Of Immunity and Accountability of International Organizations: A Contextual Reading of Jam v. IFC

Of Immunity and Accountability of International Organizations: A Contextual Reading of *Jam v. IFC*

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1. Introduction

In *Jam et al. v. IFC*, the US Supreme Court concluded that «The International Finance Corporation is […] not absolutely immune from suit», remanding the assessment of the respondent's plea of immunity to lower-tier courts.[1] Although the decision is largely grounded on the interpretation of a purely US domestic act (the International Organizations Immunity Act – IOIA),[2] it gives new impetus to the debate on a topic which is far from being settled: the invocation of the responsibility of International Organizations (IOs) before domestic courts by third parties.

The *Jam v. IFC* case, in fact, arises from a dispute between a group of individuals whose rights have allegedly been violated by a decision of the IFC to finance the *Tata Mundra* coal-fired power plant in India. The construction of the power plant resulted to have a devastating impact on the environment and on the life, health and means of subsistence of the fishermen community to which the plaintiffs belong.

The case, therefore, concerns the availability of an effective remedy to subjects adversely affected by the activities of an IO. The plaintiffs first resorted to the internal accountability mechanism of the IFC, with poor results, and then sued the IFC before US courts, struggling against the invocation of immunity by the respondent organization.

The US Supreme Court, affirming that the IFC is not absolutely immune from suit, sent one important message to every IO: immunity is no more a «stumbling block» that prevent individuals from obtaining redress when an

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1 Supreme Court of the United States of America, *Jam et al. v. International Finance Corporation*, Certiorari Decision of 27 February 2019, 586 US ___ (2019) [hereinafter *Jam* decision].

2 United States of America, International Organizations Immunity Act, Public Law No. 79-291, 59 Stat. 669 (1945) (22 USC 288 et seq.).

organization is responsible for human rights violations.[3] This is all the more important in those cases in which individuals have no alternative remedies except suing IOs before domestic courts, either because such remedies are not effective, or because they do not exist at all.[4]

Against this background, in this comment we will try to offer a contextual reading of *Jam v. IFC*, going beyond the decision of the US Supreme Court and tackling two different but intertwined issues: 1) the equivalence suggested by the US Supreme Court between rules on sovereign immunity and IOs immunity; and 2) the relationship between the effectiveness of internal accountability mechanisms (like the one of the IFC) and the immunity of IOs.

2. The suggested equivalence between rules on sovereign immunity and IOs immunity

In affirming that IOs are not absolutely immune from suit, the US Supreme Court held that their immunity is governed by the Foreign Sovereign Immunity Act (FSIA).[5] Therefore, the Court implied that immunity standards applicable to foreign governments under the FSIA patently apply also to IOs. However, drawing an analogy between sovereigns and IOs to then consistently apply the same set of immunity exceptions to both subjects might prove very complex. In this sense, the *Jam v. IFC* decision truly opens a Pandora's box.

A clear example is the commercial activity exception. In the case of States' immunity, the commercial activity exception relies on the distinction between *acta iure imperii* (sovereign acts) and *acta iure gestionis* (activities carried out by States as if they were private persons)[6].

However, assuming that this distinction can have any relevance for IOs would amount to inappropriately assimilate organizations to States. In fact, since IOs have derivative international legal personality, their delegated powers are limited and differ from those of States. In addition, IOs are often established to perform functions that would be beyond the capacity of a single State. Therefore, the distinction between *acta iure imperii* and *acta iure*

[3] The expression «stumbling block» is borrowed from J. KLABBERS, "The EJIL Foreword: The Transformation of International Organizations Law", in *European Journal of International Law* 2015, p. 14.

[4] See F. MEGRET, "La responsabilité des Nations Unies aux temps du cholera", in *Revue Belge de Droit International* 2013, p. 161 ff.

[5] United States of America, Foreign Sovereign Immunity Act (FSIA), Public Law No. 94-583, 90 Stat. 2891 (1976) (28 USC 1330, 1332, 1391, 1441, 1602-1611).

[6] The applicability of this exception has been questioned by the same US Supreme Court: *Jam v. Int'l Fin. Corp.*, cit., paras. 14-15. See also J. ARATO, "Equivalence and Translation: Further thoughts on IO Immunities in Jam v. IFC", in *EJIL:Talk!*, 11th March 2019, available at www.ejiltalk.org.

gestionis does not suit well the activities carried out by IOs in the fulfilment of the mandate received from member States.

Furthermore, IO immunity cannot be readily compared to the immunity granted to States. In principle, the rationale behind IOs immunity is the safeguard of their autonomy from States' judicial and political interference. However, while the rationale of IOs 'functional immunity' is clear, translating this concept into a definition of the scope of their immunity is not a straightforward process.

In *Jam v. IFC*, the US Supreme Court affirmed that there are legal yardsticks other than functional needs that should be used to determine the exact extent of IO immunity, which are the immunity exceptions applying to States. US national courts will have therefore no other choice but to apply the FSIA standards instead of deriving the immunities' scope from the functional doctrine. The question is: are FSIA standards consistent with the concept of IO functional immunity?

For instance, the application of the commercial activity exception to IOs rests on the assumption that any activity having a commercial nature is ancillary to the exercise of IOs functions and to the fulfillment of their purposes. A careful analysis is required to ascertain whether this conclusion always holds true, especially in the case of multilateral development banks (MDBs).

Since MDBs provide financial assistance, their activities have often been assimilated to those carried out by banks, financial intermediaries and private investors, even though such activities play a pivotal role in the achievement of the purposes of these organizations.

The case of the World Bank Group[7] is particularly significant as the founding treaties of its affiliate organizations only grant them partial immunity from the jurisdiction of domestic courts.[8] However, the organizations have taken the stance that this 'exception' only refers to their borrowing activities (selling debt instruments to raise funds on capital markets) and not to their core development assistance activities.[9]

[7] The World Bank consists of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The term 'World Bank Group' (WB Group) refers to the IBRD and IDA plus the International Finance Corporation (IFC), the International Centre for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA). Here we refer in particular to the IBRD, IDA and IFC.

[8] See Art. VII, Sections 1 and 3, IBRD Articles; Art. VIII, Sections 1 and 3, IDA Articles; Art. VI, Section 1 and 3, IFC Articles; according to these provisions actions may be brought against the IO only in a court of competent jurisdiction in the territories of a member where the IO has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities. Compare with Art. 50 of the Agreement establishing the Asian Development Bank and with Art. 52 of the Agreement establishing the African Development Bank.

[9] E. OKEKE, "Annex VI – International Bank for Reconstruction and Development (IBRD)", in *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agen-*

In particular, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) enter into a variety of operational agreements with member States (acting either as borrowers or guarantors), public entities and private subjects.

The nature of these legal instruments varies according to the counterparty, the subject matter and, more importantly, the applicable law.[10] Since IOs usually do not establish applicable law or dispute settlement mechanisms, by defining their nature also the responsibility regime will be defined.

Loan agreements (when the *member State* is the borrower) and guarantee agreements (when the borrower is a private entity and the *member State* where the project is located fully guarantees repayment of principal) fall in

the category of international treaties[11] and the Bank regularly registers them in the UN Treaty Series.[12]

cies, A. REINISCH (ed.), Oxford, 2016, p. 755 ff., p. 762. See also E. OKEKE, *Jurisdictional Immunities of States and International Organizations*, Oxford, 2018.

[10] The problem of the law applicable to the various types of agreements and contracts concluded by IOs has been investigated by several Authors among which: M. AUDIT, "Les marchés de travaux, de fournitures et de services passés par les organisations internationales », in *Journal du droit international* 4/2008, p. 941 ff.; M. SCHNEIDER, "International Organizations and Private Persons: The Case of Direct Application of International Law", in *Études de droit international en l'honneur de Pierre Lalive*, C. DOMINICÉ, R. PATRY and C. REYMOND (eds.), Basel, 1993; J. COLIN and M.H. SINKONDO, "Les relations contractuelles des organisations internationales avec les personnes privées", in *Revue de droit international et de droit comparé* 69/1992, p. 7 ff.; P. GLAVINIS, *Les litiges relatifs aux contrats passés entre organisations internationales et personnes privées*, Paris, 1992; INSTITUT DE DROIT INTERNATIONAL, "Les contrats conclus par les organisations internationales avec des personnes privés", Oslo Session, 6th September 1977, Forth Commission, Rapporteur M. N. VALTICOS; G. DELAUME, "The Proper Law of Contracts Concluded by International Persons: A Restatement and a Forecast", in *American Journal of International Law* 56/1962, p. 63 ff.; C.W. JENKS, *The Proper Law of International Organizations*, New York, 1962; F.A. MANN, "The Proper Law of Contracts Concluded by International Persons", in *British Yearbook of International Law* 35/1959, p. 34 ff.; M.J. SALMON, "Les contrats de la Banque internationale pour la reconstruction et le développement", in *Annuaire français de droit international* 2/1956, p. 635 ff.; F. SEYERSTED, "Applicable Law in Relations between Intergovernmental Organizations and Private Parties", in *Recueil des cours de l'Académie de droit international* 122/1967/III, p. 79 ff..

[11] This is the standpoint adopted by several General Counsels of the World Bank, see the writings of: R. SUREDA, "The Law Applicable to the Activities of International Development Banks", in *Recueil des cours de l'Académie de droit international* 308/2004, p. 113 ff.; I.F.I. SHIHATA, *The World Bank Legal Papers*, The Hague, 2000, p. 434; G. DELAUME, "The Proper Law of Loans Concluded by International Persons: a Restatement and a Forecast", in *American Journal of International Law* 1962, p. 63 ff., p. 68. See also C.F. AMERASINGHE, *Principles of the Institutional Law of International Organizations*, Cambridge, 1996, p. 240; T. TREVES, "Banca internazionale per la ricostruzione e lo sviluppo (e istituzioni collegate)", in *Digesto delle discipline pubblicistiche* II/1987, p. 176 ff.; S. VEZZANI, *Gli accordi delle Organizzazioni del Gruppo della Banca Mondiale*, Torino, 2011, p. 112 ff. *Contra*, L. FERRARI BRAVO, "Le operazioni finanziarie degli enti internazionali", in *Annuario di diritto internazionale* 1965, p. 80 ff., p. 109-128, according to whom Loan and Guarantee Agreements can be assimilated to State contracts or syndicated loans.

Moreover, in the case of loan and guarantee agreements, the IBRD/IDA General Conditions[13] contain a provision on enforceability which states that «The rights and obligations of the Bank and the Loan Parties under the Legal Agreements shall be valid and enforceable *in accordance with their terms*, *notwithstanding the law of any State or political subdivision thereof to the contrary*» [emphasis added].[14] This provision aims at insulating the agreement from domestic law and can be read as a way of making international law implicitly applicable.

As they are governed by international law, a breach of these agreements would entail the international responsibility of the IO concerned.[15] Controversies between the parties (the IO and the signatory member State) will have to be submitted to arbitration, any other settlement procedure being expressly excluded.[16]

Even loan agreements directly concluded with *private entities* and *guaranteed by a member State* are considered international in nature. Two theories have been proposed to support this conclusion. Some scholars maintain that these loans are ancillary to the guarantee agreement between the IO and the member country and therefore they fall within the sphere of international law,[17] whereas according to other authors, the 'internal law' of the IO applies.[18] Such 'internal law' is an autonomous body of regulations the validity of which derives from international law and is based on the IO founding

[12] The IBRD and the IDA are the only two multilateral development banks that register their lending agreements with the United Nations.

[13] The Bank's legal agreements incorporate the General Conditions which reflect the Bank's standard terms and condition that do not vary from case to case. A major update of the General Conditions for both the IBRD and the IDA took place in December 2018.

[14] See, for instance, General Conditions for IBRD Financing: Development Policy Financing, 2018, Art. VIII, Section 8.01 Enforceability. This clause has remained virtually unchanged since 1947; its negative wording/formulation can be explained by the uncertainty surrounding the status of IOs at the time of the Bretton Woods Conference.

[15] See, however, S. SCHLEMMER-SCHULTE, "World Bank," in *Encyclopedia of Intergovernmental Organizations*, J. WOUTERS (ed.), Deventer, The Netherlands, 2015, p. 50 ff., according to which the Articles on Responsibility of International Organizations «assuming [they] indeed codified international law, as an international treaty between IOs open for IOs to sign and become party to, does not apply to the Bank because it has not endorsed the treaty», para. 311.

[16] See, for instance, General Conditions for IBRD Financing: Development Policy Financing, 2018, Art. VIII, Section 8.04 Arbitration.

[17] This position was expressed by A. BROCHES, "International Legal Aspects of the Operations of the World Bank", *Collected Courses of The Hague Academy of International Law* 98/1959, pp. 339-355; R. SUREDA, cit., p. 116; J.W. HEAD, "Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks", in *American Journal of International Law* 2/1996, p. 214 ff., p. 221 ff.

[18] This is the position adopted by S. VEZZANI, *op. cit.*, p. 200 ff. In his view, even Loan and Guarantee Agreements fall within the internal law of the organization (*ibid*., p.131 ff.).

treaty.[19] The public nature of these agreements is in any case undisputed and controversies will be dealt with by arbitration.

More controversial is the definition of the legal character of *loan agreements directly concluded with private entities without a government guarantee*. Lending in this form is provided, among others, by the International Finance Corporation (IFC), which is the private sector investment arm of the World Bank Group.[20]

In these loan agreements, it is the general practice of the IFC to avoid any reference to the governing law.[21] There are various reasons behind this omission: safeguarding the impartiality of the IO and its functional independence; avoiding having to recruit personnel with specific knowledge in domestic legal systems; preventing the risk of changes in national legislation.

The absence of a choice of law clause can be interpreted as an indication of the fact that they fall under the internal law of the IO, which includes general terms and conditions and other policy documents. Nevertheless, some of the most recent IFC loan agreements designate New York law or English law as governing and submit disputes to the jurisdiction of national courts.[22]

The law of a major business center like New York or London is usually chosen because it is perceived as lender-friendly, better understandable by all the parties concerned and sufficiently developed to accommodate the complex business structure of the project. Besides, enforcement provisions are instrumental to prevent legal risks for the organization in the case of insolvency of the private borrower.

The IFC affirms that its submission to a domestic court jurisdiction derives from the express waiver of its immunity, which is at the IFC's sole discretion. However, even in the absence of governing law or jurisdiction clauses, after *Jam v. IFC*, any US court may decide to deny immunity to the

[19] On the 'internal law' of IOs see, among others, C.F. AMERASINGHE, *Principles of the Institutional Law of International Organizations*, Cambridge, 2nd ed., 2005; G. BALLADORE PALLIERI, "Le droit interne des organisations internationales", in *Collected Courses of The Hague Academy of International Law* 127/1969, p. 1 ff.; B. JENKS, *The Proper Law of International Organizations*, London, 1962.

[20] The IFC provides financing for loans, guarantees and equity participation directly to private enterprises investing in developing countries without the mandatory host country guarantee.

[21] According to R. SUREDA, *op. cit.*, p. 123, the IFC does not include a specific choice of law provisions in its loan agreements, unless participants in the IFC loans or the circumstances of the operation require otherwise.

[22] It is worth noting that the Loan Agreement between Coastal Gujarat Power Limited and the IFC, project n. 25797, dated 24 April 2008, provides for the application of the laws of England (see Article VIII, Section 8.02), available at www.earthrights.org

IFC on the grounds that the loans have a private nature[23] and, therefore, they are subject to the commercial exception, without considering that the lending activity is a core function of the organization. The question whether in contracts with private parties IOs will retain the decision-making power to decide on the waiver of their immunity remains therefore unanswered.[24]

On this point, it is worth noting that, already in 1977, the Institut de droit international recommended that «Les contrats conclus avec des personnes privées par des organisations internationales de caractère intergouvernemental dans les cas où celles-ci bénéficient de l'immunité de juridiction devraient prévoir le règlement des différends résultant de ces contrats par un organe indépendant».[25]

Ultimately it should be stressed that this analysis concerns only contractual disputes between the parties. In general, the organizations do not waive immunity from tort proceedings that individuals may lodge as a consequence of typical IOs activities.[26]

As a final remark, we consider that maybe the time is finally ripe for the International Law Commission to begin developing a draft convention on IOs jurisdictional immunities as already proposed in 2006 by prof. G. Gaja.[27]

3. Will IOs be driven to accept increasing *accountability*?

One of the issues that the Supreme Court did not discuss in *Jam v. IFC* is the relationship between the establishment of effective internal accountability mechanisms and immunity. Actually, in his Dissenting Opinion, Justice Breyer introduced this argument to give strength to his theory that IOs' im-

[23] Provided that also the requirement of a territorial nexus to the US is met (FSIA, 28 USC 1605 (a) (2)).

[24] Only when an IO is entering into contracts with a connection with the territory (like when purchasing or leasing property) or entering into contracts for the supply of goods and services (like contracts for the provision of stationery or equipment or for the supply of water or electricity), such activities are normally subject to the appropriate national law and to the jurisdiction of national courts. Employment contracts fall within the internal law of the organization and disputes are dealt with by internal justice mechanisms for staff members (administrative tribunals).

[25] Institut de droit international, Les contrats conclus par les organisations internationales avec des personnes privés (Art. 7), Session d'Oslo, 6 septembre 1977, Quatrième Commission, Rapporteur M. N. Valticos.

[26] It is worth noting that, in *Jam v. IFC*, petitioners sued the organization asserting claims almost entirely based on tort, but also raising one claim as alleged third-party beneficiaries of the environmental and social risks provisions of the loan agreement.

[27] See International Law Commission, *Report of its fifty-eighth session (1 May-9 June and 3 July-11 August 2006)*, Annex B "Jurisdictional Immunity of International Organizations (Mr. Giorgio Gaja)", UN Doc. A/61/10, p. 455 ff., p. 456.

munity should be absolute. In fact, according to the only dissenting judge, «[m]any international organizations, fully aware of their moral (if not legal) obligations to prevent harm to others and to compensate individuals when they do cause harm, have sought to fulfill those obligations without compromising their ability to operate effectively.»[28] Accordingly, should this not be the case or – to use Breyer's words – if and when «these alternatives […] prove inadequate»,[29] the theory of the absolute immunity would leave room for the executive «to set aside an organization's immunity and to allow a lawsuit to proceed in U.S. Courts.»[30] This assertion builds on the IOIA itself, which bestows on the President such a power,[31] but it also touches upon some open issues in international law, as far as the responsibility of international organizations is concerned.

Justice Breyer, as an early commentator affirmed, criticizing the majority proposed a maximalist view of the necessity of granting autonomy to IOs.[32] Indeed, the absolute immunity theory protects IOs from interferences by domestic courts. As the same Dissenting Judge implicitly admits, however, it is far from being ascertained that IOs establish effective internal accountability mechanisms. Leaving aside the merit of Breyer's dissent and in particular his interpretation of the IOIA, the above-mentioned part of his Opinion stimulates two intertwined considerations on the establishment of internal remedies within IOs and on how this might affect the preservation of immunity.

First, the establishment of accountability mechanisms is a long-standing issue for IOs. Usually, IOs establishes similar mechanisms to offer remedies to their staff and personnel: the administrative tribunals.[33] Such judicial avenues however are purely internal, and they concern exclusively the labor-related controversies arising *within* an organization.

Practice is scarce as far as the accountability of IOs *vis-à-vis* third persons is concerned and, in the vast majority of cases, accountability mechanisms are not strictly judicial in nature, as they are more akin to offering mediating services.[34] Moreover, when IOs accept to increase their account-

[28] Supreme Court of the United States, *Jam v. Int'l Fin. Corp*., cit., *Breyer Dissenting*, p. 15.

[29] *Ibid*, p. 16.

[30] *Ibid.*

[31] United States of America, Public Law No. 79-291, cit., Section 1.

[32] J. ARATO, *cit.*

[33] See, *ex multis*, C.F. AMERASINGHE, *Principles of the Institutional Law of International Organizations*, Cambridge, 2nd ed., cit., p. 220; S. VILLALPANDO, "International Administrative Tribunals", in *The Oxford Handbook of International Organizations* (J. Katz Cogan et al. eds), Oxford 2016, p. 1085.

[34] See accordingly P. KLEIN, "Panels, Médiateurs, et Mécanismes Informels de Contrôle des Activités des Organisations Internationales: Entre *Accountability* and *Responsibility*", in *Select Proceedings of the European Society of International Law* (J. Crawford, S. Nouwen eds), Oxford-Portland, 2012, p. 217 ff.

ability they do so on an *ad hoc* basis, establishing temporary quasi-judicial institutions with a specific and tailored mandate, such as the Human Rights Advisory Panel created within UNMIK, in Kosovo.[35]

The World Bank Group, and in particular the IFC, represent one of the fewest examples of IOs that established accountability mechanisms available to third persons. It is known, in fact, that the World Bank's Inspection Panel may receive complaints related to the activity of the World Bank's Group public sector institutions (the International Bank for Reconstruction and Development and the International Development Association).[36] As for the activity of the IFC and of the Multinational Investment Guarantee Agency (MIGA), the World Bank Group instituted an *ad hoc* review mechanism: the Compliance Advisor Ombudsman (CAO).

In the present instance, therefore, we are confronted with a situation in which the responsible IO – the IFC – indeed established a review mechanism.[37] It is also interesting to note that accountability mechanisms such as the Inspection Panel and the CAO are regarded by World Bank Group as the best instruments to monitor the activity of IOs and that their presence makes it superfluous to apply the Draft Articles on the Responsibility of International Organizations to the organization.[38]

Nonetheless, the CAO's functioning and effectiveness – which are relevant in the case at stake – were the objects of severe criticism on the part of the complainants. In fact, before applying to the US Courts, the complainants in *Jam v. IFC* challenged the IFC decision to finance the project of the Tata Mundra Plant before the CAO, which, after investigation, concluded that the IFC had failed to consider the environmental and social risks to

[35] United Nations Interim Administration in Kosovo, *Regulation no. 2006/12 on the establishment of the human rights advisory panel*, UNMIK/REG/2006/12 of 23 March 2006. See for an overview P. KLEIN, "Le panel consultatif des droits de l'homme (Human Rights Advisory Panel) de la MINUK: une étape dans le processus de responsabilisation des Nations Unies?", in *Perspectives du droit international au 21e siècle. Liber Amicorum Christian Dominicé*, Leiden/Boston, 2012, p. 225 ff.; for a critical view see B. KNOLL, R-J. UHL, "Too Little, Too Late: The Human Rights Advisory Panel in Kosovo", in *European Human Rights Law Review* 2007, p. 534 ff.

[36] See more in general on the World Bank Inspection Panel: F. SEATZU, *Il panel di ispezione della Banca Mondiale. Contributo allo studio della funzione di controllo delle banche internazionali di sviluppo*, Torino, 2008; E. SUZUKI, S. NANWANI, "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks", in *Michigan Journal of International Law* 2005, p. 177 ff.

[37] This was noted by the Committee of the International Law Association on the responsibility of international organizations in its Final Report: see ILA, *Accountability of International Organizations*, Final Report, 2004, p. 46, available at www.ila-hq.org/index.php/committees.

[38] See E. BAIMU, A. PANOU, "Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?", in *The World Bank Legal Review* 2011, p. 147 ff., particularly at 171.

which plaintiffs were exposed as a result of the Plant's development.[39] The IFC challenged these findings, limiting itself to propose an action plan with a view to better address the risks highlighted by the CAO, which, in turn, regarded such plan as falling short of offering an effective remedy.[40] The ineffectiveness of the CAO was at the basis of the complainants' decision to bring legal action before US Courts.

At a closer scrutiny, complainants' arguments are far from being ill-founded. In fact, CAO rules and procedures are themselves incapable of offering effective remedies. In this regard, it is useful to note that the CAO cannot order to the IFC any sort of reparation; the Ombudsman role is limited «to identify problems, recommend practical remedial actions, and address systemic issues that have contributed to the problems, rather than to find fault».[41] Therefore, although an accountability mechanism on paper does exist, it is hardly conceivable as offering effective remedies when projects funded by the IFC violate human rights.[42] Furthermore, it seems that the CAO does not have any legal tools and/or influence to push the IFC towards settling a settlement which is perfectly coherent with the experience of the complainants in *Jam v. IFC*.[43]

The above conclusion suggests another possible reading of *Jam v. IFC*, which prompts us to move to a second set of considerations on the relationship between IOs' immunity and the presence of internal accountability mechanisms; namely, to what extent the presence/absence of effective alternative remedies within an IO could be taken into consideration in the application of the law on immunity?

[39] Compliance Advisor Ombudsman, *India / Tata Ultra Mega-01 / Mundra and Anjar – Assessment Report*, January 2012, available at www.cao-ombudsman.org See also Compliance Advisor Ombudsman, *India / Tata Ultra Mega-02 / Tragadi Village – Assessment Report, April 2017.*

[40] Compliance Advisor Ombudsman, *India / Tata Ultra Mega-01 / Mundra and Anjar* – IFC Statement and Action Plan, 25 November 2013 and CAO Monitoring Report, CGPL, January 2015, available at www.cao-ombudsman.org

[41] See *CAO Operational Guidelines* of April 2007, section 2.1, p. 11, available at www.cao-ombudsman.org. See B.M. SAPER, "The International Finance Corporation's Compliance Advisor Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective", in *New York University International Law & Policy*, 2012, p. 1279 ff.

[42] See accordingly D.D. BRADLOW, "Using a Shield as a Sword: Are International Organizations Abusing Their Immunity?", in *Temple International and Comparative Law Journal* 2017, p. 67; C. YOUNG, "The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA", in *Texas Law Review* 2017, p. 907; B.M. SAPER, *op. cit.*, p. 1325.

[43] Cf. Supreme Court of the United States, *Jam v. Int'l Fin. Corp*., cit., *Brief of Amici Curiae Center for International Environmental Law, Accountability Counsel, Center for Constitutional Rights, Centre for Research on Multinational Corporations, Global Witness, Inclusive Development International, International Accountability Project, Erica R. Gould, and Jennifer M. Green in Support of Petitioners*, p. 46.

In this regard, any initial reference goes in the direction of the case law of the European Court of Human Rights (ECHR) on the immunity of international organizations. In fact, the Court had several occasions to uphold the view that IOs must not be granted immunity before national courts when there are no alternative remedies at the disposal of the applicants within the organization.[44] Granting immunity to IOs when there are no remedies available might end up in a disproportionate violation of the right of access to a court, as enshrined in Article 6, para. 1, of the European Convention.[45] It can be inferred from the ECHR case-law that IOs are under an obligation to make available to claimants «reasonable alternative means to protect effectively their rights».[46] The jurisprudence of the ECHR can be read together with domestic Courts' case-law that are upholding the view that the fundamental right consisting in granting access to courts is applicable also in the context of IOs.[47]

It is true that this judicial practice refers almost entirely to claims related to the rights of IOs' staff and personnel and that there are no similar indications as far as the responsibility of IOs' *vis-à-vis* third persons is concerned. The ECHR had the chance to deliver a clarifying decision in the *Stichting Mothers of Srebrenica* case, but it refused to do so because it adopted a self-restraint approach towards the UN: «Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations».[48]

The relationship between the availability of effective remedies and immunity of IOs *vis-à-vis* third persons remains, therefore, an open issue; one on which a clear pronunciation by an international court would be desirable.[49] There might be a number of valid justifications for the choice of the Supreme Court not to take into account this perspective in its reasoning, suffices it to say here that it appears on the surface that such an argument was

[44] European Court of Human Rights, *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgment of 18 February 1999, para. 68.

[45] European Court of Human Rights, *Chapman v. Belgium*, Application no. 39619/06, Decision of 5 March 2013, para. 51.

[46] European Court of Human Rights, *Waite and Kennedy v. Germany*, cit., para. 68.

[47] See accordingly A. REINISCH, U.A. WEBER, "In the shadow of Waite and Kennedy. The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement", in *International Organizations Law Review* 2004, p. 59 ff., the overview of the relevant international and national jurisprudence can be found at pages 79 ff.

[48] European Court of Human Rights, *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Application no. 65542/12, Decision of 11 June 2013, para. 154.

[49] Accordingly see R. PAVONI, "Choleric notes on the *Haiti Cholera case*", in *Questions of International Law Zoom-In 19* 2015, p. 39 and A. VITERBO, "Immunità dalla giurisdizione della Banca Mondiale e diritto di accesso al giudice", in *Diritti umani e diritto internazionale* 2018, p. 397 ff., at 17 ff.

not relevant for the Court's conclusions (not in the scope of the writ of certiorari).

Despite this, the Supreme Court's hidden argument on the accountability of IOs was duly received by the CEO of the IFC Philippe Le Houérou, who recently declared that the board of the organization «has decided to review [its] environmental and social accountability framework, including the role and effectiveness of CAO» and that «when CAO launches an investigation into a project, we have recently set up a new peer review process to quickly analyze issues and identify learnings to implement immediately across all projects».[50]

Maybe it is too early to assess positively similar declarations, but they suggest that *Jam v. IFC* can contribute to enhance the accountability of IOs because IOs themselves are prompted to adopt significantly higher standards of accountability to avoid the expansion of domestic court jurisdiction.[51]

4. Conclusions

In the introduction to this Article we affirmed that the Supreme Court's decision in *Jam v. IFC* generates more questions than it answers. After having analyzed its implications on the law of IOs immunity and on their accountability, we can confirm our introductory words. Furthermore, we can add that the questions that the decision raises require international law answers.

In fact, although the reasoning of the Supreme Court in *Jam v. IFC* concerns the interpretation of the IOIA, a US domestic legal act, its implications go well beyond national boundaries. On the one side, the *Jam* decision proves that the issue of defining the exact scope of IOs immunity cannot simply be solved applying by analogy the principles applicable to States. Any solution should take into account the peculiarities of IOs and of their relationships with third parties. Domestic courts will likely continue to adopt a case-by-case approach, affecting the capability of IOs to perform their mandates.

This is not necessarily bad news. In fact, and this is the other side of *Jam v. IFC*, the expansion of domestic courts' authority might prompt IOs to adopt significantly higher standards of accountability. In this regard, Justice Breyer, in his Dissenting Opinion, advanced the argument that immunity can be suspended if IOs internal remedies prove to be ineffective. Indeed,

[50] See the opinion of the CEO of the IFC, P. LE HOUÉROU, "At IFC, accountability is of utmost importance", in *Devex*, 10 April 2019, available at https://www.devex.com/news/opinion-at-ifc-accountability-is-of-utmost-importance-94667.

[51] See accordingly C. YOUNG, *op. cit.*, p. 907. Among the authors who support this view D. BRADLOW, "Multilaterals Must Earn the Right to Limited Immunity", in *Financial Times*, 28 March 2019; V. RAMACHANDRAN, "The World Bank Must Clean Up Its Act", in *Nature*, vol. 567, 21 March 2019.

plaintiffs in *Jam v. IFC* did not obtain any redress when they applied to the CAO.

A proper balancing between the immunity of IOs and the effectiveness of remedies available to third parties can be a viable solution that satisfies both the absence of a unitary international law approach to IOs immunity and the need to hold them accountable.

ABSTRACT. Titolo abstract [Of Immunity and Accountability of International Organizations: A Contextual Reading of *Jam v. IFC*]

The present Article offers a reading of the US Supreme Court decision in *Jam v. IFC* from a twofold perspective. First, it analyses the way in which the US Supreme Court approached the immunity of international organizations, considering whether the exceptions to State immunity can be applied by analogy to determine the scope of IOs immunity. Second, it presents some thoughts on the accountability of the IFC in particular and of international organizations in general. The two perspectives lead to the conclusion that a regulation of organizations' immunity grounded on international law would be welcome and it should be construed as to prompt these subjects to improve their accountability mechanisms.

Parole chiave / keywords (6):

US Supreme Court, international organizations, immunity, access to justice, accountability, Jam v. IFC

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