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*Jam v. International Finance Corporation:*  
The End of Absolute International  
Organizational Sovereign Immunity and the  
Argument for a Functional Immunity Regime

BRYCE HOLLANDER<sup>†</sup>

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## I. INTRODUCTION

On February 27, 2019, the United States Supreme Court decided its first case regarding whether international organizations retained absolute immunity from prosecution in U.S. courts—*Jam v. International Finance Corporation*.<sup>1</sup> In a stunning reversal of judicial precedent, the Supreme Court found that international organizations were no longer immune from suit.<sup>2</sup> Absolute immunity from suit was a right which international organizations have traditionally enjoyed in the United States since the passage of the International Organizations Immunities Act (“IOIA”) in 1945.<sup>3</sup> The IOIA stated that international organizational immunity was “the same immunity as foreign governments enjoy,” which in 1945 meant absolute sovereign immunity.<sup>4</sup> However, in 1976, Congress passed the Foreign Sovereign Immunities Act (FSIA) which created several

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1. *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759, 772 (2019).

2. *Id.*

3. *Id.* at 764.

4. *Id.*

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exceptions to absolute sovereign immunity that allowed parties to sue foreign sovereigns in U.S. courts.<sup>5</sup> International organizations, however, were generally thought to have retained their absolute immunity from prosecution until *Jam*.<sup>6</sup>

In a 7-1 decision, the Supreme Court held: “The International Organizations Immunities Act grants international organizations the ‘same immunity’ from suit ‘as is enjoyed by foreign governments’ at any given time.<sup>7</sup> Today, that means that the Foreign Sovereign Immunities Act governs the immunity of international organizations.”<sup>8</sup> The Supreme Court correctly decided that, given the historical and statutory context of the IOIA and the FSIA, international organizations should enjoy the same restrictive sovereign immunity as foreign governments.<sup>9</sup> However, the majority did not properly judge the impact that subjecting all U.S. based international organizations, particularly international financial institutions (IFI) and multilateral development banks (MDB), to the commercial exception of the FSIA will have; nor did the majority properly consider how to apply the FSIA’s exceptions to international organizations under the new default rule.<sup>10</sup> The most effective solution to these issues will be for lower court’s to adopt the doctrine of functional immunity; a doctrine which is used by the vast majority of nations which host international organizations.<sup>11</sup> Functional immunity allows courts to apply the exceptions listed in the FSIA while not unintentionally opening international organizations to a myriad of suits.<sup>12</sup> Functional immunity also provides individuals and groups a proper forum to have their claims heard without overwhelming U.S. courts with litigation.<sup>13</sup>

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5. 28 U.S.C. § 1605 (1976).

6. *Jam*, 139 S. Ct. at 772.

7. *Id.*

8. *Id.* Only 8 Justices participated in the *Jam* decision. Justice Kavanaugh recused himself from the proceedings, having participated in the prior D.C. Circuit panel of the case. It is worth noting that he ruled in favor of the IFC.

9. *Id.* at 771-72. International monetary organizations and multilateral lending banks are international organizations that provide financial assistance, typically in the form of loans and grants, to developing countries in order to promote economic and social development. The bulk of their activities are inherently commercial by definition.

10. *Id.* at 772.

11. Julian Arato, *Equivalence and Translation: Further thoughts on IO Immunities in Jam v. IFC*, EUROPEAN JOURNAL OF INTERNATIONAL LAW: TALK (Mar. 11, 2019), <https://www.ejiltalk.org/equivalence-and-translation-further-thoughts-on-io-immunities-in-jam-v-ifc/>.

12. *Id.*

13. *Id.*; see also Carson Young, *The Limits of International Organization Immunity: An*

## II. THE CASE FACTS

The appellee in *Jam* was the International Finance Corporation (“IFC”), a branch of the World Bank headquartered in Washington D.C.<sup>14</sup> The IFC is an international financial institution which offers investment and advisement services to encourage private sector development in less developed countries.<sup>15</sup> Here, the IFC provided loans to a subsidiary of Coastal Gujarat Power Limited, an Indian company, to construct and operate the Tata Mundra Power Plant in Gujarat, India.<sup>16</sup> The IFC had, in accordance with their internal policy, included within their loan agreement an Environmental and Social Action Plan (“the Plan”) designed to protect surrounding communities at the power plant.<sup>17</sup> The agreement also stipulated that the IFC “retained supervisory authority and could revoke financial support for the project at any time,” if Coastal Gujarat did not comply with the agreement’s provisions.<sup>18</sup> The IFC Compliance Advisor Ombudsman and an internal review board of the IFC conducted an internal audit after the plant had been completed and concluded that the Tata Mundra Plant’s construction and operations did not comply with the Plan.<sup>19</sup> However, the IFC did not compel Coastal Gujarat to act in accordance with the Plan, institute punitive measures against Coastal Gujarat, nor withdraw their financial support despite the conclusions of the Ombudsman and internal review board.<sup>20</sup>

The appellant’s were Buddha Ismail Jam and a group of fishermen, farmers, a local government entity, and a fishermen’s trade union, all of whom lived and worked in the area near the Tata

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*Argument for a Restrictive Theory of Immunity Under the IOIA*, 95 TEX. L. REV. 889, 908 (2017).

14. INTERNATIONAL FINANCE CORPORATION, [https://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/home](https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/home) (2020).

15. INTERNATIONAL FINANCE CORPORATION, [https://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/about+ifc\\_new](https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new) (Last visited Mar. 22, 2020).

16. *Jam*, 139 S. Ct. at 767.

17. *Id.*; see also The World Bank, *Environmental and Social Policies*, (last accessed, Mar. 1, 2020) <https://projects.worldbank.org/en/projects-operations/environmental-and-social-policies>. Environmental and Social Action Plans are documents which gauge the environmental and societal impact an IFC loan will have on the area receiving a loan. The World Bank requires that these plans be drawn up any time the Bank loans money. The loan receiver must strictly comply with the plan’s terms or face revocation of the loan and further potential punishment.

18. *Jam*, 139 S. Ct. at 767.

19. *Id.*

20. *Id.*

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Mundra plant.<sup>21</sup> They alleged that the plant's construction had devastated their local way of life.<sup>22</sup> The claim was primarily based on various torts which resulted from the plant's operation, including polluting the local water supply, contaminating the air, and killing off the fish population.<sup>23</sup> The plaintiffs further argued that they were the third-party beneficiaries of the environmental and social terms of the loan agreement.<sup>24</sup> Thus, the IFC was not immune to their claims, and even if it was immune, it had waived its immunity in dealing with Coastal Gujarat.<sup>25</sup>

Jam sued in the District Court of the District of Columbia, which dismissed the claims due to the IFC's IOIA derived absolute immunity.<sup>26</sup> The Circuit Court agreed, noting that the IFC enjoyed total immunity from prosecution under the IOIA and that the IFC did not waive its immunity regarding this type of suit.<sup>27</sup> The Supreme Court granted certiorari limited to the first point, and analyzed "whether the IOIA grants international organizations the virtually absolute immunity foreign governments enjoyed when the IOIA was enacted, or the more limited immunity they enjoy today."<sup>28</sup>

### III. LEGAL BACKGROUND

The theory of absolute sovereign immunity had long been in practice in U.S. courts prior to *Jam*.<sup>29</sup> In 1812, the Supreme Court held in *The Schooner Exchange v. M'Faddon* that prospective plaintiffs could not sue a foreign sovereign, even when those claims related to the sovereigns commercial activities with the United States.<sup>30</sup> For more than a hundred years following the *Schooner Exchange* case, U.S. courts applied the doctrine of absolute sovereign immunity when hearing suits against foreign governments.<sup>31</sup> A

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21. *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 105 (D.D.C. 2016).

22. *Jam*, 139 S. Ct. at 763.

23. *Id.*

24. *Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 704-05 (D.C. Cir. 2017).

25. *Id.*

26. *Jam*, 172 F. Supp. 3d at 104.

27. *Jam*, 860 F.3d at 703.

28. *Jam*, 139 U.S. at 765.

29. *See generally* Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 *YALE J. INT'L L.* 489 (1992).

30. *See The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 134-35 (1812) (finding that a private party could not sue a foreign sovereign and claim ownership of a French warship docked and left in Philadelphia during the Napoleonic Wars).

31. Daniel T. Murphy, *The American Doctrine of Sovereign Immunity: An Historical*

“significant number” of sovereign immunities cases arose during World War I, as the increase in international shipping used to supply the Entente war effort increased the number of international tort and breach of contract claims in U.S. courts.<sup>32</sup>

After World War I the Supreme Court took steps to broaden the concept of foreign sovereign immunity.<sup>33</sup> The Court held in *Berizzi Bros. v. The Pesaro* that all activities of a sovereign, including commercial activities, were public in nature and thus immune from U.S. prosecution.<sup>34</sup> Notably, this wholesale adoption of absolute sovereign immunity contradicted the State Department’s policy, which stated that government owned entities engaged in commerce were not entitled to absolute immunity from suit.<sup>35</sup> In *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, Justice Stone further expanded the concept of sovereign immunity by asserting that foreign states received absolute immunity from suit by “mak[ing] a diplomatic representation of the public ownership of the property . . . [or] intervening in [] suit as a claimant.”<sup>36</sup>

The IOIA entered into force on December 29, 1945, in order to grant international organizations of which the United States was a member of “a legal status which is adequate to ensure the effective performance of their functions and fulfillment of their purposes.”<sup>37</sup> Prior to the IOIA’s passage, the United States operated under the

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*Analysis*, 13 VILL. L. REV. 583, 587 (1968). It is important to note, however, that owing to the United States lack of international land borders compared to other nations the vast majority of these cases were confined to the realm of admiralty law. Cases did arise outside of the admiralty law context, however. *See, e.g.*, *Oliver Am. Trading Co. v. United States of Mexico*, 5 F.2d 659 (2d Cir. 1924); *see also, e.g.*, *French Republic v. Board of Supervisors*, 200 Ky. 18, 252 S.W. 124 (1923) (stating that, in general, U.S. courts overwhelmingly upheld the doctrine of absolute sovereign immunity in these cases).

32. *See, e.g.*, *The Attualita*, 238 F. 909 (4th Cir. 1916); *see also, e.g.*, *The Maipo*, 252 F. 627 (S.D.N.Y. 1918); *see also, e.g.*, *The Pampa*, 245 F. 137 (E.D.N.Y. 1917). Each of these cases involved tort suits which would have resulted in the seizure of foreign registered ships docked in U.S. ports. The various courts produced mixed opinions regarding whether this seizure violated the ship owners’ immunity as a resident of a foreign sovereign. However, the courts generally decided that the ships were protected under the doctrine of absolute sovereign immunity. *See supra* note 30, at 496.

33. *Berizzi Bros. v. The Pesaro*, 271 U.S. 562, 574 (1926).

34. *Id.*

35. Green Haywood Hackworth, *Digest of International Law*, volume IV (Washington, Government Printing Office, 1941), at p. 434. The State Department traditionally held the role of defining the limits of foreign sovereign immunity. In retaliation for the outcome of *Berizzi Bros.*, the State Department repeatedly refused to grant requests of immunity unless ordered to do so by a court.

36. 303 U.S. 68, 74-76 (1938); *see also In re Muir*, 254 U.S. 522, 532-33 (1921).

37. *See generally* Lawrence Preuss, *The International Organizations Immunities Act*, 40 AM. J. INT’L L. 332 (1946), [www.jstor.org/stable/2193194](http://www.jstor.org/stable/2193194).

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position that there was no obligation within international customary law which extended sovereign immunity to international organizations.<sup>38</sup> Noting that international organizations almost exclusively derived their funding from various foreign governments and that the U.S. had become increasingly involved in international organizational management following the end of WWII, Congress passed the IOIA to safeguard their rights.<sup>39</sup> Under the IOIA, international organizations had the “same immunity” from suit “as is enjoyed by foreign governments,” in essence codifying the regime of absolute sovereign immunity as this was what foreign governments enjoyed at the time.<sup>40</sup>

The doctrine of absolute sovereign immunity began to recede in the decade following the issuance of the IOIA. In 1952, noting developments within the field of sovereign immunity abroad, the U.S. Department of State issued the Tate Letter.<sup>41</sup> The State Department announced that it would be formally abandoning the doctrine of absolute sovereign immunity in favor of the rival restrictive theory of sovereign immunity.<sup>42</sup> The State Department justified this decision by noting that restrictive sovereign immunity had already been adopted by several western nations.<sup>43</sup> The State Department asserted that while a state’s Public Acts (*Jure Imperii*) retained absolute immunity from prosecution, a state’s Private Acts (*Jure Gestionis*) no longer enjoyed this same immunity.<sup>44</sup> As a result, the Tate Letter essentially allowed litigants the ability to sue foreign sovereigns for their commercial activities.<sup>45</sup> By 1976, this doctrine was codified by Congress in the FSIA.<sup>46</sup>

The Foreign Sovereign Immunities Act had three objectives: to transfer responsibility for immunity determinations to the judiciary, to define and codify the restrictive theory of immunity, and to provide a uniform set of standards for litigation against foreign states

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38. *Id.* at 333.

39. *See generally supra* note 38.

40. 22 U.S.C. § 288a(b) (1945).

41. Robert M. Jarvis, *The Tate Letter: Some Words Regarding Its Authorship*, 55 AM. J. LEGAL HIST. 465, 469–71 (2015).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder’s View*, 35 INT’L & COMP. L.Q. 302, 303 (1986) (stating that the U.S. became the first nation to codify the law of foreign sovereign immunity by statute).

and government agencies.<sup>47</sup> The FSIA codified several exceptions to foreign sovereign immunity, including whether the foreign state expressly waived their immunity (§ 1605(a)(1)), committed a tort in the United States (§ 1605(a)(5)), or seized property in violation of international law (§ 1605(a)(3)).<sup>48</sup> Perhaps most importantly for *Jam*, the FSIA also exempted foreign sovereign immunity in cases involving a foreign sovereign's engagement in commercial activities (§ 1605(a)(2)).<sup>49</sup> There are three bases by which a plaintiff could sue a foreign state for these commercial acts, including:

[An] action [] based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.<sup>50</sup>

Since the passage of the FSIA, the reference in the IOIA to the immunity of foreign governments has generated confusion over whether international organizations enjoyed absolute or restricted immunity from prosecution.<sup>51</sup> U.S. Circuit Courts have split on the matter.<sup>52</sup> For instance, in 1998, the District of Columbia Circuit Court of Appeals held that the immunity of international organizations remained as absolute in the present day as it was in 1945 despite the changes to the immunity of foreign states.<sup>53</sup> In *Atkinson* a woman who had filed for divorce in Maryland sought to garnish her husband's wages as alimony.<sup>54</sup> The husband worked for the Inter-American Development Bank and he asserted that the wages he had earned could not be garnished because the wages of international organization employees, like the organizations

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47. *Id.* at 304-05.

48. 28 U.S.C. § 1605 (2016).

49. *Id.*

50. 28 U.S.C. § 1605(a)(2) (2016).

51. *Jam*, 139 S. Ct. at 768.

52. *See, e.g.*, *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1336 (D.C. Cir. 1998), *as amended* (Oct. 28, 1998), and *abrogated by Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019); *see also, e.g.*, *Oss Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 759, 765-66 (3d Cir. 2010).

53. *Atkinson*, 156 F.3d at 1336. Washington D.C. is the traditional forum for international organization litigation in the United States due to D.C. being the headquarter location for many international organizations.

54. *Id.*



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operations, enjoyed absolute immunity from prosecution.<sup>55</sup> Finding that the Inter-American Development Bank had not willfully relinquished its traditional absolute immunity from prosecution in this matter, the D.C. Circuit Court of Appeals rejected the appellant's wage garnishment claim.<sup>56</sup>

Crucially, *Atkinson* discussed the commercial activities exception of the FSIA and whether international organizations were subject to its provisions.<sup>57</sup> The appellant argued that IOIA derived international organizational immunity had been amended following the passage of the FSIA.<sup>58</sup> The court rejected this argument, finding that the scope of immunity provided by the IOIA persisted beyond the enactment of the FSIA, and that nothing in the text of the FSIA implied that Congress had wished to apply the new exceptions of foreign state immunity to international organizations.<sup>59</sup> The D.C. Circuit found that the text of the IOIA left "the responsibility for updating the immunities of international organizations in the face of changing circumstances" to the executive branch.<sup>60</sup>

Contrarily, the Third Circuit Court of Appeals held in *Oss Nokalva, Inc. v. European Space Agency* that international organizational immunity had in fact changed after the passage of the FSIA in 1976.<sup>61</sup> A New Jersey corporation provided software to the European Space Agency ("ESA"), a designated international organization.<sup>62</sup> The corporation sued the ESA for breach of contract, which the ESA defended by arguing that they enjoyed international organizational immunity under the IOIA.<sup>63</sup> The District Court for the District of New Jersey ruled in favor of the corporation, finding that the ESA had waived its immunity through previously signed agreements and its organizing convention.<sup>64</sup>

The Third Circuit, while affirming the district court's rejection of the grant of summary judgment, did so by explicitly rejecting

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55. *Id.* at 1337.

56. *Id.* at 1343.

57. *Id.* at 1339-40.

58. *Id.* at 1340-41 (The court did acknowledge, however, that the legislative history of the IOIA did not express any guidance about "whether Congress intended to incorporate in the IOIA subsequent changes to the law governing the immunity of foreign sovereigns.").

59. *Id.* at 1341.

60. *Id.* at 1341.

61. *Oss Nokalva, Inc.*, 617 F.3d at 764.

62. *Id.* at 758.

63. *Id.* at 760-61.

64. *Id.* at 760.

*Atkinson*.<sup>65</sup> The court stated that there remained a question as to whether foreign sovereigns ever enjoyed absolute immunity from prosecution.<sup>66</sup> Critically, the majority rejected the *Atkinson* contention that the IOIA's delegation of authority to alter the immunity of international organizations rested with the executive branch.<sup>67</sup> Instead, the court held that since Congress had not specified whether sovereignty under the IOIA remained fixed in 1945, then it must be construed to dynamically change if the sovereignty of foreign governments did.<sup>68</sup> Thus, the Third Circuit found that the immunity conferred by the IOIA adapted with the general law of foreign sovereign immunity, and the FSIA's exceptions from immunity applied.<sup>69</sup>

Prior to *Jam*, the Supreme Court largely declined to rule on whether international organizations retained absolute sovereign immunity.<sup>70</sup> However, one case did provide an early sign that the exceptions listed in the FSIA could apply to entities outside the traditional definition of a foreign sovereign.<sup>71</sup> In 1992, Panamanian and Swiss bond holders brought a breach of contract action against the Central Bank of Argentina arising out of the lengthy amount of time for payment on bonds the bank issued as part of a currency stabilization plan.<sup>72</sup> The Supreme Court affirmed the lower court's denial of Argentina's motion for summary judgment, arguing that the issuance of bonds to fund commercial activity satisfied the "commercial activity" exception of the FSIA.<sup>73</sup> Thus, the Court held that whenever a foreign government or government entity participates as a private player in an economic market, their actions are sufficiently "commercial" under the FSIA.<sup>74</sup> Crucially, for the purposes of the commercial exception of the FSIA, it was irrelevant to determine why the foreign sovereign participated in a market as a private actor, only that it did so.<sup>75</sup>

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65. *Id.* at 761-62.

66. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (noting that the Supreme Court consistently deferred to executive branch decisions regarding whether to take jurisdiction over foreign sovereigns).

67. *Oss Nokalva, Inc.*, 617 F.3d at 764.

68. *Id.*

69. *Id.* at 764, 766.

70. *See, e.g., Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992).

71. *Id.* at 620.

72. *Id.* at 609-10.

73. *Id.* at 610-11.

74. *Id.* at 614.

75. *Id.* at 617.

## IV. THE COURT'S REASONING

In *Jam*, Chief Justice Roberts, writing for the majority, affirmed the Third Circuit's viewpoint regarding the IOIA, finding that the IOIA's reference to "the immunity of foreign governments [was] a general reference . . . and concluded that that the 'IOIA should therefore be understood to link the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other.'"<sup>76</sup> Essentially, he decided that the restrictive sovereign immunity that foreign governments enjoyed under the FSIA applied to international organizations governed by the IOIA, explicitly rejecting the *Atkinson* holding.<sup>77</sup> He applied the reference canon of legal construction to explain this restricted stance on the privileges and immunities language of the IOIA.<sup>78</sup> He defined the reference canon as:

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 . . . when a statute refers to another statute by specific title, the referenced statute is adopted as it existed when . . . enacted.<sup>79</sup>

Finally, Chief Justice Roberts analyzed what the effect of subjecting international organizations to the FSIA's exceptions would have on their operations.<sup>80</sup>

Chief Justice Roberts began his analysis by examining the language of the IOIA.<sup>81</sup> He found that the IOIA's immunity rule was a "default rule" rather than a fixed one, noting that they could have "stated that international organizations 'shall enjoy absolute immunity from suit,' or specified some other fixed level of immunity."<sup>82</sup> This reading found support both within the language of other provisions of the IOIA<sup>83</sup> as well as in other statutes that "use

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76. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019); *see also* Edward Chukwueke Okeke, *Unpacking the Jam v. IFC Decision*, 13 DIRITTI UMANI e DIRITTO INTERNAZIONALE 297 (2019).

77. *Jam*, 139 S. Ct. at 771.

78. *Id.* at 760.

79. *Id.*

80. *Id.* at 772.

81. *Id.* at 768.

82. *Id.*

83. *See* 22 U.S.C. § 288a(c) (This IOIA provision renders the property and assets of international organizations totally "immune from search.").

similar or identical language to place two groups on equal footing.”<sup>84</sup> Chief Justice Roberts stated that the IFC “gets the inquiry backward” in seeking a different immunity standard because “absent a clearly expressed legislative intention . . . the legislative purpose is expressed by the ordinary meaning of the words used.”<sup>85</sup> The Supreme Court defined the ordinary meaning of the immunity provision of the IOIA as having adapted with the FSIA.<sup>86</sup>

Chief Justice Roberts then tackled the IFC’s contention that the IOIA’s reference to the immunity of foreign governments is “a specific reference to a common law concept that had a fixed meaning . . . in 1945.”<sup>87</sup> Chief Justice Roberts ruled that when the IOIA was drafted in 1945, this immunity did not mean “virtually absolute immunity.”<sup>88</sup> By applying the reference canon, he found that the immunity language referred to a conceptual default immunity that was affected by what the government believed applied to them.<sup>89</sup> Under the reference canon international organization immunity referred to any foreign sovereign immunity rule, whether that rule be derived or amended from existing common law, statute, or organizing charter.<sup>90</sup>

Next, Chief Justice Roberts examined the conflicting outcome the D.C. Circuit came to in *Atkinson*. The *Atkinson* court focused on the President’s authority to “withhold, withdraw, condition, or limit the otherwise applicable privileges and immunities of an international organization.”<sup>91</sup> The *Atkinson* holding thus affirmed a view that Congress intended the IOIA to not “update itself” following a succeeding legislative enactment.<sup>92</sup> Chief Justice Roberts disagreed, finding that the *Atkinson* court ignored the State Department’s opinion, whose views received “special attention” in this field of the law.<sup>93</sup> In light of ignoring this conflicting stance, Chief Justice

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84. See 42 U.S.C. §§ 1981(a). In the Civil Rights Act of 1866, Congress established equal treatment of freed slaves by giving them the same property rights “as enjoyed by white citizens.”; see also *Richards v. United States*, 369 U.S. 1, 6–7 (1962) (A Federal Tort Claims Act’s provision made the United States liable for torts “in the same manner . . . as a private individual under like circumstances.”).

85. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (alterations omitted).

86. *Jam*, 139 S. Ct. at 769–70.

87. *Id.* at 769.

88. *Id.* at 770.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Jam*, 139 S. Ct. at 770.

93. *Id.*; see also *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l. Drilling Co.*, 137 S. Ct. 1312, 1320 (finding that after the FSIA was enacted the State Department

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Roberts concluded that *Atkinson's* holdings' reliance on this single line of statutory authority had been improper.<sup>94</sup>

Chief Justice Roberts further analyzed the question of whether international organizations would be disproportionately affected after being stripped of their absolute immunity.<sup>95</sup> The IFC contended that allowing parties to sue them under the commercial exception would not only acutely impact multilateral development banks but also result in a flood of foreign plaintiff litigation in U.S. courts, potentially raising the same issues the Court had previously adjudicated regarding the Alien Torts Claims Act.<sup>96</sup> Chief Justice Roberts found that subjecting these organizations to restrictive immunity would not lead to an increase in liability. To be considered commercial, the lending activity of an international organization would have to satisfy the *Weltover* "commercial" definition.<sup>97</sup> "The activity must be "the type . . . by which a private party engages in 'trade or commerce.'"<sup>98</sup> Thus, most lending activities would not be sufficiently "commercial" to trigger the commercial exception.<sup>99</sup> Chief Justice Roberts further suggested that international organizations which do lend entirely to private entities may still not be subject to increased litigation under the FSIA because prospective plaintiffs would fail to obtain proper jurisdiction.<sup>100</sup>

Finally, Chief Justice Roberts examined the privileges and immunities conveyed by the IOIA.<sup>101</sup> He again affirmed that these immunities were "default rules" which did not confer a specific grant

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took the position that IOIA and FSIA immunity were now linked, thus, restrictive sovereign immunity governed international organizational immunity).

94. *Jam*, 139 S. Ct. at 770.

95. *Id.* at 771.

96. *Id.*; see *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116–17 (2013). The plaintiffs in *Kiobel* were Nigerian citizens trying to sue Dutch, British, and Nigerian oil exploration companies by seeking damages under the ATCA. The ATCA gave federal courts original jurisdiction over any civil action by an alien for a tort which violated international law or a United States treaty. The majority in *Kiobel* held that the ATCA did not apply to claims arising outside the United States, citing in part that allowing these claims would lead to a massive influx of foreign cases reaching the United States.

97. *Jam*, 139 S. Ct. at 771.

98. See *supra* note 71.

99. *Jam*, 139 S. Ct. at 772; see *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015) (affirming that under 28 U.S.C. § 1603 a commercial activity must have a sufficient nexus to the United States to qualify for suit).

100. *Jam*, 139 S. Ct. at 772; see also *Saudi Arabia v. Nelson*, 507 U.S. 349, 356–59 (1993) (finding that a lawsuit based on the commercial exception must satisfy the requirements of the commercial exception as applied to tortious activity abroad, rather than the FSIA commercial exception).

101. *Jam*, 139 S. Ct. at 765–66.

of absolute immunity to a qualifying international organization.<sup>102</sup> He noted that international organizations had, through these default rules, the ability to specify a different level of immunity.<sup>103</sup> Several international organizations, including the UN, had specific provisions in their organizing charters which exempted them from liability.<sup>104</sup> Comparatively, the IFC's own charter did not state that it was "absolutely immune from suit."<sup>105</sup> Thus, international organizations appeared to have already understood that they would not always enjoy absolute sovereign immunity in U.S. courts, and should have written similar exemption language into their own organizing charters.<sup>106</sup> Chief Justice Roberts finally concluded that the IFC's assertion that application of the FSIA's exceptions would result in international organizations receiving "unlimited exposure to suit" did not match the actual impact the ruling would have.<sup>107</sup>

## V. THE DISSENT

Justice Stephen Breyer issued the lone dissent in the *Jam* decision.<sup>108</sup> He argued that the immunity contained within the IOIA did not evolve after the passage of the FSIA.<sup>109</sup> Instead, Justice Breyer stated that an IOIA analysis must contend with "the statute's history, its context, its purposes, and its consequences" to understand Congress's intent.<sup>110</sup> Justice Breyer also argued against the majorities dynamic interpretation of the reference canon.<sup>111</sup> Finally, Justice

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102. *Id.* at 771.

103. *Id.* This process is not as simple as the Chief Justice made it seem. The vast majority of multilevel financial institutions cannot amend their charters without a vote by their member states. In some, such as the Inter-American Development Bank, this vote must be unanimous while others, like the IFC, require a majority. Such an amendment would be incredibly unlikely, as many member states would likely wish to preserve the opportunity for redress of claims by a comparatively safe U.S. court should a loan agreement cause unforeseen harm while other members may disagree on the level of immunity the organization should grant itself.

104. *Id.* at 771-72 ("See e.g., Convention on Privileges and Immunities of the United Nations, Art. II, para. 2, Feb. 13, 1946, 21 U.S.T. 1422, T.I.A.S. No. 6900 ("The United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."); Articles of Agreement of the International Monetary Fund, Art. IX, para. 3, Dec. 27, 1945, 60 Stat. 1413, T.I.A.S. No. 1501 (The IMF enjoys "immunity from every form of judicial process except to the extent that it expressly waives its immunity.")).

105. *Jam*, 139 S. Ct at 772.

106. See *supra* notes 104-05.

107. *Jam*, 139 S. Ct at 772.

108. *Id.*

109. *Jam*, 139 S. Ct. at 772-73.

110. *Id.* at 773.

111. See *infra* note 112.

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Breyer contended that the majority's decision to rest their judgment "primarily upon the statute's language and canons of interpretation" lead to dire unintended consequences for the affected international organizations.<sup>112</sup>

In his dissent, Justice Breyer stated that he viewed the IOIA as granting international organizations the same absolute immunity from prosecution they enjoyed in 1945.<sup>113</sup> He criticized the majority for not properly considering the IOIA's "history, its context, its purposes, and its consequences."<sup>114</sup> Justice Breyer first rejected the majority's use of the reference canon; instead attempting to figure out the proper method a court should use when examining ambiguous statutory language.<sup>115</sup> He reasoned that a court could evaluate ambiguous statutory language as being fixed statically in the period of time the statute was written; however courts could also interpret the language as dynamically changing over time as outlined by the reference canon.<sup>116</sup> Justice Breyer wrote that there was no universal application of this concept, thus the majorities reliance solely on the dynamic interpretation of sovereign immunity without proper weight of the static interpretation was a major deficiency in their argument.<sup>117</sup>

Justice Breyer next examined whether the application of the reference canon to the IOIA's language provided a correct and complete interpretation of the statute.<sup>118</sup> He found that while the application of the canon did affirm the majorities viewpoint, this finding itself was not dispositive.<sup>119</sup> The author of the reference canon had written that "[n]o single canon of interpretation can purport to give a certain and unerring answer."<sup>120</sup> Additionally, casebooks including the book which defined the reference canon had also stated that a static or dynamic interpretation of a statute was "fundamentally a question of legislative intent and purpose."<sup>121</sup>

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112. *Jam*, 132 S. Ct. at 772-73.

113. *Id.* at 773.

114. *Id.*

115. *Id.*

116. *Id.*; compare *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 612-13 (1992) (adopting a static meaning of "commercial" which had been "attached to that term under the restrictive theory" when the FSIA was enacted in 1976); with *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275-76 (1995) (interpreting the term "involving commerce" in the Federal Arbitration Act dynamically).

117. *Jam*, 139 S. Ct at 773, 775.

118. *Id.* at 774.

119. *Id.*

120. *Id.* at 775 (citing 2 J. Sutherland, *Statutory Construction* § 4501 (3d ed. 1943)).

121. *Jam*, 139 S. Ct at 775; (citing Fox, *Effect of Modification or Repeal of Constitutional or Statutory Provision Adopted by Reference in Another Provision*, 168 A. L.

Accordingly, solely examining the language of the IOIA without considering historical context would not properly solve the statutory interpretation question.<sup>122</sup>

Citing his concurrence in *Dole Food Co. v. Patrickson*, Justice Breyer argued that consideration of the historical context, purpose, and related consequences of the IOIA should have led to a different result than the majorities holding.<sup>123</sup> In examining the Congressional reports written prior to the passage of the IOIA, Justice Breyer first argued that the IOIA was similar to other international organizational agreements the United States entered into in 1945.<sup>124</sup> These agreements granted the organizations broad immunity from suit within the United States, and at the time they were written Congress appeared to have understood this point.<sup>125</sup> He further contended that “Congress likely recognized that immunity in the commercial area” was vastly important to international organizations, because international organizations “are *not* sovereign entities engaged in a host of different activities.”<sup>126</sup> Thus, the immunity the IOIA conveyed should have remained absolute.<sup>127</sup>

Justice Breyer noted that many international organizations were originally dependent on the IOIA to maintain absolute sovereign immunity.<sup>128</sup> For instance the United Nations Relief and Rehabilitation Administration (“UNRRA”) primarily relied on the IOIA to enforce its own absolute sovereign immunity until 1970.<sup>129</sup> By 1950, the UNRRA had shipped billions of pounds of relief supplies to post-WWII Europe in a process which involved extensive

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R. 627, 628 (1947); *see also* 82 C. J. S., Statutes § 485, p. 637 (2009). (“The question of whether a statute which has adopted another statute by reference will be affected by amendments made to the adopted statute is one of legislative intent and purpose.”)).

122. *Jam*, 139 S. Ct at 775.

123. *Id.*

124. *Id.* at 775–76 (citing Articles of Agreement of the International Monetary Fund, Art. IX, § 3, Dec. 27, 1945 (The IMF provides that they “shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity.”); Charter of the United Nations, Art. 105, 59 Stat. 1053, June 26, 1945, T. S. No. 993. (providing that the UN had the immunities as were necessary to fulfill its purpose which Congress interpreted to be an absolute sovereign immunity from prosecution)).

125. *Jam*, 139 S. Ct at 776.

126. *Id.* (citing Convention on Privileges and Immunities of the United Nations, Art. II, § 2, Feb. 13, 1946, 21 U.S.T. 1422, T. I. A. S. No. 6900 (entered into force Apr. 29, 1970)). The UN and its constituent organizations made it clear in 1946 that the UN needed absolute immunity from suit, which until 1970 was derived from the immunity’s clause of the IOIA.

127. *Jam*, 139 S. Ct. at 776–77.

128. *Id.* at 777. Note that the IMF is an exception to this rule, as the IMF was expressly granted absolute immunity from prosecution by an act of Congress.

129. *Id.*



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contractual relationships for the transport of commercial goods with private U.S. entities.<sup>130</sup> With this historical context, Justice Breyer found that Congress enacted the IOIA to provide absolute immunity to international organizations and that this immunity was, absent an express revocation, intended to be static in its application.<sup>131</sup>

Justice Breyer then examined how the decision in *Jam* affected international organizations which continued to engage in commercial activities while deriving immunity from the IOIA.<sup>132</sup> He cautioned that the application of the commercial activity exception to all international organizations would result in uncertainty for any international organization involved in finance.<sup>133</sup> For example, the World Bank encourages development by guaranteeing and providing private loans through its own private capital, which under the majorities holding would be a commercial activity open to suit.<sup>134</sup> This broad exposure to liability both undercut Congress' original objectives in regards to the IOIA and exposed these organizations to liability in cases arising from a commercial activity.<sup>135</sup>

Finally, Justice Breyer discussed whether the *Jam* ruling would defy the judicial goal "of weeding out lawsuits that are bad or harmful."<sup>136</sup> He noted that many international organizations have their own accountability mechanisms which obviated the need for a domestic courts involvement and are multilateral, a structure which is threatened by allowing one nation to apply its own liability rules and restrict the organizations' immunity.<sup>137</sup> Justice Breyer noted that the

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130. *Id.* ("Indeed, the United States condition[ed] its participation on UNRRA's spending [by ensuring] what amounted to 67% of its budget [was spent] on purchases of goods and services in the United States." (citing B. Shephard, "The Long Road Home: The Aftermath of the Second World War" 54, 57-58 (2012))). The immunity they had under the IOIA allowed them to make these purchases without being subject to liability in U.S. courts.

131. *Id.*

132. *Id.* at 778. These organizations include but are not limited to; the Food and Agriculture Organization, the World Bank, the Inter-American Development Bank, and the Multilateral Investment Guarantee Agency.

133. *Id.*; see also *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (finding that a contract to buy army boots or even bullets is a 'commercial' activity, even if the government had entered into that contract to "fulfil[] uniquely sovereign objectives").

134. *Jam*, 139 S. Ct. at 779 (citing Articles of Agreement of the International Bank for Reconstruction and Development, Art. I, Dec. 27, 1945, 60 Stat. 1440, T. I. A. S. No. 1502).

135. *Id.* at 779.

136. *Id.*

137. *Id.* at 779-780 (citing *Broadbent v. Org. of Am. States*, 628 F.2d 27, 35 (CADC 1980) (noting "[i]t would be inappropriate for municipal courts to cut deep into the region of autonomous decision-making authority of institutions such as the World Bank."); *Convention on Privileges and Immunities of the United Nations*, Art. VIII, § 29, 21 U.S.T. 1438, T. I. A. S. No. 6900 (outlining the UN's use of alternative dispute resolution courts to

IOIA gave the President the ability to “withdraw” and “limit” any of the acts immunities provisions in response to a lawsuit.<sup>138</sup> Justice Breyer concluded that while the majorities opinion may not have rested on erroneous legal grounds, the opinion still did not sufficiently account for the statutory purpose of the IOIA.<sup>139</sup>

## VI. THE ARGUMENT

As a result of the *Jam* decision, international organizations in the United States are now subject to restricted immunity from liability under the FSIA.<sup>140</sup> However, the effect the new combined IOIA/FSIA rule will have on international organizations has been left to Congress, the organizations themselves, or the lower courts to decide.<sup>141</sup> One method of solving the issues *Jam* raised rests on the adoption of the doctrine of functional immunity, which exempts organizations from liability from suits arising out of the organizations core functions while allowing them to be sued in all other respects.<sup>142</sup> In many nations which host international organizations aside from the United States, functional immunity has already been effectively adopted.<sup>143</sup>

### *A. International Organizations in the United States Are Now Subject to Restricted Immunity from Liability*

Despite some glaring omissions, Chief Justice Roberts majority was correct in deciding that the immunity conveyed by the IOIA was merely a “default rule” which updated with general changes to foreign sovereign immunity.<sup>144</sup> There are two main grounds that the majority used to justify this decision: (1) the lack of a differing textual basis to update the IOIA’s immunity; and (2) the comparative

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solve disputes, including commercial disputes); *World Bank, Inspection Panel: About Us*, The World Bank Group (last visited Oct. 23, 2019), <https://inspectionpanel.org/about-us/about-inspection-panel> (describing the World Banks internal accountability mechanisms, including the Office of Suspension and The World Bank Group Sanctions Board)).

138. *Id.* at 780. Additional concerns that arise from this decision are that it impacts both the executive branches ability to restrict an international organization’s immunity and the organizations accountability measures. For example, the direct beneficiary of a World Bank loan can generally sue the World Bank through its internal accountability system so long as the suit did not lead to a “disruptive interference” with the organization’s functions. *Id.*

139. *Id.*

140. *Id.* at 781.

141. See Arato, *supra* note 11.

142. *Id.*

143. Carson Young, *The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA*, 95 TEX. L. REV. 889, 908 (2017).

144. *Jam*, 139 S. Ct. at 771.

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statutes that similarly established a “parity of treatment” between differing parties.<sup>145</sup> Under the “reference canon” of statutory interpretation, the IOIA’s reference to immunity is essentially tied to that of foreign governmental immunity.<sup>146</sup> As the majority correctly stated, the “IOIA’s reference to the immunity enjoyed by foreign governments is a general rather than specific reference.”<sup>147</sup> There is no evidence within the text of the IOIA that this reference to foreign governmental immunity was intended to statically fix international organizational immunity in the post-*Berizzi Bros.* absolutism of 1945.<sup>148</sup> Nor is there any available evidence suggesting that the Congress of 1945 had a fixed idea of what international organizational immunity would be, because the modern conception of international organizations did not exist until then. From a textualist standpoint, the application of the reference canon to an ambiguous and general statutory provision is an entirely permissible method of deciding this case.<sup>149</sup>

The majority’s decision that international organizational immunity was effectively a default rule of immunity is strengthened by a comparative statutory point which neither the majority nor the dissent effectively contend with.<sup>150</sup> While some international organizations are subject to the exceptions of the FSIA, international organizations retain the ability to specify the level of immunity they wish to have in domestic courts.<sup>151</sup> Since the IOIA conveyed a default rule of sovereign immunity, nothing prevents an international organization from amending their organizing charter and specifying that they have absolute immunity from prosecution.<sup>152</sup> The majority and dissent both cite to the fact that the UN and the IMF have absolute immunity from suit via categorical language which explicitly states that they have absolute immunity from prosecution.<sup>153</sup> The issue the IFC, the World Bank, the Inter-American Development Bank, and many other international

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145. Diane Desierto, *SCOTUS Decision in Jam et al v. International Finance Corporation (IFC) Denies Absolute Immunity to IFC...With Caveats*, EJIL:Talk! (February 28, 2019), <https://www.ejiltalk.org/scotus-decision-in-jam-et-al-v-international-finance-corporation-ifc-denies-absolute-immunity-to-ifc-with-caveats/>.

146. *Id.*

147. *Jam*, 139 S. Ct. at 769.

148. *Id.*

149. *Jam*, 139 S. Ct. at 769.

150. Desierto, *supra* note 145.

151. *Jam*, 139 S. Ct. at 769.

152. *Id.* at 764.

153. *Id.* at 765, 776.

organizations have as a result of *Jam* stems from the fact that their charters contain no definition of their own institutional immunity.<sup>154</sup> The majority opinion effectively suggests that while many international organizations are subject to the exceptions to immunity raised by the FSIA, a strategic amendment to their charter would result in international organizations regaining the right to absolute sovereign immunity once more.<sup>155</sup>

*B. How the new IOIA/FSIA rule should be applied*

The *Jam* decision concluded that the default rule of immunity contained within the IOIA gives international organizations “the same immunity from suit” as is effectively given to foreign sovereigns under the FSIA.<sup>156</sup> The 85 international organizations which still derive immunity from the IOIA are as a result subject to the FSIA’s sovereign immunity exceptions.<sup>157</sup> This means that international organizations “are therefore not absolutely immune from suit.”<sup>158</sup> But if this is the case, then what kind of restrictive immunity are international organizations subjected to under this new default rule? In theory, the simplest answer would be to find that international organizations are subject to an identical level of immunity as foreign sovereigns.<sup>159</sup> In practice, this equivalency would prove impossible to implement without some form of modification.<sup>160</sup>

The FSIA approach to restrictive immunity is predicated on strong national sovereignty, or the presumption that, aside from very few exceptions, independent nations have a right to exist without other nations interfering in domestic affairs.<sup>161</sup> As Justice Breyer correctly noted, however, “international organizations are *not sovereign entities*.”<sup>162</sup> An international organization is an alliance of many individual sovereigns or private individuals coming together to

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154. See Okeke, *supra* note 76, at 303-04.

155. *Id.* at 304.

156. *Jam*, 139 S. Ct. at 772.

157. Marco Simons, *Jam v. IFC – some questions and answers after the Supreme Court’s ruling*, EARTHRIGHTS INT’L (Mar. 4, 2019), <https://earthrights.org/blog/which-international-organizations-will-be-affected-most-by-the-supreme-courts-ruling/>.

158. See Arato, *supra* note 11.

159. *Id.*

160. See Cedric Ryngaert, *The Immunity of International Organizations before Domestic Courts: Recent Trends*, 7 INT’L ORG. L. REV. 121 (2010).

161. Janice E. Thomson, *State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research*, 39 (2) INT’L STUD. Q. 213-33 (1995).

162. *Jam*, 139 S. Ct. at 776 (emphasis added).

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advocate and preserve a collective goal or mandate.<sup>163</sup> International organizations do not act with “sovereign authority,” and international organizational sovereign immunity does not have the strength of national sovereign immunity.<sup>164</sup>

Yet the FSIA’s exceptions to international immunity are keyed to a preexisting rule of strong sovereign immunity that is much broader in scope, and the Court has repeatedly tied the FSIA exceptions to state sovereignty.<sup>165</sup> In *Weltover*, the Court stated that national sovereign immunity did not apply to “commercial activities” that were sufficiently private in nature.<sup>166</sup> Under the FSIA, if a nation undertook a sufficiently private action, they would automatically forfeit their immunity.<sup>167</sup> As international organizations are not sovereigns, any action they undertake that sufficiently resembles private activity, from million-dollar loans to rental contracts for office space, would be sufficiently commercial to exempt the organizations sovereign immunity.<sup>168</sup>

Neither the majority nor the dissent in *Jam* discuss the problem of actually applying this default rule to future litigation involving international organizations and the FSIA exceptions.<sup>169</sup> A solution to this problem does not appear to be immediately forthcoming either, owing to both current Congressional gridlock and the difficulties amending many international organizations charters.<sup>170</sup> Congress could amend the IOIA to explicitly codify the doctrine of absolute sovereign immunity or update the FSIA to delineate how the FSIA’s exceptions apply to international organizational immunity.<sup>171</sup> Considering the difficulty courts have had in applying the FSIA’s exceptions to cases involving national governments, however, this

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163. Dan Sarooshi. *Conferrals by States of Powers on International Organizations: a Typology*, in INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS (2007).

164. See Rosalyn Higgins, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 93, 95 (1994).

165. Arato, *supra* note 11.

166. Republic of Arg. v. *Weltover*, 504 U.S. 607, 614 (1992); see also Saudi Arabia v. Nelson, 507 U.S. 349, 359-360 (1993).

167. Arato, *supra* note 11.

168. Simons, *supra* note 157.

169. Arato, *supra* note 11.

170. *Id.*

171. *Id.* The latter possibility is not without merit. Congress has amended the FSIA in the past, in large part to strip nations that are accused of sponsoring terrorism from immunity in state courts. However, Congress has never amended the IOIA, nor has Congress amended the FSIA with regards to the commercial activity’s exception.

seems unlikely.<sup>172</sup> International organizations could also sidestep the problem entirely by, as Chief Justice Roberts suggested, amending their organizing charter to specify whatever level of institutional immunity they wish to exercise.<sup>173</sup> The problem is that the international organizations most affected by the *Jam* ruling are IFI's, whose owners and shareholders are sovereign national governments that are very likely to disagree on an amendment that would only benefit some of the member states.<sup>174</sup> In order to pass an amendment to the organization's charter, there would need to be a sufficiently powerful voting block that could overcome the threshold needed to pass the amendment.<sup>175</sup>

### *C. Functional Immunity: A Possible Solution*

Absent clarification, U.S. courts will have to figure out a means of analogizing between an international organization's acts and the FSIA's exceptions to sovereign immunity. International customary law may offer a solution to this translation problem via the principle of functional immunity.<sup>176</sup> Functional immunity is a form of

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172. See e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013) (finding that the Alien Tort Statute did not apply to extraterritorial claims despite the lack of definition Congress provided for what an extraterritorial act entailed); *Weltover*, 504 U.S. at 614 (1992) (bemoaning the lack of Congressional guidance as to what constituted a "commercial act" under the FSIA, the Court defined the activity as being rooted in how private the activity appeared); *Republic of Arg. v. NML Capital, Ltd.*, 573 U.S. 134, 144-45 (2014). In a debt default case Argentina claimed that its foreign assets were immune from discovery proceedings. The Supreme Court held that, because Congress did not and has not specified whether post judgement discovery fell under protected sovereign immunity, then this immunity must be considered not to exist until Congress clarified its position. *Id.*

173. See *Jam*, 139 S. Ct at 771 (holding that "if the work of a [] international organization would be impaired by restrictive immunity, the organization's charter can [] specify a different level of immunity.").

174. *Id.* at 776; see also Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53 (1996).

175. Arato, *supra* note 11; see also World Bank Group Finances, WORLD BANK GROUP, Oct. 17, 2019, (last accessed 11/14/2019), <https://finances.worldbank.org/Shareholder-Equity/IFC-Subscriptions-and-Voting-Power-of-Member-Count/gsdw-avpz>. The IFC provides us with one such example of this difficulty. The IFC requires a "vote of three-fifths of the Governors exercising eighty-five percent of the total voting power" for amendments. The United States holds 22.19% of the total voting power in the IFC, thus even if every other member country voted to amend the articles of agreement of the IFC to grant them immunity, the United States could unilaterally block the measure. Since the U.S. government supported the Supreme Court's *Jam* ruling, it is unlikely that this measure would be successful. *Id.*

176. *Reparations For Injury Suffered in the Service of the United Nations, Request for Advisory Opinion*, 1948 I.C.J. 174 (Dec. 4); see *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("[Customary] international law is part of our law, and must be... administered by the courts of justice of appropriate jurisdiction."); see also *Banco Nacional de Cuba v.*

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restrictive sovereign immunity which refers to the principal that state officials are generally immune from the jurisdiction of other states in relation to acts performed in their official capacity.<sup>177</sup> The ICJ stated in *Reparations for Injury Suffered in the Service of the United Nations* that “the subjecthood of international organizations is functionally delimited.”<sup>178</sup> Essentially the extent to which international organizations should retain immunity depends on the functions it carries out.<sup>179</sup> Thus, rather than read the FSIA’s exceptions to apply to any transaction an international organization is engaged in, they would instead only apply to actions taken outside the general scope of the functions the international organization had been delegated.<sup>180</sup>

The confusion surrounding the impact of the *Jam* decision will, absent guidance from the Supreme Court, result in a circuit split regarding the application of the FSIA’s exceptions to international organization cases.<sup>181</sup> Functional immunity would help U.S. courts adjudicate these cases because it would allow the courts to apply immunity to an organization’s acts depending on the functions delegated to it.<sup>182</sup> For instance, commercial activities would be weighed by whether the act was taken in “furtherance of the organization’s functions,” instead of applying to every private commercial interaction<sup>183</sup> This is vital, as it allows international organizations to maintain immunity while properly carrying out an action they were created to advocate, but not for actions taken as a purely private commercial actor or when an agreement is materially breached without recourse for the victim.<sup>184</sup>

There are three main advantages of U.S. courts applying the

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Sabbatino, 376 U.S. 398, 425 (1964) (stating that federal courts are not barred from applying customary international law).

177. Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 (4) EUR. J. OF INT’L L. 825 (2011).

178. *Reparations For Injury Suffered in the Service of the United Nations*, Request for Advisory Opinion, 1948 I.C.J. 174 (Dec. 4); see also *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009). The rights of foreign officials to enjoy immunity from civil suit with respect to their official acts is a jus cogens norm of international law – even including, at least in some situations, where the state itself may lack immunity under the FSIA. *Id.*

179. Arato, *supra* note 11.

180. *Id.*

181. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill*, 71 CAL. L. REV. 913 (1983) (assessing why circuit splits can create legal confusion subsequent to confusing Supreme Court rulings).

182. Akande & Shah, *supra* note 177; see also Arato, *supra* note 10.

183. Arato, *supra* note 11.

184. Singer, *supra* note 174.

doctrine of functional immunity. First, it would help courts evaluate whether an international organization's acts qualify for actual immunity.<sup>185</sup> This could be accomplished by comparing an international organization's action in dispute to a similar or relevant sovereign state action.<sup>186</sup> If the action is one of which sovereign states consistently enjoyed immunity under the FSIA, then international organizations would similarly be granted immunity for that action.<sup>187</sup> Second, functional immunity would help distinguish the immunity owed to different international organizations.<sup>188</sup> Unlike sovereign governments, who generally have equal rights in international law, international organizations perform wildly different functions of varying scope.<sup>189</sup> This would address the problem that the FSIA exceptions, particularly the commercial exception, affect some international organizations disproportionately.<sup>190</sup> Thus, international organizations would retain immunity for activities related to their core functions while still facing liability when they stray outside those functions.<sup>191</sup>

Third, functional immunity addresses one of Justice Breyer's core concerns; that some organizations, for instance IFI's such as the World Bank and Inter-American Development Bank, carry out activities that are entirely commercial when read under the "private acts" language of the *Weltover* test.<sup>192</sup> Under functional immunity, these commercial activities would almost certainly retain immunity because they are a "core purpose" of the organization.<sup>193</sup> This would not exempt IFI's from all liability, especially in cases where the

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185. Joseph A. Bongiorno, *Sovereign Immunity and International Organization: The Case of DeLuca v. the United Nations*, 10 (2) INT'L J. POL. CULTURE SOC'Y 321-22 (1996).

186. Arato, *supra* note 11.

187. U.N. Convention on Jurisdictional Immunities of States and their Property, *Privileges and Immunities, Diplomatic and Consular Relations, Etc.*, U.N. Doc. A/59/508 (Dec. 2, 2004). For instance, central bank accounts, buildings, and means of transportation belonging to states to fulfill diplomatic purposes are protected from search, requisition, attachment, or execution by any other states' government under the Vienna Convention on Diplomatic Relations. These immunities would undoubtedly be extended to similar property of international organizations. *Id.*

188. Arato, *supra* note 11.

189. Stephen Bouwhuis, *The International Law Commission's Definition of International Organizations*, 9 (2) INT'L ORG. L. REV. 451-65 (2012).

190. *Jam*, 139 S. Ct. at 776-77.

191. Higgins, *supra* note 164.

192. *Jam*, 139 S. Ct. at 773.

193. WBG Establishing IFC, Articles of Agreement, Art. VI(1) (as amended through June 27, 2012) (The IFC immunities provision seems to affirm this principle, as it enumerates limited immunities "[t]o enable[] the Corporation to fulfill its functions."); see also Singer, *supra* note 174.



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organization breached provisions of its own charter like the situation in *Jam*.<sup>194</sup> Instead, functional immunity would allow U.S. courts to hear a reduced number of cases stemming from organizations that are disproportionately affected by the *Jam* decision, while still enforcing the FSIA's exceptions in a more general sense.<sup>195</sup>

But functional immunity has its own issues. Absent well-understood definitions of an international organization's core functions, courts may be tempted to read the scope of functional immunity too broadly in comparison to the organization's actual functions.<sup>196</sup> Since functional immunity presumes that potential suits cannot encroach upon the organization's core functions, lawsuits derived from humanitarian and human rights claims may be precluded so long as the organization is properly carrying out its functions and has not breached its own internal rules.<sup>197</sup> Finally, application of functional immunity does not resolve the potential dispute between the executive power to manage international organizations and the legislative control of immunity.<sup>198</sup> Yet the allure of functionalism as a means of applying the ambiguous default rule of the *Jam* decision cannot be understated.<sup>199</sup> Under a functional immunity regime, immunity would only attach if truly necessary for the performance of the international organization's functions and the realization of its goals, a doctrine which can much more easily absorb the FSIA's restrictions than the aforementioned undefined default rule.<sup>200</sup> So long as international organizations can be considered bound to the consequences of their actions that fall outside their core functions or result from a breach of their duties, then the functional immunity doctrine can greatly help U.S. courts fill in the gaps left by applying the FSIA's exceptions to international organizations.<sup>201</sup>

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194. Okeke, *supra* note 76. Note that the IFC violated the provisions of its agreement by not revoking its loan to Coastal Gujarat. This kind of action would still result in a waiver of immunity for the IFC under functional immunity, as the violation did not comply with the IFC's internal policy regarding loan agreements. *Id.*

195. Arato, *supra* note 11.

196. See Gregor Novak & August Reinisch, *THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS* (August Reinisch ed. 2013) (noting that absent legislative or judicial definition of what an international organizations functions are, functional immunity can become de facto absolute immunity from suit); see also Pieter H.F. Bekker, *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES* (1994).

197. Ryngaert, *supra* note 160, at 130.

198. *Id.*

199. See Young, *supra* note 143.

200. Singer, *supra* note 174.

201. *Id.* at 113-114.

*D. How functional immunity is applied to international organizations in other jurisdictions*

While U.S. courts have never formally adopted functional immunity, several other jurisdictions have applied functional immunity to international organizations.<sup>202</sup> Their application of functional immunity may provide U.S. courts with guidance regarding how the practice is defined by international custom.<sup>203</sup> This would in turn provide good examples for U.S. courts trying to assess the proper scope of international organizational immunity.<sup>204</sup> This section will focus on Austria, the United Kingdom, and The Netherlands; countries which have multiple international organizations present within their borders and have faced similar issues involving international organizational immunity.<sup>205</sup>

The Republic of Austria provides jurisdictional immunity to over 40 of the organizations it houses.<sup>206</sup> On its face, Austria decided that “[i]t is settled case law that international organizations enjoy absolute immunity.”<sup>207</sup> However, this grant of absolute immunity does not, in practice, resemble the pre-*Jam* American regime of absolute immunity, as Austrian courts will waive this immunity if the organization does not act within its prescribed functions.<sup>208</sup> Additionally, Austrian-based international organization claims must be settled by mediation through the Austrian Foreign Ministry if the organization lacks an internal arbitration system, unlike the U.S., which lacks a similar compulsory arbitration mechanism for international organization claims.<sup>209</sup> Thus, impacted parties still have a path towards remuneration for an international organization’s conduct under the Austrian system, demonstrating the malleable nature of functional immunity as applied by an international state.<sup>210</sup>

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202. Young, *supra* note 143, at 908.

203. *Id.*

204. *Id.*

205. *Id.*

206. Austrian Press & Information Service in the United States, *International Organizations in Vienna*, EMBASSY OF AUSTRIA (Nov. 19, 2019) <https://www.austria.org/international-organizations>. These organizations include Amnesty International, the International Organization for Migration, Reporters Without Borders, and the United Nations Children’s Fund. *Id.*

207. Gregor Novak & August Reinisch, *Austria*, in *THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS* 31 (August Reinisch ed., 2013).

208. Young, *supra* note 143, at 909.

209. Kirsten Schmalenbach, *Austrian Courts and the Immunity of International Organizations*, 10 INT’L ORG. L. REV. 446, 457-58 (2013).

210. *Id.*

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The United Kingdom has one of the strongest functional immunity regimes in Europe, the result of being the host nation for numerous international organizations.<sup>211</sup> The UK's grant of immunity is grounded in the 1968 International Organisations Act ("IOA").<sup>212</sup> The IOA stipulates that international organizational immunity may be granted in the case of "seven privileges" specified in the IOA.<sup>213</sup> If an organization's action falls outside the specified privileges, then they are liable for suit as a result.<sup>214</sup> While international organizations normally enjoy immunity from suit under these privileges, the immunity itself may be waived "subject to parliamentary procedure."<sup>215</sup> Functional immunity in the UK opens international organizations to suit for actions taken outside of an agreed upon core function; while also allowing for suits arising from a protected category if Parliament determines the agency's action was sufficiently egregious to merit suit.<sup>216</sup>

The Netherlands is host to thirty-three international organizations, including the International Court of Justice, the Permanent Court of Arbitration, and the European Patent Office.<sup>217</sup> Much like the United States, Dutch jurisdiction over international organizations defers to the immunity provision found in either the organizations charter or a binding multilateral immunity treaty.<sup>218</sup> In cases where this immunity has not been expressly stated, however, Dutch courts adopt a more restrictive form of functional immunity.<sup>219</sup> The Supreme Court of the Netherlands has repeatedly stressed that an organization will be afforded immunity only after making the determination of "whether or not the acts in question are immediately connected to the tasks entrusted to the organization."<sup>220</sup> This standard

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211. Dan Sarooshi & Antonios Tzanakopoulos, *United Kingdom*, in *THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS* 275 (August Reinisch ed., 2013); see also Young, *supra* note 144, at 908.

212. International Organisations Act 1968, c. 48 (U.K.).

213. *Id.* § 1(2)(c), sch. 1.

214. Sarooshi & Tzanakopoulos, *supra* note 211.

215. Cabinet Office, *The Cabinet Manual - Draft*, (Dec. 2010), <https://perma.cc/W66F-HNG4>.

216. Sarooshi & Tzanakopoulos, *supra* note 211.

217. Ministry of Foreign Affairs, *List of International Organisations in the Netherlands*, (last accessed Nov. 19, 2019) <https://www.government.nl/topics/international-organisations/multilateral-forums>.

218. Rosanne van Alebeek & Andre Nollkaemper, *Privileges and Immunities of International Organizations in the Case Law of Dutch Courts*, ACIL Research Paper No. 2012-11, 3 (2012).

219. *Greenpeace Nederland v. Euratom*, Judgment on Appeal in Cassation, ILDC 838 (NL Sup. Ct. 2007).

220. van Alebeek & Nollkaemper, *supra* note 219, at 17-18.

is malleable depending on the function of the organization and can be either over or under inclusive of immunity depending on the courts determination of what function the organization fulfills.<sup>221</sup> While international organizational immunity in the Netherlands is not codified, in practice Dutch courts have instituted a relatively sensible functional immunity regime—an international organization, absent an inherent immunity provision, is liable to suit for any action that exceeds or violates its immediate functions.<sup>222</sup>

## VII. CONCLUSION

The 74 years of peace enjoyed by international organizations and U.S. courts from having to wrestle with questions of international organization immunity is over; the doctrine of absolute sovereign immunity in the United States is dead. The Supreme Court has left U.S. courts in a precarious situation—how to apply the exceptions to sovereign immunity from the FSIA to international organizations which are not sovereigns. With intervention from Congress and an amendment to many organization's immunity provisions unlikely, U.S. courts will have to craft a scheme of restrictive immunity until the Supreme Court issues further guidance.

U.S. courts should look to the doctrine of functional immunity to provide this answer. Current international customary law supports a grant of immunity only as far as needed for an international organization to fulfill its intended purposes. Functional immunity provides courts with an effective means of applying the FSIA's exceptions while still allowing international organizations to carry out their core functions. However, functional immunity is not likely to be a permanent solution to the default IOIA/FSIA immunity rule. Without inquiry establishing what an organizations function is, functionalism can devolve into absolute immunity in all but name, and functional immunity is not a particularly effective means of adjudicating claims by third parties. Yet despite this contestation, functional immunity provides courts with a malleable doctrine that grants international organizations the immunity necessary to function while still holding them accountable for overstepping their

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221. *Compare* Mothers of Srebrenica et al v. The Netherlands & the UN, (2012) 10/04437 (Sup. Ct. Neth.) (finding that UN constituent organizations enjoy absolute immunity from prosecution due to the absolute immunities clause of its organizing charter); *with* European Patent Office v. Stichting Restaurant De La Tour, (2011) 200.065.887 (Ct. App. The Hague) (holding that the EPO only enjoys immunity for activities “that are strictly necessary for its administrative and technical operation.”).

222. van Alebeek & Nollkaemper, *supra* note 219, at 17-18.

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boundaries. While not perfect, functional immunity remains the best available way to apply the new default IOIA/FSIA restrictive immunity doctrine to international organizations.