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Immunity of International Organizations

U.S. Supreme Court Rejects Absolute Immunity for International Organizations Under International Organizations Immunity Act

SUMMARY

In *Jam v. International Finance Corporation*,¹ the Supreme Court held that the immunity granted to international organizations under the International Organizations Immunity Act (the “IOIA”)² is the same as the immunity granted to foreign governments under the Foreign Sovereign Immunities Act (the “FSIA”).³ In reaching this conclusion, the Supreme Court rejected prior D.C. Circuit case law that held that immunity under the IOIA is “absolute.” As a result, absent more expansive immunity provisions in their charters, international organizations granted immunity under the IOIA may be subject to suit in a U.S. court to the same extent as a foreign sovereign would be under the FSIA, including as a result of the so-called “commercial activities” exception. In addition to noting that an organization’s charter may provide an independent source of immunity, the Chief Justice’s majority opinion offered helpful dictum regarding the scope of the commercial activities exception. While the opinion did not decide whether the international organization benefitted from immunity in the case, and suggested in dictum that it might, the *Jam* decision and its rejection of absolute immunity for international organizations may heighten the litigation exposure of international organizations in the United States.

BACKGROUND

A. THE IOIA

Congress enacted the IOIA in 1945, granting organizations of which the U.S. is a member pursuant to a treaty or an act of Congress authorizing or making an appropriation for U.S. membership, and which are designated by the President under the IOIA, a set of privileges and immunities, including immunity from suit and judicial process. The IOIA itself does not define the scope of the immunity from suit, but instead refers to the immunity from suit available to foreign governments. The statute provides that, in general,

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an international organization “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.”⁴

B. IMMUNITY OF FOREIGN GOVERNMENTS

When the IOIA was enacted, the United States granted foreign governments “virtually absolute immunity” from suit in the United States.⁵ In 1952, however, the State Department—which at the time was responsible for deciding when a foreign government enjoyed immunity—adopted the “restrictive” theory of foreign sovereign immunity, under which a foreign government is entitled to immunity “with respect to their sovereign acts, not with respect to commercial acts.”⁶ In 1976, Congress enacted the FSIA, transferring responsibility for making immunity decisions from the State Department to the courts, but retaining the “restrictive” theory. Under the FSIA, a foreign government is immune from suit unless one of several statutory exceptions applies, the “most significant” of which is the “commercial activities” exception, which denies immunity to foreign governments in respect of suits based on commercial activity or acts performed in connection with commercial activity with a sufficient nexus to the United States.⁷

C. FACTS OF THE CASE

The International Finance Corporation (the “IFC”), part of the World Bank Group, is a development bank founded in 1956 and based in Washington, D.C. with 184 members, including the United States.⁸ According to its charter, the IFC’s purpose is “to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas.”⁹ Among other things, the IFC makes loans to private-sector projects in developing countries. As part of its lending process, the IFC generally requires recipients to adhere to a set of “performance standards for managing environmental and social risks,” and enforces these standards through an internal review process and other means.¹⁰

In 2008, the IFC loaned \$450 million to a company in India to help finance the construction of a power plant. The IFC’s agreement with the borrower required it to comply with an environmental and social action plan. However, according to an IFC internal audit, the borrower failed to comply with the IFC’s standards, and the IFC’s supervision of compliance with the action plan was inadequate. In 2015, farmers and fishermen near the plant and the government of a nearby village sued the IFC in Washington, D.C. federal court, claiming that pollution from the plant adversely affected local fishing, drinking water and air quality. The plaintiffs sought injunctive relief or money damages from the IFC based on negligence, negligent supervision, nuisance, trespass and breach of contract.¹¹

D. LOWER COURT DECISIONS

Relying on a 1998 D.C. Circuit precedent that held that “Congress’ intent” in the IOIA was to “adopt th[e] body of law” on foreign sovereign immunity “as it existed in 1945,” and not to incorporate “subsequent changes” to that law,¹² the district court determined that the IFC currently was entitled to the absolute

immunity from suit that foreign governments enjoyed in 1945 and dismissed the case.¹³ Relying on the same binding 1998 circuit precedent, the D.C. Circuit affirmed.¹⁴

THE SUPREME COURT'S DECISION

In a 7-1¹⁵ decision authored by Chief Justice Roberts, the Supreme Court reversed. The Court held that, in granting international organizations the “same immunity” from suit “as is enjoyed by foreign governments,” the IOIA “continuously link[s] the immunity of international organizations to that of foreign governments.”¹⁶ As a result, the IFC’s immunity from suit under the IOIA is not absolute, but must instead be evaluated under the “restrictive” theory of sovereign immunity as codified in the FSIA.

The Court’s analysis began by noting that the language of the IOIA “more naturally lends itself” to a conclusion that international organizations have the “same immunity” that foreign governments have today. According to the Court, if Congress wanted to provide international organizations with absolute immunity from suit, it could have expressly done so, as it did for other immunities granted in the IOIA.¹⁷ Similarly, Congress could have specified that the IOIA incorporated the law of foreign sovereign immunity as it stood in 1945. As the text of the statute did neither of those things, the Court concluded that the “same as” language contained in the IOIA made the immunity of international organizations “continuously equivalent” to that of foreign governments. The Court noted that similar “same as” provisions “dot the statute books, and federal and state courts commonly read them to mandate ongoing equal treatment of two groups or objects.”¹⁸

The Court also relied on the “reference canon,” which provides a means for interpreting statutes such as the IOIA that define their scope by reference to another body of law. Under this canon, “general” references indicate that the scope of the referring statute is continuously linked to developments in the referenced body of law; “specific” references, in contrast, indicate that the referring statute adopts the referenced body of law as of the date of the statute’s enactment. The Court determined the IOIA’s reference to the “immunity enjoyed by foreign governments” is a general reference to an “external body of potentially evolving law,” not a specific reference to a particular statutory provision or a precise term of art with “substantive content.” Accordingly, the canon supports the conclusion that the IOIA “link[s] the law of international immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other.”¹⁹

The Court rejected the IFC’s argument that the IOIA must be interpreted differently from the FSIA because the purpose of immunity for foreign governments—comity and reciprocity between nations—differs from the purpose of immunity for international organizations—enabling organizations to pursue the “collective goals” of their members without “undue interference” from any one member’s courts. This argument, the Court concluded, “gets the inquiry backward”: absent a clearly expressed legislative intention to the contrary, legislative purpose is expressed by the ordinary meaning of statutory text. In

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any event, the Court stated, the IOIA does not address the question of the ultimate purpose of international organization immunity.²⁰

The Court also disagreed with the reasoning of the D.C. Circuit's 1998 decision. In that decision, the D.C. Circuit pointed to authority granted to the President in the IOIA to "modify, condition, limit, and even revoke" an international organization's immunity, concluding that the statute made the President—not developments in the law of foreign sovereign immunity—responsible for modifying the absolute immunity international organizations enjoyed as of the 1945 enactment of the IOIA.²¹ The Supreme Court rejected this view, stating that this presidential authority "suggests retail rather than wholesale action." In other words, the provision is most naturally read to allow the President to modify, on a case-by-case basis, the immunity rules that would otherwise apply to a single international organization, as opposed to international organizations as a whole. The Court also faulted the D.C. Circuit for not considering the State Department's "longstanding" view that immunity under the IOIA and the FSIA are "linked."²²

Finally, the Court declined to credit the IFC's argument that a "restrictive" view of immunity would be undesirable as it would allow one member's courts to "second-guess the collective decisions" of the other members and expose them to money damages, which would make it more difficult and expensive to fulfill the organization's mission. These effects, argued the IFC, would be especially acute for development banks that "use the tools of commerce to achieve their objectives" and whose activities could therefore fall within the FSIA's commercial activities exception. The Court described these concerns as "inflated" for three reasons:²³

- *First*, privileges and immunities under the IOIA are "default rules," and the members of an international organization can specify in the organization's charter that it enjoys a different level of immunity, including, if appropriate for a particular organization, absolute immunity from suit. The Court noted that the charters of some international organizations in fact do appear to confer broader immunities than those provided for in the FSIA.²⁴
- *Second*, not all activities, even by development banks, necessarily qualify as "commercial" for the purposes of the FSIA. Only activities of a "*type . . . by which a private party engages in*" trade or commerce satisfy this requirement.²⁵
- *Third*, even where a development bank's activities are "commercial" in nature, the bank is only subject to suit in the United States if the relevant commercial activity has a sufficient nexus to the United States *and* the relevant suit is "based upon" that commercial activity or acts performed in connection with that commercial activity.²⁶ If the "gravamen" of a suit is tortious activity abroad, the suit would not be "based upon" commercial activity within the meaning of the FSIA's commercial activities exception.²⁷

Justice Breyer dissented, describing the language of the IOIA as ambiguous and pointing to the "statute's history, its context, its purposes, and its consequences" as favoring an interpretation that grants international organizations the absolute immunity enjoyed by foreign governments in 1945.²⁸

IMPLICATIONS

International organizations in general, and development banks in particular, potentially may face increased litigation exposure in the United States as a result of the Court's holding that international organizations enjoy in the United States "restrictive," as opposed to absolute, immunity. However, the Court did not conclude that the IFC lacks immunity on the facts of this case. The Court expressly noted that restrictive immunity does not mean no immunity, and indeed suggested in dictum that the claims of the plaintiffs against the IFC may, in fact, not be "based upon a commercial activity" of the IFC which has a sufficient nexus with the United States to come within the FSIA's commercial activities exception to foreign sovereign immunity.

Moreover, as the Court recognized, the charter of an international organization may provide an independent source of immunity to suit even where the FSIA would not. Unless immunity is expressly waived, the charters of some organizations, including the United Nations and IMF, confer on the organizations immunity from all suits.²⁹ The charters of other organizations, including the IFC and World Bank, confer immunity from certain suits, potentially including suits that impose impermissible "regulations" on the organizations' property and assets.³⁰ The scope of immunity in the IFC's charter, which is a binding international agreement and the immunity provisions of which have been implemented into U.S. domestic law,³¹ is one of the issues that may be addressed on remand in the case.

Even when the FSIA would determine the scope of an international organization's immunity in U.S. courts, the "commercial activities" or another exception to immunity may not apply in a particular case. The commercial activities exception only denies immunity for a suit "based on" a commercial activity that has a sufficient U.S. nexus, specifically, that the suit be based on (1) a commercial activity "carried on in the United States," (2) "an act performed in the United States in connection with a commercial activity" abroad or (3) "an act" abroad "in connection with a commercial activity" abroad that "causes a direct effect in the United States."³² A suit based upon a "gravamen" of "tortious activity abroad" may not be "based upon" a commercial activity.³³ The Court acknowledged the government's statement at oral argument that the government has "serious doubts" whether the suit in *Jam*, which "largely concerns allegedly tortious conduct in India," satisfies the commercial activities exception.³⁴ Further, the Court noted that some lending activities by international organizations, such as lending to a government expressly conditioned on the recipient making changes to its domestic laws, may not be of a "type . . . by which a private party engages in trade or commerce," and thus not "commercial" for the purposes of the FSIA.³⁵

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Despite the Court's decision that international organizations do not benefit from absolute immunity from suit in the courts of the United States, other protections that remain after the Court's decision will likely limit the actual U.S. litigation exposure for the work of many international organizations. Nevertheless, organizations that do not have specific charter or statutory immunity may wish to consider whether there are opportunities to monitor or reduce their exposure for work that may not qualify for immunity under the FSIA.

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ENDNOTES

- 1 *Jam v. Int'l Fin. Corp.*, No. 17-1011 (U.S. Feb. 27, 2019).
- 2 22 U.S.C. § 288 *et seq.*
- 3 28 U.S.C. § 1602 *et seq.*
- 4 22 U.S.C. § 288a(b).
- 5 *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).
- 6 *Jam*, slip op. at 3-4; see also *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 & app. 2 (1976).
- 7 *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992); see 28 U.S.C. § 1605(a)(2).
- 8 IFC was designated by the President under the IOIA. See Exec. Order 10,680 (Oct. 2, 1956), 21 Fed. Reg. 7647.
- 9 Articles of Agreement of the International Finance Corporation, Art. I, available at https://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/About+IFC_New/IFC+Governance/Articles/.
- 10 Brief for Respondent, at 10, *Jam* (No. 17-1011), 2018 WL 4348237, at *10.
- 11 *Jam*, slip op. at 5-6; *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 107-08 (D.D.C. 2016).
- 12 *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998).
- 13 *Jam*, 172 F. Supp. 3d at 108-12.
- 14 *Jam v. Int'l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017).
- 15 Justice Kavanaugh took no part in the consideration or decision of *Jam*.
- 16 *Jam*, slip op. at 7.
- 17 See, e.g., 22 U.S.C. § 288a(c) (“ . . . shall be immune from search”); *id.* § 288c (“ . . . shall be exempt from all property taxes”).
- 18 *Jam*, slip op. at 7-8.
- 19 *Id.* at 9-11.
- 20 *Id.* at 8-9.
- 21 *Atkinson*, 156 F.3d at 1341; see 22 U.S.C. § 288.
- 22 *Jam*, slip op. at 12-13.
- 23 *Id.* at 13-14.
- 24 *Id.* at 14.
- 25 *Weltover*, 504 U.S. at 614.
- 26 28 U.S.C. § 1605(a)(2).
- 27 *Jam*, slip op. at 15. The D.C. Circuit had concluded that the “appellants’ claims are almost entirely based on tort: negligence, negligent nuisance, and trespass.” 860 F.3d 703, 704 (D.C. Cir. 2017).
- 28 See *Jam*, slip op. at 1, 16-17 (Breyer, J., dissenting).
- 29 Convention on Privileges and Immunities of the United Nations, Art. II, § 2, available at <http://www.un.org/en/ethics/pdf/convention.pdf> (United Nations); Articles of Agreement of the International Monetary Fund, Art. IX, § 3, available at <https://www.imf.org/external/pubs/ft/>

ENDNOTES (CONTINUED)

- [aa/index.htm](#) (IMF); see also 22 U.S.C. § 286h (implementing the IMF's immunity into U.S. domestic law).
- 30 See, e.g., Articles of Agreement of the International Finance Corporation, Art. VI, § 6, available at https://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/About+IFC_New/IFC+Governance/Articles/ (IFC); Articles of Agreement of the International Bank for Reconstruction and Development, Art. VII, § 6, available at <http://pubdocs.worldbank.org/en/722361541184234501/IBRDArticlesOfAgreement-English.pdf> (World Bank); see also 22 U.S.C. §§ 282g, 286h (implementing these immunities into U.S. domestic law).
- 31 See 7 U.S.T. 2197 (1956); 22 U.S.C. §§ 282, 282g.
- 32 28 U.S.C. § 1605(a)(2).
- 33 *Jam*, slip op. at 15.
- 34 *Id.*; see Transcript of Oral Argument, *Jam* (No. 17-1011), at 25-26.
- 35 *Jam*, slip op. at 14 (emphasis and internal quotation marks omitted); see Transcript of Oral Argument, *supra*, at 29-30.

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