THE IMMUNITIES OF INTERNATIONAL ORGANISATIONS: JAM V. IFC AND THE NEED FOR EXTERNAL REVIEW MECHANISMS

Dhruv Sharma*

I. Introduction

On 27 February 2019, the Supreme Court of the United States of America (Supreme Court) gave its judgment in the case of *JAM et al. v. International Finance Corporation* (*Jam*).[1] The case was filed by the Indian NGO, *Machimar Adhikar Sangharsh Sangathan* (MASS), on behalf of specific plaintiffs, against the International Finance Corporation (IFC) for failure to supervise adherence with environmental norms during the construction of a power plant in Gujarat, India. In a brief judgment, the Supreme Court delineated the nature of immunities accorded to international organisations located in the United States, including the IFC, under the International Organisations Immunities Act, 1945 (IOIA). The Court held that, at the time of the enactment of the IOIA in 1945, international organisations in the United States, like foreign governments, enjoyed absolute immunities. However, the enactment of the Foreign State Immunities Act, 1976 (FSIA) restricted the immunities enjoyed by foreign governments by introducing, *inter alia*, a commercial activities' exception.

The majority opinion of the Supreme Court, delivered by Chief Justice Roberts, upon an interpretation of the IOIA, held that the immunities granted to international organisations under the IOIA had been linked to the immunities enjoyed by foreign governments under the FSIA. Consequently, the commercial activities' exception under the FSIA was also applicable to the scope of immunities enjoyed by international organisations.

The present article reviews the judgment of the Supreme Court before undertaking an analysis of the immunities and accountability of international organisations. The article proceeds as follows. Section II provides the factual background that led to the initiation of proceedings at the Supreme Court. The section also discusses the majority opinion of the Court and dissenting opinion of Justice Breyers. Section III identifies and assesses the major issues arising from the judgment. Thereafter, Section IV considers the implications

* The author, an alumnus of the University of Cambridge and National Law University, Delhi, is an advocate based out of Delhi, India. The author is indebted to his time at Lindeborg Counsellors at Law, and to Dr Rutsel Martha and Mr Stephen Bailey who provided valuable inputs in relation to the judgment and the immunities of international organisations.

1 *JAM et al v International Finance Corporation* 139 S Ct 759 (Jam).

arising from the restriction of the immunities of international organisations. Section V addresses the limitations posed by opening up acts of international organisations to review by domestic courts. In Section VI, the article pits the ostensibly conflicting norms of immunities and accountability against each other. Section VII is devoted to a discussion of the legal mechanisms available to review the acts of international organisations, and the need to develop external mechanisms of review before concluding.

II. The Case

1. Background

The IFC is a member of the World Bank Group that provides finance and asset management services to private sector projects based in developing countries. In 2008, the IFC financed the Coastal Gujarat Power Plant (Project) near the port town of Mundra in Gujarat, India.[2] As per the requirements of the loan, the Project was to be developed in compliance with the Performance Standards on Social and Environmental Sustainability laid down by the IFC.[3]

In 2011, MASS approached the Compliance Advisor Ombudsman (CAO), IFC's independent accountability mechanism, alleging non-observance of environment and social norms in the development of the Project. The resultant audit report released by the CAO found that the IFC had failed in supervising project compliance. The CAO specifically held that the review by IFC of its client was not 'commensurate with… risk' posed by the Project including the marine and air emission impact of the Project,[4] and that the IFC had failed to hold adequate and effective consultations with the affected parties.[5]

In response to the audit report, the IFC published its action plan relating to holding community consultations, monitoring air quality and depositing of pollutant deposits in neighbouring communities. Nevertheless, in 2015, the monitoring report released by the CAO observed that the reforms implemented by the IFC were insufficient.[6]

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2 International Finance Corporation, *Tata Ultra Mega: Project Overview* (IFC Project Information Portal and Data Portal, 27 November 2007) <https://disclosures.ifc.org/#/projectDetail/SPI/25797> accessed 26 June 2020.

3 ibid.

4 Office of the Compliance Advisor Ombudsman for the International Finance Corporation Multilateral Investment Guarantee Agency Members of the World Bank Group, *CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India* (Compliance Advisor Ombudsman Audit Report C-I-R6-Y12-F160, 2013) 29-30, 35-36 <http://www.cao-ombudsman.org/cases/document-links/documents/CAOAuditReportC-I-R6-Y12-F160.pdf> accessed 26 June 2020.

5 ibid [22].

6 Office of the Compliance Advisor Ombudsman for the International Finance Corporation Multilateral Investment Guarantee Agency Members of the World Bank Group, *Monitoring of IFC's Response to: CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India* (Compliance Advisor Ombudsman Monitoring Report C-I-R6-Y12-F160, 2015) 14-22 <http://www.cao-ombudsman.org/cases/document-links/documents/CGPLmonitoringreportJanuary2015.pdf> accessed 26 June 2020.

2. Journey through the US Courts

The inadequate supervision of the project by the IFC was supplemented by the lack of any mechanism to enforce the directions issued by the CAO. Despite ensuring stakeholder participation, absent any remedy within the IFC's institutional structure for holding the IFC responsible,[7] the Petitioners filed a suit against the Organisation. The proceedings were initiated before the District Court of the District of Columbia, where the IFC is headquartered.

The suit claimed, *inter alia*, that the Coastal Gujarat Power Plant had adversely impacted the nearby environment, by degrading the local air quality, causing heightened salinity of the groundwater and substantially altering the marine environment. It was further alleged, after reliance on the audit report of the CAO, that the IFC was responsible for negligence, nuisance, trespass and breach of contract.[8]

The District Court, and thereafter the Court of Appeals for the District of Columbia Circuit, dismissed the suit at the threshold, holding that the IFC enjoyed absolute immunity.[9] The Courts, relying on previous precedent set in *Atkinson v. Inter-American Development Bank*,[10] observed that the IOIA did not limit the immunities conferred upon international organisations. Accordingly, the IFC enjoyed absolute protection from any suit brought against it. The complainants preferred an appeal to the US Supreme Court.[11]

The Appeal before the Supreme Court attracted more than 10 amici submissions,[12] with the amici submissions of Multinational Development Banks, Member Countries of

7 Benjamin M Saper, 'The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective' (2012) 44 NYU Int'l L & Pol 1279, 1321.

8 *Budha Ismail Jam, et al v International Finance Corporation*, 172 F Supp 3d 104, [3-4] <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2015cv0612-31> accessed 26 June 2020. See also *Budha Ismail Jam*, *et al v International Finance Corporation*, Civil Action No 2015-0612, Class Action Complaint for Damages and Equitable Relief <https://earthrights.org/wp-content/uploads/ifc_tata_mundra_complaint-1.pdf> accessed 26 June 2020.

9 *Budha Ismail Jam, et al v International Finance Corporation*, 429 US App DC 410 <https://law.justia.com/cases/federal/appellate-courts/cadc/16-7051/16-7051-2017-06-23.html> accessed 26 June 2020.

10 156 F.3d 1335 (DC Cir 1998).

11 *Jam* (n 1).

12 See submissions by — International Law Scholars (21 February 2018); Professors of International Organization and International Law (31 July 2018); the United States (31 July 2018); Center for International Environmental Law, *et al* (31 July 2018); Bipartisan Members of Congress (31 July 2018); US Solicitor General (11 September 2018); International Law Experts (17 September 2018); International Bank for Reconstruction and Development, *et al*. (17 September 2018); Member Countries to the IFC and the Multilateral Investment Guarantee Agency (17 September 2018); Former Secretaries of State and Secretaries of the Treasury (17 September 2018); Former Executive Branch Attorneys (17 September 2018) and; African Union, *et al* (International Organisations) (17 September 2018) <https://www.scotusblog.com/case-files/cases/jam-v-international-finance-corp/> accessed 26 June 2020.

the IFC, International Organisations (African Union, Food And Agriculture Organization, and Great Lakes Fishery Commission), former Secretaries of the State, former Executive Branch Attorneys, and a grouping of international organisations supporting the position of the respondent that international organisations enjoyed absolute immunity from suit. The Center for International Environmental Law (Center), Bipartisan Members of the Congress, as well as the US Government on the other hand supported the application of restrictive immunities to international organisations.

Interestingly, three separate amici submissions were made by scholars of international law, with two groups supporting the Petitioners (*International Law Scholars* and *Professors of International Organization and International Law*),[13] and one supporting the application of absolute immunities (*International Law Experts*).[14]

The amici submissions favouring absolute immunities were essentially based on the functional approach to international organisations.[15] This approach argues that the immunities of international organisations are conferred to preclude interference in the performance of their functions by member states. Consequently, the removal of such immunities may not only allow for interference into the acts of the international organisations, but also give one member (for instance, the State where the international organisation is headquartered) undue control over its functioning.[16]

Submissions in favour of restrictive immunity contended that immunities under the IOIA had been pegged to the immunity of States under the FSIA, and therefore any modification in sovereign immunity would also alter the immunity of international organisations.[17]

13 *Jam, et al v International Finance Corporation*, Brief of International Law Scholars as Amici Curiae in Support of the Petition For Certiorari. <https://www.supremecourt.gov/DocketPDF/17/17-1011/36084/20180221131959432_Jam%20Amicus%20Brief.Final.February.21.2018.pdf ; *Jam, et al v International Finance Corporation*, Brief of Amici Curiae Professors of International Organization and International Law in Support of Petitioners https://www.supremecourt.gov/DocketPDF/17/17-1011/56033/20180731144108292_17-1011%20tsac%20Professors%20of%20International%20Organization.pdf.>

14 *Jam, et al v International Finance Corporation*, Brief of International Law Experts as Amici Curiae in Support of Respondent. <https://www.supremecourt.gov/DocketPDF/17/17-1011/63871/20180917105440500_17-1011%20Amicus%20Brief%20of%20International%20Law%20Experts.pdf> accessed 26 June 2020.

15 *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ 174, [180]; Chanaka Wickremasinghe, 'International Organizations or Institutions, Immunities before National Courts', *Max Planck Encyclopedia of Public International Law* (2009) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e502> accessed 10 June 2020; See also HG Schermers and NM Blokker, *International Institutional Law* (5th edn, Brill 2011).

16 *Jam, et al v International Finance Corporation*, Brief for Amici Curiae Member Countries and the Multilateral Investment Guarantee Agency in Support of Respondent [3]. <https://www.supremecourt.gov/DocketPDF/17/17-1011/63939/20180917143315903_2018-09-17%20Jam%20v.%20IFC%20Amicus%20Brief%20FINAL.pdf> accessed 26 June 2020.

17 *Jam, et al v International Finance Corporation*, Brief for the United States as Amicus Curiae Supporting Reversal [13-29] <https://www.supremecourt.gov/

Unlike most amici submissions that limited their arguments to the interpretation of the IOIA, the submissions of the Center and the International Law Scholars also dealt with the principles of public international law that support restrictive immunities.[18]

The amici brief of the Center argued that, apart from legislative evolution, the lack of accountability of international organisations also dictated restriction of their immunities. It argued that the absence of independent accountability mechanisms necessitated a framework allowing for limited litigation in order to maintain effectiveness of international organisations.[19] Similarly, International Law Scholars supporting the Petition submitted that the principles of international law included the right to a remedy that required the removal of absolute immunities of international organisations.[20]

In the end, the case before the US Supreme Court turned on the interpretation of Article 288a(b) of the IOIA. Article 288a(b) states that international organisations would enjoy, '*the same immunity from suit… as is enjoyed by foreign governments*'.[21]

Two interpretations for this terminology were furthered. The Respondent argued that the meaning of the term, 'same immunity' was to be determined as it existed at the time of the implementation of the statute, i.e. 1945. Foreign governments enjoyed absolute immunity in 1945, and therefore the immunity enjoyed by international organisations, suspended in time, was absolute.[22]

The appellant argued that the immunities of international organisations were pegged to the immunities enjoyed by foreign governments and any evolution in the latter resulted in a concomitant development in the former. The codification of restrictive immunity for foreign governments through the FSIA, therefore, altered the state of immunities enjoyed

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DocketPDF/17/17-1011/56087/20180731204649177_17-1011tsacUnited%20States%20-%20REVISED.pdf> accessed 26 June 2020.

18 *Jam, et al v International Finance Corporation*, Brief of Amici Curiae Center for International Environmental Law, et al <https://www.supremecourt.gov/DocketPDF/17/17-1011/56098/20180731223229014_2018-07-31%20Amicus%20Brief%20CIEL%20et%20al%20-%20Jam%20v%20IFC%207-31-18.pdf> accessed 26 June 2020; *Jam, et al v International Finance Corporation*, Brief of International Law Scholars as Amici Curiae in Support of the Petition For Certiorari, [16-21] <https://www.supremecourt.gov/DocketPDF/17/17-1011/36084/20180221131959432_Jam%20Amicus%20Brief.Final.February.21.2018.pdf> accessed 26 June 2020.

19 *Jam, et al v International Finance Corporation*, Brief of Amici Curiae Center for International Environmental Law, *et al* <https://www.supremecourt.gov/DocketPDF/17/17-1011/56098/20180731223229014_2018-07-31%20Amicus%20Brief%20CIEL%20et%20al%20-%20Jam%20v%20IFC%207-31-18.pdf> accessed 26 June 2020.

20 *Jam, et al v International Finance Corporation*, Brief of International Law Scholars as Amici Curiae in Support of the Petition For Certiorari, [16-21] <https://www.supremecourt.gov/DocketPDF/17/17-1011/36084/20180221131959432_Jam%20Amicus%20Brief.Final.February.21.2018.pdf> accessed 26 June 2020.

21 ibid (emphasis added).

22 *Jam* (n 1).

by international organisations.[23]

The Supreme Court, with Justice Breyer dissenting, relied on the 'reference' canon of statutory interpretation, and upheld the arguments of the Appellants.[24] It held that the IOIA linked the immunities of international organisations to an external and evolving law thereby making such immunities dependent on an external law (the FSIA).[25]

At the same time, the Court also countered the submissions of the Respondent. Firstly, it rejected the argument that restrictive immunity would enable excessive intervention in the acts of international organisations and thereby adversely impact their functioning. The Court opined that restrictive immunity was only the default rule and international organisations were free to negotiate special rules of immunity with host states to guarantee further protection. Though technically plausible, this observation discounts the complexity of negotiating amendments to agreements that may have been negotiated based on a static reading of the IOIA.

Secondly, the Court dismissed the assertion that potentially all activities of the IFC or such international financial institutions could be classified as commercial. The Court observed that some loan giving activities of certain international financial institutions could be non-commercial.[26] This assertion of the Court ignores the practical difficulties, as identified by Justice Breyer,[27] that may be encountered in identifying the activities benefitting from immunities and the prospect of domestic courts categorising acts of international organisations into commercial and non-commercial heads.

Contrary to the majority opinion, the dissenting opinion of Justice Breyer held that the 'reference' canon and the rules of statutory interpretation, firstly, did not provide an answer to the anomaly posed by the terms 'same as' employed in the IOIA. Secondly, the canon was merely a rule of thumb that did not oust other considerations such as the purpose and historical context of the legislation.[28] The dissent also highlighted the potential ramifications of individual States interfering with the collective decision-making of members states through their domestic courts and creating a divided jurisprudence.[29] Relying on the purpose of the IFC and the context in which the international organisations came about, Justice Breyer held that the IFC enjoyed absolute immunity.[30]

It is worth bearing in mind that the appeal before the Supreme Court raised the limited

23 ibid [6-8].

24 ibid [9-10].

25 ibid [15].

26 ibid [14].

27 *Jam, et al v International Finance Corporation* 139 S Ct 759 (Dissenting Opinion of Judge Breyer) [12].

28 ibid [5-6].

29 ibid [13-14].

30 ibid [17].

question of the immunities of international organisations before US National Courts. The decision, therefore, did not deal with the ultimate responsibility of IFC towards the Petitioners.

This question was remanded to the District Court of District of Columbia. On 14 February 2020, the District Court held that the IFC was in fact immune from the claims brought by Jam as the claims were not 'based upon activity — commercial or otherwise — carried on or performed in the United States'.[31]

Accordingly, despite the adoption of restrictive immunities, several obstacles such as the need to establish a territorial link with the activity and the bar of forum *non-conveniens*, still lie in the path of parties adversely affected by the conduct of international organisations.

III. Critical Assessment – The inapplicability of the absolute and restrictive divide

Under international law, States have enjoyed absolute or restrictive immunity.[32] The former provides immunity for acts *jure imperii* (acts performed in sovereign capacity) and *jure gestionis* (acts that are commercial in nature), whereas the latter only covers acts *jure imperii*.[33]

The dilution of the doctrine of absolute immunity commenced in the 19th century with the proliferation of State acts, and the resultant distinction employed by other States between sovereign and commercial acts of other States.[34] The restrictive approach to immunities achieved specific approval in the US through the Letter issued by the Acting Legal Adviser to the Attorney General[35] and has since become the dominant theory of State immunities.[36] This distinction between sovereign and commercial acts, which forms the basis of restrictive state immunity, has now been applied by the Supreme Court to international organisations. Consequently, the Supreme Court equated the basis of international immunities for international organisations and States and applied the absolute and restrictive divide to international organisations. This assumption that acts of international organisation may be classified into sovereign acts and commercial acts may be misplaced.

31 *Jam v International Finance Corporation*, Civil Action No 2015-0612 (DDC 2020), 14 February 2020.

32 Malcolm Shaw, *International Law* (8th edn, CUP 2008) 509-519 (Shaw).

33 ibid; Peter-Tobias Stoll, 'State Immunity (2011) in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (online ed) (Stoll).

34 Rosanne van Alebeek and Riccardo Pavoni, 'Immunities of States and their Officials' in André Nollkaemper, et al (eds), *International Law in Domestic Courts: A Casebook* (OUP 2018) 104.

35 Jack B Tate, 'Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments' (1952) 26 Dep't St Bull 969, 984—85. The Tate Letter noted the existence of "two conflicting concepts of sovereign immunity" and observed growing trend in the international practice toward the restrictive theory of sovereign immunity.

36 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Reports 99, 124-125; Shaw (n 32) 513-514.

At the outset, while a differentiation between sovereign and commercial acts of a state may be factually difficult in certain cases,[37] it is still legally and theoretically possible. On the other hand, no such distinction may be possible for international organisations.[38] Unlike states, international organisations do not have a territory of their own,[39] nor do they have an unrestrained mandate.[40] They rely on territorial and financial provisioning by member states to carry out their functions. A distinction does exist between the functions of organisations flowing from their constitutive charter and implied activities ensuing from their institutional mandate.[41] However, such distinction does not translate into sovereign and commercial acts for three reasons.

Firstly, purely based on terminology, sovereign acts are governmental acts that, unlike commercial activities such as trade, cannot be performed by private parties.[42] Such distinction, as highlighted above, arose with the proliferation of governmental agencies and their increased involvement in purely economic activities.[43] International organisations do not perform sovereign acts, but only functions based on their constitutive instruments. For instance, the function of the IFC is to provide loans to private companies undertaking developmental work. The US Supreme Court has previously held that an activity qualifies as being commercial when it engages in trade or commerce.[44] Therefore, any institutional function performed by the IFC may be characterised as both commercial and functional. Its very mandate is to provide financial assistance in the form of affordable loans to private enterprises. The commercial cannot be delinked from the functional.

Secondly, in the absence of its own territory, the functions performed by an international organisation would necessarily fall within the territory of a sovereign. Sovereign States have the capability of performing acts within their own territories without external intervention and whilst enjoying the protection offered by such sovereignty.[45] On the contrary, all functions of an international organisation rely on activities performed in one or the other

37 M. Sornarajah, 'Problems in Applying the Restrictive Theory of Sovereign Immunity' (1982) 31(4) ICLQ 661.

38 Rutsel Silvestre J Martha, 'International Financial Institutions and Claims of Private Parties: Immunity Obliges' (2012) 3 World Bank Legal Rev 93, 103 (Martha).

39 *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt,* Advisory Opinion, 1980 ICJ 73, [155] (Separate Opinion, Judge Ago).

40 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Reports 66, [78-79].

41 ibid; *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Reports 174, [182-183].

42 *Shaw* (n 32) 510-512.

43 *Stoll* (n 33)

44 *Republic of Argentina v Weltover Inc* 504 US 607, 614 (1992).

45 Leonardo Díaz-González, 'Fourth Report on Relations between States and International Organizations (Second Part of the Topic)' (1989) 2 YB Intl L Commn (part 1) 153, 158; *Martha* (n 38) 103.

State.[46] International organisation cannot avoid functioning out of their headquarters and are therefore, at all times, amenable to the jurisdiction of the host state, unless the requisite Headquarters Agreement provide for absolute immunity.

Finally, unlike States, that have an undefined and relatively unrestrained mandate, the functionality of international organisations is limited by their constitutive charters, and therefore, an analogy of international organisation with States regarding distinct sovereign and commercial acts is difficult.

A reading of the law to restrict the immunities and privileges based on the nature of activities will certainly influence the loan giving policies of international organisations like the IFC. More generally, distinction between acts *jure imperii* and *jure gestionis* is bound to affect the functioning of international organisations.

IV. Immunities of International Organisations

1. General Implications of Restricting Immunities of International Organisations

The amenability of international organisations to the jurisdiction of domestic courts can have both adverse and favourable implications. It may help improve organisational transparency and disallow States from doing indirectly what they are proscribed from doing directly.[47]

On the negative side, such review may increase the functioning costs of international organisations by the imposition of stricter accountability mechanisms. Oversight may be viewed by member states as a burdensome obligation increasing operational costs in the form of due diligence and assessment.[48] This, in turn, may lead States to renounce their support of international organisations in light of the increased contributory costs and limited potential returns.[49]

A further tangent to this argument is the potential drifting away of States from formal international institutions towards informal means of policy-making and governance, such as intergovernmental cooperation at the executive level, public-private arrangements or even standard-setting by private organisations.[50] Eyal Benvenisti discusses the repercussions of such flight away from international organisations, stating that the same decreases the

46 *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt,* Advisory Opinion, 1980 ICJ 73, [155] (Separate Opinion, Judge Ago).

47 Draft articles on the responsibility of international organizations, (2011) II(2) Yearbook of the International Law Commission, art 61.

48 Robert O Keohane, 'International Institutions: Two Approaches' (1988) 32(4) International Studies Quarterly 379, 386-389; See also Charles H II Brower, 'International Immunities: Some Dissident Views on the Role of Municipal Courts' (2001) 41 Va J Int'l L 1.

49 ibid.

50 Kal Raustiala, 'Governing the Internet' (2016) 110(3) AJIL 491; Mauro Bussani, 'Credit Rating Agencies' Accountability: Short Notes on a Global Issue' (2010) 10 Global Jurist 2.

oversight over decision-making, and allows States to function purely through their executive mandate precluding domestic checks by the state legislature or international checks by an international bureaucracy or judiciary.[51] Finally, it is likely that the imposition of stricter norms of accountability upon IFC and other formal institutions set up in the States with separation of powers would shift the focus toward other international organisations with less comprehensive accountability systems. For instance, newer multilateral development banks such as the New Development Bank, and the Asian Infrastructure Investment Bank do not have any mechanisms, or merely mirror the informal complaints and grievance mechanisms of the older Bretton Woods institutions.[52]

On the positive end, the scrutiny of the acts of international organisations paves way for greater transparency in functioning and decision-making. Absence of immunities begets accountability. This added layer of accountability by review functions in two ways. Firstly, by opening up organisational acts to subsequent internal and, increasingly, external review. Secondly, review mechanisms make decision-making more comprehensive by requiring decision-makers to consult and coordinate with stakeholders and focus on a variety of issues more competently to avoid future dispute resolution costs.[53]

2. Limitations of Review by Domestic Courts

It is arguable that even in the absence of the interpretive device employed by the Supreme Court, the result achieved in the *Jam* case was imminent. The law on immunities of international organisations has been evolving towards a more restrictive reading in light of their increasingly pervasive existence, as reflected from the recent jurisprudence of various domestic courts in Europe.[54]

This development is most significantly borne out from the decision of the European Court of Human Rights (ECtHR) in *Waite and Kennedy*.[55] In the decision, the ECtHR observed that the absence of equivalent alternative review mechanisms to adjudicate disputes raised by the complainants would necessitate the exercise of jurisdiction by domestic courts to avoid denial of justice under Article 6 of the European Convention on

51 Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 37-42; Eyal Benvenisti and George W Downs, 'Court Cooperation, Executive Accountability and Global Governance' (2009) 41 NYU J Int'l L and Pol 931, 932.

52 Korinna Horta, 'The Asian Infrastructure Investment Bank (AIIB) A Multilateral Bank where China sets the Rules' (2019) 52 Publication Series on Democracy 1, 17-26 <https://www.boell.de/sites/default/files/boell_aiib_studie_0.pdf?dimension1=division_as> accessed 14 June 2020; Javier Solana, 'China's influence on global governance' *Politico* (4 January 2015) <https://www.politico.eu/article/chinas-influence-on-global-governance/> accessed 14 June 2020.

53 Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 158-161; Daniel C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 Yale LJ 1490, 1520.

54 August Reinisch, 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals' (2008) 7(2) Chinese Journal of International Law 285.

55 *Waite and Kennedy v Germany* (Merits) (1999) ECHR 13.

Human Rights (ECHR).[56] On the facts, the Court did not exercise jurisdiction holding that the Applicant had access to an internal complaints procedure within the organisation.[57] Nevertheless, this observation paved way for the exercise of jurisdiction by various domestic courts.

In particular, the holding was applied by the French Courts in the case of *UNESCO v. Boulois*[58] and *Banque africaine de développement v. M.A. Degboe*,[59] wherein the absence of an alternate remedy available to the complainants was equated to a denial of justice.[60] Similarly, other domestic courts have followed a similar line of reasoning in dealing with the immunities of international organisations from suits.[61]

The law surrounding state immunity arises from the doctrine of sovereign equality and is encapsulated in the principle *par in parem non habet imperium* that proscribes one State from exercising jurisdiction over another.[62] With respect to international organisations no such principle of sovereign equality is applicable[63] andthe law has evolved out of a functional necessity to allow unfettered operations.[64] The law of immunities was, therefore, not developed to preclude access to justice and redressal of grievances of victims,[65] but to only ensure seamless functioning independent of interference.[66]

In this light, the review of the acts of the international organisations by domestic courts seems like a response to the ineffectiveness of internal review mechanisms and the consequent lack of remedy. Yet, two difficulties arise from piercing the veil of immunity by domestic courts.

56 ibid [47] , [67-68].

57 ibid [69-73].

58 *UNESCO v Boulois, Tribunal de grande instance de Paris* (ord. Réf.), 20 October 1997, Rev Arb (1997) 575.

59 *Banque africaine de développement v. M.A. Degboe*, Cour de Cassation, Chambre sociale, 25 Janvier 2005, 04-41012, (2005) 132 Journal du droit international 1142.

60 August Reinisch, 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals' (2008) 7(2) Chinese Journal of International Law 285.

61 ibid; Cedric Ryngaert, 'The Immunity of International Organizations Before Domestic Courts - Recent Trends' (2010) 7 International Organizations Law Review 121.

62 Niels Blokker, 'Jurisdictional Immunities of International Organisations — Origins, Fundamentals and Challenges' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds)., *The Cambridge Handbook of Immunities and International Law* (CUP 2019).

63 HG Schermers and NM Blokker, *International Institutional Law* (5th edn, Brill 2011).

64 Leonardo Díaz-González, Special Rapporteur, 'Fourth report on relations between States and international organizations (Second Part of the Topic) (1989) UN Doc. A/CN.4/424 II(I) Yearbook of the International Law Commission 153—168, 157-158; Niels Blokker, 'Jurisdictional Immunities of International Organisations — Origins, Fundamentals and Challenges' in Tom Ruys, Nicolas Angelet with Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019).

65 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* Advisory Opinion, 1999 ICJ Reports 62, [66].

66 HG Schermers and NM Blokker (n 63).

Firstly, acquiescence to the exercise of jurisdiction by domestic courts can allow disproportionate control over the organisation by a few member states, particularly the state hosting the headquarters of the organisation.[67] Such control can rear its head by allowing the host State excessive and unnecessary influence over the functions of the organisation through adjudication of the organisation's functions. Further, the control can allow the State to pre-empt the decision-making of the international organisation and expand or limit its functioning.[68] At the same time, the overarching control of a particular State can decrease the scope of control that other member states can exercise over the organisation. For instance, the characterisation of the function of providing financial assistance as sovereign or commercial activity by domestic courts of the US may amount to a classification of the nature of the acts of an organisation by an external actor without consultation with the member states of the organisation. The control exercised over an international organisation has the possibility of having a disproportionate effect upon less developed/developing states who, having gotten a modicum of equality in the form of participation in an international organisation, would now have to contribute to the funding and functioning of the international organisation in accordance with the decisions and vision of transnational domestic courts.[69]

Secondly, an indulgence into the acts of international organisations by domestic courts of different states could lead to the creation of divergent jurisprudence.[70] The divergence may be a result of varying models of interpretation, the domestic legal framework of the relevant state, or the very approach to international immunities. Similarly, without the existence of binding international precedents guiding different domestic courts, the application of international norms may be at variance or even in complete conflict. An example of this divergence is already seen from the varying underlying bases governing the approach to international immunities followed by the national courts of the US and those in Europe. Following the *Jam* judgment, the US Courts shall now distinguish between sovereign and commercial acts to identify the application of immunities. At the

67 Eric De Brabandere, 'Immunity of International Organizations in Post-Conflict International Administrations' (2010) 7 Int'l Org L Rev 79, 84; Official Bulletin of the International Labour Office (1945) XXVII (2) 199.

68 Charles H II Brower, 'International Immunities: Some Dissident Views on the Role of Municipal Courts' (2001) 41 Va J Int'l L 1, 46-57; UNHCR 54th Session 12 February 1998 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy' UN Doc E/CN.4/1998/39 106-116. The Report notes the impediments caused in the functioning of the Special Rapporteur through the filing of numerous lawsuits against him due to which the Special Rapporteur was not "in a position to effectively follow-up his investigations into these allegations".

69 Bhupinder S Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 EJIL 1.

70 Peter HF Bekker, *The legal position of intergovernmental organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (Nijhoff 1994); Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Va J Int'l L 53, 130, 134.

same time, national courts in Europe, since *Waite & Kennedy*, have followed a human rights approach exercising jurisdiction in the absence of alternate review mechanisms. As a result, while the adjudication of a suit against IFC in the US may turn on the nature of the act, courts in Europe may exercise jurisdiction owing to the ineffectiveness of the internal review mechanism of the IFC. This involvement of domestic courts in the adjudication of international organisations could rupture any existing unity in international norms and further fragment the system.

Therefore, despite being an understandable response to the lack of accountability of international organisations, review by domestic courts is not a lasting solution.

V. Immunity and Accountability

It is imperative to recall the principal objective of ensuring transparency in decision-making and accountability of international organisations. Accountability by itself has many facets, including fiscal, and reputational accountability.[71]

Limited accountability may be achieved through transparency and public participation in decision-making. The inclusion of stakeholders in decision-making allows people affected by the decisions of international organisations to highlight their concerns and limits the capture of organisations by special interest groups.[72] Additionally, inclusiveness attaches legitimacy to the organisation by committing the stakeholders to the policy and thereby enhancing implementation.[73]

Similarly, international organisations remain fiscally accountable to the contributing States upon whom the organisations rely for their continued functioning. Periodic performance reviews help assess the utilisation of funds by an organisation, and provide a basis for sanctioning inefficient functioning by limiting future funding. Deviation from mandate can similarly attract penalties in the form of lower funding, or limiting the same for specialised purposes.[74] In addition to this fiscal accountability, we may add reputational accountability. The working of international organisations attracts plaudits or criticism from a variety of stakeholders. Such informal evaluation affects future functioning and, depending on previous performance, may decrease State cooperation or individual trust. A contemporary example of these forms of accountability may be the functioning of the World Health Organisation (WHO) during the Covid-19 Coronavirus Pandemic ("Covid-19").[75] The belated decision-making and subservience of the WHO to one State attracted

71 Grant Ruth and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) American Political Science Review 29.

72 Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 159-160.

73 Sabino Cassese, 'A Global Due Process of Law?' in Gordon Anthony, Jean-Bernard Auby, John Morison and Tom Zwart (eds), *Values in Global Administrative Law* (Hart 2011).

74 Daniel Nielson and Michael J Tierney, 'Delegation to international organizations: Agency theory and World Bank environmental reform' (2003) 57(2) International Organization 241.

75 Dhruv Sharma, Kit De Vriese, 'COVID-19: An assessment of the WHO's response' *(TheGlobal.*

criticism from several spheres damaging not only the financial independence of the Organisation (for instance, the US announced a moratorium on the WHO's funding), but also adversely affected its public image[76] forcing the WHO to an independent assessment of its functioning.[77]

These forms of accountability provide certain assistance in restraining organisations. However, they continue to be informal and soft power-based mechanisms. Furthermore, the stick accompanying such mechanisms is often wielded by powerful states, thereby maintaining the global *status quo* and abandoning weaker States or stakeholders.[78]

Legal accountability, instead, proffers an opportunity to individual stakeholders to interrogate the actions of international organisations in judicial or quasi-judicial forums. The law surrounding immunities, at the same time, seeks to preclude intervention into the activities of a subject such as a state or an international organisation. At first brush, this conflict may seem to require resolution through preference of norms.[79]

However, immunities of international organisations are not an anti-thesis of accountability for immunities do not imply impunity. In fact, immunities of international organisations necessitate the establishment of alternate mechanisms to allow for dispute settlement with private parties.[80] Further, preference of one norm over another may be an excessive remedy. For instance, the conferment of absolute immunity without alternate redressal mechanism would qualify as impunity and the absolute removal of immunities has the potential for misuse, and divergent and overbroad application.

VI. The Way Forward

Thus, balancing the ostensibly conflicting norms of immunity and accountability may be achieved in three ways.

Blog 19 June 2020), <https://theglobal.blog/2020/06/19/covid-19-an-assessment-of-the-whos-response/> accessed 26 June 2020; Dhruv Sharma, Kit De Vriese, 'COVID-19, the WHO, and the Failures of Global Governance' (TheGlobal.Blog 30 June 2020) <https://theglobal.blog/2020/06/30/covid-19-the-who-and-the-failures-of-global-governance/> accessed 12 August 2020.

76 Pooja Biraia Jaiswal, 'All ill, No will' *The Week* (10 May 2020) <https://www.theweek.in/theweek/cover/2020/04/30/all-ill-no-will.html> accessed 26 June 2020; Editorial, World Health Coronavirus Disinformation, *Wall Street Journal* (5 April 2020) <https://www.wsj.com/articles/world-health-coronavirus-disinformation-11586122093> accessed 26 June 2020.

77 WHO countries agree 'equitable and timely access' to coronavirus vaccine, 'comprehensive evaluation' of response (*UN News*, 19 May 2020) <https://news.un.org/en/story/2020/05/1064442> accessed 24 August 2020.

78 Grant Ruth and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) American Political Science Review 29, 37- 40.

79 Cedric Ryngaert, 'The Immunity of International Organizations Before Domestic Courts - Recent Trends' (2010) 7 International Organizations Law Review 121.

80 *Martha* (n 38) 131.

Firstly, as discussed above, there has been a growing trend of taking a qualified approach to immunity by domestic courts to adjudicate upon claims made against the organisations. Immunities may be restricted for the achievement of a particular objective like access to justice – as exemplified by European Domestic Courts – or through differentiation between commercial and functional acts as done in the *Jam* case. However, the exercise of such jurisdiction, in addition to being an improvised mechanism reliant upon the subjectivity and discretion of domestic courts, has the potential of creating a disjointed jurisprudence without a uniform precedent system.

Secondly, immunities may be limited through internal dispute settlement mechanisms. Such internal systems may be divided into two parts, dispute settlement mechanisms adjudicating contractual disputes with employees,[81] or recommendatory bodies such as the CAO at the IFC that may influence policy formulation or reversal through non-binding findings. These internal mechanisms with narrow jurisdiction and directory pronouncements may prove inadequate with the ever-expanding global reach of international institutions and their increasing role in governance, hitherto the domain of the sovereigns.

In contrast to the above mechanisms, States could set up an independent international tribunal to adjudicate private disputes against international organisations. Structurally such a mechanism could culminate in the form of a separate international institution open to membership of international organisations that recognise its jurisdiction.[82] Alternatively, an independent tribunal may be located within the broader institutional structure of individual international organisations. Finally, international organisations could consent to the resolution of non-contractual disputes through *ad hoc* arbitrations.

Such mechanisms have three possible advantages. Firstly, it defines a specific path of redress available for adjudication of non-contractual claims, as against the prevailing scenario of improvising a combination of remedies. Secondly, it provides a binding dispute resolution mechanism. Thirdly, it prevents intervention of domestic courts by providing an alternate mechanism that precludes their jurisdiction *ratione materiae* (subject-matter

81 Statute of the Administrative Tribunal of the International Labour Organisation adopted by the International Labour Conference on 9 October 1946 and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992, 16 June 1998, 11 June 2008, 7 June 2016 and 17 June 2019. The Tribunal is open to membership by other international organisations, and is currently empowered to hear contractual complaints by present or former employees of 57 international organisations under Article 2 of the Statute. Also See: Statute of the United Nations Dispute Tribunal adopted by the General Assembly in resolution 63/253 on 24 December 2008, amended by resolution 69/203 adopted on 18 December 2014, amended by resolution 70/112 adopted on 14 December 2015, amended by resolution 71/266 adopted on 23 December 2016, and amended by resolution 73/276 adopted on 22 December 2018; Statute of the United Nations Appeals Tribunal adopted by the General Assembly in resolution 63/253 on 24 December 2008, amended by resolution 66/237 adopted on 24 December 2011, amended by resolution 69/203 adopted on 18 December 2014, amended by resolution 70/112 adopted on 14 December 2015 and amended by resolution 71/266 adopted on 23 December 2016.

82 Statute of the Administrative Tribunal of the International Labour Organisation, art 2.

jurisdiction).[83]

The availability of a binding alternate mechanism is also in line with the overall objective of immunity i.e. the preclusion of intervention without the exclusion of accountability. The case of the European Union (EU) and The International Criminal Police Organization (INTERPOL) are particularly illustrative in this scenario.

The immunities and privileges of the EU and its officials are provided under Protocol 7 on the Privileges and Immunities of the European Union. At the same time the EU has made the right to damages a fundamental right,[84] and provides for claims of damages to be brought against it under the Treaty on the Functioning of the European Union.[85] Finally, the Court of Justice for the EU has exclusive jurisdiction over claims of damages in accordance with the Statute of the Court of Justice of the European Union.

INTERPOL[86] in its Headquarters Agreement with France[87] also allows for the resolution of disputes with private parties according to the Optional Rules for Arbitration between International Organizations and Private Parties of the Permanent Court of Arbitration. Similarly, Article VIII of the Headquarters Agreement between the Organisation of American States (OAS) and the United States of America provides for arbitration of disputes with private parties notwithstanding the immunities of the OAS under the Agreement.[88]

The need for defined accountability mechanisms gains further importance with the steady rise of non-contractual disputes between international organisations and private parties. International institutions increasingly pervade through myriad aspects of individual life. Governance by formal and informal institutions may lead to asset-freezing, and travel bans under the targeted sanction scheme of the United Nations,[89] invade the private space through genetic testing,[90] or systemically hamper the development of the fisheries industry in developing states.[91] The absence of an independent accountability mechanisms has led to confrontation between two international institutions as seen in the proceedings relating

83 *Martha* (n 38) 125-126.

84 Charter of Fundamental Rights of the European Union, art 41(3).

85 Treaty on the Functioning of the European Union, art 340.

86 On the international legal personality of INTERPOL see generally: Rutsel J Martha, *The Legal Foundations of INTERPOL* (Hart 2010).

87 Agreement between the International Criminal Police Organization - Interpol and the Government of the French Republic regarding Interpol's Headquarters in France (adopted 24 April 2008, entered into force 1 September 2009), art 24(1).

88 William M. Berenson, 'Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial The Case of the OAS' (2012) 3 World Bank Legal Rev 133.

89 Thomas J Biersteker, 'Targeted Sanctions and Individual Human Rights' (2009) 65 Int'l J 99.

90 Michele Krech, 'To Be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletics' (2017) 35 Berkeley J Int'l L 262.

91 Simon R Bush, et al., 'The 'devils triangle' of MSC certification: Balancing credibility, Accessibility and Continuous Improvement' (2013) 37 Marine Policy 288.

to the *Kadi* case[92] and through the peer review of the WHO by the EU,[93] and has led to removal of international immunities by domestic courts.

The ILOAT, which serves as the dispute resolution mechanism to employees of more than 57 international organisations, provides a valuable starting point for the design of a Permanent Tribunal for International Organisations. Alternatively, consent to the Optional Protocol of the Permanent Court of Arbitration through amendment of relevant Headquarters Agreements, or through the exercise of implied powers would provide an adequate mechanism for adjudication of non-contractual disputes with private parties.

The provision of such alternate independent mechanism helps separate the issue of immunities and legal accountability while ensuring the fulfilment of the principle informing the two.

VII. Conclusion

Despite the subsequent dismissal of the case in *Jam v. IFC* by the District Court of the District of Columbia, the judgment of the Supreme Court is an important development in the law surrounding immunities of international organisations. While the interpretive methodology undertaken by the Court, combined with a growing need to review ever expanding international organisations, is understandable, the remedy of domestic court review is both provisional and potentially detrimental.

The debate surrounding the accountability of international organisations routinely devolves into a criticism of immunities of international organisations that ostensibly preclude accountability by barring recourse to settled dispute resolution mechanisms. It is important to understand that, in as much as accountability is a legitimate objective, immunities of international organisations are essential for the independent performance of their functions and as a guard against unnecessary state interference.

The present paper is an attempt to separate the issue of immunities and legal accountability and hypothesise alternate redressal mechanisms to ensure achievement of both objectives without their dilution.

92 Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 267-270.

93 Parliamentary Assembly, 'The handling of the H1N1 pandemic: more transparency needed', Report, Social Health and Family Affairs Committee, 24 June 2010 AS/Soc (2010) 12; See also Abigail C. Deshman, 'Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture' (2011) 22(4) EJIL 1089.