The immunity of international organizations before and after *Jam v IFC*: Is the functional necessity rationale still relevant?

Yohei Okada*

1. Introduction

While the International Court of Justice held that State immunity ‘derives from the principle of sovereign equality of States’, it has been widely accepted that the immunity of international organizations (IOs) is based on the principle of ‘functional necessity’: immunities are necessary to shield IOs from unilateral intervention by member States, so as to ensure their ability to function autonomously and effectively. These separate rationales have resulted in the difference in scope between State immunity and IO immunity. On the one hand, the law of State immunity has developed the doctrine of restrictive immunity, according to which States are entitled to jurisdictional immunity with regard to sovereign acts (*acta iure imperii*) while a forum State is not barred from exercising jurisdiction over a foreign State for the latter’s commercial acts (*acta jure gestionis*). On the other hand, some have argued that the functional necessity rationale necessarily leads to absolute immunity.

Against this background, on 27 February 2019, the US Supreme Court, in *Jam v International Finance Corporation*, found that the International Organizations Immunities Act (IOIA) links the law of IO

---

* Associate Professor of International Law, Graduate School of International Cooperation Studies, Kobe University.

1 *Jurisdictional Immunities of the State (Germany v Italy) (Judgment)* [2012] ICJ Rep 99, 123 para 57.


immunity to the law of State immunity, ‘so that the one develops in tandem with the other’ and, thus, concluded that IOs are no longer absolutely immune from suit under the IOIA.\textsuperscript{4} Given that immunities serve as hurdles to holding accountable those who exercise public authority and, thus, are, in general, under attack,\textsuperscript{5} this ruling might be seen as a welcome step. Its impact, however, should not be overemphasized and it is not obvious whether the ‘restrictive’ approach adopted by the Supreme Court is a game-changer in the quest of IO accountability. Since the Supreme Court exclusively focused on the language of the IOIA, the implications of its findings are inherently limited in scope. Furthermore, the purely textual interpretation adopted by the Supreme Court ‘generates more questions than it answers’.\textsuperscript{6} Arguably, the most difficult question is how to tailor the doctrine of restrictive immunity to IOs. However, the specific facts of the \textit{Jam} case make it possible to circumvent this knotty question and, thus, in February 2020, the District Court for the District of Columbia (DC) again upheld the immunity of the International Finance Corporation (IFC) on remand from the Supreme Court.\textsuperscript{7} Be that as it may, these recent developments provide an excellent opportunity to revisit some fundamental questions regarding IO immunity. How does the functional necessity rationale affect the ways in which the legal system interprets and applies domestic legislations on IO immunity? Is it still relevant in the US jurisdiction after \textit{Jam v IFC}? The purpose of this study is to examine these questions.

After a brief outline of the Supreme Court’s ruling (para 2), it is demonstrated that the functional necessity rationale for IO immunity has often played a crucial role in the interpretation and application of the IOIA (para 3). Then, the paper will inquire which commercial transactions conducted by IOs are subject to scrutiny by US courts under the IOIA, which is now understood as a mirror of the law of State immunity.


\textsuperscript{7} \textit{Jam et al v International Finance Corporation}, US District Court of the District of Columbia (14 February 2020) 1:15-CV-00612-JDB.
The immunity of international organizations before and after Jam v IFC

The author argues that the ‘tandem’ approach adopted by the Supreme Court does not render the functional necessity principle completely irrelevant in the interpretation and application of the IOIA. However, that approach may undermine the effective functioning of IOs without any corresponding benefit (para 4).

2. The ‘tandem’ approach adopted by the US Supreme Court

The International Finance Corporation, forming a part of the World Bank Group, was established as a distinct international financial institution (IFI) in 1956. It is headquartered in Washington, DC, and now has 185 member States. The IFC’s primary function is to finance private sector development projects. In one case that eventually came before several courts, the IFC provided $450 million for the construction of a coal-fired power plant in a coastal region of Gujarat in India. The case originates from the construction and operation of the plant by an Indian company, which polluted the air, land and water in the area and caused serious environmental and social harm to the local community. The release of hot water from the cooling system of the plant into the sea has substantially changed the marine environment and reduced the fish catch near the shore. Saltwater leaked from the plant and made the groundwater unsuitable for drinking or irrigation. Inhabitants of the region who made their living by fishing or farming sued the IFC and alleged that the organization was responsible for the harm because it failed to supervise the client company’s management of social and environmental risks and impacts in the construction and operation of the power plant.

However, the IFC, as a public international organization in which the US participates, enjoys jurisdictional immunity before US courts under the IOIA, which declares as follows:

‘International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive

8 The IFC has been designated by President Dwight D Eisenhower as entitled to enjoy the privileges, exemptions, and immunities conferred by the IOIA. Executive Order No 10680, 21 Fed Reg 7647 (2 October 1956).
their immunity for the purpose of any proceedings or by the terms of any contract. 9

During the interwar period there were many discussions in the US, which was not a member of the League of Nations, about whether IOs should or could benefit from the customary international law that accorded immunities to foreign governments. 10 Therefore, it is understandable that the IOIA, which was enacted in 1945, links the jurisdictional immunities of IOs with State immunity. At that time, foreign States were entitled to absolute immunity from suit under US law. However, the subsequent development of the restrictive doctrine in the law of State immunity resulted in the 1976 Foreign Sovereign Immunities Act (FSIA), 11 which provides that foreign States are not immune from suit with regard to commercial activities:

'A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is 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.' 12

Consequently, we should examine whether IOs are still entitled to absolute immunity as they were in 1945, despite the fact that the FSIA has discarded the absolute approach, or if they are now immune from suit only with regard to their non-commercial activities.

The DC Circuit, where several IFIs are headquartered, has developed its own jurisprudence on the IOIA. In Atkinson v Inter-American Development Bank, the Court of Appeals emphasized that the IOIA allows the president of the US to designate IOs as being entitled to enjoy the immunities conferred by the Act and also to ‘condition or limit the

enjoyment by any such organization … of any such … immunity’ in light of the functions performed by the IO in question, which means that ‘Congress was content to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances’. The court concluded from this built-in updating mechanism that Congress did not incorporate into the IOIA any subsequent changes to the law of State immunity and, thus, intended to ‘adopt that body of law only as it existed in 1945—when immunity of foreign sovereigns was absolute’.

Though the District Court and the DC Circuit Court of Appeals followed this approach in Jam v IFC, the US Supreme Court concluded in a 7-1 majority, based on the language of the IOIA, that IOs are not absolutely immune from suit under the Act. Justice Roberts, who delivered the majority’s opinion, took a textual approach and found that ‘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’. If the IOIA intended to incorporate the fixed and unchangeable absolute immunity, it could have simply stated that IOs should enjoy absolute immunity or specified that IOs would enjoy the same immunity as was enjoyed by foreign governments in 1945. Hence, ‘the “same as” formulation is best understood to make international organization immunity and foreign sovereign immunity continuously equivalent’, and ‘[t]he IOIA should … 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’. The Supreme

17 Jam et al v International Finance Corporation, US Court of Appeals (DC Cir) (23 June 2017) 860 F.3d 703.
18 Jam v IFC (Supreme Court) (n 4) 7.
19 ibid.
20 ibid 10.
Court thus concluded that ‘[t]he International Finance Corporation is therefore not absolutely immune from suit’.  

Justice Breyer delivered the dissenting opinion in which he adopted the ‘purpose-based methods of interpretation’.  

He identified two related purposes: the IOIA was enacted in order to enable the US to fulfil the obligations that result from its membership in IOs, and to allow IOs to fully function in the US. The latter purpose coincides with the rationale for IO immunity under international law. As to the former, Justice Breyer maintained that when the IOIA was drafted there already existed several IOs that ‘expected the United States to provide them with essentially full immunity’. Therefore, he concluded that since many treaties are not self-executing (i.e. not automatically applicable in US courts) ‘[i]f Congress wished the Act to carry out one of its core purposes—fulfilling the country’s international commitments—Congress would not have wanted the statute to change over time’.

3. Jurisdictional immunities of IFIs before Jam v IFC

Even before the Supreme Court ruled on *Jam v IFC*, the absolute nature of IO immunity under the IOIA did not always signal the end of discussion, especially in cases of IFIs. Constituent treaties of IFIs usually provide for their jurisdictional immunities in a restrictive manner compared with other IOs such as the UN. On the one hand, the Convention on the Privileges and Immunities of the United Nations (CPIUN), which was drafted ‘with a view to determining the details of’ the immunities stipulated in the UN Charter, establishes the *de facto* absolute immunity from suit for the UN:

21 ibid 15.
22 *Jam v IFC* (Supreme Court), Breyer Dissenting (n 4) 1.
23 ibid 6.
24 ibid 6-9.
25 Art 105 of the Charter of the United Nations provides as follows:
1. 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.
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
The immunity of international organizations before and after Jam v IFC

‘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.’

On the other hand, the International Bank for Reconstruction and Development, commonly known as the World Bank, enjoys jurisdictional immunity of very limited scope under its constituent treaty, the Articles of Agreement. Article VII section 1 first articulates the purpose of the Bank’s immunities: ‘[t]o enable the Bank to fulfill the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Bank in the territories of each member’. Its jurisdictional immunity is laid down in section 3 of the same article:

‘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 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. The property and assets of the Bank shall, wheresoever located and by whomever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.’

The IFC’s Articles of Agreement has the almost identical provisions. A literal interpretation leads to the conclusion that the World Bank, as

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.’

26 Art II section 2 of the CPIUN (emphasis added by author). A number of IOs modelled their charters or supplementary treaties on the CPIUN and the Convention on the Privileges and Immunities of the Specialized Agencies (CPISA). For instance, art 3 of the General Agreement on Privileges and Immunities of the Council of Europe is almost identical to art II section 2 of the CPIUN and Article III section 4 of the CPISA.

27 Art VI sections 1 and 3 of Articles of Agreement of the International Finance Corporation. The latter provides as follows: ‘Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service 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. The property and assets of the Corporation
well as the IFC, does not call for immunity from suit before the domestic courts of the US, where its headquarters are located, unless a person sues the World Bank on behalf of the US or one (or more) of its member states.

In *Mendaro v World Bank*, therefore, the DC Circuit Court of Appeals was required to determine whether Article VII section 3 of the Bank’s Articles of Agreement constitutes a waiver of immunity for the purpose of the IOIA and, if so, whether that waiver is broad enough to encompass employment-related disputes. The point of departure for the court was ‘the interrelationship between the functions of the Bank set forth in the Articles of Agreement and the underlying purposes of international immunities’. The court observed that ‘Article VII section 3 does expressly waive immunity, but the scope of its limitation on immunity is unclear’. In order to clarify this point, the Court of Appeals drew, from the functional necessity rationale for IO immunity, the inference that ‘it is likely that most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization’s goals’. In other words, ‘when the benefits accruing to the organization as a result of the waiver would be substantially outweighed by the burdens caused by judicial scrutiny of the organization’s discretion to select and administer its programs, it is logically less probable that the organization actually intended to waive its immunity’. ‘Applying these principles to the World Bank’s Articles of Agreement’, the court held that notwithstanding ‘the broad language of Article VII section 3, which does not affirmatively reserve the World Bank’s immunity over employee actions’ there was ‘no evidence that the members of the Bank intended to waive the Bank’s immunity to employee suits’. In short, the constituent treaty makes the Bank subject to the jurisdiction of domestic courts in order ‘to enhance the marketability of its securities and the credibility of its activities in the lending markets’. As Treichl and Reinisch highlighted, ‘if the partners of IFIs in financial transactions

shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Corporation.’

29 ibid 617.
30 ibid.
31 ibid 618.
were precluded from bringing claims against the institution, the latter’s promises would amount to nothing on the capital market’. The court’s reading of the Bank’s Articles of Agreement corresponds to its travaux préparatoires. Consequently, the Court of Appeals found that ‘the Bank’s articles waive the Bank’s immunity from actions arising out of the Bank’s external relations with its debtors and creditors’, while ‘a waiver of immunity to suits arising out of the Bank’s internal operations, such as its relationship with its own employees would contravene’ the functional necessity principle expressed in Article VII section 1.

This interpretation is corroborated by the fact that IFIs with similar functions to the World Bank subsequently adopted clearer provisions regarding their jurisdictional immunities. For instance, the Agreement Establishing the Asian Development Bank provides as follows:

‘The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction in the territory of a country in which the Bank has its principal or a branch office, or has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.’

Given the facially broad waiver in the World Bank’s Articles of Agreement, the ‘corresponding benefit’ doctrine adopted in Mendaro v World Bank appears to be rather generous, if not overprotective. In Jam v IFC, the Court of Appeals, with the language of Article VI section 3 of the IFC’s Articles of Agreement in its mind, observed that ‘it is a bit strange that it is the judiciary that determines when a claim “benefits” the international organization’. It is true that no two IOs have the same rights and obligations, but the way in which those rights are interpreted and applied can have a profound impact on the ability of affected individuals to seek redress.

34 Mendaro v World Bank (n 28) 618 (emphasis in original).
35 Art 50(1) of the Agreement Establishing the Asian Development Bank. See also art 52(1) of the Agreement Establishing the African Development Bank.
36 Jam v IFC (Court of Appeals) (n 17) 707.
functions: otherwise one of them would lose its *raison d’être*. Thus, as Judge Pillard emphasized in her concurring opinion, ‘the organization itself is in a better position than we are to know what is in its institutional interests’. However, the intention of drafters is not always precisely reflected in the text. Therefore, the functional necessity rationale, through the corresponding benefit doctrine, has played a significant role in the endeavours of the DC Circuit courts, as State organs, to carefully comply with the US’s obligations under international law to grant immunities to the IFIs. Despite the history of this rationale in the legal system, we must ask ourselves if the functional necessity principle remains relevant after *Jam v IFC*.

4. *The relevance of the functional necessity rationale after Jam v IFC*

Above all, one should note that the ruling of the Supreme Court has no impact on IOs whose charters or supplementary treaties adopt the *de facto* absolute approach to their jurisdictional immunities. The majority’s opinion noted that ‘the privileges and immunities accorded by the IOIA are only default rules’ and, thus, ‘[i]f the work of a given international organization would be impaired by restrictive immunity, the organization’s charter can always specify a different level of immunity’ which the CPIUN does. Justice Breyer, who expressed his concern that treaties which govern IO immunity might not be regarded as self-executing, also underlined that the majority’s opinion was of no consequence to the UN’s *de facto* absolute immunity since ‘the UN itself is no longer dependent upon the Immunities Act’. However, ‘many other organizations, such as … several multilateral development banks, continue to rely upon [the IOIA] to secure immunity’.

The Supreme Court, in order to manage the concern that the application of the commercial activity exception under the FSIA to IOs would

---

37 *Jam v IFC* (Court of Appeals), Judge Pillard’s Concurring Opinion (n 17) 711.
38 *Jam v IFC* (Supreme Court) (n 4) 14.
39 *Jam v IFC* (Supreme Court), Breyer Dissenting (n 4) 11. For the established jurisprudence of the Second Circuit, see, eg, Bzok v United Nation, US Court of Appeals (2nd Cir) (2 March 2010) 597 F.3d 107; Georges v United Nations, US Court of Appeals (2nd Cir) (18 August 2016) 834 F.3d 88.
40 *Jam v IFC* (Supreme Court), Breyer Dissenting (n 4) 11.
bring a flood of litigation and expose them to excessive liability, opined
that ‘it is not clear that the lending activity of all development banks quali-
fies as commercial activity within the meaning of the FSIA’. For in-
stance, ‘the lending activity of at least some development banks, such as
those that make conditional loans to governments, may not qualify as
“commercial” under the FSIA’. The identification of ‘commercial’
transactions of IOs for the purpose of the FSIA seems to be quite onerous
to say the least. Aware of this difficulty, the Supreme Court left another
exit open. ‘[E]ven if an international development bank’s lending activity
does qualify as commercial, that does not mean the organization is auto-
matically subject to suit. The FSIA includes other requirements that must
also be met. For one thing, the commercial activity must have a sufficient
exus to the United States’. In fact, the DC District Court, to which the
Supreme Court referred this case back, was guided toward this exit. The
District Court held that the action was not based upon an activity carried
out by the IFC in the US so that the court could avoid a determination
about whether or not the activity in question was of a commercial na-
ture. Consequently, it remains unclear how to identify commercial
transactions by IOs for the purpose of the FSIA in cases where the nexus-
to-US exit is blocked.

The FSIA defines a commercial activity as ‘either a regular course of
commercial conduct or a particular commercial transaction or act’, and
stipulates that ‘[t]he commercial character of an activity shall be deter-
mined by reference to the nature of the course of conduct or particular
transaction or act, rather than by reference to its purpose’. However, it
has been argued that ‘an absolute separation is [not] always possible

---

41 Jam v IFC (Supreme Court) (n 4) 14.
42 ibid.
43 A Viterbo, A Spagnolo, ‘Of Immunity and Accountability of International
Organizations: A Contextual Reading of Jam v. IFC’ (2019) 13 Diritti umani e diritto
internazionale 319, 320-325.
44 Jam v IFC (Supreme Court) (n 4) 15.
45 Jam v IFC (District Court) (n 7). See S Dias, ‘Jam v IFC before the D.C. District
Court: Forget the Floodgates, there won’t even be a Trickle’ EJIL: Talk! (1 April 2020)
available at <www.ejiltalk.org/jam-v-ifc-before-the-d-c-district-court-forget-the-floodgates-
there-wont-even-be-a-trick/).
between the ontology and the teleology of an act’. In Segni v Commercial Office of Spain, the Seventh Circuit Court of Appeals had to determine whether the plaintiff’s employment by the Commercial Office of Spain, an entity charged under Spanish law with the direction and coordination of the National Institute for Fostering Exports’ activities in the US, was of a commercial nature for the purpose of the FSIA. According to the court, it is an oversimplification to define the employment contract between the parties as merely the purchase of services, and it is necessary to examine ‘the nature of [the plaintiff]’s “employment activities” in order to determine whether they are governmental or private’. The term ‘governmental’ is no more appropriate for IOs than the term ‘sovereign’ is. However, if we set aside the difference between sovereign States and IOs, it might be argued that an activity that is carried out in order to perform the core of functions of the IO in question could be characterized as public or non-commercial even if the nature of the activity itself is commercial. That may be the case for IFIs as a result of their dual character. As Bradlow emphasized, while IFIs ‘are inter-governmental organizations that are created by states for a public purpose … they engage in financial transactions, which, despite their public purpose, are, by nature, similar to market-based financial transactions’. Thus, as the Supreme Court hinted, international development banks such as the World Bank and the IFC continue to be entitled to jurisdictional immunity under the IOIA with regard to their lending activity because such an activity may be viewed as non-commercial for the purpose of the FSIA.

47 De Sanchez v Banco Central De Nicaragua, US Court of Appeals (5th Cir) (19 September 1985) 770 F.2d 1385, 1393.
However, this has unexpected repercussions. On the one hand, IFIs enjoy immunity from suit under the IOIA when it is not necessary for or even detrimental to their proper functioning. In that case, courts still need to rely on the functional necessity principle to determine whether the provisions on jurisdictional immunity in the IFIs’ constituent treaties may be construed as a waiver of immunity for the purpose of the IOIA.\(^{53}\)

On the other hand, an IO is no longer immune from suit in employment-related disputes if the employee in question is not entrusted to perform actions that are key to the IO’s functions. In fact, in Segni v Commercial Office of Spain the Court of Appeals concluded that the defendant was not entitled to immunity from the plaintiff’s breach-of-contract claim because ‘[h]e had no role in the creation of the government policy or its administration; rather, he simply carried it out’.\(^{54}\) However, IOs’ constituent treaties or supplementary agreements do not, in general, adopt such a distinction. IOs have developed internal mechanisms to settle employment-related disputes\(^{55}\) in return for immunity. By doing so, IOs have strived to strike a balance between their autonomous functioning and the right of access to justice that is enshrined in international documents on human rights and national constitutions.

Nevertheless, we must concede that there is a need for substantial improvement to the existing procedures for third-party claims.\(^{56}\) In this regard, it should be noted that the Indian farmers and fishermen of the coastal region of Gujarat began legal proceedings in the US courts after the IFC’s internal mechanism for dispute settlement failed to provide redress. They filed a complaint with IFC’s Compliance Advisory Ombudsman (CAO). According to its audit report, the client company did not comply with the Environment and Social Action Plan to protect the surrounding communities that was included in the loan agreement and the

---


54 Segni v Commercial Office of Spain (Court of Appeals) (n 48) 165.


CAO criticized the IFC for its inadequate supervision of the project.\textsuperscript{57} However, the report did not enable the inhabitants to obtain relief from the IFC because ‘CAO has no authority with respect to judicial processes’, nor is it ‘a legal enforcement mechanism’.\textsuperscript{58} Thus, they seized the US courts as a last resort.

With regard to the relationship between IO immunity and the right of access to justice, the jurisprudence of European courts has developed the so-called alternative means test. In \textit{Waite and Kennedy v Germany}, the European Court of Human Rights stated that ‘a material factor in determining whether granting [an IO] immunity from [a forum State’s] jurisdiction is permissible under the [European Convention on Human Rights] is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention’.\textsuperscript{59} The test was formulated in order to determine whether granting jurisdictional immunity to an IO constitutes a violation of the right of access to justice and, thus, does not itself govern the scope of IO immunity, that is, whether IOs are absolutely immune from suit or their immunities are restrictive in some way.

Under US jurisdiction, a similar but distinct approach to IO immunity has recently been discussed. In the Haiti cholera case, the UN and its peacekeepers were reproached for triggering the 2010 cholera outbreak, the plaintiffs argued before the US courts that the UN is not entitled to jurisdictional immunity in cases where it fails to offer any reasonable alternative means for dispute settlement.\textsuperscript{60} In fact, the CPIUN obliges the UN to ‘make provisions for appropriate modes of settlement of … disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party’.\textsuperscript{61} In the Haiti cholera case, the


\textsuperscript{59} \textit{Waite and Kennedy v Germany}, App no 26083/94 ([GC] ECHR, 18 February 1999) para 68.

\textsuperscript{60} \textit{Georges v United Nations} (Court of Appeals) (n 39).

\textsuperscript{61} Art VIII section 29 of the CPIUN.
The immunity of international organizations before and after Jam v IFC

conditional link was advocated, as a matter of interpretation of the CPIUN, with a view to restricting the scope of the UN’s immunity. However, the Second Circuit Court of Appeals did not accept the conditional link between the UN’s entitlement of immunity and its compliance with the obligation to provide alternative means for dispute settlement because the court could find nothing that justifies such an interpretation in the text of the CPIUN.62

Since the Supreme Court in Jam v IFC confined itself to handling techniques for statutory interpretation, its reasoning tells us nothing about how the inadequacy of alternative means impacts the IFC’s entitlement of jurisdictional immunity.63 Furthermore, it cannot be expected that the Supreme Court’s restrictive approach will ‘incentivize international organizations to ensure that their accountability mechanisms and related measures in fact provide effective remedies to adversely affected parties’64 since the adequacy of alternative means does not secure immunity under the IOIA.65 Therefore, it seems that the tandem approach adopted by the Supreme Court may undermine the effective functioning of IOs without being very helpful in filling the accountability gap.

5. Conclusion

In conclusion, even after Jam v IFC, the functional necessity rationale is still relevant in the US jurisdiction. First, a non-commercial (public)/commercial distinction could not be made without referring to the functions that are entrusted to the IO in question.66 Second, even if an

62 Georges v United Nations (Court of Appeals) (n 39) 92-94.
63 EC Okeke, ‘Unpacking the Jam v. IFC Decision’ (2019) 13 Diritti umani e diritto internazionale 297, 303; Rossi (n 53) 316-317. The Supreme Court’s technical approach also makes its ruling totally irrelevant to the questions whether or not IOs enjoy immunity under customary international law and, if so, whether the immunity is absolute or restrictive. On these questions, see Bordin (n 51) 216-221. See also Rossi (n 53) 310-311.
65 But see Viterbo, Spagnolo (n 43) 328-329.
66 This distinction under the IOA should not be conflated with the public/private divide for the purpose of art VIII section 29 of the CPIUN. See M Buscemi, ‘The Non-justiciability of Third-party Claims before UN Internal Dispute Settlement Mechanisms: The “Politicization” of (Financially) Burdensome Questions’ (2020) 68 QIL-Questions Intl L 23, 30-35.
activity qualifies as non-commercial for the purpose of the FSIA, the functions of the IO sometimes prefer domestic courts to exercise jurisdiction over the organization.

Unfortunately, Jam v IFC does not seem to be a big step forward in the quest to hold IOs legally accountable before domestic courts since the Supreme Court was silent on the normative relationship between IO immunity and the right of access to justice. Nevertheless, IOs must improve their internal mechanisms for settlement not only of employment-related disputes but also of third-party claims so that domestic courts will not be inclined to deprive IOs of their immunities in order to guarantee the right to a fair trial.  

67 Treichl, Reinisch (n 32) 135-136.