Immunity from Suit for International Organizations: The Judiciary's New Que of Separating Lawsuit Sheep from Lawsuit Goats

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ABSTRACT

In 1945, the United States Congress enacted the International Organizations Immunities Act (IOIA). Section 288a(b) of the act grants international organizations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." The ensuing issue has been whether "the same immunity" means the immunity enjoyed in 1945, or whether it has evolved together with the body of law on sovereign immunity.

In Jam v. Int'l Finance Corp, 586 U.S. (2019), the U.S. Supreme Court was finally asked to decide this issue, resolving a split in the federal circuits. The Court held that the immunity enjoyed by international organizations is that immunity which is enjoyed by foreign governments pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA).

This article reaches two conclusions: first, a static interpretation more accurately reflects the context, purpose, consequences, and history of the IOIA. Second, if the reference to the same immunity is taken to mean a reference to the body of law on sovereign immunity, it is nonetheless a reference to the general rule of absolute immunity, which is now codified as a presumptive (or default) rule in § 1604 of the FSIA.

I. INTRODUCTION

In 1945, Congress enacted the International Organizations Immunities Act (IOIA). The act, among other things, confers immunity from suit to international organizations (IOs), for their property and for their employees. In section 288a(b), the act gives international organizations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." In a decision rendered on February 27, 2019,[1] *Jam v. International Financial Corporation,* the United States Supreme Court was asked to decide whether the IOIA grants IOs "virtually absolute immunity,"[2] as was enjoyed by foreign governments in 1945 when the act was adopted, or whether a more

1. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 773 (2019).

2. States enjoyed absolute immunity. "Virtually" is added because the State could always consent to waive immunity. There was also a narrow exception for vessels used for purposes other than in State possession, see, for example, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-12 (1976), and an exception for immovable property due to the principle of territorial jurisdiction, see, for example, XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 10, 37-41, 67 (2012) ("[T]erritorial jurisdiction has been asserted over immovable property without interruption during the whole history of State immunity.").

limited immunity should be enjoyed in accordance with the contemporary regime of sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA).[3] Put a bit differently, is the reference to "the same immunity" in IOIA meant to be "lucid and dynamic" or "static"?[4] International Financial Corporation (IFC), the respondent, contended that the "same immunity" cited in the statute granting immunity from suit was the same immunity that foreign governments enjoyed in 1945, while the petitioners (a group of local farmers and fishermen from Gujarat, India) argued that the respondent should be given only the more limited immunity available to foreign governments today pursuant to the FSIA. The Court sided with the petitioners and rejected the respondent's argument that the doctrine of absolute immunity is the one applicable under the IOIA.[5]

This article reaches a different conclusion. First, I agree with Justice Breyer in his dissenting opinion that the static interpretation more accurately reflects the purpose of the IOIA. Second, from a purely textual standpoint, the presumptive immunity in 2019 mirrors the immunity granted in 1945 and 1976.[6] In this case, the Court entertained arguments underpinned by flawed jurisprudential premises and a misguided account of the evolution of immunity under public international law, and therefore failed in their reasoning and ultimate decision.[7] Stated a bit differently: even though the exceptions in IOIA and FSIA differ, the presumptive immunity in each remains absolute.

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3. The question had been answered in both ways in two different federal courts of appeals ("circuits") and therefore represented a "circuit split." The D.C. Circuit had held that the Congress' "intent[ion] was to adopt [a] body of law only as it existed in 1945," see Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1341 (D.C. Cir. 1998), and the Third Circuit had held that Congress intended the reference to "adapt with the law of foreign sovereign immunity," see OSS Nokalva, Inc. v. Eur. Space Agency, 617 F.3d 756, 764 (3d Cir. 2010). The FSIA provides for "presumptive immunity" from suit in section 1604 but is subject to statutory exceptions as outlined in section 1605. Among those exceptions is the "commercial activity" exception, which is allegedly a codification of the "restrictive immunity" elaborated first in the "Tate Letters." Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T. ST. BULL. 984, 984-985 (1952).

4. Justice Breyer formulated the crux of the matter in this way in his dissenting opinion, see *Jam*, 139 S. Ct. at 772-81 (Breyer, J., dissenting).

5. *Id.* at 772.

6. *See* YANG, *supra* note 2, at 39 ("It is safe to assert that the presumption of immunity has now been established as a principle of universal validity.").

7. The law on jurisdictional immunity was crystalized by the International Court of Justice in the Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 99, ¶ 26 (Feb. 3) where the Court observed, by citing International Law Commission Yearbook of 1980, that immunity from jurisdiction had been "adopted as a general rule of customary international law solidly rooted in the current practice of States." *Report of the International Law Commission on the Work of Its Thirty-Second*

By codifying a presumption of absolute immunity with a number of statutory exceptions, the FSIA tracks the general doctrinal evolution on jurisdictional immunity under public international law.[8] Notably, the act codifies the restrictive doctrine on immunity in the commercial activity exception of section 1605 (a) (2). In *Jam*, the Court reasoned that:

> Under the FSIA, foreign governments are presumptively immune from suit. (Citations omitted) But a foreign government may be subject to suit under one of several statutory exceptions. Most pertinent here, a foreign government may be subject to suit in connection with its commercial activity that has a sufficient nexus with the United States.[9]

As will be further elaborated in sections IV-V below, I believe that—textually, and even more when attributing purpose and consequences—"the same immunity" reference is indeed a specific reference to the presumption of immunity from suit.[10] Further, it is argued that the exceptions in the FSIA are specifically carved out for that exact context, just as the exceptions in the IOIA are carved out for its particular context. Thus, the act's reference to "the same immunity" does not incorporate the exceptions in the FSIA. This is further demonstrated

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Session (5 May-25 July 1980), *Chapter VI: Jurisdictional Immunities of States and Their Property*, [1980] 2 (2) Y.B. INT'L L. COMM'N 1, 147, U.N. DOC. A/35/10.

8. *See* HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 12 (3d ed. 2013) ("The formulation of immunity as a general rule of immunity with exceptions has the consequential effect that the court is itself required to give effect to immunity."); YANG, *supra* note 2, at 37-38 ("It was the Court of Appeals for the Third Circuit that first used the phrases 'presumptive immunity from suit' and 'presumption of immunity.' Then, for the first time, in Gibbons, a district court pronounced that: Under the FSIA, an entity having the status of a foreign state is entitled to a presumption of immunity, which presumption can be rebutted if the plaintiff shows that an exception to the general rule of immunity is available. Other courts quickly followed the suit; and the notion finally received the stamp of authority from the Supreme Court in *Saudi Arabia v. Nelson*: Under the [FSIA], a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.").

9. *Jam*, 139 S. Ct. at 766.

10. It may be a specific reference to a general rule, but it is not a general reference to a body of law. The SIA has the same structure and it is a generally held view that there is a "presumption that a [S]tate possesses immunity, with the plaintiff bearing the burden of proof to the contrary." JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 491 (8th ed. 2012). The general rule is one of immunity. *See also* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 99, ¶ 26 (Feb. 3).

by reading the entirety of section 288a (b) of the IOIA and sections 1604-1605 of the FSIA alongside each other, especially if read in its proper context, where the FSIA was aware of the IOIA, but not the opposite. The specific sections read as follows:

> **IOIA § 288a (b)**
>
> (b) 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 their immunity for the purpose of any proceedings or by the terms of any contract. (emphasis added).
>
> **FSIA §§ 1604-1605**
>
> § 1604 Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.
>
> § 1605 (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> (1) ["the waiver exception"];
> (2) ["the commercial activity exception"]

In short, a foreign state is immune "unless, and to the extent that, one of the exceptions set forth" applies.[11] Once a state has shown on the basis of *prima facie* evidence that it enjoys presumptive immunity,

11. DAVID P. STEWART, THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 7 (2013) (ebook) (quoting 28 U.S.C. § 1604 (LEXIS through Pub. L. No. 116-108 (excluding Pub. L. No. 116-94))). "The FSIA creates nine distinct and independent exceptions to immunity from jurisdiction. Six of these are found in 28 U.S.C. § 1605(a), as amended: (1) waiver, (2) commercial acts, (3) expropriations, (4) rights in certain kinds of property in the United States, (5) non-commercial torts, and (6) enforcement of arbitral agreements and awards. The seventh involves cases arising from certain acts of state-sponsored terrorism . . . . The eighth category involves maritime liens and preferred mortgages. Counterclaims . . . constitute the ninth category." *Id.* at 41.

the burden shifts to the plaintiff to show that one of the exceptions apply.[12] It becomes abundantly clear that each respective act, on its own, is relying on a presumption of immunity only; that is, a default rule on absolute immunity from suit and that each act carves out its own context-specific exceptions regime.[13] Each act specifically establishes which branch is to withdraw, withhold, condition, or limit immunity—namely, the IOs themselves, the executive branch, or the Court.

When both the IOIA and the FSIA are read in their proper context, it becomes abundantly clear that the IOIA's reference, in section 288, to "the same immunity . . . as is enjoyed" is a specific reference to the presumptive "virtually absolute" immunity of the 1945 IOIA and that it is for the IOs or the president to qualify the rule.

II. IMMUNITY FROM SUIT IN PUBLIC INTERNATIONAL LAW: SOVEREIGN STATES AND INTERNATIONAL ORGANIZATIONS

Considering the sources of law in the field of sovereign immunity and immunity for IOs, a judge tasked with determining whether, when, and how immunity should be limited could engage in a historical (contextual) inquiry and, to a large extent, must engage with a comparative methodological approach, considering—among other things—general principles of international law, renowned scholarly opinion, and foreign case law. In fact, "[i]t is the only sensible way of gaining a full appreciation of the scope and content of the law of [sovereign] immunity."[14] Due to its unique methodological framework, one could argue that the law on sovereign immunity is a transnational rule of law.

Finally, because a uniform multilateral framework has yet to enter into force and because the International Court of Justice (ICJ) has not really crystallized or consolidated the law, municipal courts are still

12. To demonstrate the early perception of the Rule and the role of qualifying the rule, Lord Diplock (pursuant to the United Kingdom State Immunity Act) referred to the immunity as "absolute sovereign immunity." See Alcom Ltd. v. Colombia [1984] AC 580 (HL) 600 (Eng.). It is my contention that the rule is indeed "absolute" and the exceptions codify a regime of qualifications. The exceptions may swallow the rule in the context of sovereign immunity from suit (not from execution, unfortunately) but it is context specific.

13. It is also notable that the IOIA incorporates the exception in the rule itself, while the FSIA instead has a separate section with an exhaustive enumeration. Moreover, the rule on jurisdictional immunity is one of three rules of sovereign immunity articulated in the FSIA; the other two being immunity from attachment prior to entry into force of a judgment and execution after a judgment. Each rule has its own qualification, namely context specific exceptions.

14. YANG, *supra* note 2, at 4.

tasked with defining the contours of the law. As a result, uniform principles are cumbersome to distill. In some jurisdictions, there is legislation to ease the process for judges tasked to determine whether and how immunity should be qualified (such as in the United States and United Kingdom). Where this is the case, the codification represents the exclusive basis for deciding cases implicating sovereign immunity.[15]

(A) Sovereign Immunity: Sources, Legal Theory, and Doctrinal Evolution

This section explores one methodological comparative approach that judges must undertake in any determination of immunity. Because state sovereign immunity has been a dominant concern for longer than IO immunity has been contemplated, it is impossible to determine IO immunity without first looking to the doctrine from which IO immunity evolved. This section begins with a brief discussion of state sovereign immunity and the lack of uniformity across borders, follows with the current legal theories on sovereign immunity, and concludes with a discussion of how this theory has evolved when applied to state sovereigns.

(i) Sources of Sovereign Immunity

The law of sovereign immunity is a branch of law under the broader realm of public international law. Therefore, the sources are, generally speaking, to be found in Article 38, paragraphs 1 and 2 of the Statute of the International Court of Justice.[16] A multilateral framework with regard to sovereign immunity is not yet in place. As a result, the law has primarily developed through domestic decisional law and

15. Arg. Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434, 439, 443 (1989); *see also* Ruggiero v. Compania Peruana de Vapores, 639 F.2d 872, 873-75 (2d Cir. 1981); Williams v. Shipping, 653 F.2d 875, 878 (4th Cir. 1981); Rex v. Compania, 660 F.2d 61, 63-65 (3d Cir. 1981); Goar v. Compania, 688 F.2d 417, 420-23 (5th Cir. 1982); McKeel v. Iran, 722 F.2d 582, 587-89 (9th Cir. 1983); H.R. REP. NO. 94-1487, at 6 (1976) ("The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.").

16. Statute of the International Court of Justice art. 38, ¶¶ 1-2 ("1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.").

legislation. Succinctly stated, "immunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum."[17] While these forums have been expanded with multilateral agreements,[18] there is no "single source" of the law on sovereign immunity. Moreover, it is unlikely that the international community will agree to a single source at any point in the foreseeable future. In 2004, members of the international community came close to settling a uniform standard for sovereign immunity with the adoption of the United Nations Convention on the Jurisdictional Immunities of States and their Property (UNSCI). But the convention is not in force, and will remain nonbinding until thirty states have ratified their agreement: as of March 2020, twenty-eight states have signed the agreement, but only twenty-two have ratified it.[19]Accordingly, we may conclude that: (a) there is no consolidation on the law of sovereign immunity; and (b) that major disagreements on the legal, political, economic, and philosophical normative values underpinning the doctrine makes it cumbersome to distill any uniform legal application. Despite this rather pessimistic view, several principles have been promulgated with a *de facto* consensus in jurisprudence and doctrinal development.[20]

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17. CRAWFORD, *supra* note 10, at 488; *see also* FOX & WEBB, *supra* note 8, at 13-18.

18. Two early multilateral treaties deal with sovereign immunity: the 1926 Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, see generally International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, Apr. 10, 1926, 176 L.N.T.S. 199, deals with sovereign immunity in, obviously, a narrow context; and the 1972 European Convention on State Immunity, see generally European Convention on State Immunity, May 16, 1972, 1495 U.N.T.S. 181, expands the scope of sovereign immunity to the members of the Council of Europe.

19. Fourteen states have signed but not ratified, including states that have traditionally been opposed to restrictive immunity, such as China, India, and Russia. *See* Status of Treaties for *Chapter III: Privileges and Immunities, Diplomatic and Consular Relations, Etc.*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en (last visited Mar. 25, 2020). The United States has neither signed nor ratified the convention. *See id.* For a full list of parties to the convention, see *id.*

20. For a demonstrative list, see YANG, *supra* note 2, at 34 ("1. States enjoy immunity before foreign national courts as a principle of customary international law. 2. International law prescribes a presumption of immunity; that is, first, immunity is the norm rather than the exception, and it can be denied only when one or more exceptions allowed by international law are present; and, secondly, immunity must be given due effect even if the defendant State does not appear before the court. 3. States enjoy immunity for sovereign, or public, or governmental acts (acta jure imperii) but not for commercial, or private, or non-governmental acts (acta jure gestionis). 4. The characterization of and distinction between these two types of acts are performed primarily by reference to domestic law, i.e. the law of the forum State. 5. The exceptions to immunity are almost exclusively based on territorial jurisdiction; and the restrictions on

Because the law is essentially identified and elaborated upon primarily in municipal judicial pronouncements—and secondarily in municipal codification—I argue that the law is best ascertained through a comparative legal methodology, by which judges look at general principles of law, foreign case law, and renowned scholarly work. This is not to say that municipal judges "create" international law. It is, however, to say that identifying what the law is can only be done through a comparative method of decisionmaking. In jurisdictions where the law on sovereign immunity is codified, the judge has an "easier" task of statutory interpretation.

(ii) Legal Theory on Sovereign Immunity

The law on immunity is one of the classic branches of public international law,[21] and has evolved separately from some of the other branches. This evolution depends on the subject that requires protection and on the scope, degree, and extent that is mandated in a specific context. For example, diplomatic and consular missions and their representatives have rules of immunity different from those of international organizations (IOs) or of states. Sovereign immunity is based on two separate concepts: (1) immunity *ratione materiae* (meaning, a direct inference from the equality and independence of states); and (2) immunity *ratione personae* (meaning, foreign state officials should not be subject to host state jurisdiction—the personal or functional level).[22]

Sovereign immunity has been described as "a rule of international law that facilitates the performance of public functions by the state and its representatives by preventing them from being sued or prosecuted in foreign courts."[23] In other words, "[i]ts rationale is to promote the

territorial jurisdiction become more stringent and extensive where attachment or other enforcement measures against foreign State property are involved. 6. The immunity enjoyed by a foreign State encompasses two distinct immunities in connection with the two distinct stages of the judicial process: immunity from adjudication and immunity from execution; loss of immunity from adjudication does not automatically lead to a loss of immunity from execution. 7. Immunity can be waived by the defendant State either expressly or impliedly. Two separate waivers are needed for the adjudicatory and the executory stages, unless the defendant State has made a clear and unmistakable indication of a combined waiver.").

21. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 146 (2002).

22. CRAWFORD, *supra* note 10, at 488.

23. *Id.* at 487. The author has not engaged with all debates surrounding the scope, degree and extent of sovereign immunity; for example, there will be no analysis on whether the plea of immunity is applicable to the agencies, political instruments and instrumentalities of a State; the extent to which it is applicable for individuals; extent of criminal jurisdiction; no discussion on immunity from measures of constraint; etc.

functioning of all governments by protecting states from the burden of defending litigation abroad."[24] Therefore, it has been described as a protection that enables states "to carry out their functions effectively."[25] In practice, absolute immunity seems to be a default international rule of law that has been subjected to municipal procedural exceptions due to contextual realities. The general rule of immunity seems to be an obligation under customary international law.

At the outset, it should be emphasized that a court has *ipso facto* jurisdiction in its forum and is thus competent to hear disputes and coercively enforce foreign judgments and arbitral awards.[26] The crux of the matter is not whether a court can exercise its inherent powers, but rather when and why they should refuse to do so. Sovereign immunity has had the effect of limiting the competence and jurisdiction of a forum court on the basis of various normative values. Sovereign immunity has mostly been presented as a manifestation or an outgrowth of independence, dignity, equality, or equivalence. The legal justification for immunity has been articulated mainly through one or more of these normative values.[27] Whether reliance on any of these concepts leads to a workable rule of law or a dead-end in legal analysis can be argued persuasively from either side.[28] Whether a legal justification is needed at all can be equally argued with merit on both sides.[29]

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24. JULIAN D M LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 744 (2003).

25. FOX & WEBB, *supra* note 8, at 1. The authors argues that sovereign immunity serves three main functions; that is, "(i) as a method to ensure a 'stand-off' between States where private parties seek to enlist the assistance of the courts of one State to determine their claims made against another State; (ii) as a method of distinguishing between matters relating to public administration of a State and private law claims; (iii) as a method of allocating jurisdiction between States in disputes brought in national courts relating to State activities in the absence of any international agreement by which to resolve conflicting claims to the exercise of such jurisdiction." *Id.*

26. *See, e.g.*, U.S. CONST. art. III; 28 U.S.C. §§ 1-5001 (Supp. 2006).

27. YANG, *supra* note 2, at 44-58.

28. YANG, *supra* note 2, at 57 ("Thus such notions as sovereignty, equality, independence, dignity and reciprocity are but items on a random list, to be chosen à la carte, according to the predilections of whoever is making the choice, but cannot be seriously identified as the theoretical underpinnings of State immunity. Ultimately, the discussion of the doctrinal basis or bases of immunity is neither profitable nor even necessary, and is at best of academic interest only, for courts regularly deal with the issue of State immunity without regard to any doctrinal consideration and this tendency is becoming more and more manifest.").

29. One argument for the unnecessary nature of added legal justifications is that the doctrine is already justified on international comity, but this argument seems to rest on an ad hoc determination of political concerns and policy objectives. *See, e.g.*, Jasper Finke, *Sovereign Immunity: Rule, Comity, or Something Else?* 21 EUR. J. INT'L L. 853, 871-79 (2010).

Empirically speaking, different judges have cited to one or more of these vague legal concepts in order to justify their judicial pronouncements.[30] For practical reasons, most scholars start from the presumption that sovereign immunity is based on the concept of equality between states.[31] Historically, the notion of sovereign immunity has been expressed and justified in light of the maxim *par in parem non habet imperium*; namely, that states are equal and thus have no authority over one another.[32] This notion forms the basis for the subsequent development of sovereign immunity. Relying on equality as expressed in the maxim is not only tempting for logical justification, but indeed a workable stepping-stone for legal method and analysis. The maxim encompasses "capital-letter sovereignty," or independence, equality, and dignity.[33] Chief Justice Marshall seemed to struggle with the justification of sovereign immunity in *Schooner Exchange v. McFadden*. Here, the Court held that:

> The world being composed of distinct sovereignties, *possessing equal rights and equal independence*, whose mutual benefit is promoted by *intercourse with each other*, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute

30. *See, e.g.*, Areios Pagos [A.P.] [Supreme Court] 11/2000, p. 514, 516 (Greece). ("In its contemporary version, the institution of sovereign immunity constitutes a consequence of the sovereignty, independence and equality of nations, whilst its aim is to avoid the disturbance of international relations."); *cf.* Rahimtoola v. Nizam [1958] AC 379 (HL) 418 (Eng.) ("It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction.").

31. CRAWFORD, *supra* note 10, at 447.

32. *See, e.g.*, Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 24, 40 ("[S]overeign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State."); *see also* G.A. Res. 25/2625, at 124 (Oct. 24, 1970) ("All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature."); *see also* CRAWFORD, *supra* note 10, at 488.

33. Each judge in each of the following cases applied the *par in parem non habet imperium* slightly different. One judge connected it to the wider realm of sovereignty, and the other combined it with sovereignty but added also equality. As seen in this section, at the end of the day, it does not make a substantial difference either way. *Cf.* Regina v. Bow Street Metropolitan Stipendiary (*Ex parte* Pinochet Ugarte (No. 3)) [2000] 1 AC 147 (HL) 210 (Eng.); Holland v. Lampen-Wolfe [2000] 1 WLR 1573, 1583 (Eng.); Playa Larga v. I Congreso del Partido [1983] 1 AC 244 (HL) 262 (Eng.).

> and complete jurisdiction within their respective territories which sovereignty confers . . . . This *full and absolute territorial jurisdiction being alike the attribute of every sovereign*, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character *not to degrade the dignity of his nation*, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. *This perfect equality and absolute independence of sovereigns*, and this *common interest impelling them to mutual intercourse*, and an *interchange of good offices with each other*, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.[34] (emphasis added).

This reasoning seemingly justifies both a general rule on immunity and exceptions to the rule on the bases of sovereignty, equality, independence, dignity, territorial sovereignty, and international comity. Whether one of these manifestations of statehood would have been enough to grant immunity, or whether all make up the rules and principles on sovereign immunity in combination, is cumbersome to distill from this pronouncement alone.

With the benefit of hindsight, it can be argued (with relative confidence) that none of the normative values have represented the "true" legal basis of, or justification for, sovereign immunity. This paper argues that the true basis for a general rule on sovereign immunity is a

34. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136–37 (1812) (emphasis added). For a more recent pronouncement, see generally, *Playa Larga*, 1 AC at 262. (displaying a more recent pronouncement of the above case and displaying that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate).

result of political concerns and policy objectives.[35] Therefore, as the world has shifted to market economies competing for business in a global, free, and open market, the doctrine of sovereign immunity has shifted to align with modern political realities and new policy objectives. As a result, the doctrine on international comity is probably the more sound manner by which to explain not only the legal basis for a general (or a default) rule on sovereign immunity, but also for describing the weakening of the basic rule by the increased carving-out of exceptions as contextual realities may require—or even demand.

Therefore, the best justification for the rule on sovereign immunity seems to be on the basis of comity as explained by contextual realities. Comity justifies the rule on immunity on the basis of mutual intercourse and, at the same time, qualifies the rule on the basis of philosophical, economic, political, and legal perspectives.[36] If, on the other hand, a judge or legislator justifies immunity on the basis of independence, equality, sovereignty, dignity, reciprocity, equivalence, or a combination thereof, there is usually no problem.[37] Actually, the only things that really matter are the following: (1) should the state enjoy immunity in a particular context? And (2) what should be the degree, extent, and scope of that immunity? Comity captures both political concerns and policy objectives.

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35. For example, take the discussion below on the transition from absolute to restrictive immunity. It could be called a liberal success story, or even "a triumph." However, "[t]he problem is once again that the distinction and the way it is applied rests 'on political assumptions as to the proper sphere of State activity and of priorities in State policies' which cannot easily be contained in formal rules." FOX & WEBB, *supra* note 8, at 35.

36. Because the Western World has had a disproportionate influence on philosophical, economic, legal, and political perspectives, it can be argued that there are no universal standards and instead that Western hegemony and supremacy undermines other parts of the world and their perspectives, such as China, Russia, Brazil, Global South, etc. For excellent questions framed in advance of a conference and special edition published on the matter of sovereign immunity, see Higher Sch. of Econ. (Nat'l Research Univ.) & Pluri Courts, *Call for Papers: Jurisdictional Immunities of States and Their Property: Emergence of New International Customary Law Rules – by Whom?*, EUR. SOC'Y INT'L L., https://esil-sedi.eu/wp-content/uploads/2019/04/CfP_Jurisdictional-Immunities3-4.10.2019.pdf (last visited Feb. 19, 2020).

37. *See* YANG, *supra* note 2, at 47 ("No general pattern can be discerned from the ways in which courts refer to these bases; in fact, one finds a highly haphazard, even whimsical lumping-together of them."). There seem to be no need for an exact understanding and justification upon one or more of the legal concepts traditionally underpinning sovereign immunity. The genesis is clear. Historically States were immune for several reasons, including (but not limited to) theories on independence, dignity, equality, comity, policy concerns, etc. If one, however, were to lump them together, one could say that immunity was granted due to political concerns and policy objectives.

In this context, the doctrine of international comity is a discretionary tool for judges to weigh "legal correctness" against political concerns and policy objectives. Comity is a concept—a legal doctrine, really—that has been referred to both when: (a) establishing the *degree* of deference afforded to a foreign State, and (b) determining (and limiting) the *scope* and *extent* of such deference.[38] However, the doctrine of comity is bound to generate uncertainty, because it does indeed invite subjectivity as an element of legal methodology. But law is inherently political, and so is the individual tasked with interpreting a statute or with generating common law. Further, given that municipal law has inherent political dimensions, then of course public international law has much more of the same. It is a half-cooked half-truth to portray law as an isolated phenomenon where legal method can ensure an objective, consistent, and uniform outcome for any legal issue. This contrivance removes from law the economic, political, and philosophical aspects of which it is a subspecies. It is disingenuous to disguise the human element from legal interpretation. The US/United States Supreme Court has held that international comity requires a balancing between, on the one hand, "international duty and convenience," and on the other, "the rights of its own citizens or other persons who are under the protection of its laws."[39] Alternative approaches have been proposed and rejected.[40] The reconceptualization of the doctrine of comity has been and will continue to be frequently

38. *See* 18 HALSBURY'S LAWS OF ENGLAND ¶ 1548, at 794 (Lord Hailsham of St. Marylebone et al. eds., 4th ed. 1977) ("An independent sovereign state may not be sued in the English courts against its will and without its consent. This immunity […] is accorded upon the grounds that the exercise of jurisdiction would be incompatible with the dignity and independence of any superior authority enjoyed by every sovereign state. The principle involved is not founded upon any technical rules of law, but upon broad considerations of public policy, international law and comity."); Donald E. Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 14 (2010); Joel R. Paul, *The Transformation of International Comity*, 71 L. & CONTEMP. PROBS. 19, 19–20 (2008). The latter two sources are cited in an elaborate amici brief on the doctrine of international comity: Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 3–4, Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., 138 S. Ct. 1865 (2018) (No. 16-1220).

39. Hilton v. Guyot, 159 U.S. 113, 164 (1895) ("[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.").

40. A clear rule of conclusive deference has been proposed and rejected; more recently with respect to formal representation of a foreign States own law. *See* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1879 (2018) (Holding that a "federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements.").

ventilated. The test should emphasize the "international duty" arising out of legal obligations more than "convenience" as arising out of grace, equality, independence, and dignity. At the very minimum, the Court must carefully weigh both considerations against each other in order to "properly account for the novel, sensitive, and difficult issues that often arise in cases involving transnational litigation."[41]

Moreover, the Court has repeatedly made the case that sovereign immunity and comity are intimately linked.[42] In fact, the doctrine of foreign sovereign immunity initially developed in common law and was a circumstance of grace and comity.[43] At this point in history, sovereign immunity is not necessarily underpinned by comity, but the court seems to have implicitly turned the doctrine of comity into an exception to the modern, restrictive conceptualization on sovereign immunity. It is indeed an impediment to both the evolution of the doctrine of sovereign immunity and for developed nations refusing to remain "subversive of their own morals, justice, or polity."[44] In *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, the Court refused to give conclusive effect to the foreign state's law because that would allow the state to "violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts."[45] The Court held that it had not adopted or announced a "mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded."[46] The Court further held that it was "the product of the application of *internationally recognized equitable principles* to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law" (emphasis added).[47]

In accord with the *Bancec* Court, a concept of comity that tilts in favor of the sovereign can be used to carve out a heightened degree of deference to the sovereign. But this has the potential to politicize the

41. Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners, *supra* note 38, at 7.

42. *See,* e.g., Republic of Austria v. Altmann, 541 U.S. 677, 689, 696, 709 (2004).

43. *See, e.g.*, Samantar v. Yousuf, 560 U.S. 305, 311–12 (2010).

44. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 25, at 36 (Little, Brown & Co. 4th ed. 1852) (1834).

45. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 622 (1983).

46. *Id.* at 633.

47. *Id.* at 633-34 (emphasis added).

court.[48] Courts would be tasked with addressing political concerns and policy objectives on a case-by-case basis.[49] This is not to say that foreign states should not be heard. A state's interest should be taken into consideration with *substantial* deference, but only as a backdrop for other relevant factors and only when assessed against the international duty to uphold a transnational rule of law, the interests of the United States, and the interests of its citizenry.

There have been and will continue to be many foreign states that are sued in US courts, awards against foreign states enforced in the US, or else foreign states that for whatever reason have an interest in the outcome of US litigation. If the courts took every state's brief—as petitioner, respondent, or amici—at face value, the sovereign would eventually acquire a despotic role when engaging in international trade, commerce, and investment.

(iii) Doctrinal Evolution of Sovereign Immunity

The law on sovereign immunity is not static. The theory on sovereign immunity has changed incrementally and continues to do so. The theory of absolute immunity has been reformulated to respond to globalization and capitalism, in general, and incidentally to the domain of global commerce, trade, and investment, in particular. Doctrinal developments continue to reflect changes in philosophical, economic, political, and legal policies. As a result, "the descent of the State into the arena of private rights and obligations, courts gradually accepted the argument that it was no longer in keeping with justice that immunity should be retained in the case of a foreign State acting . . . as a trader."[50]

Not only have the majority of courts been pushed to articulate a restrictive doctrine on sovereign immunity, but they have also been tasked with carving out further context-specific exceptions. To facilitate this move towards restrictive immunity, the area of sovereign

48. *See, e.g.*, *id.* at 622. (The Court was tasked with determining whether the foreign entity was a State instrumentality and held that giving "conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit th[at] state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts."). The Court applied no mechanical formula, it sought to apply "internationally recognized equitable principles to avoid injustice." *Id.* at 633.

49. *See* FOX & WEBB, *supra* note 8, at 7 ("In order to understand the structure of international law, theory must be tested against reality, and the significance of trends and patterns must be discerned. A study of State immunity directs attention to the central issues of the international legal system.").

50. YANG, *supra* note 2, at 19.

immunity was increasingly becoming the subject of codification.[51] This trend slowed quickly; the subject- area remains largely uncodified worldwide.

It has been said that "[t]he history of the law of [sovereign] immunity is the history of the triumph of the doctrine of restrictive immunity over that of absolute immunity."[52] In other words, courts have held that immunity from suit for commercial or private law dealings is not compatible with immunity from suit for modern trade, commerce, and investment.[53] This transition has happened gradually and really

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51. In 1972, the Council of Europe opened the European Convention on State Immunity for signature. *See generally* European Convention on State Immunity art. 1-15, May 16, 1972, 1495 U.N.T.S. 181. This was the first treaty seeking to codify a public international law on sovereign immunity. The multilateral treaty was of a general nature but endorsed the restrictive doctrine. This Convention adopted the general rule on immunity but added a list of exceptions, such as "commerciality." Despite great efforts, the impact of the Convention was not that great. The second attempt to multilaterally codify a restrictive law on sovereign immunity came in 2004, the UN General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNSCI). *See generally* United Nations Convention on Jurisdictional Immunities of States and Their Property (UNSCI) art. 1-4, Dec. 2, 2004, U.N. Doc. A/59/508. This Convention has not yet entered into force because thirty States need to ratify before it enters into force. Notwithstanding this, the Convention has proven to have teeth by having been accepted as in parts codifying customary international law. *See generally* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 99, ¶ 137 (Feb. 3). On municipal level, the United States codified a restrictive doctrine on immunity, with elaborated exceptions, in 1976 through the adoption of the Foreign Sovereign Immunities Act (FSIA). *See generally* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976). The exceptions to the general rule of immunity in the FSIA include *inter alia* the "waiver" and "commercial activity" exceptions. The United Kingdom adopted a similar codification in 1978 through the adoption of the State Immunity Act (SIA). *See generally* State Immunity Act 1978, c. 33 (Eng.).

52. YANG, *supra* note 2, at 6; *see, e.g.*, Administration des Chemins de Fer du Gouvernement Iranien v. Société Levant Express Transport 52 ILR 315, 316 (Court of Cassation 1969) (Fr.); Englander v. Statni Banka Ceskoslovenska, 52 ILR 335, 335-36 (Court of Cassation 1969) (Fr.); Société Nationale des Tabacs et Allumettes v. Chaussois, 65 ILR 44, 45–46 (Court of Cassation 1969) (Fr.); Dralle v. Czechoslovakia, 17 ILR 155, 156–157, 163 (Sup. Ct. of Austria 1950); Soviet Republic Case, 4 AD 172, *aff'd*, Soviet Republic Case, Areios Pagos [A.P.] [Supreme Court] 29/1928, p. 842 (Greece); Dreyfus, Switzerland, Tribunal fédérale [TF] 1918, 44 ENTSCHEIDUNGEN DES SCHWEIZERCHEN BUNDESGERICHTS I 49, 54 (Switz.); Philip C. Jessup & Francis Deák, *Part III: Competence of Courts in Regards to Foreign States*, 26 AM. J. INT'L L. SUPPLEMENT 451, 482, 612–13 (1932) (referencing cases Morellet v. Governo Danese, Cass., 1882, n. 35, Giur. it. 1883, I, 125, 130-31 (It.) (The Court opined that the State exists in as a "political entity" and as a "legal person."); Rau v. Duruty, Hoven van Beroep [HvB] [Cours d' Appel] [Court of Appeal], 1879, Pas. 1879, II, 175, 176 (Belg.)); *see also* Letter from Jack B. Tate, *supra* note 3, at 984-85. Interesting to note is that already in 1882 there was some trace of appreciation for and reception of the restrictive theory.

53. *See, e.g.*, Kuwait Airways v Iraqi Airways Co. [1995] 1 WLR 1147 (HL) 1171 (UK) (Per Lord Mustill, "[t]he rationale of the common law doctrine of the restricted immunity,

took off from the 1970s and onwards.[54] Others would add an additional third model of immunity, namely "immunity as a procedural plea."[55] Thus, the transition might actually be one from absolute immunity, to restrictive immunity, and finally to no immunity at all, but rather a procedural plea.[56]

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of which section 3 is the counterpart, is that where the sovereign chooses to doff his robes and descend into the market place he must take the rough with the smooth, and having condescended to engage in mundane commercial activities he must also condescend to submit himself to an adjudication in a foreign court on whether he has in the course of those activities undertaken obligations which he has failed to fulfil.").

54. *See* FOX & WEBB, *supra* note 8, at 2.

55. FOX & WEBB, *supra* note 8, at 5. The authors present a caveat however; that is, "[t]hese three models do not strictly describe a historical progression—indeed they overlap and infiltrate each other." *Id.* at 4. From one perspective, we seem to have entered into an additional third phase. This third phase invites forum courts to exercise jurisdiction by denying sovereign immunity on grounds other than commerciality. Two arguments have primarily been made to widen the basis of jurisdiction to remove immunity: "First, the mandatory nature of international law's prohibition on international crimes and its effect on the responsibility of the State as well as the individual for such violations. Second, the right of access to a civil court for an individual that is the victim for a reparation, such as a violation of human rights." Hazel Fox, *Hazel Fox on State Immunity*, UN WEB TV (Oct. 10, 2011), http://webtv.un.org/watch/lady-hazel-fox-on-state-immunity/2622888935001/?term= (on file with UN Audiovisual Library). Moreover, the *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment of 3 February 2012 was a set-back in the push for carving-out further exceptions to the rule on immunity; that is, the push to qualify immunity on the basis of peremptory rules of public international law, human rights, and access to courts (alternatively restoration by access to justice). *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J Rep. 99, ¶ 77, 93 (Feb. 3). (Para. 77: "State practice in the form of judicial decisions supports the proposition that State immunity for acta jure imperii continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State." Para. 93: "The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful"). And finally, "In consequence, the pleas of violation of *jus cogens* rules and of no effective alternative means of securing redress raised by Italy had no application . . . ." FOX & WEBB, *supra* note 8, at 101. For a strong disagreement of this evolution, see the separate and dissenting opinions per Judges Koroma, Judge Trindade, Judge Gaja, and Judge Yusuf and separate opinion per Judge Keith. *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 99 (Feb. 3) (Koroma, J., separate opinion) (opinion appended to judgment); *id.* (Trindade, J., dissenting) (opinion appended to judgment); *id.* (Gaja, J., dissenting) (opinion appended to judgment); *id.* (Yusuf, J., dissenting) (opinion appended to judgment).

56. This was confirmed by the International Court of Justice in Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 77, 93 (Feb. 3) (ruling that State immunity is a procedural plea).

It has been written that the evolution of the sovereign as a player in the global market has "provoked the development of the so-called restrictive theory of immunity."[57] This move manifested itself gradually from jurisdiction to jurisdiction. In the US, this shift in approach was introduced with the "Tate Letters," a series of communications by which the State Department explained that it was from now on aligning with the restrictive theory on immunity; the move was finally entrenched with the enactment of the FSIA in 1976.[58] Similarly, in the UK the shift away from absolute immunity was cemented with the enactment of the

57. CRAWFORD, *supra* note 10, at 488; *see* FOX & WEBB, *supra* note 8, at 4 ("This distinction has in the main proved workable but the absence of objective criteria on which to base the distinction for the two types of act has left it open to criticism and inconsistent application."). The restrictive theory on immunity is mostly divided in (1) a private act and (2) to be performed in the territory of the forum State. Here is where the substantive rule of law stops and procedural rules assumes a greater positioning in the debacle. *See* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 123 (1812) ("So if a sovereign descend from the throne and become a merchant, he submits to the laws of the country. If he contract private debts, his private funds are liable. So if he charter a vessel, the cargo is liable for the freight."). In today's world, it is hard to tell what activities or assets are public or used for public purposes and which are commercial or used for commercial purposes.

58. *See generally* Letter from Jack B. Tate, *supra* note 3 (explaining that the state department was from now on aligning with the restrictive theory on immunity). *See also* Jam v. Int'l Fin. Corp, 139 S. ct. 759, 766 (2019). Yang outlined a short list of principles that have received a broad consensus on the doctrinal understanding of sovereign immunity; that is: "1. States enjoy immunity before foreign national courts as a principle of customary international law. 2. International law prescribes a presumption of immunity; that is, first, immunity is the norm rather than the exception, and it can be denied only when one or more exceptions allowed by international law are present; and, secondly, immunity must be given due effect even if the defendant State does not appear before the court. 3. States enjoy immunity for sovereign, or public, or governmental acts (acta jure imperii) but not for commercial, or private, or non-governmental acts (acta jure gestionis). 4. The characterization of and distinction between these two types of acts are performed primarily by reference to domestic law, i.e. the law of the forum State. 5. The exceptions to immunity are almost exclusively based on territorial jurisdiction; and the restrictions on territorial jurisdiction become more stringent and extensive where attachment or other enforcement measures against foreign State property are involved. 6. The immunity enjoyed by a foreign State encompasses two distinct immunities in connection with the two distinct stages of the judicial process: immunity from adjudication and immunity from execution; loss of immunity from adjudication does not automatically lead to a loss of immunity from execution. 7. Immunity can be waived by the defendant State either expressly or impliedly. Two separate waivers are needed for the adjudicatory and the executory stages, unless the defendant State has made a clear and unmistakable indication of a combined waiver." YANG, *supra* note 2, at 34. The FSIA keeps the doctrinal evolution and understanding in perfect order, namely by articulating a presumptive absolute immunity rule, followed by exceptions that seek to, among other things, codify a doctrine on restrictive immunity.

SIA in 1978 but started with a series of judicial pronouncements in the seventies and continued in the eighties and beyond.[59]

(B) Jurisdictional Immunity for International Organizations

International Organizations (IOs) are associations established by treaties for various diverse purposes, including but not limited to pursuing common aims and strengthening global efforts of harmony and de-escalation of war and reduction of poverty. IOs "as subjects of international are a relatively new phenomenon;"; the upswing of these organizations took place subsequent to World War II (WWII).[60] Most IOs are altruistically motivated and seek to foster interdependence among diverse states. This is especially the case for international financial institutions.[61]

As with sovereign states and diplomatic and consular missions, IOs are protected by certain immunities in order to enable them "to achieve [their] ends without the hindrance of [municipal courts].".[62] States differ significantly from IOs and, as a result, the specific immunities enjoyed differ as well. "The distinction between public and private acts . . . has little direct relevance in determining the scope of immunity [for IOs]."[63] Accordingly, the need for protection differs depending upon the natures, purposes, and functions of IOs. Briefly stated, the major features of

59. *See* CRAWFORD, *supra* note 10, at 492-93; Philippine Admiral v. Wallem Shipping (The Philippine Admiral) [1977] AC 373 (PC) 401-02 (actions in rem); Trendtex Trading Corp. v. The Central Bank of Nigeria [1977] QB 529 at 549-580 (actions in personam); Playa Larga v. I Congreso del Partido [1983] 1 AC 244 (HL) 260-77 (Eng.). The leading case elaborating the doctrine on absolute immunity was Compania Naviera Vascongado v. Steamship "Cristina" [1938] AC 485 (HL) 490 (Eng.).

60. FOX & WEBB, *supra* note 8, at 570. Albeit some IOs were established long before the end of WWII. Most notably was the failed attempt of the League of Nations (1920).

61. These are established to promote peace through postwar reconstruction efforts and integrating developing States into the free and open market. The financial institutions can be said to be a streamlined and collective effort to promote interdependence through international commerce, trade, and investment. The International Monetary Fund (IMF), World Bank, European Investment Bank (EIB); Islamic Development Bank (IsDB); Asian Development Bank (ADB); International Bank for Reconstruction and Development (IBRD); International Finance Corporation (IFC); etc. are examples of these financial institutions. Many of these are established in Washington D.C.

62. MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 214 (7th ed. 2013). It can be said that minimum standards of freedom and legal security is needed for the IOs to function effectively. CRAWFORD, *supra* note 10, at 171; *see also* Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L L. 828, 846-52 (1947).

63. FOX & WEBB, *supra* note 8, at 574. That said, there are jurisdictions that have sought to limit the immunity of IOs by analogy to the distinction crafted for sovereign immunity, for example, Italy. *See* CRAWFORD, *supra* note 10, at 152-53 (referring to three Italian court cases).

differentiation between states and IOs can be summarized as follows: (1) "unlike states, [IOs] have no territory or population", and IOs are therefore "vulnerable to interference, particularly from the state where their headquarters are based;" (2) "while states have general powers, rights and responsibilities, [IOs'] powers and responsibilities are defined by their functions and purposes, as set out in their constituent instrument and as implemented in practice;" and (3) "States enjoy sovereign equality", while IOs enjoy no sovereign status, and therefore no right to claim "equality" or "comity."[64]

Two broad categories of immunity fall under the realm of immunity for IOs: immunity for the organization itself and immunity for its personnel.[65] This article focuses exclusively on organizational immunity.[66] More specifically, this section concentrates on immunity from suit for IOs. The sources of immunities can be found primarily in treaty law, in the constituent instrument of the IOs,[67] and in national law.[68] In contrast to states, IOs "enjoy no immunities under customary [international] law." [69] However, this point is subject to debate, and some governments and municipal courts have taken the position that immunity for IOs can be found in custom.[70]

Relevant and necessary immunities vary because IOs vary in their underlying rationales, purposes, and effects. However, the key

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64. FOX & WEBB, *supra* note 8, at 571.

65. *Id.* at 574.

66. Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, at 1, Mar. 14, 1975, UN Doc. A/CONF.67/16, https://treaties.un.org/doc/Treaties/1975/03/19750317%2008- 17%20AM/Ch_III_11p.pdf ("Recognizing that the purpose of privileges and immunities contained in the present Convention is not to benefit individuals but to ensure the efficient performance of their functions in connection with organizations and conferences."). The convention is not directly applicable to the immunities of IOs as such. But it is a clear testament to the separate ness and uniqueness of immunities for IOs and their representatives and officers from that of immunity for sovereign States.

67. There is no mention of immunities for IOs in the 2004 UNSCI, except for in Article 15 with respect to "participation in companies or other collective bodies and in Article 21(1)(a) [with respect] to the exclusion . . . of missions to [IOs]." FOX & WEBB, *supra* note 8, at 570. Article 3 excludes immunities for diplomats and consular officials from the realm of the UNSCI. For a multilateral treaty dealing with immunities of one IO, see *id.* art. 3.

68. *E.g.*, International Organizations Immunities Act, 22 U.S.C.A. § 288a (1945); and International Organisations Act 1968 48, sch. 1 (Eng.). One scholar wrote that "the law relating to privileges and immunities of organizations is a labyrinth of treaties and other legal instruments, including domestic legislation." KLABBERS, *supra* note 21, at 155.

69. ALEXANDER ORAKHELASHVILI, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 248 (Routledge 8th ed. 2019) (1970).

70. CRAWFORD, *supra* note 10, at 173 (citing Iran–US Claims Tribunal v. AS (1985) 94 ILR 321; Eckhardt v. Eurocontrol (No 2) 94 I.L.R. 331 (1984)).

justification for granting absolute immunity from suit remains the same: "that otherwise, member state courts may purport to rule on the legality of acts of the organization."[71] The potential immunities include protection from suit, execution, inviolability of premises and archives, interference with funds (protection of currency and finances), and communications.[72] Regardless of the degree, scope, and extent that specific multilateral treaties, constituent treaties, or national laws may rely on to justify or withdraw protection for IOs, the underlying motive for granting IOs a presumptive immunity is underpinned by "the criterion of functional necessity."[73] In contrast to the sovereign, an IO has been created for a purpose, and its functions can only be performed properly with a set of protections by immunity. When a court is tasked with determining whether an IO has jurisdictional immunity, a pragmatic court will first presume that the IO has virtually absolute immunity. If that presumption is disproven, the court should then look to the test developed for public international law:

> [I]f the activity is ultra vires of the purpose and functions of the organization it will not be covered by immunity. Thus, in order to determine the question of whether jurisdictional immunity is applicable to an activity of an international organization the question should be: was the activity necessary for its purpose? That is, "was the activity necessary for the effective functioning of the organization?"[74]

However, this test is only complementary to the sources of the law on IO immunity. Of course, if national law is ambiguous, the court can elaborate on the content of the act in order to effectuate the underlying motives, policy objectives, and purposes of the law.[75] The doctrine helps

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71. *Id.* at 175.

72. Johan G. Lammers, *Immunity of International Organizations: The Work of the International Law Commission*, *in* IMMUNITY OF INTERNATIONAL ORGANIZATIONS 18, 22 (Niels Blokker & Nico Schrijver eds., 2015).

73. FOX & WEBB, *supra* note 8, at 574. "[R]esort is usually had to the third contending theory on privileges and immunities, that of 'functional necessity.' The idea, then, is that organizations enjoy such immunities as are necessary for their effective functioning: international organizations enjoy what is necessary for the exercise of their functions in the fulfillment of their purposes." KLABBERS, *supra* note 21, at 148.

74. FOX & WEBB, *supra* note 8, at 575; *see also* A.S. MULLER, INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES: ASPECTS OF THEIR LEGAL RELATIONSHIP 157 (1995).

75. Another endorsed approach has been the so-called "equivalent protection" doctrine elaborated by the European Court in Waite & Kennedy v. Germany, see generally Waite &

judges clarify the content of IO immunity.[76] The doctrine functions much like comity does in the sovereign immunity context.[77] There is no escaping the arbitrariness of the doctrine and the unpredictability that can ensue.

The debate on the proper scope of jurisdictional immunity for IOs is as crucial as that of sovereign states; for understandable reasons, the juridical approaches to immunity differ. The most compelling case for restricting the presumptive immunity for IOs is that the natures, and therefore, the purposes and effects, of IOs have changed dramatically, and their role in the world economy is of too great importance to allow them to circumvent liability. For example, there are now many ways in which the work of an IO can adversely affect individuals.[78] This

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Kennedy v. Germany, 1999-I Eur. Ct. H.R. 13. The doctrine essentially says that IOs can enjoy jurisdictional immunity if they provide for alternative remedies for affected individuals (e.g. grievance commissions). ORAKHELASHVILI, *supra* note 69, at 249. However, this doctrine was "overruled" in Stichting Mothers of Srebrenica et al. v. Netherlands, App. No. 65542/12, Eur. Ct. H.R. 27-46 (2013). In that case it was held that "the provisions of an alternative remedy is no longer a requirement for immunity being granted." ORAKHELASHVILI, *supra* note 69, at 249. For an elaborate discussion on such "administrative tribunals" (primarily in employment context) are accounted for by August Reinisch, see generally August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, CHINESE 7 J. INT'L L. 285 (2008). *See, e.g.*, THOMAS E. CARBONNEAU, EMPLOYMENT ARBITRATION (2d ed. 2006) (discussing legal and political developments of employment arbitration); AM. ARBITRATION ASS'N, HANDBOOK ON LABOR ARBITRATION (Thomas E. Carbonneau & Philip J. McConnaughay eds., 2007) (providing a practical guide to arbitration).

76. *E.g.* financial institutions limit their immunity in certain respects—like "borrowing activities—in the basis of the functional argument. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 133 n.6 (2d ed. 2009).

77. *See id.* at 151 ("What is functionally necessary is, however, in the beholder's eye, and the members may have rather different conceptions from the organization itself; differences of opinion will also exist among members, and perhaps even among organs of one and the same organization."); AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 206 (2000) ("The fundamental problem is clearly that functional immunity means different, and indeed contradictory, things to different people or rather to different judges and states"); *cf.* CRAWFORD, *supra* note 10, at 401("International comity is a species of accommodation: it involves neighbourliness, mutual respect, and the friendly waiver of technicalities."). *See generally* Donald E. Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010) (analyzing international comity as a conflict of laws doctrine); Joel R. Paul, *The Transformation of International Comity*, 71 L. & CONTEMP. PROBS. 19 (2008) (referencing how international comity has developed historically).

78. *See* Marcello Di Filippo, *Immunity from Suit of International Organisations Versus Individual Right of Access to Justice: An Overview of Recent Domestic and International Case Law*, *in* DERECHO INTERNATIONAL DE LOS DERECHOS HUMANOS: MANIFESTACTIONES, VIOLACIONES Y RESPUESTAS ACTUALES 203, 242 (2014).

implicates a larger debate on access to justice for affected individuals.[79] It might even spark a nuanced debate on the role of peremptory norms (customary international law). This point raises several possible counterarguments. First, even if IOs are presumptively immune, they are free to waive their immunity. This is not an uncommon phenomenon. Most constituent instruments (or other agreements) include waivers of immunity. Development banks often include waivers from suit by third-parties due to the nature of their mission, which is to lend and borrow. Second, courts can develop a "functional necessity" test to deal with *ultra vires* acts. Third, IOs are created for a specific purpose and, therefore, their immunity is based on their function; in contrast, sovereign states base their immunity on the distinction between commercial and public acts. Such a distinction does not make sense with respect to IOs. Last, because IOs are not sovereign entities, they cannot rely on mitigating doctrines, such as that of equality or comity in order to avoid suit (or attachment and execution of assets crucial to the performance of their mission). Furthermore, it should be underscored that "[t]he functions and features of international organizations are too specific for universally applicable rules."[80] Immunity for IOs requires

79. *Id.* It seems to be argued that invoking absolute immunity can potentially—even if only indirectly—interfere with the evolution of international human rights. KLABBERS, *supra* note 21, at 151 ("Yet another problem with anything like the functional necessity thesis has recently been observed to reside in the possibility that the organization can commit violations of public order, or even human rights, under the shield of its functional necessity"); *see also* Waite & Kennedy, 1999-I Eur. Ct. H.R. Moreover, this debate has been evident in discussion on sovereign immunity as well. Italy pushed this narrative without success in the Jurisdictional Immunities of the State, 2012 I.C.J. This has been coined as a possible "third phase" on the transition of sovereign immunity. *Id.* The push for carving out further exceptions to the general rule on immunity failed; that is, the push to qualify sovereign immunity on the basis of peremptory rules of public international law, human rights, and access to courts (alternatively restoration by access to justice). *See* Jurisdictional Immunities of the State, 2012 I.C.J. ¶¶ 77, 93 ("State practice in the form of judicial decisions supports the proposition that State immunity for acta jure imperii continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. . . . The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State.") Thus, the Court ruled that State immunity is a procedural plea. And finally, as stated in conclusion by Fox and Webb in reference to paragraphs 97 and 101: "In consequence, the pleas of violation of jus cogens rules and of no effective alternative means of securing redress raised by Italy had no application . . . ." FOX & WEBB, *Supra* note 8, at 101. For a strong disagreement of this evolution, see the dissenting opinion per Judges Koroma, Judge Trindade, Judge Gaja, and Judge Yusuf and separate opinion per Judge Keith.

80. FOX & WEBB, *supra* note 8, at 579; *see also* KLABBERS, *supra* note 21, at 149-51 ("The determination of the functional needs of an organization is essentially in the eye of

exceptions carved out on a case-by-case basis. At best, we should have light-handed supervision by the courts in determining whether the IOs are staying true to their functions.

(C) Sovereign Immunity and Immunity for International Organizations in the U.S.

Grace and comity influenced the initial development of the doctrine of sovereign immunity at common law.".[81] At the time, courts turned to the Department of State for a recommendation on whether a foreign government should enjoy immunity.[82] The courts deferred to the Department of State and *de facto* elevated its recommendation into a decision. When Congress enacted the IOIA in 1945, IOs were afforded virtually absolute immunity pursuant to the common law standard applicable at the time.[83]

As time went on, absolute immunity from suit did not seem to be consistent with modern commercial realities. States moved away from absolute immunity and embraced a doctrine of restrictive immunity—that is, the states claimed immunity for activities with a public function (*acta jure imperii*) but not for commercial activities (*acta jure gestionis*). This shift in approach was first introduced in the US by the well-renowned "Tate Letters," in which the State Department explained that it was transitioning to adherence of restrictive immunity, mainly due to an increase of state participation in commercial activities.[84]

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the beholder. […] It turns out that concrete decisions relating to the scope of an organization's privileges and immunities are almost unpredictable."); Waite & Kennedy, 1999-I Eur. Ct. H.R. ¶¶ 66-67.

81. *See, e.g.*, Samantar v. Yousuf, 560 U.S. 305, 311–12 (2010).

82. *See, e.g.*, *id.*

83. *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

84. Letter from Jack B. Tate, *supra* note 3, at 984-85 (1952); *see also* Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 766 (2019). Yang outlined a short list of principles that have received a broad consensus on the doctrinal understanding of sovereign immunity; that is: "1. States enjoy immunity before foreign national courts as a principle of customary international law. 2. International law prescribes a presumption of immunity; that is, first, immunity is the norm rather than the exception, and it can be denied only when one or more exceptions allowed by international law are present; and, secondly, immunity must be given due effect even if the defendant State does not appear before the court. 3. States enjoy immunity for sovereign, or public, or governmental acts (acta jure imperii) but not for commercial, or private, or non-governmental acts (acta jure gestionis). 4. The characterization of and distinction between these two types of acts are performed primarily by reference to domestic law, i.e. the law of the forum State. 5. The exceptions to immunity are almost exclusively based on territorial jurisdiction; and the restrictions on territorial jurisdiction become more stringent and extensive where attachment or other enforcement measures against foreign State property are involved. 6. The immunity enjoyed by a foreign State encompasses two distinct immunities in connection with the

The Foreign Sovereign Immunity Act of 1976 codified the restrictive immunity.[85] Despite this, the default rule did not *per se* become one of "restrictive immunity." Rather, the rule on sovereign immunity from suit in section 1604 of the FSIA provides that a foreign state is *normally* immune from the jurisdiction of federal and state courts, subject only to a set of exceptions specified in section 1605.[86] The FSIA also transferred "the primary responsibility for immunity determinations from the Executive to the Judicial Branch."[87]

There seems to be a serious misconception regarding the supposed codification of restrictive immunity in the US. It is true that the FSIA achieved those results, but not by reconceptualizing the presumption of immunity. The FSIA starts from the same default rule as found in the common law, namely, virtually absolute immunity. One of the several exceptions available in the FSIA is a codification of the commercial activity exception. Other exceptions include the waiver and arbitration exceptions.[88]

The same evolution had not occurred regarding immunity for IOs.[89] At least this was the contention before the decision in *Jam*. *Jam* raised

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two distinct stages of the judicial process: immunity from adjudication and immunity from execution; loss of immunity from adjudication does not automatically lead to a loss of immunity from execution. 7. Immunity can be waived by the defendant State either expressly or impliedly. Two separate waivers are needed for the adjudicatory and the executory stages, unless the defendant State has made a clear and unmistakable indication of a combined waiver." YANG, *supra* note 2, at 34. The FSIA keeps the doctrinal evolution and understanding in perfect order, namely by articulating a presumptive absolute immunity rule, followed by exceptions that seek to, among other things, codify a doctrine on restrictive immunity.

85. The purposes of the act has been described as follows: "to codify the restrictive principle of immunity whereby the immunity of a foreign State is restricted to suits involving its public acts (jure imperii) and is not extended to suits based on its commercial or private acts (jure gestionis); to ensure the application of this restrictive principle in the courts and not by the State Department; to provide a statutory procedure to make service upon and establish personal jurisdiction over a foreign State; and to remedy in part the private litigant's inability to obtain execution of a judgment obtained against a foreign State." FOX & WEBB, *supra* note 8, at 238-39.

86. *See, e.g.*, STEWART, *supra* note 11, at 2.

87. Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004).

88. Only when one of these exceptions apply can the State be considered equal to a private individual and sued on the same terms. *See Verlinden*, 461 U.S. at 488-89; *see also* 28 U.S.C. § 1606 (LEXIS through Pub. L. No. 116-108 (excluding Pub. L. No. 116-94)).

89. Brief for Respondent at 2, Jam v. Int'l Fin. Corp., 139 S. Ct. 759 (2019) (No. 17-1011). "B. The United States Did Not Change Its Views with Respect to International Organizational Immunity in the Wake of the Tate Letter." Brief of International Law Experts as Amici Curiae in Support of Respondent at 28, Jam v. Int'l Fin. Corp., 139 S. Ct. 759 (2019) (No. 17-1011); *see also* STEWART, *supra* note 11, at 9-10 ("The immunities of most international organizations in the United States are governed by separate instruments. International organizations themselves will not meet the definition of a

the question of whether "the same immunity from suit" in the IOIA was a reference to the body of law that governed foreign sovereign immunity in 1945 or in 2018. Prior to this case, the issue had been raised in the lower courts, and had led to a circuit split on whether to answer the question restrictively, or whether to use a lucid and dynamic approach. The D.C. Circuit, in the case of *Atkinson v. Inter-American Development Bank,*[90] held that Congress' intention was to adopt a new body of law—restricting the interpretation of "the same immunity from suit" to 2018. The Third Circuit, on the other hand, held in the case of *Oss Nokalva Inc. v. European Space Agency*[91] that Congress intended the reference to adapt with the already-existing laws of foreign sovereign immunity—using a lucid and dynamic approach for interpreting "the same immunity from suit." Moreover, courts still have a role to play even under the IOIA regime. For example, a court can elaborate on the "functional necessity test" (which they have already done).

Finally, the historical context of the IOIA must be taken into consideration when construing its meaning. The act was not drafted in a political vacuum, with the birth of the IOIA coinciding with the end of World War II (WWII) in 1945. In turn, the end of WWII marked the promising start of a new global project underpinned by interconnectivity and interdependence. As a result, IOs were established to fulfill various objectives—often altruistic in nature (such as development banks).[92] Political concerns and policy objectives motivated a global order that sought to stimulate economic prosperity and achieve peace. The end of WWII thus "saw international cooperation through [IOs] as one way both to diminish the risk of conflict and to promote economic development and commercial prosperity."[93] In this setting, the IOIA was enacted as one of many efforts in which the US positioned itself as the

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"foreign state," and the immunities they enjoy in U.S. law typically flow either from a relevant treaty obligation (such as the Convention on Privileges and Immunities of the United Nations) or from the International Organizations Immunities Act, not from the FSIA.").

90. Aktinson v. Inter-Am Dev. Bank, 156 F.3d 1335, 1341 (D.C. Cir. 1998).

91. Oss Nokalva, Inc. v. Eur. Space Agency, 617 F.3d 756, 764 (3d Cir. 2010).

92. *See, e.g.*, UNITED NATIONS, THE WORLD ECONOMIC AND SOCIAL SURVEY (WESP) (2017) (assessing the development and growth of the global economy through efforts like policy implementation, international trade, and global initiatives). See, in particular, *id.* at 23-48, https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESS_2017_ch2.pdf (Chapter II: Post-war Reconstruction and Development in the Golden Age of Capitalism).

93. *Jam*, 139 S. Ct. at 781 (Breyer, J., dissenting). Respondents eloquently pointed out this in their brief by stating that: "As World War II drew to a close, the United States and its allies endeavored to create a post-war order that would foster international cooperation rather than nationalistic strife. International organizations were integral to that effort." Brief for Respondent, *supra* note 89, at 3.

new fiscal and political superpower. In furtherance of this goal, it was important for the US to provide a venue favorable to IOs.[94]

In light of the contextual background of FSIA as well as IOIA, it should be clear that the reader is ill advised to ascertain the "objective" meaning of the acts in isolation of their historical context. The historical context, purposes, and consequences can help us understand the acts and assist in creating workable solutions by offering a framework within which we can determine the meaning of ambiguous language.

Accordingly, the FSIA is the sole or exclusive instrument for determining sovereign immunity from suit or execution for states. If no statutory exception can be established to rebut the presumption of immunity, the state remains absolutely immune.

III. JAM V. INTERNATIONAL FINANCE CORPORATION: A NEW DAWN FOR INTERNATIONAL ORGANIZATIONS IN THE U.S.

The respondent, International Finance Corporation (IFC), is an IO protected under the IOIA. IFC entered into a loan agreement with Coastal Gujarat Power Limited (CGP) to finance the construction of a coal-fired power plant in Gujarat, India. As the project evolved, CGP failed to comply with environmental standards imposed by the IFC, allegedly leading to serious pollution damage in the surrounding air, water, and land.

The petitioners (mainly private citizens directly affected by the pollution) sued IFC instead of CGP.95 A tort claim case was filed in in the federal district court in Washington, D.C., and the plaintiffs argued that IFC had failed to ensure that CGP and its parent company complied with the environmental standards in the loan financing agreement. IFC sought to dismiss the claim on several grounds, including the assertion that "IFC was immune under the IOIA.".96 Petitioner argued to the contrary, relying on the commercial activities exception in section 1605 FSIA.

The district court held that "IFC was immune from suit because it enjoyed the virtually absolute immunity that foreign governments

94. Jurisdictions such as Austria, Belgium, the Netherlands, and the U.K. all have similar aspirations and serve as venue for various IOs. For these reasons, each jurisdiction offer favorable jurisdictional immunity to IOs in order to carry out their missions without undue hindrance. U.K. and U.S. are good examples of jurisdictions with general acts on IOs and corollary privileges and immunities. Austria even has domestic law granting privileges and immunities to NGOs. *See* KLABBERS, *supra* note 21, at 165-66.

95. Presumably because they could not have successfully sued the CGP. *See* Brief for Respondent, *supra* note 89, at 12.

96. *Id.* at 13.

enjoyed when the IOIA was enacted."97 In other words, the district court adopted the restrictive interpretation and relied heavily on the circuit precedent in Atkinson for its justification.98 The D.C. Circuit Court of Appeals affirmed the lower court and held that the standard is, indeed, virtually absolute immunity.99 Interestingly, Judge Pillard in the D.C. Circuit wrote separately to state his preference for the Third Circuit's dynamic approach in OSS Nokalva, but considered the D.C. Circuit bound by its own precedent in Atkinson. A petition for a writ of certiorari was filed and granted for the Supreme Court to resolve the split.

(A) Jam v. Int'l Finance Corporation: Majority View

The Court in *Jam* held that the "IOIA affords international organizations the same immunity from suit that foreign governments enjoy today under the FSIA."[100] In a nutshell, the Court's reasoning implicates the following: (a) that "the IOIA's 'same as' formulation is best understood as making [IO's] immunity" from suit with that of foreign governments pursuant to a so-called body of "foreign sovereign immunities;" (b) that the "'reference canon' of statutory interpretation" reinstates this; (c) that the *Atkinson* decision constituted only part of a Circuit split and is now emphatically overruled; and finally (d) that the IOIA provides only for default rules, and therefore the respondent's concerns with respect to "defeat[ing] the purpose of granting immunity in the first place" is an inflated one.

Before addressing the reasoning of the Court, we need to identify exactly what the Court was asked to address. In the Court's own words, it was, "require[d] to determine 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."[101]

This is indeed the crux of the matter, but a more sophisticated narrative is revealed through a number of additional questions. For example, a relevant series of follow-up questions to the Court might include: If the immunity is more limited today, is it so by presumption or by exception, and if the former, are those limited to the context of foreign governments alone?

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97. *Jam*, 139 S. Ct. at 763 (syllabus).
98. *See* Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1342-43 (D.C. Cir. 1998).
99. Jam v. Int'l Fin. Corp., 860 F.3d 703, 705-06 (D.C. Cir. 2017), *overruled by* Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 773 (2019).
100. *Jam*, 139 S. Ct. at 763 (syllabus).
101. *Id.* at 765 (majority).

The Court agreed with the petitioners' assertion that the IFC enjoys the "limited" or "restrictive" immunity that foreign governments currently enjoy.[102] I disagree with the basic premises of the reasoning, and, therefore, the justification of this opinion. The Court reasoned that the IOIA links the immunity for IOs to that of foreign governments by the language adopted:

> In defining the "same immunity" from suit "as is enjoyed by foreign governments," the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity be- tween the two. The statute could otherwise have simply stated that international organizations "shall enjoy absolute immunity from suit," or specified some other fixed level of immunity.[103]

The "same as" language apparently signals the "continuous equivalent" between the immunities: that is, ensuring ongoing parity between immunity from suit for IOs and foreign governments.[104] The respondent argued that section 288a(b) adopts the common law, and, therefore, that "the same immunity" was to be determined by the standards and principles in place when the act was enacted.[105] I think that the respondent should have instead—or additionally—underscored that "statutes [should] not be interpreted as changing the common law unless they affect the change with clarity," and that the change was in no means clear enough to alter the reference to a common-law term.[106]

To support its reasoning, the Court's majority applied a traditional reading of the statute's text. The Court's central thesis is that purpose and consequences do not justify a departure from the confines of the text. The Court reasoned that:

> We ordinarily assume, "absent a clearly expressed legislative intention to the contrary," that "the legislative purpose is expressed by the ordinary meaning of the words used." ([citations omitted.) . Whatever the ultimate purpose of international organization immunity

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102. *Id.*
103. *Id.* at 768 (quoting 22 U.S.C.A. § 288(a) (Westlaw through Pub. L. No. 116-91).
104. *Id.* Namely referring to that body of law codified in the FSIA.
105. Brief for Respondent, *supra* note 89, at 15 (citing Morissette v. United States, 342 U.S. 246, 263 (1952)); *see* Samantar, 560 U.S. at 311; *see also* Sekhar v. United States, 570 U.S. 729, 733 (2013); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 320 (2012).
106. SCALIA & GARNER, *supra* note 105, at 318.

> may be—the IOIA does not address that question—the immediate purpose of the immunity provision is expressed in language that Con- gress typically uses to make one thing continuously equivalent to another.[107]

The Court went on to justify its interpretation by relying on the "reference" canon of interpretation, which it defined as the maxim that "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."[108] The Court also opined that the IOIA's reference to "the same immunity" is a "general rather than specific reference."[109] The Court reasoned that:

> The reference is to an *external body of potentially evolving law*—the law of foreign sovereign immunity—not to a specific provision of another statute. 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.[110]

The Court reasoned, further, that the instructions in IOIA are an instruction to "look up the applicable rules of foreign sovereign immunity, wherever those rules (emphasis on plurality) may be found."[111] Again I disagree. In this case, it was a reference to immunity from adjudication, specifically; that is, a very narrow and specific part of sovereign immunities.

Going beyond text, precedent, history, and structure, IFC underscored purposes and consequences of the petitioners' contention. The Court summarized their purposive contention succinctly as follows:

> The IFC argues that interpreting the IOIA's immunity provision to grant anything less than absolute immunity would lead to a number of undesirable results. The IFC first contends that affording international organizations only restrictive immunity would defeat the purpose of granting them immunity in the first place. Allowing

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107. *Jam*, 139 S. Ct. at 769 (quoting Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982)).
108. *Id.*
109. *Id.*
110. *Id.* (emphasis added).
111. *Id.* at 770 (emphasis on plurality).

> international organizations to be sued in one member country's courts would in effect allow that member to second-guess the collective decisions of the others. It would also expose international organizations to money damages, which would in turn make it more difficult and expensive for them to fulfill their missions.[112]

The Court entertained and addressed the main consequential argument—i.e. that allowing suits on IOs "would bring a flood of foreign-plaintiff litigation to U.S. courts"—and held that the "concerns are inflated" because the rules in "the IOIA are only default rules."[113] The Court, minimizing the concern of a flood of cases, concluded that "even if an international development bank's lending activity does qualify as commercial, that does not mean the organization is automatically subject to suit."[114] "Restrictive immunity [does not] mean unlimited exposure to suit for [IOs]."[115] For all the reasons stated, the Court held that the IOIA grants international organizations the same immunity from suit as is enjoyed by foreign governments at any given time. Today, that means that the FSIA governs the immunity of international organizations. IFC is therefore not absolutely immune from suit. The Supreme Court reversed the judgment of the D.C. Circuit Court of Appeals, and remanded the case for further proceedings consistent with the Supreme Court's opinion.

The Court incorporated the entirety of the FSIA with respect to immunity from suit. As previously noted, the Court found that the IOIA's reference to the *same immunity* was a reference to the totality of the body of law on sovereign immunity. Accordingly, the law is not static and frozen to that of 1945, nor is the reference limited to the presumptive rule (alternatively, the "general rule of immunity"). The reference is general, and by textual intention incorporates sections 1604 and 1605 in the FSIA.

If the Court's reasoning is given its maximum possible reach, then nothing in the IOIA with respect to immunities should be applicable today. The entirety of the IOIA would be swallowed by developments in the body of law on sovereign immunity as incorporated by the general reference in section 288a(b). Additionally, we must note that in the IOIA, there is no reference to a statute nor—as has been proclaimed to justify the decision—to "a body of law."

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112. *Id.* at 771.
113. *Id.*
114. *Id.* at 772.
115. *Id.*

The petitioners referred to the IOIA's "same immunity" language as a reference to a body of law and not to an identifiable statutory provision and, therefore, the text arguably incorporates a body of federal law that may evolve over time.[116] My contention is that we are dealing with a presumptive rule (in singular) and exceptions (various in scope, nuance, and degree depending on context). Furthermore, we are concerned with a specific reference to immunity from suit and not to—as has been alleged—a general reference to sovereign immunities for foreign states. In the IOIA, the reference is to immunity from suit as for foreign governments at that time (or, alternatively, at any given time), but the exceptions are carved out in the act itself. For sovereign states, the immunity is nowadays provided for in the FSIA, the reference to immunity is articulated in section 1604, and the exceptions in section 1605. In both cases we are talking about (1) a context, (2) a presumption, and (3) exceptions. The reference from one statute was only to the presumptive immunity in 1945. If not, the presumptive immunity is still the same in 2019 as at the entry into force of the IOIA. The reference in the IOIA as to the same immunity is a specific and, indeed, a narrow reference. Probably the D.C. Circuit was more right than it knew in refusing to justify a dynamic interpretation, arguing instead that a structural inference outweighs its probative force from the larger context of the IOIA.[117]

If taken at face value, the result will culminate in, as Justice Breyer describes it in his dissenting opinion, a future scenario where courts will have to unwillingly embrace a new quest of "separating lawsuit sheep from lawsuit goats." At worst, it will simply culminate in an absurdity that implicates the policy objectives of IOs and weakens the United States' position as a hospitable and leading venue for IOs.

(B) Jam v. Int'l Finance Corporation: Dissenting Opinion by Justice Breyer

Justice Breyer concluded that the IOIA grants IOs the same immunity that was enjoyed by foreign governments in 1945, and therefore that courts should allow a purpose-based method of interpretation to shed light on opaque statutory language. This, he argues, would "lead[ ] to a result that reflects greater legal coherence and is, as a practical matter, more likely to prove sound."

116. Brief for Petitioner at 19, Jam v. Int'l Fin. Corp., 139 S. Ct. 759 (July 24, 2018) (No. 17-1011) (citing United States v. Kozminski, 487 U.S. 931, 941 (1988)).

117. Jam v. Int'l Fin. Corp., 860 F.3d 703, 708-10 (D.C. Cir. 2017), *overruled by* Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 773 (2019).

The dissent takes umbrage with what appears to be a false reliance on textualist interpretation. As argued by the petitioners, the "same as" language, written in the present tense, must include the future because the Dictionary Act says it must. Justice Breyer contended that the act's inclusion of future tense language (1) "creates only a presumption," and (2) " did not even appear in the statute until . . . after Congress had passed the Immunities Act.".[118] Indeed, the words "as is enjoyed" do not conclusively tell us when they were supposed to be "enjoyed," and therefore seems that Justice Breyer thought that we should read the evenhanded opaque statutory language in light of a purpose-based method.

In rebutting the strict reliance on the reference canon, Breyer referred to Sutherland's treatise on statutory construction and emphasized that "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*," but further noted that this is, at most, a rule of thumb.[119] He further underscored—from Sutherland's treatise—that "[no] single canon of interpretation can purport to give a certain and unerring answer."[120] Adding to that, there is a well-known canon labeled the "principle of interrelating canons" which states that no canon is absolute; that is, canons are guides and not conclusive.[121] Moreover, he highlighted that hornbooks summarizing case law have

> [L]ong explained that whether a reference statute adopts the law as it stands on the date of enactment or includes subsequent changes in the law to which it refers is "fundamentally a question of legislative intent and purpose."[122]

There was obviously no reference to a statute that would enter into force some thirty years later. Such an interpretation would be absurd, to say the least. Adding to that, the Court could have zoomed in on the presumption against ineffectiveness, the presumption of validity, and the absurdity doctrine. The textual consequences of the majority's

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118. *Jam*, 139 S. Ct. at 773 (Breyer, J., dissenting).

119. *Id.* at 774 (citing 2 J. SUTHERLAND, STATUTORY CONSTRUCTION §§ 5207-08 (3d ed. 1943)) (emphasis in original).

120. *Id.* at 775 (citing 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 4501 (3d ed. 1943)).

121. *See, e.g.*, Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001).

122. *Jam*, 139 S. Ct. at 775 (Breyer, J., dissenting) (quoting R.J. Fox, *Effect of Modification or Repeal of Constitutional or Statutory Provision Adopted by Reference in Another Provision*, 168 A.L.R. 627, 628 (1947)).

reading should have persuaded the justices in the majority to align with Justice Breyer's dissent despite a methodological disagreement.[123] For these reasons, Justice Breyer opined in his dissent that "language alone cannot resolve the statute's linguistic ambiguity" and that "all interpretive roads here lead us to the same place . . . to context, to history, to purpose, and to consequences."[124]

In line with his philosophical conviction on statutory interpretation, Justice Breyer relied more heavily on the statute's history, context, purposes, and consequences. While agreeing with Justice Breyer's methodology and his comments on cumbersome language that potentially yields several truths, we must ask whether he wrote for legacy rather than for result. Textualist reasoning alone could have motivated the same outcome.

Breyer rightly refused to invoke the Dictionary Act because "as it enjoyed" could mean both "at the time of [IOIA's] enactment" or "at the time the plaintiff brings a lawsuit."[125] As he pointed out, referring to a dissenting opinion by Justice Alito:, "[w]ithout knowing the point in time at which the law speaks, it is impossible to tell what is past and what is present or future."[126] Furthermore, he correctly noted that "there is no hard-and-fast rule that statutory words 'as is' or the statutory words 'same as' require applying the law as it stands today."[127] Conversely, it is the *purpose* of the legislation, and not linguistics, that will help us approximate a workable solution.[128]

Justice Breyer's methodological approach to opaque statutory language is, generally, a preferable approach. However, it was not necessary to invoke it in the case at hand. The Court could answer the question of whether the specific reference refers to "virtually absolute immunity" or to "restrictive immunity" in line with Breyer's rationale in the dissenting opinion on the basis of text, precedent, history, and structure alone. There was no need to underscore the purpose and consequences explicitly. To the extent necessary for the persuasive value

123. It is unfortunate and puzzling that Justice Breyer did not in fact then rely on other canons to make his point. Instead, he relied on purpose and consequence. Your author agrees, as a matter of legal philosophy, but Justice Breyer knew that the majority of the justices of the court do not. Perhaps he could have persuaded Justices Ginsburg and Sotomayor at best.

124. *Jam*, 139 S. Ct. at 775 (Breyer, J., dissenting).

125. *Id.* at 773-74.

126. *Id.* at 774 (quoting Carr v. United States, 560 U.S. 438, 463) (Alito, J., dissenting)).

127. *Id.* at 774.

128. *Id.* Justice Breyer is doing what any purposivist or consequentialist would do, namely to "give effect to what the legislature desired—the broader purpose that it had in mind, or the sensible, workable outcomes that it surely intended." SCALIA & GARDNER, *supra* note 105, at 22.

of his arguments, Breyer could have zoomed in on the purposes of each act by highlighting the historical context and highlighting the textual consequences of muddying the waters. However, given the overall tone of the Court's discussion, he did the right thing in articulating a methodological approach that is more sound and workable than the rigid alternative.

IV. THE EXCEPTION THAT PROVES BUT DOES NOT SWALLOW THE RULE ON "VIRTUALLY ABSOLUTE IMMUNITY:" *CRITICISM OF THE MAJORITY IN THE JAM OPINION FROM A TEXTUALIST STANDPOINT*

If we were to interpret IOIA's section 288a(b) reference restrictively, the default rule would be absolute immunity from suits arising in any context, including for IOs' commercial activities. The IOs themselves and the Executive Branch determine whether and when to withdraw, limit, or condition otherwise absolute immunity. Alternatively, and according to the Court, if we interpret it dynamically, the outcome is that the immunity is in parity with the restrictive immunity that is allegedly the rule in the FSIA. Either way, the crux of the matter is one of statutory construction. The discussion invokes political concerns and policy decisions, but the discussion underscores a larger debate on legal theory and methodology stretching back to the origins of law and legal interpretation.

The static understanding of section 288a(b) of the IOIA leads to the preferred outcome when taking both purpose and potential consequences into account. If one does not align philosophically, a false premise nevertheless is the underpinning of the dynamic approach; that is, that the reference is a general reference to the immunity enjoyed by foreign governments, which in turn is allegedly an external body of potentially evolving law. The justification for this reasoning is because the immunities practice was in a "flux" in 1945, Congress intentionally instructed the courts to track the development *vis-á-vis* foreign governments.[129] Essentially, this view says that "[i]mmunity [r]ules for IOs [w]ere [u]nsettled, and Congress [e]nvisioned [t]hat [t]hey [w]ould

129. *See, e.g.*, Brief of Amici Curiae Professors of International Organization and International Law in Support of Petitioners at 5, *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019) (No. 17-1011) ("Amici submit that Congress could not possibly have meant to insist on rigid application of an approach to immunity that was already obsolescing in 1945 and would very soon be definitively rejected for cases against foreign governments."). However, not every Court was moving towards restrictive immunity. *See* YANG, *supra* note 2, at 17 ("U.K. courts generally remained curiously unperturbed by the fundamental changes taking place in the world and, until 1975, 'continued to adhere to a pure, absolute, doctrine of state immunity in all cases.'").

[c]ontinue to [c]hange."[130] Yet, if there is a reference to a "new" body of law, the reference has not been to common law nor to customary international law, but to the codified FSIA, and, therefore, to a specific rule (or put differently, to a default rule or presumptive rule). The default rule in the FSIA is the same as that in the IOIA, namely in regard to absolute immunity from suit. The exceptions differ, and they do so for good contextual reasons. Additionally, "international law does not recognize the application of the restrictive theory to IOs."[131]

When interpreting a statute, textualists look at text, precedent, history, and structure. Additionally, some judges also adduce meaning from ethics or prudence. In this section, we will focus on the fair reading method, which lies within the realm of textualism.[132] When interpreting a text, the reader ought to focus mainly on "the natural or reasonable meanings of language; . . . by choosing always a meaning that the text will sensibly bear;" and therefore employ "a rational method for choosing among . . . [various methods]."[133]

(A) A Conceptual Caveat: Jurisprudential Logic

Analyzing all codifications on sovereign immunity, one can distill a general pattern; namely, the general rule is that a State is immune, followed by a number of specified context-specific exceptions.[134]

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130. Brief of Amici Curiae Professors of International Organization and International Law in Support of Petitioners, *supra* note 130, at 6.

131. Brief of International Law Experts as Amici Curiae in Support of Respondent, *supra* note 89, at 3. The law on immunities for IOs should be treated differently from sovereign and diplomatic immunity due to the special nature of IOs. *See* 17 PETER H.F. BEKKER, THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES 149-50 (1994).

132. For example, relying heavily on the weighing of contexts and presumption against ineffectiveness.

133. Frederick J. de Sloovere, *Textual Interpretation of Statutes*, 11 N.Y.U. L. Q. REV. 538, 541 (1934); *see also* SCALIA & GARDNER, *supra* note 105, at 34.

134. *See, e.g.*, Foreign Sovereign Immunities Act §§ 1602-1611; European Convention on State Immunity, *supra* note 51, art. 1-15; State Immunity Act 1978, c. 33 (Eng.); United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* note 51, art. 1-4. By way of illustration, see, for example, Kuwait Airways v Iraqi Airways Co, [1995] 1 WLR 1147 (HL) 1171 (UK) ("The rationale of the common law doctrine of the restricted immunity, of which section 3 is the counterpart, is that where the sovereign chooses to doff his robes and descend into the market place he must take the rough with the smooth, and having condescended to engage in mundane commercial activities he must also condescend to submit himself to an adjudication in a foreign court on whether he has in the course of those activities undertaken obligations which he has failed to fulfil. A claim of the present kind falls entirely outside this reasoning. Equally, although the meaning of 'commercial transactions' is broadened by section 3(3)(c) to embrace an 'activity' as well as a 'transaction,' the word is qualified by the parenthesis '(whether of a

Therefore, the default rule is absolute immunity and remains so unless and until the claimant proves otherwise in accordance with the available exceptions. Thus, the FSIA "starts from a premise of immunity and then creates exceptions to the general principle. [It] is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed."[135]

In this section, I argue that the default rule on jurisdictional immunity—the presumptive rule of virtually absolute immunity—is the same in the IOIA and in the FSIA. Furthermore, in order to accept the majority decision in *Jam*, one must not only believe that section 288a(b) refers to the rule applicable under FSIA (section 1604), but one must also be of the opinion that the exceptions in FSIA (section 1605) form an integral part of the rule in section 1604 of the FSIA and section 288a(b) of the IOIA. Moreover, if the presumptive rule of sovereign immunity is one of restrictive immunity *per se*—as was argued by the petitioners—then the exceptions not mentioned in the rule can nonetheless form part of it—that is, "one has only to read between the lines to see [it]."[136] This raises a jurisprudential puzzle that has been called "the logic of exceptions."[137] Unfortunately, however, the topic of exceptions has, to a large extent, been ignored by legal philosophers—it represents "an invisible topic in legal theory."[138]

The law on sovereign immunity is often articulated and understood in light of its exceptions. It is not too much to say that the exceptions have swallowed the rule. Therefore, when we discern the meaning of, and distill principles based on, the law on jurisdictional immunity (for IOs and states alike), the real question is whether the rule remains intact or whether the exceptions have rewritten its content by blending into the rule. I argue that the presumptive rule stands as a default rule, and that the exceptions can modify the rule on a case-by-case basis. Therefore, the default rule can be best implemented when a judge has considered the relevant statute's history, context, purposes, and consequences. The proper way of analyzing and understanding rules—by analogy to principles—is through the prism of conflict or

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commercial, industrial, financial, professional or other similar character),' which conforms with the general policy which I have suggested. In my opinion the plaintiffs' claim for wrongful misappropriation is within neither the letter nor the spirit of the commercial exception to the general immunity of the state.").

135. YANG, *supra* note 2, at 38 (quoting H.R. REP. NO. 94-1487, at 17 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6616).

136. Claire Oakes Finkelstein, Faculty Scholarship, *When the Rule Swallows the Exception*, 19 QUINNIPIAC L. REV. 505, 507 (2000).

137. *Id.* at 505.

138. *Id.* at 506 (quoting Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 872 (1991)).

interaction[139] Because principles (and rules) can conflict and interact, they can modify or qualify each other.[140]

This section outlines an analysis of the jurisdictional immunity provided for in the IOIA and the FSIA. I philosophically agree with the point of view that rules and principles can conflict with each other, and therefore, an exception can remain applicable as an independent rule or principle and applied on a case-by-case basis, as the context requires, without altering the default rule.[141] This approach takes into account the statute's history, context, purposes, and textual consequences. A textualist bench should endorse this, as well as a purpovist one. This is what the text of the respective acts mandate. As noted by Finkelstein, "to think of exceptions as superficial products of a linguistic or stylistic decision, or to eliminate them by thinking of them as *already* implicit in the rules they qualify, is to misconceive the nature of rules."[142]

The fact of the matter is that exceptions arise in a situation where the rule standing alone cannot dispose of a case due to contextual realities. The contextual realities are understood only in light of the purpose of the act and possibly the textual environment. In many individual situations, the rule must be interpreted in light of the exception, which is *ipso facto* another rule (or principle). It is also possible that well-developed doctrines conflict, and thereby, require the modification of fundamental rules (such as the doctrine on international comity).

When the default rule on absolute immunity from suit is modified or canceled by an exception, the principle underpinning the rule conflicts with the principle underpinning the exception (a separate rule). This metaunderstanding of rules and principles is crucial to properly address and assess legal issues. A rule is virtually meaningless or, at the very least difficult to apply if its own background justification (or purpose) is unaccounted. Finkelstein writes that: "Deciding in accordance with an exception rather than with an applicable rule sometimes reflects a recognition of the weight or importance of a contrary rule or principle; it need not be a rejection of the rule to which it is an exception."[143]

Rules do, in fact, often represent different background purposes and are underpinned by conflicting principles. There can be several values underpinning rules, which nevertheless fall under the same holistic legal regime. This following analysis demonstrates that the exceptions form independent rules or principles which can (and should) be taken

139. *Id.* at 513.
140. *See* Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 829-34 (1972).
141. *See* Finkelstein, *supra* note 137, at 516.
142. *Id.* at 507.
143. *Id.* at 516.

into account only in their proper context and for the assigned purpose. Two jurisprudential models, seen below in *Table 1*, analyze the conundrum manifested in the IOIA and the FSIA with respect to immunity from suit.

(i) Models of a Proper Jurisprudential Analysis

R = Rule
E = Exception
V = Value
***Caveat:** The enumerated exceptions in the FSIA context are not exhaustive. The values can be described as different. The values are chosen for illustrative purposes. Section II above better articulates the background purpose of the IOIA and FSIA.

Model 1:
Analyzing a Rule as Separate from the Exception:
Jurisdictional Immunity under the IOIA and the FSIA

Step 1: Identify the Default Rule/Presumptive Rule

R_1 = Absolute Immunity from Suit
$R_{1,1}$= § 288a(b) of the IOIA
$R_{1,2}$= § 1604 of the FSIA
$R_1 = R_{1,1}$
$R_1 = R_{1,2}$
$R_{1,1} = R_{1,2}$
= The Default Rule/Presumptive Rule is the same in the IOIA and the FSIA

***Other Potential Rules on Immunities in this context:** Rules on immunity from execution and inviolability

Step 2: Identify the Exceptions (Qualification) Separately

Analyzing the R against the backdrop of E and V underpinning the rule and each exception in the particular context.

Comment on Model 1

Each act has its own background purpose. The presumptive rule is the same but with different background justifications. The exceptions form independent rules (or principles) that qualify the rule but do not

swallow it. Finkelstein articulates Schauer's position on exceptions as follows:

> "For Schauer, a case in which an exception prevails is one in which a decision-maker recognizes that applying the rule would not further the purpose the rule itself was originally designed to promote."[144]

The author agrees with this analysis and the genesis of it. However, as pointed out by Finkelstein, stretching this analysis to make the argument that adding an exception changes the rule is to misconceive the proper role for exceptions.

Even if there is a reference in the IOIA to the FSIA, the only possible way of reading section 288a(b) as incorporating the exceptions of the FSIA is by philosophically adopting the view that: (a) section 1605 forms an integral part of the rule even if stated separately (meaning not as an "unless clause"), or (b) that albeit codified separately, the exceptions are tacitly approved as molding into the rule if one only "reads between the lines." This notion fails to take proper account of the purpose of the rule in the respective context and the purpose of each exception in the respective context.

Model 2:
Analyzing Exceptions as Forming Part of the Rule:
Jurisdictional Immunity under the IOIA and the FSIA

Rule

R_1 = Absolute Immunity from Suit *Unless xyz*

CONTEXT 1: IOIA
R_1+E_1= § 288a(b) of the IOIA = Absolute immunity from suit *unless IOs waive immunity or the president limits it*

CONTEXT 2: FSIA
R_1+E_2= § 1604 of the FSIA = Absolute immunity from suit *unless* one of the exceptions in § 1605 are applicable
= The Default Rule/Presumptive Rule reads the same in the IOIA and the FSIA but the exceptions qualify its content.

***Other Potential Rules on Immunity:** Rules on immunity from execution and inviolability

144. *Id.* at 510.

Comment on Model 2

This reasoning essentially says that the exceptions form part of the rule and that the rule means nothing in isolation. Put slightly differently, an exception re-writes the content of the rule. The exception is included in the rule and is "not properly speaking an exception to it."[145] The rule is a mere skeleton, a presumption that will be rebutted by internal structures. Finkelstein wrote that:

> On this way of looking at the matter, the rule has swallowed the exception, for if all of a rule's qualifications are an implicit part of the rule itself, then there is no qualification outside a rule that could count as a true exception to it.[146]

Dworkin articulated that rules are to be interpreted in an "all or nothing fashion."[147] Bluntly, there are no exceptions to rules according to Dworkin—the exceptions mold into the rule and form part of it; that is, exceptions add (or change) the rule.

For reasons stated throughout this section, this jurisprudential analytical framework, developed primarily by Dworkin, is flawed, inconsistent, and does not naturally lend itself to rational and sound statutory interpretation. An exception is not an implicit part of a rule. It is an independent qualifier that can only be understood by attributing enough attention to the relevant statute's history, context, purposes, and consequences.

(B) Text & Textual Consequences

In *Jam*, the petitioners made one very persuasive point, namely, that "[h]ad Congress intended to grant international organizations static, absolute immunity from suit, it would simply have used language it used elsewhere—e.g., 'shall be immune' or 'shall be inviolable.'"[148] It is true that the IOIA is not a perfect piece of legislation: we must concede that the language is somewhat ambiguous and could and should have been more clearly articulated. However, the ambiguity does not warrant the opposite interpretation—that the ambiguity should automatically be interpreted against the purpose of the IOIA. We are dealing with

145. *Id.* at 508.
146. *Id.* at 507.
147. *Id.* at 509 (referring to RONALD DWORKIN, *The Model of Rules I*, *in* TAKING RIGHTS SERIOUSLY 14, 24 (1977)).
148. Brief for Petitioners, *supra* note 116, at 27 (quoting 22 U.S.C. § 288a(c) (LEXIS through Pub. L. No. 116-108 (excluding Pub. L. No. 116-92 and Pub. L. No. 116-94)).

legislation, and not with an instrument such as a contract, where ambiguities are typically read against the drafter.[149] Even if the statute failed to expressly articulate the proper level of immunity, it did clarify the exceptions regime. For example, in *Atkinson*, the Court opined that "the IOIA sets forth an explicit mechanism for monitoring the immunities of designated international organizations."[150] The president, or the IOs themselves, are explicitly empowered to "modify, condition, limit, and even revoke the otherwise absolute immunity" from suit.[151]

Thus, the "same immunity" reference in the IOIA is a specific reference to the presumptive (or default) rule on immunity from suit—the exceptions are clearly and unmistakably articulated in the IOIA. The petitioners, by reference to Judge Pillard's dissent in the D.C. Circuit Court, argued that:

> The presidential authority provision does not grant the President the authority to establish default immunity rules. Instead, as its text indicates, Section 288 addresses *departures* from the generally applicable default rules—authorizing the President to make "organization and function-specific exemptions."[152]

The presumption in the IOIA is absolute immunity. And, if the IOIA presumption follows from the presumption in the FSIA, it is still absolute immunity. Neither the executive branch nor the judiciary can modify the presumption. It is unequivocally laid down in the FSIA. In addition, both FSIA and IOIA provide for context-specific exceptions to the presumption. In short, the reference to immunity in section 288a(b) of the IOIA is "tethered" to the decisions of the president and the IOs themselves, and not to the developments in the law on sovereign immunity.[153]

Moreover, it is indeed perplexing that the petitioners interchangeably referred to the immunity from suit as, sometimes, "rules" (in plural) and at other times "rule" (in singular). It makes a big difference whether the reference is to a rule, (which is quite specific) or

149. In contract law, this would be called *contra proferentem* interpretation.

150. Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1341 (D.C. Cir. 1998).

151. *Id.* Compare to U.K. where the government decides exceptions by Order in Council.

152. Brief for Petitioners, *supra* note 116, at 30 (quoting Jam v. Int'l Fin. Corp., 860 F.3d 703, 709 (D.C. Cir. 2017), *overruled by* Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 773 (2019)).

153. *Atkinson*, 156 F.3d at 1340-41. For a good discussion in favor of restrictive immunity, see Carson Young, *The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA*, 95 TEX. L. REV. 889, 896 (2017).

to rules (which are more general). Petitioners make another fundamental error by conflating the "rule of immunity from suit" with being subject to "rules in the FSIA." For example, petitioners argued that:

> [i]n short, the default rules governing international organizations' immunity from suit follow the rules for foreign governments (as currently codified in the FSIA), whereas Section 288 authorizes the President to withdraw, limit, or condition privileges and immunities of specific organizations, as particular circumstances warrant.[154]

Then it goes on, in the very next page, to state the opposite:

> "[b]ut none of this overcomes the plain text of the 'same immunity' provision or otherwise renders it unnecessary for the IOIA's *default rule regarding immunity from suit* to track the current law of foreign sovereign immunity.

The outstanding question is simple: is the reference to "same immunity from suit" to a presumptive/default rule, or to a body of law that includes several rules (including immunity from attachment, immunity from execution, immunity from suit, and several exceptions under each header)? By a fair textual reading, it is pretty clear that the reference is specific and refers to a presumptive/default rule (in singular).

(C) Precedent & History

In 1998, in *Atkinson v. Inter-American Development* Bank, the D.C. Circuit pointed out that the reference to same immunity for foreign governments was a "shorthand" for immunities enjoyed at the time the act was passed, namely in 1945.[155] Since 2010, however, there has been a circuit split that the Supreme Court revisited in *Jam*. The Third Circuit rejected *Atkinson* and instead concluded that the Act incorporates subsequent changes in the law of sovereign immunity.[156]

154. Brief for Petitioners, *supra* note 116, at 30.

155. *Atkinson*, 156 F.3d at 1340-41.

156. *See* OSS Nokalva, Inc. v. Eur. Space Agency, 617 F.3d 756, 763-64 (3d Cir. 2010). Prior to *Jam et al*, the question on whether IOIA incorporates by reference Section 1604 (and Section 1605 apparently) had been answered both restrictively and with a lucid and dynamic approach. The D.C. Circuit had held that the "Congress' intent[ion] was to adopt [a] body of law . . . that existed in 1945," see *Atkinson*, 156 F.3d at 1341, and the Third

Put differently, the Third Circuit held that Congress intended the IOIA to "adapt with the law of foreign sovereign immunity."[157] The Circuit relied on the reference canon in order to include "all the amendments and modifications of the law subsequent to the time the referenced statute was enacted."[158] It is difficult to discern exactly what the Third Circuit meant with "changes in the law of sovereign immunity" and the bed rock principles are impossible to instill. In contrast, the D.C. Circuit refused the reference canon on the basis of Congress's intention and the explicit exceptions regime in the IOIA.

It may be that the Third Circuit approach, which was then adopted in *Jam*, has the potential of making litigation the primary tool for ascertaining on a case-by-case basis when an IO should enjoy immunity from suit. Moreover, the "law of sovereign immunity" is broad and, if incorporated, would render several articles in IOIA invalid, ineffective, and manifestly without meaning. This absurdity could not have been desired by the drafters of neither IOIA nor FSIA.

That said, Judge Pillard in the D.C. Circuit wrote separately to articulate her approval of the Third Circuit, but at the same time expressed that she was bound by *Atkinson* due to *stare decisis*. In a word, she approved the dynamic interpretation of a general reference.

Justice Breyer analyzed the historical context in which the IOIA was drafted, and in his dissent, highlighted an important feature:

> If 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, taking on a meaning that would fail to grant not only full, but even partial, immunity to many of those organizations.[159]

Taking the context into consideration, the analysis is well-articulated. The IOIA provides for default rules when the IOs themselves (or the president) has not waived immunity. This was the historical context, namely what the words meant then and what they mean today; that is, the default law is one of virtually absolute immunity. The petitioners themselves articulated this thoughtfully in their initial brief. They described the IOIA provision at issue as follows:

Circuit had held that Congress intended the reference to "adapt with the law of foreign sovereign immunity," see *OSS Nokalva*, 617 F.3d at 764.

157. *OSS Nokalva*, 617 F.3d at 764. For a short but accurate description on the circuit split, see Young, *supra* note 154, at 897.

158. *OSS Nokalva*, 617 F.3d at 763.

159. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 777 (2019) (Breyer, J., dissenting).

> The *operative provision*—22 U.S.C. § 288a(b)—provides that, *absent waiver of immunity*, such organizations shall enjoy "the same immunity" from suit that "is enjoyed by foreign governments." The IOIA also contains a provision allowing the President to limit any of the IOIA's privileges, exemptions, and immunities on an organization-by organization basis.[160]

This perfectly encapsulates section 288a(b). The virtually-absolute immunity was automatically granted, only subject to the decision-making of political branches. As is the case today, exceptions were carved-out where necessary, but instead of statutorily engrafted and elaborated by the judiciary—the exceptions were engrafted by the IOs themselves, or by the executive branch.

To borrow a phrase from the late Justice Scalia (whom often reiterated his disregard for legislative history), "for those who care,"[161] the parties also referred to legislative history.[162] The petitioners referred, among other things, to Senate Reports and House Reports. For example, the petitioners referred to the following passages:

> With respect to *immunity from suit* in particular, "'the privileges, exemptions, and immunities extended international organizations are those accorded foreign governments under similar circumstances."[163]

> [O]rganization[s] made up of a number of foreign governments, as well as our own. . . should enjoy the *same status as an embassy* of . . . [a foreign] government.[164]

160. Brief for Petitioners, *supra* note 116, at 5 (emphasis added).

161. This perhaps arrogant start of a sentence is meant to be a tribute to Late Justice Antonin Scalia (who often insisted on such wording in order to join the opinion of the Court) and is not meant to offend the reader. Your author does in fact attribute great significance to legislative history and happens to align more with Justice Breyer and Judge Posner's methodological conviction. Moreover, your author is from Sweden, where legislative history is a primary source of law. With that said, may the late Justice Antonin Scalia rest in peace. He may be gone but his legacy lives on forever.

162. *See* Brief for Petitioners, *supra* note 116, at 31-37. Nonetheless it is valuable to shed light on the historical context and therefore ascertaining the intention of the drafters, and hence the objective meaning of the text.

163. *Id.* at 32 (quoting S. REP. NO. 79-861, at 4 (1945)) (emphasis added).

164. *Id.* at 32 (quoting 91 CONG. REC. 12,432 (Dec. 20, 1945)) (emphasis added).

The legislative history references are interesting in two respects: (1) the Senate Report refers specifically to the *particular rule* that the reference is concerned with (reinstating the specific reference), and (2) to the extent they discussed the constitution of IOs, it was not as a "foreign government," but more resembling the part of a government that performs public functions, namely the "status as an embassy."[165] As outlined above, the move toward restrictive immunity was one in which foreign governments would be held accountable for their private functions (*acta jure gestionis*) and not for their public functions (*acta jure imperii*). Therefore, the intention of Congress seems to have been to treat IOs as though they perform public functions, which is entirely in line with their objectives and purpose.[166] This logic makes perfect sense when one considers the historical context in which the IOIA was drafted. However, despite their own reference, the petitioners went on to claim that "[t]he logic of Congress's decision to *link international organizations with foreign governments*, and to provide that they should enjoy equivalent immunity from suit going forward, is apparent."[167] The petitioners continued this trend in their reply brief, arguing that the respondent "ignore[d] several congressional pronouncements that the goal of the statute was to accord international organizations the same protections as foreign states because they are 'organizations made up of a number of foreign governments.'"[168] The petitioners completely missed the reference to the "same status as an embassy . . . of a foreign government." Words have meaning. Nuance, degree, and scope are ingredients necessary when drafting and interpreting legislation. Conclusively, states still enjoy "virtually" absolute immunity for their public functions.

The inconsistency and lack of nuance in petitioners' reading is perplexing. There was obviously no link between IOs and foreign governments as such. In fact, the result was quite the opposite. Congress made sure to emphasize that IOs are made up by foreign governments,

165. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 712 (1976); Republic of Mexico v. Hoffman, 324 U.S. 30, 36-37 (1945). The status of property used for "diplomatic or consular" purposes were always protected and treated under a special-status sub- category of the foreign government.

166. *See also* Brief for Respondent, *supra* note 89, at 22 ("'[T]o assimilate [international organizations] to states . . . is not correct. Their basis of immunity is different. The relevant test under general international law is whether an immun-ity from jurisdiction . . . is necessary for the fulfilment of the organization's purposes,' not whether it was act- ing 'in sovereign authority.'") (quoting ROSALYN HIGGINS, PROBLEMS AND PROCESS – INTERNATIONAL LAW AND HOW WE USE IT 93 (1994)).

167. Brief for Petitioners, *supra* note 116, at 32.

168. Reply Brief for Petitioners at 12, Jam v. Int'l Fin. Corp., 139 S. Ct. 759 (Oct. 5, 2018) (No. 17-1011) (quoting Brief for Petitioners, *supra* note 116, at 32).

but should be given the same status as embassies because of their objectives and purposes. More perplexing, however, is that both the respondent and the Court failed to pick up and address this fundamental error. The petitioners' arguments—as well as the Court's opinion—rest on a thesis that is underpinned by flawed premises. Scope and degree should have received much more emphasis and, accordingly, much more credibility.

To put the historical-context debate beyond speculation, it is inarguable that WWII prompted the current crucial necessity for interdependence, interconnectivity, and a heightened measure of accountability and responsibility of states. In an English court case from the seventies, the court held that "[t]here is no doubt . . . that since the Second World War there has been . . . a movement away from the absolute theory of sovereign immunity . . . towards a more restrictive theory."[169] One way of promoting cooperation, unity, and harmony was through establishing IOs. Universal interests of peace and economic empowerment could be promoted together, but not under the auspice of individual state pressure. It then follows that IOs need protection for the effectuation of their functions. The collection of states coming together to promote altruistic objectives through the functions of IOs was desperately needed. The history and nature of immunity for states and IOs have been substantially different.

(D) Structure

Respondent argued that the structure (and purpose) of section 288a(b) "establishes a fixed substantive common-law rule."[170] The respondent also highlighted the IOIA's *express* waiving regime—e.g. that section 288 authorizes the president and the IOs to limit (but not expand) their immunity.[171] It contends that the express waiving regime is inconsistent with a "fluctuating rule of immunity."[172] Moreover, "authorizing the President [and IOs] to 'limit,' but not expand, . . . [the] immunity . . . [can only] make sense" if the established rule is one of absolute immunity.[173] A statute should be interpreted so that it is effective or at least valid.

169. Philippine Admiral v. Wallem Shipping (*The Philippine Admiral*), [1975] AC 373 (PC) 397 (appeal taken from S. Ct. of Hong Kong) (Eng.).

170. Brief for Respondent, *supra* note 89, at 16 (citing King v. Burwell, 135 S. Ct. 2480, 2490-91 (2015)).

171. *Id.*

172. *Id.*

173. *Id.* at 32-33.

In her separate opinion for the D.C. Circuit, Judge Pillard "registered her disapproval of the D.C. Circuit's waiver jurisprudence."[174] She was of the opinion that: "Rather than *establishing* an absolute immunity rule and then creating *case-by-case exceptions* according to an *"amorphous" waiver-curbing doctrine*, she maintained it would be far better to consider assertions of immunity using the "time-tested body of law under the FSIA."[175] This reasoning represents the core of her opinion and was—unfortunately, tacitly, and impliedly—approved by the Supreme Court's opinion. The "disapproval" represents, at best, a thoughtful opinion of what the legislators should have considered—namely, her legislative preference. I wish to underscore again that the rule (in singular) on immunity from suit is already established, and the so-called "amorphous" waiver-curbing doctrine, as described by Pillard,[176] represents an integral part of the IOIA. The structure of both the IOIA and the FSIA articulates emphatically and unequivocally that the judges should first entertain the presumption (of immunity), and then move on to assess possible exceptions. The presumption in 2019 is the same as it was in 1945. An expert on sovereign immunity described the US general immunity and exception regime as follows:

> Such a uniform pattern of general immunity qualified by particular exceptions can only mean one thing, namely, that the starting premise is always that a foreign State is presumed immune unless and until proven otherwise. The US practice is especially prominent in enunciating this presumption of immunity. According to the legislators, the US FSIA: "starts from a premise of immunity and then creates exceptions to the general principle. [It] is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed."[177]

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174. Brief for Petitioners, *supra* note 116, at 14.

175. *Id.*

176. *See id.*

177. YANG, *supra* note 2, at 38 (quoting H.R. REP. No. 94-1487, at 17 (1976)); *see also* Youming Jin v. Ministry of State Sec., 475 F. Supp. 2d 54, 61 (D.D.C. 2007) ("The basic premise of FSIA is that foreign sovereigns are immune from suit in the United States unless the action falls under one or more of the nine specific exceptions enumerated in the statute (citation omitted). . . . The plaintiff bears the burden of producing evidence to show that the foreign sovereign defendant does not enjoy immunity and that one or more of the nine exemptions to FSIA constitutes a waiver of the defendant's sovereign immunity thereby conferring federal court jurisdiction over the plaintiff's claims (citation omitted).

In *Jam*, the respondent contended that the waiver clause would be superfluous if the IOIA's reference to the same immunity incorporates an entire body of law.[178] The petitioners argued that this is not so: "[t]he ability to waive an immunity or other protection is distinct from the substantive protection itself." The petitioners further emphasized *Blatchford*, stating the case held that "immunity and its waiver of that immunity are 'wholly distinct,'" and therefore the waiver clause was "irrelevant."[179] Granted, though the context in *Blatchford* was the Eleventh Amendment immunity and its waivers, the central thesis holds true for other similar situations; that is, the presumptive/default rule is not necessarily to be equated with the exception unless the exception is explicitly incorporated in the rule and made an integral part thereof. Moreover, exceptions are generally context specific. The exceptions of immunity from suit for IOs are different from foreign governments because of their respective nature, purposes, and objectives. The respondent and the Court should have relied on the petitioners' own reference, which is exactly spot-on and holds truth. The follow-up questions would then have been: (a) is the reference specifically to a presumptive rule, and (b) are the qualifications to the rule be considered "wholly distinct"? The answer should have been an unequivocal "yes they are wholly distinct." The outcome of the judgment would have been the complete opposite, even if the Court would have approved the dynamic nature of the reference. The matter should have been put to rest and the decision irrevocable and irreversible.

Moreover, the FSIA "transfer[red] the primary responsibility for immunity determinations from the Executive to the Judicial Branch."[180] This was one of the main features of the statute. Therefore, the two acts are structurally incompatible. The waiving function is substantially different and highly context specific. The similarity is this: both the IOIA and the FSIA mention a presumptive rule, and the presumptive rule in each is the same.

Had the Court been a little more truthful to textualism, the outcome would have been different. A fair reading would have culminated in an

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Once the plaintiff has shown that the foreign sovereign defendant is not immune from suit, the burden shifts to the defendant to prove that the plaintiff's allegations do not bring the case within one of the statutory exceptions to immunity (citation omitted). A court may dismiss a complaint brought under FSIA only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief.").

178. Brief for Respondent, *supra* note 89, at 31 (quoting 22 U.S.C. § 288a(c) (LEXIS through Pub. L. No. 116-108 (excluding Pub. L. No. 116-94))); *see also* Reply Brief for Petitioners, *supra* note 169, at 9.

179. Reply Brief for Petitioners, *supra* note 169, at 9; *cf.* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 786 n.4 (1991).

180. Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004).

approach that would have sought textual purpose in the context by looking at the rules' "historical associations acquired from recurrent patterns of past usage," and by looking at the rule's "immediate syntactic setting" (the exceptions and surrounding context-specific words).[181] The rule in the FSIA is the same as that in the IOIA; that is, a general presumption of immunity. Subsequently, to establish the presumption, the claimant has the burden to prove that one of the exceptions apply by rebutting the presumption.[182] The reference in the IOIA is a reference to the general rule on immunity, not to context-specific exceptions.

(E) Concluding Remarks on Textualism

Textualists do look at purpose. For a textualist, words take on a different meaning depending on the context. They are of the opinion that the "subject matter of the document (its purpose, broadly speaking) is the context that helps to give words meaning."[183] If we analyze the IOIA and the FSIA separately, the subject-matter differs significantly. IOs operate on the basis of specific—often altruistic—purposes. Therefore, the necessary privileges and immunities differ significantly from that of states with sovereign authority.

Statutory interpretation is a holistic endeavor: and the purpose of an act sets the contextual realities straight.[184] A true textualist looks at textual consequences, too, especially looking at whether a particular reading will cause the statute to be ineffective, invalid, or lead to an absurd result.[185] The Court is instructed to interpret a text in a manner that furthers the document's purpose instead of one that renders it ineffective. For example, reading in the FSIA's exception regime into the IOIA would render the president's and IOs' authority to limit their immunity worthless. In an excellent paper on treating exceptions separate from rules, Finkelstein concluded that:

> I have argued that an exception exists when an applicable rule fails to dispose of a case because another rule or principle that conflicts with it is dispositive

181. SCALIA & GARNER, *supra* note 105, at 33.

182. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 489 (1983) ("If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject matter jurisdiction . . . but if the claim does not fall within one of the exceptions, federal courts lack subject matter jurisdiction.").

183. SCALIA & GARNER, *supra* note 105, at 56.

184. *See, e.g.*, United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988); *see also In re* Stinson, 285 B.R. 239, 243 (Bankr. W.D. Va. 2002).

185. SCALIA & GARNER, *supra* note 105, at 352.

> instead. I have also argued that this sort of conflict is indirectly a conflict of principles. In the case of a conflict of rules, this is because the rules reflect different background principles. The clash between them thus expresses a clash of principles. Where a rule comes into conflict with a principle, the principle that supports the rule clashes directly with another principle.[186]

From a jurisprudential point of view, it is abundantly clear that the purposes of the FSIA are not compatible with the purposes for the IOIA. The principles underpinning the rules in each act are motivated by different values, and therefore the justification for each default rule (albeit both being an absolute rule on immunity from suit) and exceptions regime differs significantly. Reading IOIA in light of FSIA would manifest absurdity that could never have been the intent of the drafters of either statute.

V. IMPLICATIONS FOR THE COURT AND INTERNATIONAL ORGANIZATIONS: CRITICISM OF THE MAJORITY OPINION FROM A PURPOSIVIST STANDPOINT

Under this heading, I will address how context-specific purposes[187] and consequences[188] can help shed light on the interpretation of the IOIA. As a matter of fact, both the purpose-based method[189] of interpretation and the textual method of interpretation[190] should lead to the same outcome in the case at hand.[191] For the latter methodological

186. Finkelstein, *supra* note 137, at 530.

187. Purposive interpretation can be described as: "[a]n interpretation that looks to the evil that the statute is trying to correct (i.e., the statute's purpose," usually conceived broadly and apart from the limitations of the text). SCALIA & GARNER, *supra* note 105, at 431.

188. Consequentialism can be described as "[a]n interpretive theory that assesses the rightness or wrongness of a judge- interpreter's reading according to its extratextual consequences." *Id.* at 426.

189. Sometimes referred to as "liberal interpretation" and described as: "[b]road interpretation of a text's language beyond its permissible meanings, usually with the object of producing the result that the interpreter thinks desirable." *Id.* at 430-31.

190. Articulated as a method whereby the reader[s] "look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences." *Id.* at xxvii.

191. Some judges, scholars, and lawyers denotes the insertion of what they call "own ideas" that would render the reader a "full collaborator" with the original author and enable all sorts of new material to enter the realm of statutory interpretation. This method of allegedly subjective interpretation has been coined "exegesis." This notwithstanding, judges, lawyers, and scholars disagree and indeed attribute more than

approach, textual consequences should have guided the Court to the same conclusion as it reached under purpose-based (or puposivist) methods—but it did not. I will show that many of the contentions of the Respondent, amici for Respondent, and Justice Breyer in his dissent are relevant to a textual decision, and not only to those judges that stray away from text, precedent, history, and structure in order to adduce meaning by looking at ethics and prudence.

Of course, purpose and consequence may often help end an unfortunate textual deadlock in favor of pragmatism and workability.[192] In his *Jam* dissent, Justice Breyer eloquently commented that:

> Purposes, derived from context, informed by history, and tested by recognition of related consequences, will more often lead us to legally sound, workable interpretations—as they have consistently done in the past. These methods of interpretation can help voters hold officials accountable for their decisions and permit citizens of our diverse democracy to live together productively and in peace—basic objectives in America of the rule of law itself.[193]

The central thesis arising in the aftermath of a purpose-oriented method is that the FSIA did not change the IOIA's substantive rule of virtually absolute immunity. There was never an intention for the FSIA to apply to IOs. The purpose of offering IOs immunity, to begin with, can only be effectuated if the presumption is one of absolute immunity. This

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text, precedent, history, and structure to their reading of a text—more notably, Justice Breyer and Judge Posner. *See generally* SCALIA & GARNER, *supra* note 105 (explaining the principles and foundation of statutory and constitutional interpretation).

192. For example, this functional reading has paved the way for a "strong federal policy favoring arbitration," and therefore the entire landscape on the U.S. law on arbitration. *See also* William F. Fox & Ylli Dautaj, *New Prime Inc. v. Oliveira: Are the judicial pronouncements no longer superior and the text in the Federal Arbiration Act inferior?*, 3 DIRITTO COMMERCIO INTERNAZIONALE (2019); Ylli Dautaj, *The Act Is Not the Entire Story: How to Make Sense of the U.S. Arbitration Act*, WOLTERS KLUWER: KLUWER ARB. BLOG (Apr. 4, 2018), http://arbitrationblog.kluwerarbitration.com/2018/04/04/act-not-entire-story-make-sense-u-s-arbitration-act/. *See generally* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (applying the Mitsubishi principle, see generally Mitsubishi Motors Corp., 473 U.S., to domestic contracts involving the rights of purchasers of shares of stock); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (holding that arbitration clauses in international commercial agreements must be honored and enforced); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (holding that the FAA signals a congressional policy favoring arbitration agreements, in spite of any state policies to the contrary).

193. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 781 (2019) (Breyer, J., dissenting).

contention is strengthened by IOIA section 288a(c), in which it is held that "the archives of [IOs] shall be inviolable." The respondent had good merit to their argument that: "Had Congress thought that international organizations might eventually be subject to a wide range of suits in which they had not voluntarily waived their immunity, it would not have simultaneously granted them immunity from all compelled discovery."[194]

Subjecting IOs to suit but granting them immunity from discovery would make little sense. In this light, it makes perfect sense that "[h]ad Congress intended that the FSIA would automatically apply to international organizations by virtue of Section 288a(b), it surely would have written the statute differently to avoid these anomalies."[195] It would indeed be a fruitless exercise to sue an IO without being able to readily enjoy (a) discovery, and (b) an effective attachment and execution regime. Moreover, foreign states were not immune from discovery at the time; the FSIA was drafted with this general awareness and did not dispense of civil rules of discovery.[196]

All in all, if IOs were subject to suit pursuant to the FSIA exceptions regime, there would be a serious impediment to their carrying out their purposes, objectives, and general missions. As one scholar observed and one amicus brief put forth: "jurisdictional immunity is a necessary bulwark of the independence of international organizations and an essential safeguard for their opportunities of further growth."[197] In enacting both the IOIA and the FSIA, Congress was aware of the objectives and purposes of IOs, and therefore attributed significance and weight to possible adverse consequences of repeat litigation.

At the end of the day, I am quite confident that policy implications played a large role for the judges and justices in the D.C. Circuit, the Third Circuit, and the Supreme Court. Statutory interpretation aside, one of the great policy objectives pushing the reasoning, in one way or another, was between the "incentive for foreign governments to evade legal obligations by acting through [IOs]"[198] on one hand, and the fact that allowing suits against IOs would "bring a flood of foreign-plaintiff litigation into US courts"[199] and protecting "against interference by any single state,"[200] on the other.

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194. Brief for Respondent, *supra* note 89, at 33.

195. *Id.* at 40.

196. *Id.* at 43; *see also* Republic of Arg. v. NML Capital, Ltd., 134 S. Ct. 2250, 2256 (2014); First City, Tex.-Hous., N.A. v. Rafidain Bank, 150 F.3d 172, 177 (2d Cir. 1998).

197. C. WILFRED JENKS., INTERNATIONAL IMMUNITIES 41 (1961); Brief of International Law Experts as Amici Curiae in Support of Respondent, *supra* note 89, at 8.

198. OSS Nokalva, Inc. v. Eur. Space Agency, 617 F.3d 756, 764 (3d Cir. 2010).

199. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 771 (2019) (Breyer, J., dissenting).

200. *Id.* at 780.

Context, history, purpose, and consequences should have been given much more weight and, ultimately, a strengthened currency to the judges, had they aligned instead with the reasoning in the dissenting opinion delivered by Justice Breyer. These arguments include but are not limited to:, (a) the restrictive theory on immunity makes sense for sovereign states but not for IOs; (b) there will be an increased scope for potential interference with IOs' policy choices; (c) reading the FSIA into the IOIA might render the US in breach of its international obligations; (d) the dynamic interpretation might open a floodgate of foreign focused lawsuits in an already overly burdened court system; and (e) providing for absolute immunity cements US attractiveness as a venue for multilateralism, in general, and for serving home to IOs' headquarters, in particular.

First, it is true that the virtually absolute immunity from suit did not sit well with a new, global commercial class. For several reasons, states moved from absolute immunity to restrictive immunity, claiming immunity for public functions but not for commercial activities. This move manifested itself in the US with the well-renowned "Tate Letters" (*see* above at I(b)).[201] The restrictive immunity was codified in the FSIA. This enabled modern market practices to take shape, and for the state to function as an integral part of the international market of free trade, commerce, and investments. However, the reasons for sovereign immunity and, therefore, the adoption of the FSIA is context-specific, and the same evolution has not occurred regarding immunity for IOs. This is so because it would make little, if any, sense to apply the distinction artificially to IOs, who are neither sovereigns nor commercial actors *per se*. The respondent argued that "subjecting [IOs] to suit for so-called commercial activities would be inconsistent with the purposes of their immunity," and referred to persuasive scholarly teachings and cases from high courts in a number of foreign countries.[202] Moreover, law professors submitting an amicus brief for the respondent rightly emphasized that the "Petitioners' attempt to assimilate the

201. Letter from Jack B. Tate, *supra* note 3, at 985; *see also id.* at 766.

202. Brief for Respondent, *supra* note 89, at 51-52 ("[T]he application of the distinction between acta iure gestionis and acta iure imperii to acts of international organizations has been explicitly rejected by courts of other countries, and is also generally rejected in doctrine." (quoting HENRY SCHERMERS & NIELS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW § 1610, at 1033 (5th rev. ed. 2011)); *see also* Firma Baumeister Ing. Richard L v. O., Oberster Gerichtshof [OGH] [Supreme Court] Dec. 14, 2004, 10 Ob 53/04y 394, 397 (Austria) ("While, under national law and prevailing interna-tional law, foreign states enjoy immunity only in re-spect of sovereign acts, but not in their capacity of legalentities in private law, the immunity of international organizations must, [as] a matter of principle, be re-garded as absolute when they are acting within the limits of their functions.").

immunities from suit and judicial process of IOs with those of foreign states ignores the fundamental differences . . . . States have the sovereign authority."[203] Therefore, the difference in this fundamental respect signals the difference also for purposes of immunity.

Law professors writing amici briefs in support of the petitioners disagreed and argued that: "[b]y contrast, adherence in 2018 and beyond to an absolute theory of immunity for IOs that was obsolescing in 1945—and that had been abandoned for foreign states by Executive policy in 1952 and by Congress in 1976—would be outdated and dysfunctional." As pointed out by the law professors writing for the respondent, this is a binary argument.[204] The reference is specific and addressed only to a presumption or default rule. IOs in their treaties and the executive branch can both waive immunities. The law professors for petitioners add that "[t]he FSIA also confers upon the courts . . . the responsibility for deciding claims of immunity. This approach, too, is the proper one to apply to IOs today and far preferable to either a blanket rule of absolute immunity for IOs or case-by-case executive determinations." This is at best a logically and analytically sound *de lege ferenda* (forward-thinking) alternative to the status quo. It makes legal sense, but it remains a preference only, nonetheless. This preference was solidified with respect to foreign governments, but never amended in the IOIA to reflect this doctrinal evolution with respect to IOs—not in the US, nor elsewhere for that matter.

In short, it is not a matter of whether a textualist reading of the IOIA is "proper" or not. It is a matter of what was actually agreed upon. It was—and still is—clearly and unmistakably the case that it was for the executive branch or the IOs themselves to carve out exceptions. To do a proper analysis, one must underscore the significant difference between IOs and foreign governments. If the immunity for IOs was obsolescing in 1945, why did some seventy years without any efforts to make that evident and clear? The framing of a supposed choice of either absolute immunity or FSIA-based immunity is wrong; the IOIA does not

203. Brief of International Law Experts as Amici Curiae in Support of Respondent, *supra* note 89, at 1-2. "International organizations and foreign states are fundamentally different creatures. Although both have legal personality under international law, states are sovereigns in equality with other states; IOs are not. States have territory and wield exclusive sovereign authority; IOs do not. And states have citizens, economies, and militaries; IOs do not." *Id.* at 5.

204. *See Id.* at 3. "Petitioners present this Court with a false, binary choice: IOs get absolute immunity or they get FSIA-based immunity. To the extent the IOIA creates a rule of absolute or virtually absolute immunity, it does so only as the default rule. The President may depart from this default rule and withhold or withdraw IOs' immunity in light of the functions they perform. Seven Presidents have exercised this IOIA authority." *Id.*

freeze the rule but allows instead the president and IOs to elaborate proper and necessary qualifications to the default (or presumptive) rule. The president regularly limits IOs' privileges and immunities and so dodoes IOs themselves.[205]

Second, there would be an undue interference with IOs' policy choices, objectives, and general missions. Multilateralism relies heavily on a "light touch" supervision at the place of *lex loci*. If one government can interfere with an IO, its underlying neutral mandate is exchanged for political concerns and domestic policy objectives. The immunity from suit is particularly important where the IOs have their headquarters in order to avoid host-State influence peddling and indirect control over their functions.[206] In his dissent, Justice Breyer highlighted the fear as follows:

> That multilateralism is threatened if one nation alone, through the application of its own liability rules (by nonexpert judges), can shape the policy choices or actions that an international organization believes it must take or refrain from taking. Yet that is the effect of the majority's interpretation.[207]

It is the role of the *lex loci*'s courts to refrain from interference in order not to serve as an impediment to the overall global objectives of IOs, or worse, serve as a stepping-stone in dismantling IOs and bringing us back to a pre-World War II global order. Given that the D.C. Circuit had, "for nearly 40 years . . . interpreted those waivers [of immunity] in a way that protects [IOs] against interference by any single state," why did it stop now?[208] No doubt IOs will be subject for serious interference with their objectives, goals, and policy aims—either by states or by the fear of getting sued.

The strongest counterargument would be—as put forth by the petitioners—that "foreign states should not be able to evade legal accountability for private endeavors, such as commercial activities, simply by pursuing them through [IOs]."[209] However, the alleged adverse consequences are inflated, to put it mildly. Presidents can waive immunity and many have. As stated by Justice Breyer in his dissenting opinion: "the Executive Branch, under a static interpretation, would

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205. *Id.* at 22-23 (referring to seven different Presidents exercising this function on 16 occasions, namely Kennedy, Johnson, Nixon, Reagan, Clinton, G.W. Bush, and Obama).

206. For a persuasive argument, see Brief for Respondent, *supra* note 89, at 5.

207. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 779 (2019) (Breyer, J., dissenting).

208. *Id.* at 780.

209. Brief for Petitioners, *supra* note 116, at 15.

have the authority needed to separate lawsuit sheep from lawsuit goats."[210]

Third, there would be an increased risk for a flood of foreign-focused lawsuits.[211] One of the main features with the FSIA was to remove immunity decisions from the State Department to the judiciary. If IO decisions are stripped from the president in favor of the judiciary, there would be a likely surge in foreign-focused litigation including cases that, "like this case, ha[ve] only a tenuous connection to [the United States]."[212] The Court has a responsibility to protect backlog and avoid political questions that can undermine the judiciary's legitimacy, authority, and sustainability. That is actually why, among other things, the Court has developed the "political question doctrine," an "emphatic federal policy favoring arbitration," and the doctrine on *forum non conveniens*. As scholars have pointed out, the "consequences to IOs, especially those headquartered in the United States, and to U.S. foreign policy interests are too severe to adopt Petitioners' construction."[213] The better approach would be to "permit the political branches to make any changes to IO immunity law that they may consider warranted."[214]

Fourth, applying the FSIA to the IOIA could potentially place the US in violation of other international obligations. Section 288 addresses the presumptive rule on immunity and provides for the limiting power. Conversely, it does not empower the "expansion" of immunities—because there is nothing to expand. Removing the absolute immunity renders the executive branch's Executive Branch's and the IO's limiting authority futile and trite. *A contrario*, IOIA has very few immunities left and the president, and IOs themselves, have no role to play. Beyond making no legislative sense whatsoever, it also would render the US in breach under international law with respect to treaties dealing with IOs' immunities. As law professors for Respondent wrote in their amicus brief:

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210. *Jam*, 139 S. Ct. at 780 (Breyer, J., dissenting).

211. U.S. courts have to consider the backlog and address the issue properly. For example, the "strong federal policy favoring arbitration" has partly been developed as a response to backlog in courts. Arbitration assists overly burdened courts so that litigants in judicial recourse can enjoy constitutional guarantees. *See, e.g.*, STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION, NEGOTIATION, MEDIATION, AND OTHER PROCESSES 235 (3d ed. 1999) ("There is a strong public policy in favor of arbitration as a means of reliving court congestion."); THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF UNITED STATES ARBITRATION xxviii (6th ed. 2018) ("[T]he recourse to arbitration is justified, first and foremost, by deeply-rooted legal need.").

212. Brief of International Law Experts as Amici Curiae in Support of Respondent, *supra* note 89, at 4, 36.

213. *Id.* at 38.

214. *Id.*

> If the IOIA were to incorporate the FSIA's immunity provisions, the IOIA would violate any non-self-executing treaties entered into by the United States after October 1976 that provide different immunities for IOs than does the FSIA and are not accompanied by implementing legislation.[215]

Adopting the dynamic interpretation and its outcome can put the US/United States in danger of having to dramatically change policy that had been emphatic for a long time. There is a danger to IOs if any state can bend the operations of these organizations by the laws of that state—even worse, if other states start doing likewise, and thus "possibly paralyzing or fragmenting the organization."[216] Finally, multilateralism is crucial for purposes of interconnectivity and interdependence. The invention of IOs was to a large extent a direct result of the post-WWII realization that peace and reduction of poverty go hand-in-hand with transborder cooperation and harmony. We must look forward to better the legal framework for international adjudication, in general, and for the restoration of justice for individuals, in particular. However, we should also look to the past and not forget the very reason for some great achievements in the development of legal civilization.

There is one obvious way to clarify this debate and put the historical analysis and linguistic debate straight into the history bin. Congress can amend either the IOIA or the FSIA.[217] As the expression goes: "garbage in, garbage out." However, that seems unlikely, and therefore with *Jam* in mind, the US courts might have to, as Justice Breyer put it, adapt to the new reality of being forced to *separate lawsuit goats from lawsuit sheep*. US/United States courts might have to prepare for a floodgate of lawsuits implicating political concerns and policy objectives, which are by their nature more apt to be handled by other branches of the government.

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215. *Id.* at 20 (citing Medellin v. Texas, 552 U.S. 491, 504-05 (2008)).

216. *Id.* at 35 (citing Brief for the United Nations as Amicus Curiae ("U.N. Broadbent Amicus Br.") at 5, Broadbent v. Org. of Am. States, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465)); *see also* Alice Ehrenfeld, *United Nations Immunity Distinguished from Sovereign Immunity*, 52 AM. SOC'Y INT'L L. PROC. 88, 91 (1958)).

217. *See* Young, *supra* note 154, at 912 ("The simplest and most obvious method of restricting international organization immunity is by legislative amendment of either the FSIA or IOIA. All Congress need do is expressly state that either: (a) the FSIA applies to international organizations or (b) the IOIA provides international organizations the same immunity that foreign states currently enjoy and incorporates any subsequent changes in foreign sovereign- immunity law.").

VI. CONCLUDING REMARKS

In *Jam*, the petitioners contended that the "same immunity" from suit in section 288a(b) of the IOIA was a general reference to the same immunity that foreign governments enjoy under the FSIA today (adopting a dynamic approach). Conversely, the respondent argued that it refers to the more limited immunity that was available to foreign governments in 1945—namely, "virtually absolute immunity" (adopting instead a static approach). On February 27, 2019, the Court sided with the petitioners.[218] The Court unfortunately entertained flawed reasoning and half-cooked justifications. The Court appeared to favor a textual method of interpretation. In reality, the Court sidestepped the actual text, the more reliable precedent, the historical context, and the structure of the IOIA and the FSIA. For those who cares, ethics and prudence also spoke highly in favor of the respondent. As a matter of fact, textualists also deduce meaning from purpose and textual consequences.[219]

The Tate Letters paved the way for a restrictive sovereign immunity for foreign states and their entities and instrumentalities. However, the codification in the FSIA "only" provided for statutorily engrafted exceptions. The code does not modify the presumptive rule. As a corollary, the presumptive rule (default rule) is the same today as it was in 1945. There is no way around the fact that the exceptions in the FSIA are specially carved out for its proper context, unless of course clearly and unmistakably intended otherwise.[220] With respect to foreign governments, it is clearly and unmistakably section 1605 of the FSIA that lays down, exclusively and exhaustively, the exceptions to the "virtually absolute immunity" from suit. Under the FSIA, it is for the courts to elaborate upon the meaning and content of the act. Under the IOIA, it is clearly and unmistakably either the executive branch or the IOs themselves that carves exceptions to the general rule of immunity. When the exceptions in the FSIA are applicable, the separate rules qualify the content of the default rule on sovereign immunity from suit for foreign states.

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218. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 772 (2019) (holding in favor of the Petitioners).

219. *See* SCALIA & GARNER, *supra* note 105, a 352–54. "The evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to words." *Id.* at 20.

220. *See* YANG, *supra* note 2, at 34 ("International law prescribes a presumption of immunity; that is, first, immunity is the norm rather than the exception, and it can be denied only when one or more exceptions allowed by international law are present.").

The exceptions in the FSIA and the IOIA have not swallowed the presumptive (or default) rule. If the Court in the *Jam et al.* should have any jurisdiction to carve out exceptions pursuant to the IOIA regime, itthey should have first asked whether "the activity [was] necessary for the effective functioning of the organization," and then been "given" the necessary mandate to elaborate a "functional necessity" test as an additional qualification to the presumptive absolute immunity under the IOIA.[221] This would have been fairly and squarely within the Court's competence when interpreting public international law.[222] The Court can, for example, elaborate on the scope of waivers in the IOs' constituent instrument.[223] Similarly, the Court could have qualified the immunity of the IO on the basis of the IOIA-waiving regime instead of incorporating the body of law in the FSIA. Albeit, it should be mentioned that some commentators highlight that the idea of functional necessity is potentially biased in favor of IOs.[224]

Further, from a pragmatic and workable standpoint, we must underscore the fact that IOs have legitimately expected that the US will provide them with absolute immunity, except only as waived by the president or the IOs themselves.[225] We should not isolate the IOIA drafting process from its proper historical context. The world had just faced WWII and desperately needed IOs as vehicles for moving towards an interconnected and interdependent world. At the same time, the US was asserting itself as the next superpower and was accordingly establishing itself as a suitable and hospitable venue for multilateralism, in general, and as a *situs* for IOs in particular. To his credit, Justice Breyer is a champion of putting forth contextual realities and pragmatic, workable solutions—often in a subtle manner. He may have lost this battle temporarily, but the majority opinion will

221. FOX & WEBB, *supra* note 8, at 575 (quoting A. SAM MULLER, INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES 153 (1995); *see also* Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT'L L. REV. 471, 474-75 (2008).

222. It is since long determined that public international law has a direct effect in U.S. courts through treaties, see U.S. CONST. art. III, and an indirect influence on U.S. domestic law and judicial pronouncements through the so-called Charming Betsy canon elaborated on by Chief Justice Marshall in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (AM. LAW INST. 1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

223. The Court has done so, see, for example, Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1339-42 (D.C. Cir. 1998).

224. *See* KLABBERS, *supra* note 21, at 36-39.

225. *See* Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 776-80 (2019) (Breyer, J., dissenting).

eventually be reconsidered when the new doctrine repeatedly comes back to haunt the judiciary.

If the justices had consistently followed a fair reading method, analyzed contextual realities in 1945 as well as in 2019, and finally attributed significance to textual consequences (especially focusing on the presumption against ineffectiveness, on the presumption of validity, on harmonious reading, and on avoiding absurd results), the decision might have been different. The argument that the general presumption of restrictive immunity for foreign governments has changed, and that such shreds of evidence are also the same for IOs, would have been put to the history bin.

The Court in *Jam* entertained flawed reasoning underpinned by inconsistencies and serious shortcomings, culminating in seriously muddling the waters of the IOIA and the FSIA. Textualism was exposed as the fourteenth falsity; that is, the half-truth that textualism allows judges to consistently follow the "letter of the law" and hence provide for consistency, clarity, and a degree of foreseeability. The only positive aspect of the case is that the purpose-based method will soon regain necessary attraction because judges, practitioners, and scholars will understand that cases reaching the Supreme Court are not those where "purpose in text is a straightforward matter requiring no feats of subtle deduction."[226] Legal philosophy has long taught students of life and law that there are often several "truths" operating at the same time and that pragmatic thinking can often help separate the wheat from the chaff. As the judiciary is flooded with cases and judges tasked to separate lawsuit sheep from lawsuit goats, *Jam.* will represent yet another case that unfortunately "make[s] lawyers laugh and legal philosophers weep."[227]

Conclusively, the issue of sovereign immunity will keep on throwing up nuanced problems of, among other things, sovereignty as such; the legal theory and justification of immunity, statutory interpretation, federal courts' applications of public international law, whether U.S. courts should rely on foreign case law, application and reliance on international normative values (e.g. international comity, independence, equality, etc.), the need for uniformity, and the necessity for removal of legal barriers in particular contexts.[228]

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226. SCALIA & GARNER, *supra* note 105, at 34.

227. Guru Nanak Found. v. Rattan Singh & Sons, (1981) 4 SCC 634, ¶ 1 (India).

228. *See* THOMAS E. CARBONNEAU, CARBONNEAU ON INTERNATIONAL ARBITRATION: COLLECTED ESSAYS (discussing and analyzing prominent topics and issues in trans-boarder arbitration) (2011).