supreme Court's Decision in *Jam*

As mentioned above, the Supreme Court reversed the D.C. Circuit's decision, claiming that international organizations, under the IOIA are granted the "same immunity" from suit that foreign governments enjoy today – restrictive immunity – with IO immunity continuing to evolve *in tandem* with foreign sovereign's immunity.

We will analyse the court's reasoning throughout this section by focusing on four different iterations of its argument, which mostly are responses to concerns and objections posed by the IFC: (a) the "same immunity" provision using a formulation best understood as continuously linking IO immunity to the law of foreign sovereign immunity, (b) the "reference canon" as substantiation of (a), (c) *Atkinson*'s misuse of the reference canon and its decision being overruled by the Supreme Court in Jam, and (d) the futility of concerns regarding the integrity of IOs immunity or IOs' exposure to excessive litigation, since the IOIA only provides default rules[219].

The Supreme Court decision opens with explaining how an interpretation of the IOIA as incorporating the FSIA is supported by the statute's language. In the words of the court:

> "In granting international organizations the "same immunity" from suit "as is enjoyed by foreign governments," the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two[220]."

The court substantiated its argument by highlighting the fact that the IOIA could have specified its intention to grant IOs absolute immunity by simply stating as such in its provision through the use of noncomparative language, as is done in other provisions of

[218] Jam v. Intern. Finance Corp., 139 S. Ct.
[219] Dautaj, 'Immunity from Suit for International Organizations'.
[220] Jam v. Intern. Finance Corp., 139 S. Ct.

the IOIA, such as the one granting immunity from search for IOs' property and assets. Alternatively, it could have specified it was incorporating foreign sovereign immunity law as it existed at a particular time. However, since the IOIA does not use any such language in its provision, "the "same as" formulation is best understood to make international organization immunity and foreign sovereign immunity continuously equivalent[221]".

The court's reading is supported by other statutes' provisions using the "same as" formulation to guarantee continuous equivalence between laws in, for instance, the Civil Right Act of 1866, or the Federal Tort Claims Act.

The IFC's objection to this interpretation is founded on the belief that because the purpose of IO immunity is fundamentally different from that of foreign sovereigns – the former being "to allow [international] organizations to freely pursue the collective goals of member countries without undue interference from the courts of any one member country[222]" (i.e. *functional* immunity) and the latter being grounded in the principle of sovereign equality – the IOIA could not in any way be read to link IO immunity to the continuously changing foreign sovereign immunity.

The Supreme Court's decision rejects this argument by stating that the IFC "gets the inquiry backwards[223]": with the exception of it being clearly stated in the relevant statute, the legislative purpose of a provision "is expressed by the ordinary meaning of the words used[224]". In the case of IOs immunity, the IOIA does not expressly state what its purpose may be, meaning that the immunity provision's purpose is to be found in the statutory language employed and the "same as" formulation has always been used by Congress to express the continuous equivalence between two things.

To further substantiate its argument, the Supreme Court turns to the reference canon. As was described when discussing *Atkinson*, according to the reference canon "when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises[225]." The reference to a "general subject" must be

[221] Jam v. Intern. Finance Corp., 139 S. Ct.
[222] Jam v. Intern. Finance Corp., 139 S. Ct.
[223] Jam v. Intern. Finance Corp., 139 S. Ct.
[224] Jam v. Intern. Finance Corp., 139 S. Ct.
[225] Jam v. Intern. Finance Corp., 139 S. Ct. (quoting 2 J. Sutherland, Statutory Construction §§ 5207–5208 [3d ed. 1943].

contrasted with the reference to a specific title or section number of another statute, which indicates that the referring statute only refers to the referenced statute as it existed when the former was adopted.

A reference to a "general subject" is precisely what can be applied to the IOIA's reference to foreign sovereign immunity: the reference is a general rather than specific one since it points to an "external body of potentially evolving law[226]", that of foreign sovereign immunity, rather than to a specific provision within the FSIA. In the court's opinion, this should warrant an interpretation of IO immunity as linked to foreign sovereign immunity, "so that one develops *in tandem* with the other[227]."

The IFC argued to the contrary, stating that the IOIA's reference to foreign sovereign immunity was not a general but a specific one to a common law concept having fixed meaning as of 1945, when the IOIA was enacted. According to the IFC, the IOIA should thus be read as incorporating the "then-settled meaning of the "immunity enjoyed by foreign governments": virtually absolute immunity[228]."

However, the court reasonably pointed out that in 1945 the "immunity enjoyed by foreign governments" did not have the specific meaning of "virtually absolute immunity". As opposed to the clear substantive content that defines terms such as "fraud" or "forgery", the phrase was rather an open-ended concept which could only be given precise scope and content by referencing the relevant rules governing foreign sovereign immunity. In 1945, those rules would have led to immunity being virtually absolute, but as they are encapsulated by the FSIA today, they point towards a more limited immunity. In the court's opinion, "the IOIA's instruction to grant international organizations the immunity "enjoyed by foreign governments" is an instruction to look up the applicable rules of foreign sovereign immunity, wherever those rules may be found— the common law, the law of nations, or a statute[229]." To put it more simply, the court reinforced the view that the IOIA's reference to foreign sovereign immunity is, again, a "general reference to an external body of (potentially evolving) law[230]".

[226] Jam v. Intern. Finance Corp., 139 S. Ct.
[227] Jam v. Intern. Finance Corp., 139 S. Ct. (emphasis added).
[228] Jam v. Intern. Finance Corp., 139 S. Ct.
[229] Jam v. Intern. Finance Corp., 139 S. Ct.
[230] Jam v. Intern. Finance Corp., 139 S. Ct.

To justify its take on the reference canon, the Supreme Court had to address the Circuit split between the D.C. Circuit's approach in *Atkinson*[231] – previously relied upon by the D.C. circuit to dismiss the plaintiff's claim in *Jam* and uphold the IFC's immunity – and the Third Circuit's approach in *OSS Novalka*[232], an ambivalence pointed out by Judge Pillard in her concurring opinion to the Court of Appeals for the D.C. Circuit's decision in *Jam*[233]. The Supreme Court resolved the split by reversing *Atkinson* and holding instead that IOs enjoy the same immunity under the IOIA as foreign sovereigns under the FSIA[234].

In *Atkinson*, the D.C. Circuit court, while acknowledging the reference canon, opined that the canon could not be applied to the IOIA, whose larger context pointed towards an outweighing of the reference canon's application in favour of a more static interpretation of IO immunity. In particular, the court in *Atkinson* pointed to the "provision of the IOIA that gives the President the authority to withhold, withdraw, condition, or limit the otherwise applicable privileges and immunities of an international organization, "in the light of the functions performed by any such international organization"[235]" as a clear indication that Congress' intention in the IO immunity provision was never for the IOIA "to in effect update itself by incorporating changes in the law governing foreign sovereign immunity[236]", but rather to preserve IOs' absolute immunity with the *exception* of the delegation provision through which the President could make modifications to IO immunity.

The Supreme Court, however, disagreed on the basis of the fact that the delegation provision only allows the President to modify "on a *case-by-case* basis[237]" the immunity rules of a *specific* international organization. The statute thus allows for "retail rather than wholesale action[238]", meaning there is nothing in particular within the IOIA which suggests that the President's power to modify immunity rules in specific situations cannot coexist with the notion that the otherwise-applicable immunity rules might change over time *in tandem* with foreign sovereign immunity law.

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[231] Atkinson v. Inter-American Development Bank, 156.
[232] OSS Nokalva, Inc. v. European Space Agency, 617.
[233] Jam v. Intern. Finance Corp., 860.
[234] LeClercq, 'A RULES-BASED APPROACH TO JAM'S RESTRICTIVE IMMUNITY: IMPLICATIONS FOR INTERNATIONAL ORGANIZATIONS'.
[235] Jam v. Intern. Finance Corp., 139 S. Ct.
[236] Jam v. Intern. Finance Corp., 139 S. Ct.
[237] Jam v. Intern. Finance Corp., 139 S. Ct. (emphasis added).
[238] Jam v. Intern. Finance Corp., 139 S. Ct.

To further corroborate its argument, the Supreme Court brought attention to the *Atkinson* court's dismissal of the State Department's opinion (instead mentioned by the court in *OSS Novalka*), which, shortly after the FSIA's enactment, took the very clear position that the immunity rules of the IOIA and the FSIA would from that point forward be "link[ed][239]".

Finally, the Supreme Court addressed an argument by the IFC which, as we shall further discuss in the following chapter, has been cause for controversy among judges and scholars alike ever since the pronouncement of the Supreme Court's decision. The IFC argued that "interpreting the IOIA's immunity as anything less than absolute immunity would lead to a number of undesirable results[240]."

In particular, we may summarise the IFC's position along three lines of reasoning: (a) a restrictive approach to IO immunity would, in the IFC's opinion, eliminate the very purpose – the ability to freely and autonomously operate in pursuance of their objectives without undue external interference – for which immunity was granted to IOs in the first place, meaning that the courts of a member state to an IO could in effect "second-guess the collective decisions of the others[241]". The IFC also lamented that (b) restrictive immunity for IOs would expose them to excessive litigation costs and money damages, rendering IOs' pursuance of their mission more difficult and costly. Finally, (c) the IFC expressed particular concern for MDBs, a group of international organizations which the IFC itself is a part of, and their exceptionally disadvantageous position following the Supreme Court's decision: since the FSIA restricts immunity on the basis of a "commercial activity exception", which would now likewise apply to international organizations, multilateral development banks, whose core objectives are achieved mainly through commercial means, would be excessively liable to suit in US courts.

The Supreme Court would have none of it. It immediately expressed the view that the "IFC's concerns are inflated[242]". Firstly, the court reminded the IFC of the fact that that the privileges and immunities specified in the IOIA are only "default rules", meaning that any international organization under the impression that its operation would be impaired

[239] Jam v. Intern. Finance Corp., 139 S. Ct. (quoting Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., Senior Legal Advisor, OAS, p. 2 [Mar. 24, 1977]).
[240] Jam v. Intern. Finance Corp., 139 S. Ct.
[241] Jam v. Intern. Finance Corp., 139 S. Ct.
[242] Jam v. Intern. Finance Corp., 139 S. Ct.

by restrictive immunity is free to specify a broader scope of immunity for itself under its constitutive documents. The IFC, however, has not accorded itself absolute immunity under its own Articles of Agreement[243]. The IFC's concern that MDBs would be excessively liable to suit after the *Jam* decision is likewise unfounded, since we cannot assume that the lending activity of all MDBs would be classified as a commercial activity for the purposes of the FSIA, which requires the foreign state in question to be acting as a private party would while engaging in trade or commerce. Not all MDBs fit this description, with some organizations' lending activity constituting conditional loans to government, which, for instance, would not be fall under the FSIA's commercial activity exception. Furthermore, even if the lending activity could be classified as "commercial activity" for the purposes of the FSIA, the statute specifies other requirements to be met for the foreign state to be subject to suit: the commercial activity in question must have a "sufficient nexus[244]" to the United States, and the lawsuit "must be "based upon" either the commercial activity itself or acts performed in connection with the commercial activity[245]". The organization's commercial activity must thus both be carried out or have a sufficient nexus to the United States, and constitute the actual "gravamen", or core, of the claim, meaning it constitutes the essential element of the lawsuit. In fact, as will be analysed in the following Section, the D.C. Circuit dismissed the plaintiff's claim in *Jam* on remand precisely because it believed the commercial activity in question not to have a sufficient nexus to the United States.

Having concluded the discussion on the Supreme Court majority's view in *Jam*, which rejects the IFC's more teleological interpretation of immunities in favour of a textualist approach relying on the "reference canon", thus officially linking the immunity of IOs under the IOIA to that of foreign states under the FSIA, it is important to remind ourselves that the decision was not unanimous. Justice Breyer's dissent is, in fact, an excellent point of departure for the upcoming analysis of the main critiques to the *Jam* decision, in Chapter 3.

Justice Breyer's dissent can be analysed on two grounds: on the one hand, from his opinion we are able to discern a clear methodological conflict between the majority's

[243] Some inconsistencies between the Supreme Court's declaration that the immunity provided by the IOIA only constitutes "default rules" and its actions partially contradicting that statement in this very case are however noted by the author, and will be topic of discussion in the following Chapter.
[244] Jam v. Intern. Finance Corp., 139 S. Ct.
[245] Jam v. Intern. Finance Corp., 139 S. Ct. (referencing 28 U.S. Code § 1605).

view and Justice Breyer's opinion, where the majority followed a more textualist approach in interpreting the IOIA's immunity provision, while Justice Breyer, in line with his well-known philosophical convictions on statutory interpretation, relied more heavily on a purpose-based approach, taking into account the history and context behind the IOIA's enactment[246]. While it is this author's opinion that a purely methodological conflict cannot be conclusively resolved beyond a shadow of a doubt due to the dynamic nature of international organizations themselves, whose functions and character have changed dramatically since 1945 for any one interpretation to be considered fully part of the IOIA's drafters' intentions, a second set of objections can be gleamed from Justice Breyer's dissent, dealing with the practical consequences of the Jam decision, which are arguably much more pertinent to an analysis of the state of IO immunity today and the effects *Jam* might have on future litigation in US courts.

As for the majority's interpretation of the IOIA, Justice Breyer had this to say:

> "[M]ore fundamentally, the words 'as is enjoyed' do not conclusively tell us when enjoyed. Do they mean as is enjoyed at the time of the statute's enactment? Or at the time when a plaintiff brings a law suit? If the former, international organisations enjoy immunity from law suits based upon their commercial activities, for that was the scope of immunity that foreign governments enjoyed in 1945 when the immunities act became law. If the latter, IOs do not enjoy that immunity for foreign governments can no longer claim immunity from law suits based upon certain commercial activities. Linguistics do not answer the temporal question[247]."

In lieu of a textualist interpretation of the IOIA through the use of the reference canon, which yields too ambiguous results for it to be confidently relied on, Justice Breyer opined that "all interpretive roads here lead us to the same place … to context, to history, to purpose, and to consequences.[248]"

Apart from criticising the majority's textualist approach and describing how Congress' enactment of the IOIA as part "of an effort to encourage international organizations to

[246] Dautaj, 'Immunity from Suit for International Organizations'.
[247] Jam v. Intern. Finance Corp., 139 S. Ct.
[248] Jam v. Intern. Finance Corp., 139 S. Ct.

locate their headquarters and carry on their missions in the United States[249]" apparently warrants a static interpretation of IO immunity's cross-reference to the immunity of foreign states, Justice Breyer also expressed concern over what the majority's restrictive approach to IO immunity under the IOIA would mean in practice, with US courts presiding over the activities of IOs[250].

Firstly, he hypothesised that, despite the Supreme Court's insistence on the IOIA only providing "default rules", US courts would prioritise the application of IOIA-based restrictive immunity instead of relying on treaty provisions providing for full immunity[251]. This attitude would follow from the conventional practice – established in *Medellin* – of taking a very restrictive stance to the identification of self-executing treaties. According to Justice Breyer, constituent treaties granting full immunity to IOs would likely be labelled as non-self-executing by US courts, thus not enforceable as domestic law in the absence of implementation by the national legislature, leading to suits being ordinarily handled through the IOIA despite treaties guaranteeing immunity in cases regarding commercial activities[252].

Furthermore, Justice Breyer highlighted the difference between foreign sovereigns and IOs to point out the threat posed by the *Jam* decision to multilateralism, which international organizations, as opposed to foreign states, are characterized by, with members from many different jurisdictions[253]. According to Justice Breyer, that threat lies in the possibility for a single member state to simply apply its own stricter liability rules, through non-expert judges, thus possibly changing the policy direction of IOs which feel the need to refrain from certain actions in fear of liability in domestic courts of a single one of its member states[254]. Equally worrying, in Justice Breyer's view, is the rising probability for divided decisions among different member states' courts regarding the rules and operations of IOs[255].

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[249] Jam v. Intern. Finance Corp., 139 S. Ct.
[250] Mmiselo Freedom Qumba, 'Balancing International Financial Institutions' Immunity with Private Individuals' Right to Effective Remedy', *South African Journal of International Affairs* 27, no. 1 (2 January 2020): 89–112, https://doi.org/10.1080/10220461.2020.1729853.
[251] Rossi, International Law Immunities and Employment Claims.
[252] Rossi.
[253] Qumba, 'Balancing International Financial Institutions' Immunity with Private Individuals' Right to Effective Remedy'.
[254] Qumba.
[255] Qumba.

Justice Breyer's concerns regarding the possible consequences of *Jam* in domestic courts and at the international level fairly reflect those expressed by like-minded scholars in the aftermath of the Supreme Court's decision and whose arguments will be discussed in the following Chapter. However, one last suggestion made by Justice Breyer in his dissenting opinion is, in the author's opinion, quite indicative of the attitude generally adopted by those favouring an absolute approach to IO immunity and calls for a discussion regarding whether legislative space should be left for human rights considerations when it comes to the immunity of international organizations.

Ultimately, apart from any specific argumentation against the majority's view in *Jam*, Justice Breyer simply called for the matter of project-affected people's right of redress from IOs to be left to the good graces of the international organizations themselves, since they are "fully aware of their moral (if not legal) obligations to prevent harm to others and to compensate individuals when they do cause harm[256]." This view blatantly disregards the right to remedy of indigenous populations, effectively leaving project-affected individuals at the mercy of international organizations, the decisions of which such individuals have no direct say in. States themselves often fail to properly represent local communities affected by international development projects[257]. In this author's opinion, and as will be discussed further in Chapter 3, human rights considerations regarding access to justice questions *need* to be part of the broader discussion on IO immunity, precisely so that project-affected people's right to remedy may never exclusively be under the benevolence of international financial institutions.

### 2.2.4 A Less-than-revolutionary Judgment? The *Jam* Decision on Remand

With the Supreme Court reversing the judgment of the Court of Appeals for the D.C. Circuit, the case was remanded for further proceedings to the D.C. District Court, so that it could actually rule, in light of the Supreme Court's decision, on whether the IFC was entitled to immunity under to immunity under the IOIA or whether the claim fell within the commercial activity exception under the FSIA[258]. In particular, the FSIA's commercial activity exception works to withhold the immunity of an IO when (a) a commercial

[256] Jam v. Intern. Finance Corp., 139 S. Ct.
[257] Qumba, 'Balancing International Financial Institutions' Immunity with Private Individuals' Right to Effective Remedy'.
[258] Moore and Kleist, 'Immunity for Multilateral Development Banks in the United States'.

activity is "carried on in the United States[259]" by an IO or (b) when "an act [is] performed in the United States in connection with a commercial activity[260]" of the IO "elsewhere[261]".

Ultimately, despite the Supreme Court's narrowing of the scope of IO immunity under the IOIA from absolute to restrictive, the IFC's immunity was still upheld. The D.C. District Court, on remand, rejected the plaintiff's argument that the FSIA's commercial activity exception applied to their claim[262]. In doing so, the District Court did not even consider whether the IFC's lending activities were of a commercial nature, but rather focused on whether the claims were "based upon" activity "carried on" or "performed in the United States"[263].

The court, however, dismissed the case in February 2020 after analysing the first question: the activity at issue, the claim's "gravamen", is not performed in the United States, and the IFC is therefore still immune from suit. The District Court reasoned that the "gravamen" or "core" of the plaintiff's claim was not the IFC's approval of the loan, an act performed in Washington D.C., but rather the IFC's failure to ensure that the plant's construction and operation would not cause harm to the plaintiff's property, health or environment, as required by the environmental and social standards included in its own loan agreement[264]. The court ruled that this conduct, however, was not "carried out" in the US, with site visits, negotiations and the signing of the loan agreement all being carried out in India[265].

Additionally, the D.C. District Court had also *a priori* excluded the possibility, advanced by the plaintiffs, that the IFC had waived its immunity in its Articles of Agreement, making the non-application of the commercial activities exception irrelevant to this claim[266]. Citing *Mendaro*, which the Supreme Court's decision in *Jam* had not overturned,

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[259] 'Foreign Sovereign Immunities Act', 28 U.S.C. § (1976), art. 1605(a)(2).
[260] Foreign Sovereign Immunities Act.
[261] Foreign Sovereign Immunities Act.
[262] Wenjun Yan and Lin Shang, 'Forget International Law Not: IFC Loses Absolute Immunity in Jam v International Finance Corporation', *Beijing Law Review* 13, no. 03 (2022): 662–72, https://doi.org/10.4236/blr.2022.133043.
[263] Moore and Kleist, 'Immunity for Multilateral Development Banks in the United States'.
[264] Diane Desierto, 'SCOTUS Decision in Jam et al v. International Finance Corporation (IFC) Denies Absolute Immunity to IFC…With Caveats', *EJIL: Talk!* (blog), 28 February 2019, https://www.ejiltalk.org/scotus-decision-in-jam-et-al-v-international-finance-corporation-ifc-denies-absolute-immunity-to-ifc-with-caveats/.
[265] Yan and Shang, 'Forget International Law Not'.
[266] LeClercq, 'A RULES-BASED APPROACH TO JAM'S RESTRICTIVE IMMUNITY: IMPLICATIONS FOR INTERNATIONAL ORGANIZATIONS'.

the D.C. Circuit court applied the corresponding benefit test and thus held that "claims that implicate internal operations of an international organization . . . threaten the policy discretion of that organization[267]" and thus do not further that organization's goals.

As of today, despite the plaintiffs' effort to appeal the decision with the D.C. Circuit Court of Appeals in September 2020, which resulted in the D.C. Circuit affirming the District Court's dismissal of the case, and their petition for *certiorari* to the Supreme Court asking to reconsider the case and overturn the D.C. Circuit's holding that a lawsuit for commercial acts carried out in the US do not quality for the commercial activities exception, which was as well denied, the IFC still has not been held to any legal accountability for its actions in relation to the Tata Mundra power plant, and local communities have still not been granted any remedy for the injuries they incurred[268].

## 2.3 Conclusion

The evolution of international organizations' immunity in the United States has been marked by controversy and contradicting judgments. In this Chapter, we have analysed the US legal framework regarding IO immunity, which largely relies on the International Organizations Immunities Act, and the effect the 1976 enactment of the Foreign Sovereign Immunities Act on its application in US Courts.

Going from *Broadbent'*s refusal to decide on the IOIA's relation to the FSIA to the Circuit split between *Atkinson*'s absolute approach to immunity and *OSS Novalka*'s attempt at incorporating the FSIA's standards, we have realised just how influential the *Jam* decision was for the judicial climate at the time.

Through a discussion of the Supreme Court's judgment in *Jam v IFC*, which officially reversed *Atkinson* and ruled for the IOIA's incorporation of the FSIA's standards of immunity, based on the distinction between activities *jure imperii* and *jure gestionis*, a door has been opened for a discussion on the consequences of such a decision for litigation on IO immunity in the United States, as well as for a reconsideration of the "functional necessity" rationale which has traditionally been employed to justify IO immunity, in light of the growing need for accountability of IOs in the face of project-affected communities (as well as individuals facing discrimination, in the case of

[267] Jam v. Intern. Finance Corp. (Court of Appeals, Dist. of Columbia Circuit 6 February 2017).
[268] 'Budha Ismail Jam, et al v. IFC'.

employment claims) in need of redress, and of increasingly popular human rights approaches to access of justice questions. These questions, and their broader relevance to international organizations law, will be the main focus of the following Chapter.

# 3. Beyond the Functional Necessity Framework: The Implications of *Jam* and the Need for a Right-to-an-effective-remedy Approach to IO Immunity

In the last chapter, the evolution of US case law regarding IO immunity was discussed, culminating in the *Jam* decision finally ruling on the decades-long debate on the possible incorporation of the FSIA's standards of immunity into the IOIA, exemplified by the Circuit split between the D.C. Circuit's approach in *Atkinson* and the Third Circuit's approach in *OSS Novalka*. The Supreme Court, in *Jam*, reversed the *Atkinson* court's decision, and finally established a continuous link between the IOIA and the FSIA, such that "the Foreign Sovereign Immunities Act [also] governs the immunity of international organizations". While the decision was largely well-received among the general public and international organizations scholars, the decision itself raised more than a few doubts regarding its implications.

While this thesis' author welcomes the Supreme Court's decision as a significant step towards a legal framework capable of protecting the rights of individuals affected by international organizations' activities, a clearer analysis of *Jam*'s implications, especially as far as its relation with other countries' jurisprudence and with international law at large is concerned, seems to be in order. The Supreme Court's judgment has faced a lot of criticism, some of which was already addressed and countered by the majority's decision itself, such as the concerns regarding a risk of "excessive liability" facing IOs in the aftermath of *Jam*. While some of these criticisms will be addressed in this Chapter, their very discussion will serve as a point of departure for a broader discussion on the shortcomings of the *Jam* decision as regards the actual protection of individuals' right of redress in the future. The controversies underlying *Jam*'s repercussions for international organizations' immunities only make apparent, in the present author's opinion, the fundamental flaws behind the rationale for IO immunity, which simply fails to address the needs of victims of the socio-economic and environmental harms caused by IOs.

Therefore, the first Section of this Chapter deals with some of the most contended points of discussion regarding *Jam v IFC*: the relationship between international law and domestic law in the aftermath of *Jam* will be discussed, followed by an analysis of the "functional necessity" approach to IO immunity, dealing with the difference in the rationales underlying sovereign and IO immunity, which, according to some

commentators, makes the FSIA's standards fundamentally incompatible with the IOIA. Finally, this Section will address the effect the perceived risk of future litigation could have on international organizations' attitude towards harm prevention and internal dispute settlement.

## 3.1 The Implications of *Jam v IFC*: The Interaction between Different Sources of Immunity and the Illusory Relevance of Functionalism

In the last Chapter, the main points argued by the Supreme Court's majority within the *Jam* decision were discussed. And while the Court thoroughly analysed the textual evidence for a continuous link between the IOIA and the FSIA, it did not do much to provide a consistent framework for the interpretation of these changes in IO immunity against the backdrop of broader international law.

As was explained in Chapter 1's section on the sources of IO immunity, the legal framework outlining a specific organization's immunity is comprised of a number of different instruments: at the international level, immunity provisions are typically contained within either constitutive instruments, multilateral treaties, or bilateral agreements, such as headquarters or host agreements. While among themselves, priority is granted according to the principle of *lex specialis*, meaning bilateral agreements, for instance, would be applied before the more general multilateral conventions, these instruments' interactions with the IOIA – a domestic US law statute – has been the subject of some controversy among international law scholars, as well as being highlighted by Justice Breyer in his dissenting opinion. The main points of contention can be summarised along three lines: (a) the Court's inconsistent treatment of treaty regimes granting narrower immunities than the IOIA, (b) the difficult identification of self-executing treaties, and (c) the relevance of customary international law for future litigation in the United States.

### 3.1.1 "Default rules" and the Application of Treaty-based Immunity Provisions

Some of the criticism directed towards the Supreme Court's decision regarded the possibility, feared by the IFC and highlighted in Justice Breyer's dissenting opinion, that incorporating the FSIA (and all of its possible subsequent changes) into the IOIA would lead to international organizations being exposed to "excessive liability" in US courts. In

response to this argument, the Court clarified that, in the relationship between different legal sources of IO immunity, the IOIA only comprises "default rules", which in no way prevent IOs from granting themselves a different level of immunity under their constituent treaties[269]. So, for instance, the IOIA could not possibly be applied by US courts in a case against the UN, whose General Convention specifically grants the organization "immunity from every form of legal process[270]".

What this interpretation suggests is that the Supreme Court in *Jam* was trying to reinforce the alignment between domestic law and the US' international obligations in the area of IO immunity; by treating the immunities accorded by the IOIA as only "default rules", the Court is suggesting that, instead of *assuming* that IOs enjoy absolute immunity (as they did under the IOIA before *Jam*) and only then looking for potential waivers to said immunity in the IOs constituent treaty (or other IO-specific international agreements), US courts should now first consider the immunity provisions specific to the IO in question, and only in the absence of those apply the "default rules" found in the IOIA[271].

And, while this qualification seems to leave international organizations with quite a bit of leeway as to the immunities to be granted to them, the *Jam* decision itself offers some additional insight as to how the relationship between the IOIA and international treaty obligations will actually be handled by US courts. In the *Jam* decision, in fact, the Court specifically chose to apply the IOIA instead of the narrower immunity provided for by the IFC Articles of Agreement, which, while providing for privileges and immunities, never mention immunity from suit in particular[272].

The Supreme Court, therefore, opted for applying the IOIA's restrictive immunity to the claim at hand so as to supplement the IFC's treaty regime establishing narrower immunities. What this approach suggests is that the Supreme Court's approach, by applying the IOIA to 'fill a gap' in the IFC's treaty regime, resembles more a "minimum threshold[273]" way of applying the IOIA, rather than a "default rule" one[274]. This is further evidenced by the fact that the Supreme Court only points to this "default rule" quality of

[269] Jam v. Intern. Finance Corp., 139 S. Ct.
[270] Convention on the Privileges and Immunities of the United Nations.
[271] Bordin, 'To What Immunities Are International Organizations Entitled under General International Law?'
[272] Pierfrancesco Rossi, 'The International Law Significance of Jam v. IFC: Some Implications for the Immunity of International Organizations', 2019.
[273] Rossi.
[274] Rossi.

the privileges and immunities granted by the IOIA when faced with the accusation that its decision to apply to *jure imperii/jure gestionis* distinction to IOs might lead to "excessive litigation"; the Court only meant to specify that treaties granting broader immunity would supersede the IOIA[275]. We might therefore imagine that, in the future, the IOIA will be treated as the minimum standard for IO immunity in the US, below which no constituent instrument granting narrower immunities will be considered, instead only being applied when the IO's immunity regime grants *broader* immunity to the IO in question.

### 3.1.2 Applying Treaty Provisions over the IOIA and the Problem with "Self-execution"

The interaction between international and domestic law in the interpretation of IO immunity, however, does not simply concern the application of constitutive treaties in lieu of the IOIA, or absence thereof, but has also to do with the US' doctrine of self-executing treaties and its impact on the treatment of IOs' constituent treaties vis-à-vis domestic law.

The US Constitution considers international treaties and federal legislation to be at the same level within the hierarchy of norms. However, as Justice Breyer highlights in his dissenting opinion, international treaties will only be applied qua domestic law if the treaty in question is considered self-executing[276]. What could therefore constitute an obstacle to IOs in the application of their own constituent treaties in lieu of the IOIA's restrictive immunity standard, is the fact that the Supreme Court's approach to the identification of self-executing treaties is actually rather restrictive, as evidenced by the Supreme Court's decision in *Medellin v Texas*[277]. What Breyer feared is that IOs whose constituent treaties provide for full immunity would likely be subject to the IOIA instead, as a result of the treaties in question being most likely considered non-self-executing by US courts.

However, Rossi notes that these concerns are most likely exaggerated. Apart from the fact that constituent treaties such as the UN General Convention are considered self-executing despite the strict criteria established in *Medellin*, the application of treaty-based immunity

[275] Rossi.
[276] Jam v. Intern. Finance Corp., 139 S. Ct.
[277] Medellin v. Texas (Supreme Court 10 October 2007).

regimes do not necessarily depend on whether or not said treaties are held to be self-executing[278]. In fact, through the so-called Charming Betsy canon, a canon of interpretation first announced by Chief Justice Marshall in the 1803 *Schooner Charming Betsy*[279] case, a treaty's immunity provisions can still be applied over the IOIA based on the principle that "an act of Congress ought never be construed to violate the law of nations if any other possible construction remains[280]".

### 3.1.3 What about Customary International Law?

Having seen the effect of the *Jam* decision on the treatment of international and domestic sources of IO immunity in the United States, it becomes clear that the Supreme Court failed to address another important legal source, customary international law. While *Jam*'s interpretation of IO immunity under the IOIA impacts international law insofar as it now constitutes US' *opinion juris* on the possible restrictions to IO immunity under customary international law[281], the Court's absence of a reference to any possible customary international norm when assessing IO immunity seems to indicate that the court in *Jam* mostly agrees with those that deny the existence of any customary international norm regarding IO immunity[282]. This approach by the Supreme Court, apart from being controversial among scholars who have long debated the actual existence – and possible delineation – of a specific customary norm with regard to IO immunity, also contradicts earlier US courts' decisions[283]; in *Mendaro*, for instance, the D.C. Court of Appeals claimed that the rule interpreting constitutive waivers of immunity based on a "corresponding benefit test" articulated in its decision constituted "an accepted doctrine of customary international law[284]".

The claim in *Mendaro* being superseded in *Jam* should, however, be unsurprising in light of the fact that the D.C. Court of Appeals did not support its statement by showing adequate reference to state practice in *Mendaro*. The Supreme Court's avoidance of any

[278] Rossi, 'The International Law Significance of Jam v. IFC: Some Implications for the Immunity of International Organizations'.
[279] Murray v. Schooner Charming Betsy (Supreme Court 22 February 1804).
[280] Murray v. Schooner Charming Betsy, 6.
[281] Sachintha Dias, 'Jam v IFC before the D.C. District Court: Forget the Floodgates, There Won't Even Be a Trickle', *EJIL: Talk!* (blog), 1 April 2020, https://www.ejiltalk.org/jam-v-ifc-before-the-d-c-district-court-forget-the-floodgates-there-wont-even-be-a-trickle/.
[282] Rossi, 'The International Law Significance of Jam v. IFC: Some Implications for the Immunity of International Organizations'.
[283] Rossi.
[284] Mendaro v. World Bank, 717.

reference to customary international law in *Jam* suggests that, in future litigation, defendants will not be able to claim any entitlement to immunity based on customary obligations, thus having to solely rely on either treaty provisions or the IOIA[285].

### 3.1.4 The Allure of *Functionalism* and Scholarly Concerns over the Sovereign Immunity-IO Immunity Analogy

What ultimately can be inferred from the Supreme Court's decision in *Jam* is that, contrary to a first-glance analysis of the judgment, the Supreme Court did not actually decide that international organizations no longer enjoy absolute immunity in the United States. The decision, despite any difficulty that might arise from a constituent instrument not being considered self-executing, simply held that in the absence of treaty provisions granting a different level of immunity (which *Jam* suggests shall be *stricter* than that granted by the IOIA) the immunity of international organizations shall be determined following the FSIA's restrictive approach[286]. Thus, if the constituent instrument of an international organization is a self-executing treaty or has been otherwise incorporated into US law through enabling legislation, the scope of immunity for the IO in question is simply established by the immunity provision contained in the relevant IO's constituent treaty[287]. It is however important to remind ourselves that the *Jam* decision will definitely have a significant impact on the liability before US courts of international organizations such as the IFC, a multilateral development bank whose constituent treaty already provides for less-than-absolute immunity.

Most importantly, what the *Jam* decision *did* accomplish is breaking the pattern of equating the functional necessity rationale underlying IO immunity with absolute immunity being granted to them in US courts. In fact, *Jam* has incited animated discourse among scholars regarding the scope of immunity IOs should enjoy under a functionalist approach, with many scholars arguing that the Supreme Court made a crucial methodological mistake in attributing the FSIA's *jure imperii/jure gestionis* distinction to IOs, since sovereign immunity and international organizations immunity are founded on

[285] Rossi, 'The International Law Significance of Jam v. IFC: Some Implications for the Immunity of International Organizations'.
[286] Dias, 'Jam v IFC before the D.C. District Court'.
[287] Edward Chukwuemeke Okeke, 'Unpacking the "Jam v. IFC" Decision', *Diritti Umani e Diritto Internazionale*, no. 2 (2019): 297–304, https://doi.org/10.12829/94295.

different principles, with the former being based on the sovereign equality of states and the latter having a "functional necessity" rationale[288].

In this author's opinion, the decision in *Jam* is not only justified in light of the specific legal framework defining sovereign and IO immunity in the United States, which clearly already called for an interpretation of the IOIA as incorporating US rules on the law of state immunity throughout any of its possible future changes (such as the 1976 enactment of the FSIA), but is also perfectly within the bounds of the treatment of IO immunity on the international plane.

In fact, as has already been discussed both earlier in this Chapter and in Chapter 1, no specific customary international norm can be said, beyond a doubt, to pertain to IO immunity. In particular, Special Rapporteur Sir Michael Wood found, through a careful analysis of treaties, domestic legislation, courts' decisions and academic commentary, that it could not be said "that there is a 'general practice accepted as law' establishing a customary rule of immunity[289]" for IOs. Thus, while it would seem unfathomable that any single state could just 'act as they please' in its treatment of IO immunity, there is no generally accepted "functional necessity" rationale for IO immunity within general international law[290].

This line of thought is delved into with exceptional care by Bordin in his commentary to the *Jam* decision[291]. His insight on the analogies that can be drawn between State immunity, which *is* part of customary international law, and IO immunity, support this thesis' position with respect to IO immunity by dispelling the claim often held by those who oppose the Supreme Court's decision in *Jam*; namely that IOs enjoy a "functional immunity" under general international law, thus making the US' application of the FSIA's exceptions to sovereign immunity incompatible with an international understanding of IO immunities[292].

In particular, Bordin claims that, while Wood's report on the absence of customary rules of IO immunity seems convincing, and that the IOIA interpretation offered in *Jam* would

[288] Gulati, 'The Nature of Institutional Immunities'; Stewart, 'Holding International Organizations Accountable'.
[289] Wood, 'Do International Organizations Enjoy Immunity under Customary International Law?'
[290] Bordin, 'To What Immunities Are International Organizations Entitled under General International Law?'
[291] Bordin.
[292] Bordin.

thus not put the US in breach of general international law, States still seem to show some doubt in exercising jurisdiction over IOs without a specific justification[293]. It is the very presence of a disagreement over whether or not a customary norm regarding IO immunity exists that gives rise to uncertainty in the law. That legal uncertainty is usually resolved through analogical reasoning, finding similar cases and applying the rules in existence for said cases to those giving rise to uncertainty[294]; in other words, analogical reasoning seeks to project "the existing logic of the law into an area of uncertainty or controversy using devices such as analogy and reference to underlying principles[295]".

To put it briefly, Bordin argues that a number of similarities can be found between sovereign states and IOs such that analogical reasoning would render permissible the application of sovereign immunity rules to international organizations. While the concept of sovereignty is exclusively confined to States, with several domestic courts rejecting immunity for IOs under general international law on the basis of the perceived difference between "sovereign States and "non-sovereign IOs", we cannot reasonably conclude that there are no other grounds for similarity between IOs and States[296].

Bordin, for instance, highlights the *legal autonomy* shared by States and IOs when operating on the international plane as a "relevant similarity[297]" justifying a similar treatment of the two as regards customary (sovereign) immunity rules. In fact, while IOs are certainly controlled by their own members, that control is achieved through the member states' participation in political organs whose procedures are established by the IOs' constituent treaties[298]. To justify why IOs legal autonomy points towards a default immunity for IOs similar to that of States, Bordin states that:

> "Even though the organization and its members constitute separate legal persons, it cannot be seriously argued that the (sovereign) rights of member States that set up an organization to act in their stead are not affected when a domestic court rules on a dispute involving that organization[299]."

[293] Bordin.
[294] Bordin.
[295] Jeremy Waldron, 'The Concept and the Rule of Law', SSRN Scholarly Paper (Rochester, NY, 24 September 2008), https://papers.ssrn.com/abstract=1273005.
[296] Bordin, 'To What Immunities Are International Organizations Entitled under General International Law?'
[297] Bordin.
[298] Bordin.
[299] Bordin.

In other words, it would be "incoherent for international law to enable States to create IOs for collective action but then expose that action to the jurisdiction of third parties in a way that would be impermissible when States act individually[300]".

Furthermore, Bordin notes that, even though approaches focusing on sovereign status are well-accepted within international law, they fail to emphasise an equally important rationale for immunity: maintaining a coherent and orderly system regarding international claims by prioritising international forums over domestic courts, so as to actually protect States' capacity to self-govern. An excessive amount of claims being brought before domestic courts, with States exercising jurisdiction over one another, would bring forward "an unwieldy decentralised mechanism for the enforcement of international obligations that might hinder their coexistence as formally independent entities[301]". For this reason, IOs being devoid of "sovereignty" actually plays no role in the way in which their immunities should be treated in relation to "sovereign" States, since they too are self-governing institutions created to operate under the same conditions as States under general international law, with a presumption of coherence as regards the possibility of claims under many different states' jurisdictions.

Despite these similarities, which reinforce the belief that State immunity and IO immunity can be treated similarly under general international law, it must be emphasised that private actors bringing claims against IOs are still at a disadvantage as far as access to justice is concerned in relation to private actors being harmed by foreign States[302]. In fact, while private parties injured by a foreign State can still find a possible avenue of redress in the domestic courts of the State causing the harm, where no international law immunity could apply, private parties injured by an IO protected by immunity could be left without any other means of redress. In the end, therefore, while the absence of any 'last resort' exception to State immunity in cases of denial of justice would give some reason to the articulation of IO-specific exceptions to immunity, such qualifications should be understood as complementary to the present solution of treating States and IOs similarly as far as immunity is concerned. In Bordin's words: "It should be understood that any

[300] Bordin.
[301] Bordin.
[302] Bordin.

solution adopted on the authority of a systemic argument should be a starting point rather than the finishing line[303]."

Bordin also responds to the concerns regarding the application of FSIA's exceptions to IOs and its accordance with general international law. In particular, many scholars have lamented the irreconcilability of the *jure imperii/jure gestionis* distinction with a functionalist approach to IO immunity.

Functional immunity, as was explained in Chapter 1 of this thesis, relies on the idea that "states delegate functions to entities they create[304]" and that, therefore, immunity law is to be construed as *protecting* the functions of IOs themselves, so that they may be allowed to perform their tasks free from judicial interference. In fact, treaty regimes justify immunity provisions for IOs being more protective than customary rules applying to States through functionalist thinking. Such functionalist thinking is thus eventually used to justify even absolute immunity, by arguing that the "functional nature of the legal personality of any international organization[305]" implies that "all its acts have to be closely linked to their intended organisational purpose[306]".

However, it is not only in the creation and application of treaty regimes that we can observe the effects of functionalist thinking, since functionalism also pervades discourse surrounding the default rules of IO immunity, with some judges and scholars – who have already taken to accept that IOs enjoy immunity under general international law – arguing that "the international privileges and immunities recognized by customary law are those that each individual organization requires in order to discharge its responsibilities independently and without interference[307]". Arguments to this end have been espoused both by the Dutch Supreme Court in *Spaans v Iran-US Claims Tribunal*, in which it was helf that "[a]ccording to unwritten international law as it currently stood, an international organization was in principle not subject to the jurisdiction of the courts of the host state in respect of disputes which were immediately connected to the fulfilment of the tasks

[303] Bordin.
[304] Klabbers, 'The Transformation of International Organizations Law'.
[305] Company Baumeister Ing Richard L v O, 10 Ob 53/04y, ILDC 362.
[306] Company Baumeister Ing Richard L v O, 10 Ob 53/04y, ILDC 362.
[307] Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2005); Bordin, 'To What Immunities Are International Organizations Entitled under General International Law?'

assigned to that organization[308]", and by Justice Breyer in his dissenting opinion to the *Jam* decision, where he claimed that Congress had enacted the IOIA to facilitate IOs' capacity to perform their functions in the US, an intention which would be impeded by the new "restrictive" interpretation of the IOIA, since contrary to foreign governments, IOs are non-sovereign entities which are given specific functions "that often require them to engage in what U.S. law may well consider to be commercial activities[309]".

We can therefore conclude that under a functionalist perspective, international organizations should enjoy wider immunities than States under most circumstances, since the commercial activities which constitute an exception to State immunity under customary international law may well constitute a "core" activity of IOs whose functions include lending activities or otherwise financial endeavours. However, it is this author's opinion that there are strong reasons to doubt whether functional immunity for IOs actually has any place within general international law and that, therefore, there aren't sufficient grounds to believe that IO immunity could not be restricted on commercial grounds, following the standards for State immunity.

Firstly, we have already discussed Wood's report on the absence of a customary norm of IO immunity, since functional immunity cannot be specifically found neither in State practice nor in their *opinio juris*[310].

In addition, an argument against a customary norm of functional immunity could be based on the very same systemic reasoning that led us to confer to IOs immunities in line with those granted to States was based on the notion that it would be "incoherent" for IOs set up by States for collective action to be subject to a degree of jurisdiction that States wouldn't be subjected to when acting individually[311]. Intuitively, this analogical argument used to "fill the gap" left by the uncertainty generated by the absence of a customary norm of IO immunity can easily be reversed to argue that, just as it is unacceptable to deny IOs immunity in cases where States acting alone would enjoy it, it is equally unacceptable for a "group of states acting through an international organization [to enjoy] broader

[308] Spaans v Iran-United States Claims Tribunal, Final appeal judgment (Dutch Supreme Court [HR] 20 December 1985).
[309] Jam v. Intern. Finance Corp., 139 S. Ct.; Bordin, 'To What Immunities Are International Organizations Entitled under General International Law?'
[310] Bordin, 'To What Immunities Are International Organizations Entitled under General International Law?'
[311] Bordin.

immunity than its member states enjoy when acting alone[312]". As was pointed out in *OSS Novalka*, functional immunity for IOs would have the secondary effect of providing States with a sort of 'legal loophole' through which to "evade legal obligations by acting through international organizations[313]".

Finally, arguments bolstering functional immunity as the basis of a presumed 'incompatibility' between IO and State immunity tend to exaggerate the "technical challenges[314]" arising from an incorporation of exceptions to State immunity into IO immunity frameworks[315]. Distinguishing between *acta jure imperii* – being acts of public authority performed by a self-governing entity – and *acta jure gestionis* – being acts that a private party could perform as well – is equally challenging for the purpose of both State immunity and IO immunity, and the contours of such definitions are constantly being redefined in 'borderline" cases concerning States, despite the distinction being well-accepted in the context of State immunity[316]. While the restrictive scope of immunity that an organization dealing with commercial matters, such as the IFC, now enjoys under the FSIA's standards could be grounds for the adoption of further treaty protections for said IOs' immunities, but does not lead to any IO-specific difficulties in distinguishing between *acta jure imperii* and *acta jure gestionis*. In fact, the case against the IFC in *Jam* was mostly related to tortious liability towards third parties, instead of to the loan agreement as such, a claim which does not necessarily fall within the commercial activity exception[317]. Therefore, contrary to what was claimed by many of its critics, the *Jam* decision did not lead to an all-encompassing erosion of IFC's immunities.

In conclusion, we have analysed, through a discussion of Bordin's commentary to the Supreme Court's decision in *Jam*, the reasons for which IOs and States can be placed under a common legal roof when it comes to immunity rules within general international law. Despite what many commentators in the aftermath of *Jam* have argued, therefore, the Supreme Court's interpretation of the IOIA as incorporating the default rules of State

[312] OSS Nokalva, Inc. v. European Space Agency, 617.
[313] OSS Nokalva, Inc. v. European Space Agency, 617.
[314] Bordin, 'To What Immunities Are International Organizations Entitled under General International Law?'
[315] Bordin.
[316] Bordin.
[317] Bordin.

immunity actually complies with the US' international obligations under general international law.

### 3.1.5 Preventing Litigation by Opening the Doors to it? The post-*Jam* Potential for a Strengthening of IOs' Dispute Settlement Mechanisms

Before delving into the possibilities for accountability of IOs offered by an access-to-justice approach to IO immunity, one last implication of the *Jam* case must be discussed. In particular, an analysis of the decision's impact on the future liability of international organizations before domestic courts has led some commentators to underline the potential secondary effect of a restriction to IOs' scope of immunity on the behaviour of IOs themselves. Some international organizations may look towards strengthening their harm prevention mechanisms as well as their internal dispute settlement mechanisms, so that project-affected individuals may be protected or otherwise receive remedy for their injuries before any possible claim before a domestic court could arise.

In fact, the IFC's approach leading up to the *Jam* case perfectly evidences exactly what the negative effects of a disregard for internal accountability mechanisms are, with the organization's refusal to consider the CAO's findings leading to a lawsuit being brought against the IFC by the Indian communities affected by the Tata Mundra power plant project[318]. The very same actions that the IFC alleged, in its Draft Approach to Remedial Action[319], would have given rise to legal risk in the aftermath of *Jam* – the exercise of the IFC's oversight and enforcement authority over its borrowers as well as committing to provide remedy in the case of harm – are the most coherent ways to prevent future litigation. Had the IFC enacted the CAO's recommendations to address the injuries caused to local communities by the plant's construction and operation, or had it actually compelled its borrower to comply with their contractual environmental and social standards, the *Jam* lawsuit would have simply had no reason to exist[320].

One could argue that organizations could instead simply rush to amend their constituent treaties, in an effort to grant themselves broader immunities to be applied in lieu of the

[318] Harrison and Marcoux, 'Legal Risk and Accountability in Development Finance: Lessons from Jam v. International Finance Corporation'.
[319] 'Consultation on the Proposed IFC/MIGA Approach to Remedial Action', Text/HTML, IFC, October 2022, https://www.ifc.org/en/about/accountability/consultation-on-the-proposed-ifc-miga-approach-to-remedial-action.
[320] Harrison and Marcoux, 'Legal Risk and Accountability in Development Finance: Lessons from Jam v. International Finance Corporation'.

IOIA before domestic courts[321]. However, this view greatly underestimates the legal and political difficulties that go with such a change to IOs' internal rules: international organizations are only able to amend their own instruments through member state participation and vote, a process whose possibility for failure greatly diminishes the likelihood of an actual amendment in favour of absolute immunity for newly liable IOs[322].

In the end, the availability of alternative avenues to seek justice through internal accountability mechanisms not only benefits IOs insofar as they can avoid having to incur the economic and political costs of a lawsuit against them, but also renders justice more accessible for project-affected individuals who, to bring a lawsuit against an IO before domestic courts, often need a number of scientific and legal resources simply unavailable to most of them, with the exception of any *pro bono* help they might receive, as well as significant economic resources to be able to afford a lawsuit abroad[323].

It is this author's opinion that it is precisely the "risk of excessive litigation" currently plaguing IOs that represents the true potential force of the Jam decision. Apart from any technical analysis of the judgment's implication for the actual rules of IO immunity in the United States, *Jam* may have the effect of stimulating preventative action on the part of IOs in the face of a newly increased likelihood of litigation. As LeClerq simply puts it: "One oft-overlooked benefit of rules is that they deter harmful behavior. Now confronted by new national rules of jurisdiction, these organizations may have been catalyzed to prevent harm[324]."

## 3.2 Access to Justice Considerations in Limiting IO immunity: A Right-to-an-effective-remedy Approach

In the previous Section, some of the implications and secondary effects of the Supreme Court's judgment in *Jam v IFC* have been discussed, namely those concerning the interaction between domestic and international law, the absence of a "functional" immunity standard for IOs within general international law (confirming the Supreme

[321] LeClercq, 'A RULES-BASED APPROACH TO JAM'S RESTRICTIVE IMMUNITY: IMPLICATIONS FOR INTERNATIONAL ORGANIZATIONS'.
[322] LeClercq.
[323] Letkemann et al., 'Holding International Finance Institutions Accountable for Environmental Injustice'.
[324] LeClercq, 'A RULES-BASED APPROACH TO JAM'S RESTRICTIVE IMMUNITY: IMPLICATIONS FOR INTERNATIONAL ORGANIZATIONS'.

Court's right assessment of State immunity and IO immunity as comparable) and possible preventative measures being adopted by IOs in the aftermath of *Jam*.

The Supreme Court, however, made absolutely no mention of a very important point, especially considering its growing relevance in international law discourse regarding immunity: the role of human rights in determining the scope of IO immunity. In a significant number of national and international courts, human rights considerations are directly influencing IOs' entitlement to immunity, with alternative means of redress for affected parties being a specific requirement for immunity to be upheld[325].

While at earlier steps in *Jam*'s judicial history it had been pointed out by commentators that a full immunity grant for the IFC would have most likely resulted in a denial of justice for the plaintiffs, the Supreme Court's eventual denial of absolute immunity for IOs under the IOIA never specifically depended on access to justice considerations; the incorporation of the FSIA's restrictive standards of immunity *did* cause a *de facto* enlargement of private parties' access to justice, but this was an entirely "accidental" consequence[326]. In fact, the Supreme Court even highlighted a number of different reasons why the IFC's immunity could still be upheld on remand as regarded the petitioners' claim, citing the probable absence of a sufficient nexus of the IFC's activities to the United States. Therefore, with respect to previous US case law, which never took human rights into account when defining immunities, *Jam* did not prove to be as much of a 'revolutionary' decision as some had argued following the judgment[327].

This thesis, in its conclusion, therefore turns to an evaluation of a different possible approach to IO immunity, which, building on the momentum for demanding international organizations' accountability brought by *Jam*, inserts access to justice considerations into the determination of the scope of IO immunity.

This thesis' proposal for a standard of IO immunity based on access to justice considerations comes as a result of the realities brought forward by the *Jam* case, such as the interlinking between IO immunity and environmentally-harmful international development, with communities in the Global South suffering the economic and social

[325] Rossi, 'The International Law Significance of Jam v. IFC: Some Implications for the Immunity of International Organizations'.
[326] Rossi.
[327] Rossi.

consequences of IO impunity. The functional necessity approach, even if counterbalanced by the restrictions imposed upon it by sovereign standards of immunity, has not necessarily been destabilised by the Supreme Court in *Jam*, which still upheld the possibility for respondent IOs to raise a sort of "functionalist defence[328]" in cases of "excessive" exposure to liability. In its stead, this thesis proposes a right-to-an-effective-remedy approach to IO immunity, which takes significant inspiration from the ECtHR's decision in *Waite v Kennedy*.

### 3.2.1 A European Perspective: *Waite and Kennedy* and the Requirement for "Reasonable Alternative Means"

In 1990, for the first time, the European Court of Human Rights suggested that granting immunity to an international organization could have the effect of infringing upon an individual's right to seek a remedy if a "reasonable alternative remedy" was not provided. The decision which established the European precedent for exceptions of immunity based on access to justice considerations was taken by the ECtHR in *Waite and Kennedy v European Space Agency*[329], and concerned a labour dispute considered inadmissible by the German courts who first dealt with the case. The German courts deemed the suits inadmissible on the basis of the UN treaty which both characterised the ESA as an international organization and granted it immunity from suit. The complaint that was thereafter lodged against Germany in the ECtHR was based on an alleged violation of the plaintiffs' human right of "access to a court for a determination of their dispute with the ESA[330]" under the European Convention on Human Rights. Waite and Kennedy argued that Germany had violated Art 6 Section 1 of the Convention, which states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law[331]", by denying them access to court as regarded their labour dispute[332].

The ECtHR, in answering the question of whether Germany had in fact violated the plaintiffs' right to seek a remedy, by highlighting that a state granting IOs certain immunities is not grounds for an exception to said State's responsibilities under the

[328] Rossi.
[329] Waite & Kennedy v. Germany.
[330] Waite & Kennedy v. Germany.
[331] 'European Convention on Human Rights (ECHR)', 1950.
[332] Jandali, 'Jammed from Justice: How International Organization Immunity Enshrines Impunity'.

Convention. What the court suggested, contrary to past case law which allowed IO functional immunity to supersede individuals' right to seek a remedy, is that "IO immunity only goes so far as human rights allow[333]". In other words, the application of an IO's immunity could not result in a violation of an individual's right to seek a remedy.

The test established by the ECtHR to review whether an IO's immunity could infringe upon individuals' right to seek a remedy is articulated in the following manner: "[A] material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the ECHR is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention[334]." This test, which revolves around examining the dispute settlement mechanisms provided for by the IO in question, was successfully passed by the ESA, which, according to the Court, "expressly provide[d] for various modes of settlement of private-law disputes[335]", thus sufficiently providing "alternative means of legal process[336]". Having assessed that Waite and Kennedy's right to seek a remedy had thus not been violated, the ECtHR upheld the ESA's immunity.

However, for the purposes of proposing an actual approach to IO immunity based on access to justice, it is important to note that the ECtHR's decision in *Waite and Kennedy* presents a substantial amount of issues, relating to both its scope of application as well as its underwhelming impact on subsequent judicial practice.

Firstly, as regards the ECtHR's application of its own standards, it is relevant to mention that the ECtHR never actually defined what constitutes reasonable alternative means, since in its examination of the ESA's dispute settlement mechanisms, the Court only made sure that an alternative means of legal process *existed*, in the form of the ESA's internal appeals board, without questioning whether that alternative means was "reasonable" by checking the applicants' ability to actually access the ESA's Board of Appeal[337]. Therefore, even though the ECtHR heralded a new access-to-justice approach to IO immunity, it appears that it applied its own approach too leniently, considering the mere

[333] Jandali.
[334] Waite & Kennedy v. Germany.
[335] Waite & Kennedy v. Germany.
[336] Waite & Kennedy v. Germany.
[337] Ulf Andreas Weber and August Reinisch, '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', 1 January 2004, https://doi.org/10.1163/1572374043242330.

existence of an alternative remedy for injured parties to be enough for their right to seek a remedy not to have been violated[338].

In fact, the ECtHR's low threshold for determining what constitutes a "reasonable alternative means", with the term "reasonable" basically being devoid of any substantial meaning insofar as fair trial standards are concerned, has unsurprisingly led to the ECtHR never denying IO immunity on the basis of its own approach he only courts to occasionally make use of the *Waite and Kennedy* jurisprudence have been national courts, which have been known to render inapplicable IOs' immunities not only, as the ECtHR did in *Waite and Kennedy*, in the case of a complete absence of alternative means, but also where those alternative means were held not to be 'reasonable'[339]. For instance, Belgian courts have applied the reasonable alternative means approach in full, by piercing IO immunity even in the presence of an internal dispute settlement mechanism, because said mechanism was not independent[340]. Likewise, a case arising out of a labour dispute against the AfDB in France, resulted in the social chamber of the Cour de Cassation declaring the AfDB's immunity inapplicable in the absence of an internal tribunal accessible by the staff member concerned, since French courts did not consider the mere existence of alternative means to be appropriate grounds for upholding immunity, but also made sure said means would grant the plaintiff a fair trial[341].

Apart from distinguishing between national courts' and the ECtHR's application of the reasonable alternative means approach, the cases just described also point to a relevant feature of the *Waite and Kennedy* decision that further diminishes its impact: all of these decisions arose out of labour disputes. The reason lies in the fact that the ECtHR specifically limited the *Waite and Kennedy* jurisprudence to the employment sphere, meaning that the approach could only be utilised to assess an IO's internal dispute settlement mechanism's compatibility with the right of access to a court when the IO was involved in a labour dispute. Further restricting the already slim realm of applicability of the *Waite and Kenndy* approach and officially dispelling any claim of its 'revolutionary' impact on IO immunity, is the fact that, for employment matters in particular, most organisations already *have* dispute settlement mechanisms in place, a characteristic

[338] Jandali, 'Jammed from Justice: How International Organization Immunity Enshrines Impunity'.
[339] Gulati, 'The Nature of Institutional Immunities'.
[340] Gulati; *See* Siedler v Western European Union, Appeal Judgment (Labour Court of Appeal 17 September 2003).
[341] Gulati, 'The Nature of Institutional Immunities'.

which, when coupled with the ECtHR's reluctance to deny immunity on the basis of existing, yet 'unreasonable' alternative means, essentially renders the approach 'useless' against international organisations whose ineffective, or altogether inexistent, dispute settlement mechanisms render access to justice unreachable for most individuals suffering harm at the hands of said organisations. A perfect example of this contradictory interpretation can be seen in the *Srebrenica* case, in which the ECtHR contended that, despite the UN's failure to establish an alternative means of remedy for the applicants, the claim's gravamen having to do with the organisation's core activities as opposed to an employment relationship between the latter and its staff was reason enough for the ECtHR to uphold the UN's immunity in the face of the patent violation of the applicants' right of access to a court[342].

Having discussed the less-than-revolutionary effect of the *Waite and Kennedy* decision on IO immunities, the following Section, shall constitute an effort to remedy some of the mistakes to do with the ECtHR's approach by outlining a possible right-to-an-effective-remedy test which focuses on both the existence and the efficacy of alternative dispute settlement mechanisms, so as to define a framework for the attribution of IO immunity which truly takes into account the rights of individuals affected by IOs' activities.

### 3.2.2 The Right to an Effective Remedy: A Two-fold Test

The right to an effective remedy, as scholars would generally agree, is two-fold: the *procedural* right to a remedy requires IOs to provide for "effective access to a fair hearing[343]" – meaning affected parties should have access to a hearing before an independent body before which they can vindicate their rights – while the *substantive* right to a remedy is the reparation itself, either in the form of a recognition that the affected party's rights were violated, an end to the violation itself, or of compensation for the injury incurred by the affected party[344].

To properly apply the test so as to decide whether domestic courts are able to exercise jurisdiction over a claim concerning an international organization, states should proceed

[342] Stichting Mothers of Srebrenica and Others v. the Netherlands (dec.), No. 65542/12 (ECtHR 11 June 2013); Maria Irene Papa, 'The *Mothers of Srebrenica* Case before the European Court of Human Rights: United Nations Immunity versus Right of Access to a Court', *Journal of International Criminal Justice*, 12 August 2016, mqw040, https://doi.org/10.1093/jicj/mqw040; Gulati, 'The Nature of Institutional Immunities'.
[343] Jandali, 'Jammed from Justice: How International Organization Immunity Enshrines Impunity'.
[344] Jandali.

by a two-step process: first, they should assess whether there are alternative dispute settlement mechanisms set up by the IO in question, for the purpose of allowing affected private parties to seek a remedy[345]. If such dispute settlement mechanism cannot be identified, the test is brought to a close and the international organizations' immunity is suspended, allowing domestic courts to exercise jurisdiction. If, instead, an alternative dispute mechanism is provided by the IO, a second step is added onto the test[346].

In the second step, states should examine the IO's alternative means to find whether they actually provide an effective remedy for affected individuals. A remedy is considered "effective" when individuals' access to a fair hearing before an independent body where they are able to claim their rights (*procedural* effectiveness) and when individuals have access to adequate reparations for their harm (*substantive* effectiveness)[347]. When either the procedural or substantive effectiveness requirements are not met by the IO in question, the IO's immunity is suspended and individuals are free to bring a claim against the IO in domestic courts. Meanwhile, if the IO's dispute settlement mechanism provides for an actual "effective remedy" by adhering to the requirements set out in this test, the state may uphold the IO's immunity, with domestic courts not being able to exercise jurisdiction over claims concerning the organization's activities[348].

To further clarify how this approach would be applied, it can be noted that for the purposes of *Jam*, the IFC would not pass the right-to-an-effective-remedy test, since, while it certainly does provide individuals with alternative means to seek remedy through its independent accountability mechanism, the CAO neither provides project-affected individuals access to a fair hearing before an independent body, not does it provide those same individuals with access to adequate reparations for their harm[349]. As had been mentioned when analysing the procedural history of *Jam*, the CAO acts either via dispute resolution or via compliance auditing when dealing with project-related complaints, two mechanisms which never include the adjudication of the complaints through a hearing before an independent body. The CAO's findings are communicated to the IFC, but the organization (and its private sector partners) is under no obligation to actually enforce

[345] Jandali.
[346] Jandali.
[347] Jandali.
[348] Jandali.
[349] Jandali.

any of the CAO's recommendations[350]. The IFC thus does not meet the procedural effectiveness requirement of the test. At the same time, even though the test would have been considered over after the first step, the IFC can also be proved to fail the substantive effectiveness requirement, since the CAO has no direct control over the finances of the IFC for the purposes of compensation if it finds, as was the case in *Jam*, that individuals have been harmed by the organization's activities in the pursuance of one its projects[351].

This right-to-an-effective-remedy approach to IO immunity, contrary to its "functional necessity" counterpart, places the rights of individuals before the operational needs of international organizations, making immunity dependent on the possibility for individuals to actually obtain remedy to their harm through alternative means. In the absence of excessive procedural safeguards to IO immunity, which has led many commentators (and the general public) to talk about the legal unaccountability of IOs, international organizations would have to create effective frameworks for the attribution of remedial action to affected parties, so as to not have their immunity suspended when a claim arises, and avoiding the political and financial setbacks that come with disputing a lawsuit in domestic courts.

## 3.3 Conclusion

In this Chapter, an analysis of the main implications of the *Jam* decision has been carried out, which has resulted in a series of considerations on the state of IO immunity in the aftermath of *Jam*: the immunities provided for by the IOIA can be said to constitute a "minimum threshold" rather than "default rules" in the eyes of the Supreme Court, the determination of the self-execution of treaties could play a role in the IOIA's relevance to certain IOs' exposure to litigation, and IOs will not be able to claim immunity on the basis of customary international law.

Following said analysis, a discussion of the main criticisms to the decision as far as functional immunity and the inapplicability of State immunity standards to IOs are concerned has proved such criticisms baseless from an international law perspective, since there is no customary norm establishing functional immunity for IOs that would

[350] Jandali.
[351] Jandali.

render the US decision to incorporate the FSIA's standards of immunity into the IOIA's incompatible with general international law.

Finally, while recognising the step forward *Jam* constituted for furthering accountability of IOs in the United States, the underlying reliance on functionalism, an approach which inherently disregards human rights considerations, as the main rationale for IO immunity has been argued to be unjust for individuals seeking justice for the harm caused to them by international organizations' activities. In its stead, this thesis has advanced a proposal placing access to justice considerations at the forefront of the determination of IO immunity. The last Section has outlined a possible right-to-an-effective-remedy test, modelled after the ECtHR's approach in its *Waite and Kennedy* decision, to properly protect individuals' right to seek a remedy when attributing immunity to any particular international organization.

# Conclusion

*Jam v International Finance Corporation,* as has most likely become apparent throughout this thesis, has been having, and will continue to have, a lasting impact on international organizations' immunity within the United States: the inadmissibility of immunity claims on the basis of IOs' activities being considered *acta jure gestionis* is bound to give a significant blow, despite what has been discussed in the latest Chapter of this thesis regarding the possibly 'less-than-revolutionary' impact of the judgment, to the almost absolute immunity enjoyed by international organizations before *Jam*, and especially to that enjoyed by multilateral development banks, whose lending activities were left virtually unchecked despite their status being more akin to that of a private sector company and in a clear disregard for their proclaimed goal of "improv[ing] the lives of people in developing countries[352]" while promoting social and environmental sustainability[353]. *Jam* might not be the 'end-all-be-all' of IO accountability, but it is most certainly a step forward to look upon with optimism.

To reach that conclusion, and to offer further grounds for reflection as to the possible future of international organizations' immunity, this thesis has outlined the theoretical background to jurisdictional immunities more generally, and of IO immunity specifically, with particular care for the concept of "functionalism" and the different judicial, and scholarly, opinions regarding its application for the determination of IO immunity. This thesis' main analysis, however, was carried out with respect to the Supreme Court's decision in *Jam* and its implications, which, as was said earlier, point to a future US jurisprudence – albeit not completely, and only as reserved to matters of *jure gestionis* – more in line with human rights concerns when it comes to the tensions between IO immunity and affected parties' access to justice. Finally, this thesis turned to a proposal for a 'right-to-an-effective-remedy' approach to IO immunity that prioritises access to justice considerations above the uncompromising protection of international organizations' functions.

While the fragmented nature of immunity law, and the persisting lack of a purposefully delineated international framework for the immunities of IOs, might be cause for

[352] 'Who We Are', Text/HTML, IFC, https://www.ifc.org/en/about.
[353] 'IFC Performance Standards on Environmental and Social Sustainability' (International Finance Institution (IFC), 2012), https://www.ifc.org/en/insights-reports/2012/ifc-performance-standards.

scepticism when it comes to the development of a widespread and well-established standard of immunity relying on access to justice considerations, it is this author's opinion that the increasing pressure being applied for the protection of human rights, and the simultaneous strengthening of domestic courts' role in the field of IO immunity, could make justice for all victims of IOs' environmentally and socially harmful activities a likely prospect in the future.

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