"unequivocal and unconditional" and that its purpose is to confirm the status of the treaty party, as *Wightman* required, it could be argued that under general principles of law, any right, including that envisaged in VCLT Article 68, has to be exercised in good faith and that an abuse of such right is prohibited.

Crucially, however, and contrary to the finding in *Wightman*, VCLT Article 68 is unconcerned with domestic law: a violation of domestic constitutional law would not render the revocation devoid of legal effect under international law. One might argue by analogy to VCLT Article 46 that the consent to give such revocation is invalid because a manifest violation of a domestic rule of fundamental importance has taken place, such as a requirement of parliamentary approval. However, there is no evidence that such a rule exists vis-à-vis a unilateral act, or that VCLT Article 68 was intended to give such deference to domestic law after revocation has been made.

The ruling in *Wightman* that conditions the withdrawal revocation on observance of domestic constitutional requirements constitutes EU practice in the application of the EU founding treaties and is relevant to the interpretation of those treaties.[13] Given the CJEU's significant focus on the particular features of the TEU and the EU legal order, it seems unlikely that *Wightman* and any future implementation by EU member states would constitute practice as a constitutive element of a customary rule concerning withdrawal revocation from treaties in general. However, it may offer guidance (and may consolidate future practice) about special unilateral revocation conditions in treaties of a similar character to that of the EU founding treaties. It remains to be seen how other states and international organizations may react to the reasoning in *Wightman*.

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United States Supreme Court—international organizations—immunity from suit in U.S. courts

Jam v. International Finance Corp., No. 17-1011. *At* https://www.supremecourt.gov/opinions/18pdf/17-1011_mkhn.pdf.
United States Supreme Court, February 27, 2019.

In *Jam v. International Finance Corp.*, the U.S. Supreme Court held that the International Organizations Immunities Act of 1945 (IOIA) affords international organizations (IOs) the same immunity from suit in U.S. courts that foreign governments currently enjoy under the Foreign Sovereign Immunities Act of 1976 (FSIA), which codifies the restrictive theory of foreign sovereign immunity. The International Finance Corporation (IFC) had argued that the IOIA, which grants international organizations the "'same immunity' from suit . . . 'as is enjoyed by foreign governments'" (p. 15), should be understood to provide international organizations with absolute immunity, which it argued foreign governments

[13] Int'l L. Comm'n Rep., Text of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties with Commentaries, at 93, Conclusion 12(3), UN Doc. A/73/10 (2018).

enjoyed prior to the United States' explicit adoption of the restrictive theory in 1952. Under the restrictive theory, a foreign state is immune from suit for its sovereign acts (*acta jure imperii*), but not for its commercial acts (*acta jure gestionis*). By interpreting language in the IOIA as granting the "same immunity" to international organizations as foreign governments enjoy at the time the suit is filed, the Supreme Court aligned the regime for IO immunity with that of foreign state immunity, except in cases where the IO's founding charter provides a different rule or where the executive branch has explicitly limited immunity. It remains to be seen what IO activities are deemed "commercial" under this regime and what types of transactions are found to have a sufficient nexus to the United States to fall within the FSIA's commercial-activity exception.

The IFC, an international development bank headquartered in Washington, D.C., was created by an international agreement to which the United States is a party. The IFC, which is designated as an international organization under the IOIA,[1] provides loans for private-sector-development projects in member countries, with a focus on less developed regions "where sufficient private capital is not available on reasonable terms."[2] In 2018, the IFC provided around $23 billion in financing.

In the late 2000s, the IFC loaned Coastal Gujarat Power Limited, an Indian company, $450 million to help finance the construction of a power plant in India. Under the loan terms, Coastal Gujarat was required to comply with environmental and social-action plans designed to protect local communities from environmental and social risks created by the project. However, an audit by the IFC ombudsman found that Coastal Gujarat did not comply with its obligations and that the IFC did not adequately supervise the project nor revoke the financing for noncompliance.

In 2015, a group of local Indian farmers and fishermen sued the IFC for negligence, nuisance, trespass, breach of contract, and other claims, alleging that pollution from the power plant had destroyed or contaminated much of the surrounding land, air, and water. Because the IFC enjoys immunity from suit in India, the plaintiffs brought their claims for damages and injunctive relief in the U.S. District Court for the District of Columbia.

The IFC sought dismissal on the grounds that, among other things, the corporation was immune from suit in U.S. courts. The IOIA provides IOs with "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments."[3] Under the statute, the president may withhold, withdraw, condition, or limit the IOIA's grant of immunity in light of the functions the IO performs.[4] In addition, an IO's founding charter can extend or restrict its privileges and immunities, subject to implementation by Congress. Here, however, the IFC's immunity depended solely upon a determination of the scope of the IOIA's immunity grant.[5]

The IFC argued that the IOIA's reference to the immunity "enjoyed by foreign governments" codified the immunity that foreign governments enjoyed *at the time the IOIA was*

[1] Exec. Order No. 10680, 3 C.F.R. § 86 (1957); *see* 22 U.S.C. §§ 282, 288.

[2] Articles of Agreement of the International Finance Corporation, Art. I, I(i), 7 UST 2197, TIAS No. 3620, 264 UNTS 117 (July 20, 1956).

[3] 28 U.S.C. § 288a(b).

[4] *Id.* § 288.

[5] The Court of Appeals for the D.C. Circuit found that a waiver of immunity in the IFC's Articles of Agreement did not waive immunity from this suit. Jam v. IFC, 860 F.3d 703, 707–08 (D.C. Cir. 2017).

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enacted. The IOIA was enacted during a period in which foreign states enjoyed "'virtually absolute'" immunity (p. 3). During this period, foreign states claiming immunity would request suggestions of immunity from the Department of State. If the United States filed a suggestion of immunity on behalf of the foreign state, courts would generally defer to that suggestion. If the United States did not file a suggestion, courts would "decide[] for themselves whether to grant immunity, although they did so by reference to State Department policy" (*id.*). At the time the IOIA was enacted, the United States ordinarily requested, and courts ordinarily granted, immunity in suits against foreign states (*id.*).

In 1952, seven years after the IOIA was enacted, Acting State Department Legal Adviser Jack Tate issued a letter indicating that the State Department would follow the newer restrictive theory of foreign sovereign immunity in making immunity determinations.[6] This restrictive theory extended immunity to foreign sovereigns in cases involving their sovereign or public acts but not in cases involving their private acts. In 1976, Congress enacted the FSIA, which transferred primary responsibility for immunity determinations from the executive branch to the courts.[7] The FSIA follows the restrictive approach. Under the FSIA, foreign states (including their agencies and instrumentalities) are presumptively immune from suit in U.S. courts, subject to enumerated exceptions. The commercial activity exception denies immunity to foreign states for actions "based on" a commercial activity "carried on by a foreign state in the United States" that has a sufficient nexus with the United States.[8] Under the terms of the FSIA, the commercial character of an activity depends on the nature of that activity, rather than its purpose.[9]

Applying binding circuit-level precedent, the Court of Appeals agreed with the IFC that the IOIA affords IOs today the absolute immunity that was extended to foreign states at the time the IOIA was enacted.[10] The U.S. Supreme Court reversed, finding instead that the IOIA should be interpreted as affording IOs the same immunity that foreign states enjoy at the time a suit is filed. In the Court's view, the IOIA's grant of the "'same immunity' from suit . . . 'as is enjoyed by foreign governments'" (p. 15) directs courts to look to the *present* scope of foreign sovereign immunity, which today is embodied in the FSIA. The Court reasoned that "the 'same as' formulation is best understood to make international organization immunity and foreign sovereign immunity continuously equivalent" (p. 7). This interpretation is supported further by the "reference canon" of statutory interpretation, which provides 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" (p. 9). Consequently, the Court held that "[t]he 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" (p. 10).

The Court also noted that its interpretation of the IOIA corresponds to the interpretation consistently advanced by the executive branch, including in a brief the solicitor general filed as *amicus curiae* (p. 12). The solicitor general's brief pointed out that although the House version of the bill that was to become the IOIA "expressly afforded international organizations

[6] Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEPT. STATE BULL. 984–85 (1952).

[7] 28 U.S.C. § 1602.

[8] *Id.* § 1605(a)(2).

[9] *Id.* § 1603(d).

[10] Jam v. IFC, 860 F.3d at 705–06.

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absolute immunity from suit," the Senate "stripped the grant of absolute immunity and replaced it with the current language."[11] The brief noted:

> [I]f Congress had intended to adopt a particular standard for international organizations' immunity from suit, it would have done so expressly—particularly given that, at the time, international consensus was trending towards the restrictive theory and the State Department itself had declined to recognize immunity in suits involving foreign state owned vessels engaged in commercial activities.[12]

The United States also argued that its "longstanding interpretation—evinced by actions of both political Branches—of the privileges and immunities afforded by the IOIA in order to fulfill the United States' international obligations deserves deference."[13] The Court did not go so far as to say it was according "deference" to the U.S. position, but it did indicate that this "longstanding view further bolsters our understanding of the IOIA's immunity provision" (pp. 12–13) and that the D.C. Circuit should have given "consideration" to the opinion of the State Department, "whose views in this area ordinarily receive 'special attention'" (p. 12). The Supreme Court's interpretation of the IOIA thus tracked the one advanced by the executive branch.

Noting that "the privileges and immunities accorded by the IOIA are only default rules," and that "the organization's charter can always specify a different level of immunity," the Court rejected the IFC's argument that exposing IOs to litigation under the exceptions to immunity enumerated in the FSIA would open the floodgates to suits in U.S. courts (p. 14). In addition, the Court credited the solicitor general's suggestion that "the lending activity of at least some development banks, such as those that make conditional loans to governments, may not qualify as 'commercial' under the FSIA" (*id.*). And even if an IO's activities are "commercial" in nature, they must still satisfy the other requirements of the FSIA in order to provide a basis for jurisdiction, including the requirements that the lawsuit be "based upon" a commercial activity and that the commercial activity have a "sufficient nexus" with the United States (p. 4). Indeed, in *Jam* itself, the government expressed "'serious doubts'" whether the IFC's conduct would satisfy the "'based upon'" requirement of the commercial activity exception (p. 15).

Justice Breyer, writing in dissent, agreed with the IFC that the IOIA provides IOs with the absolute immunity that existed at the time the IOIA was enacted. In his view, the statute's language does not answer the question (pp. 3–4). Instead, he advocated "purpose-based methods of interpretation" (p. 1). In identifying the statute's purpose, Breyer noted that "Congress enacted the Immunities Act as part of an effort to encourage international organizations to locate their headquarters and carry on their missions in the United States" (p. 10). In his view, it followed that the IOIA should be interpreted to codify absolute immunity (p. 11). Justice Breyer also worried that restrictive immunity would hamper the "core functions" of certain IOs, including those of the IFC, that "are at least arguably 'commercial' in nature" (p. 12).

[11] Brief for the United States as Amicus Curiae Supporting Reversal at 11.
[12] *Id.*
[13] *Id.* at 29.

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The jurisprudential import of the *Jam* decision may be greater than its practical effect. At a jurisprudential level, the statutory language presented the Court with a choice between static and dynamic interpretations, and the Court made a persuasive case for adopting the dynamic option. At a practical level, it is not clear how much of a burden restrictive immunity will actually be, or has actually been, on IOs. In addition to the legal arguments that statutory immunity could still apply to certain activities of IOs under the restrictive theory, IOs facing the prospect of litigation in U.S. courts have both *ex ante* and *ex post* methods for channeling dispute resolution into other fora.

The *ex ante* method is for IOs to be formed through founding charters that specify expanded immunities that enable them to perform their designated functions without undue exposure to U.S. legal proceedings. Such charters override the IOIA's exceptions to immunity. Language in founding charters can be crafted to take into consideration, and mitigate, the litigation risk that a new IO is likely to face in light of its mission and activities. For example, the founding charter of the International Monetary Fund, which is headquartered in the United States, explicitly preserves absolute immunity.[14] The Convention on Privileges and Immunities of the United Nations also represents a negotiated immunity agreement whose provisions supplant the IOIA.[15] Agreeing to such *ex ante* provisions may be appropriate when undue exposure to national litigation could impede an IO's ability to perform its designated functions. Conversely, however, inadequate recourse for those injured by an IO's activities can create an accountability gap and provide insufficient incentives for IOs to self-regulate, as became clear following the outbreak of a devastating cholera epidemic in Haiti associated with the deficient sanitation practices of UN peacekeepers.[16]

The *ex post* method for mitigating litigation exposure is for IOs sued in U.S. courts to avail themselves of other forum-avoidance doctrines besides immunity. Many lawsuits brought against IOs in U.S. courts, including *Jam*, relate to matters that predominantly occurred abroad. U.S. federal courts adhere to the doctrine of *forum non conveniens*, which relies on a number of public and private factors to determine whether a U.S. court should dismiss a lawsuit so that it can be refiled in more convenient or appropriate country.[17] Private factors include access to sources of proof, the ease of compelling evidence and witnesses in the forum, and other practical considerations; public factors include court congestion, the forum's interest, difficult choice-of-law problems, and other public considerations.[18] The doctrine can point to dismissal even if the plaintiff's recovery prospects are dimmer in the other country.[19] Further, the doctrine gives no deference to the plaintiff's choice of a U.S. forum when the plaintiff is a foreign party.[20] In light of how U.S. courts have applied this doctrine, the

[14] *See* Articles of Agreement of the International Monetary Fund, Art. IX, § 3, 60 Stat. 1413, TIAS No. 1501 (Dec. 27, 1945) (implemented by 22 U.S.C. § 286h).

[15] Convention on Privileges and Immunities of the United Nations, Art. II, § 2, 21 UST 1422, TASA No. 6900 (Feb. 13, 1946) (deemed to be self-executing).

[16] *See* Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti (2011).

[17] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

[18] *Id.* at 241 n. 6.

[19] *Id.* at 250.

[20] *Id.* at 257.

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case against the IFC for its conduct involving the Indian power plant seems like a candidate for dismissal under *forum non conveniens*,[21] something that the IFC urged in its motion to dismiss before the district court. Although dismissals for *forum non conveniens* may require the defendant to agree to submit to the jurisdiction of an alternative forum, defendants often prefer to litigate tort claims in judicial systems that they view as less inclined, or unable, to order extensive discovery and to impose punitive damages. Even without absolute immunity, then, IOs like the IFC may nonetheless avoid being subject to litigation in U.S. courts for their conduct overseas.

Whether an IO should face consequences in U.S. courts for its activities abroad ultimately depends on the nature of the claims and the circumstances of the alleged misconduct. Viewed from a broader perspective, the underlying assumption that bestowing international legal personality (and a corresponding domestic legal personality) on IOs means that they should, as a default rule, enjoy the same privileges and immunities as states poses some obvious problems. Just as the International Law Commission transposed its work on state responsibility into the IO context without substantial modification in the Draft Articles on the Responsibility of International Organizations, so too did Congress in 1945 succumb to the temptation to equate IOs with foreign states for certain legal purposes. As a group of international law experts who proposed a functional (rather than an absolute or a restrictive) approach to IO immunity noted:

> The restrictive theory of sovereign immunity turns on the distinction between foreign states' sovereign acts (*acta jure imperii*) and their private acts (*acta jure gestionis*). That distinction is meaningless when applied to IOs. International organizations do not undertake sovereign acts. Rather, they undertake acts in the exercise of their function, many of which have some of the attributes of private acts. Even so, they are not genuinely private acts; they are acts in fulfillment of the mission their member states assign to them.[22]

The inverse could be said of foreign states; as Sir Hersch Lauterpacht observed, "the state always acts as a public person. It cannot act otherwise. In a real sense all acts *jure gestionis* are acts *jure imperii*."[23] Determining the commercial nature of an act entails applying certain artificial constructs to state acts for the purpose of distinguishing claims that are justiciable in domestic courts from those subject exclusively to adjustment through diplomacy. The exercise may be contrived, but it is not futile—to the contrary, the restrictive theory of immunity represents a practical accommodation of the conflicting demands for legal recourse (including against sovereign entities) and nonintervention in the domestic affairs of other states. As suggested above, given that IOs are not themselves sovereign entities—although they are generally formed by agreements among such entities—a plea of jurisdictional immunity might not always be the most suitable or efficacious line of defense against claims brought in domestic courts, especially when those claims arise from conduct that occurred outside the forum state.

[21] *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195, 202 (2d Cir. 1987).

[22] Brief of International Law Experts as *Amici Curiae* in Support of Respondent at 3.

[23] Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 224 (1951).

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The IOIA's enactment manifested a commitment on the part of the United States to host and to participate in IO activities. International lawyers might take some comfort in the first sentence of the United States' amicus brief in *Jam*, which affirms that "[t]he United States' participation in international organizations is a critical component of the Nation's foreign relations and reflects an understanding that robust multilateral engagement is a crucial tool in advancing national interests."[24] Against the backdrop of this commitment, the IOIA's statutory grant of immunity attempts to strike a balance between enabling IOs to perform their functions unencumbered by the burdens of litigation and the threat of excessive damages awards, on the one hand, and incentivizing IOs to self-regulate and to ensure compensation for those injured by their potentially harmful activities, on the other.

Although IOs themselves favor absolute immunity, restrictive immunity's residual risk of liability may have the salutary effect of prompting IOs to improve their internal accountability mechanisms. As one group of amici argued before the Supreme Court,

> [A] restrictive theory of immunity will appropriately incentivize international organizations to ensure that their accountability mechanisms and related measures in fact provide effective remedies to adversely affected parties. If international organizations face the unappealing prospect of being haled into a U.S. court for noncompliant behavior, they will make reasonable efforts to resolve complaints and grievances before litigation becomes necessary. That will only redound to the benefit of the communities and peoples that these organizations are meant to help, and thus ultimately to the organizations themselves.[25]

Although not without its problems, *Jam* thus holds out hope that the IOIA will cloak IOs with some immunity in appropriate cases while encouraging IOs to mitigate and remedy litigable harms in the first instance.

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[24] Brief for the United States as Amicus Curiae Supporting Reversal at 1.
[25] Brief of *Amici Curiae* Center for International Environmental Law et al. in Support of Petitioners at 31.