Unpacking the *Jam v. IFC* Decision

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1. Introduction

The much-anticipated decision of the United States Supreme Court in *Jam v. IFC* was rendered on February 27, 2019[1]. It was the first time that the Supreme Court has decided a case on the immunity of international organizations. It was a seismic, but not quite seminal, decision from an international law perspective. The Supreme Court decided a narrow question of United States legislation:

> The International Organizations Immunities Act grants international organizations the 'same immunity' from suit 'as is enjoyed by foreign governments' at any given time. Today, that means that the Foreign Sovereign Immunities Act governs the immunity of international organizations. The International Finance Corporation is therefore not absolutely immune from suit[2].

The decision has raised more issues than it has resolved. Before analyzing the ramifications of the decision, it is pertinent to discuss the legal landscape of the immunity from suit for international organizations in the United States before the surprise decision.

2. Legal Landscape Prior to the Decision

The International Organizations Immunities Act (IOIA), which was enacted in 1945, provides pertinently that international organizations «shall enjoy the same immunity from suit […] 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». In 1945, the doctrine of absolute sovereign immunity held sway, but since 1952, following the declaration of the United States Department of State in the famous Tate letter, the doctrine of

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[1] Supreme Court of the United States of America, *Jam v. International Finance Corporation*, 139 U.S. 759 (2019), Order of February 27th, 2019.

[2] *Ibid.*, para. 772.

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restrictive sovereign immunity, which accords foreign States immunity for what is considered sovereign or official acts but not for commercial or private acts, has taken hold. Thus, the scope of immunity of foreign States revolves around the distinction between *acta jure imperii* and *acta jure gestionis*. In 1976, the doctrine of restrictive sovereign immunity was codified in the Foreign Sovereign Immunities Act (FSIA).

The reference in the IOIA to the immunity of foreign governments had generated considerable confusion over the precise scope of the immunity of international organizations in light of the Tate letter declaration and the subsequent enactment of the FSIA. The confusion was compounded by the differing jurisprudence amongst the circuits. Did the paths of foreign sovereign immunity and international organization immunity diverge? The jurisprudence of the District of Columbia Circuit Court of Appeals was that the scope of immunity of international organizations did not change with that of foreign States and remained absolute as it was in 1945[3]. The conflicting jurisprudence of the Third Circuit Court of Appeals is that immunity of international organizations changed from absolute to restrictive with the enactment of the FSIA[4]. Thus, there was a split in circuits before the Supreme Court resolved it in *Jam*.

3. Procedural History of the Case

The defendant, International Finance Corporation (IFC), an international organization with its Headquarters in Washington, DC, United States of America, had provided loans to a subsidiary of Tata Power, an Indian company, for the construction and operation of the Tata Mundra Power Plant in India. In accordance with IFC's policy to prevent environmental and social damage, the loan agreement included an Environmental and Social Action Plan designed to protect surrounding communities at the power plant. The IFC Compliance Advisor Ombudsman (CAO) conducted an internal audit and concluded that the construction and operation of the plant did not comply with the Plan, but IFC did not compel the loan recipient to comply with the Plan.

The plaintiffs, represented by Earth Rights International, a nongovernmental organization, are Indian fishermen, farmers, a local government entity, and a trade union of fishermen who claim that their way of life has been devastated. They based their claims on various torts allegedly committed in their community in India. In addition, they claim to be third party beneficiaries of the environmental and social terms of the loan agreement. They argued that IFC is not immune to their claims and even if it was immune, it has waived the immunity. The

[3] See United States of America, *Court of Appeals for the District of Columbia Circuit*, *Atkinson v. Inter-Am. Dev. Bank*, October 9th, 1998, as amended October 28th, 1998, 156 F.3d 1335 (D.C. Cir. 1998).

[4] See United States of America, *Court of Appeals for the Third Circuit*, *OSS Nokalva, Inc. v. European Space Agency,* August 16th, 2010, 617 F.3d 759 (3d Cir. 2010).

District Court of the District of Columbia dismissed their claims based on its determination that IFC was immune[5]. The Court of Appeals for the District of Columbia Circuit agreed with the District Court that IFC was immune under the IOIA, and that IFC did not waive its immunity regarding this type of suit in its Articles of Agreement[6]. The case was appealed to the Supreme Court which granted *certiorari* limited to the following question:

> Whether the International Organizations Immunities Act – which affords international organizations the 'same immunity' from suit that foreign governments have, 22 U.S.C. para. 288a(b) – confers the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. paras. 1602-11.

The case required the Supreme Court 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»[7].

4. How *Jam* Was Decided

The Supreme Court applied the 'reference' canon of statutory interpretation. It stated that the IOIA's reference to the immunity of foreign governments is a general reference, as opposed to a specific reference, and concluded that 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». According to the Supreme Court, the restrictive sovereign immunity that foreign States have under the FSIA would now be applicable to international organizations under the IOIA. In other words, international organizations no longer have the virtually absolute immunity under the IOIA that they had when that statute was enacted in 1945.

Justice Stephen Breyer, in his lone dissent, took the majority to task for its decision «resting primarily upon the statute's language and canons of interpretation». He disagreed with the majority that the immunity of international organizations evolved with that of foreign States and in reaching his conclusion, he did «rest more heavily than does the majority upon the statute's history, its context, its purposes, and its consequences»[8].

As a practical matter, it is of no significance whether one agrees with reasoning of the 7-1 majority[9]. As Justice Robert Jackson had immortally remarked

[5] See United States of America, *District Court for the District of Columbia*, *Jam v. Int'l Fin. Corp.,* March 24th, 2016 172 F. Supp. 3d 104 (D.D.C. 2016).

[6] See United States of America, *Court of Appeals for the District of Columbia Circuit, Jam v. Int'l Fin. Corp.*, June 23rd, 2017860 F.3d 703 (D.C. Cir. 2017).

[7] Supreme Court of the United States of America, *Jam v. Int'l Fin. Corp.*, cit., para. 765.

[8] *Ibid.*, para. 773.

[9] Justice Kavanaugh, who was a Judge of the D.C. Circuit Court of Appeals when that Court decided *Jam*, did not participate in the consideration or decision of the case in the Supreme Court.

about the Supreme Court: «We are not final because we are infallible, but we are infallible only because we are final»[10]. What are of significance are the implications of the *Jam* decision for IFC in particular and international organizations in general. To appreciate the ramifications of the *Jam* decision is to be clear about what was decided and what was not decided.

5. What Was Decided

The Supreme Court decided:

> To begin, the privileges and immunities accorded by the IOIA are only default rules. If the work of a given international organization would be impaired by restrictive immunity, the organization's charter can always specify a different level of immunity. The charters of many international organizations do just that. See, *e.g.*, Convention on Privileges and Immunities of the United Nations, Art. II, para. 2, Feb. 13, 1946, 21 U.S.T. 1422, T.I.A.S. No. 6900 ('The United Nations [...] shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity'); Articles of Agreement of the International Monetary Fund, Art. IX, para. 3, Dec. 27, 1945, 60 Stat. 1413, T.I.A.S. No. 1501 (IMF enjoys 'immunity from every form of judicial process except to the extent that it expressly waives its immunity'). Notably, the IFC's own charter does not state that the IFC is absolutely immune from suit[11].

The Supreme Court has decided that the primary source of the immunity of international organizations is their constituent instruments and that the immunities accorded by the IOIA are only default rules. In this regard, it pointed out that the so-called absolute immunity of the IMF under its Articles of Agreement or the United Nations under the Convention on the Privileges and Immunities of the United Nations is unaffected by the new restrictive immunity standard of the IOIA via the FSIA. It, however, noted that IFC does not have absolute immunity under its Articles of Agreement.

The decision is of consequence for those international organizations that derive their immunity from legal process in the United States from the IOIA which will now be governed by the FSIA standards. However, these international organizations should find some comfort in the following dicta in the opinion of the Supreme Court:

> Nor is there good reason to think that restrictive immunity would expose international development banks to excessive liability. As an initial matter, it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA. To be considered 'commercial', an activity must be 'the *type*' of activity 'by which a private party engages in' trade or commerce. *Republic of*

[10] *Supreme Court of the United States, Brown v. Allen,* 344 U.S. 443, 540 (1953), February 9th, 1953.

[11] *Ibid.*, paras. 771-772.

Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992); see 28 U.S.C. para. 1603(d). As the Government suggested at oral argument, 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. See Tr. of Oral Arg. 27-30[12].

The Supreme Court goes on to say:

> And even if an international development bank's lending activity does qualify as commercial, that does not mean the organization is automatically subject to suit. The FSIA includes other requirements that must also be met. For one thing, the commercial activity must have a sufficient nexus to the United States. See 28 U.S.C. paras. 1603, 1605(a)(2). For another, a lawsuit must be 'based upon' either the commercial activity itself or acts performed in connection with the commercial activity. See para. 1605(a)(2). Thus, if the 'gravamen' of a lawsuit is tortious activity abroad, the suit is not 'based upon' commercial activity within the meaning of the FSIA's commercial activity exception. See *OBB Personenverkehr AG v. Sachs*, 577 U.S. ___, ___-___ (2015); *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-359 (1993). At oral argument in this case, the Government stated that it has "serious doubts" whether petitioners' suit, which largely concerns allegedly tortious conduct in India, would satisfy the 'based upon' requirement. Tr. of Oral Arg. 25-26. In short, restrictive immunity hardly means unlimited exposure to suit for international organizations[13].

6. What Was Not Decided

The Supreme Court did not decide that all international organizations no longer have absolute immunity in the United States. The decision of the Supreme Court is much more nuanced than has been reported by some. When it comes to the immunity of international organizations, there are two courts: (a) courts of law and (b) courts of public opinion, and their viewpoints do not always converge.

Section 1 of the IOIA authorizes the U.S. President through appropriate Executive Order to designate international organizations that are entitled to enjoy certain privileges and immunities under the Act. To that effect, President Truman by Executive Order 9751 designating the International Bank for Reconstruction and Development (World Bank), the International Monetary Fund (IMF), amongst others, stated pertinently that their designation

> as public international organizations within the meaning of the said International Organizations Immunities Act is not intended to abridge in any respect privileges and immunities which such organizations have acquired or may acquire by treaty or Congressional action; provided, that with respect to the International Bank for Reconstruction and Development, such designation shall not be construed to affect in any way the applicability of the provisions of section 3, Article VII, of the Articles of Agreement of the Bank as adopted by the Congress of the United States in the Bretton-Woods Agreements Act of July 31, 1945 (Public Law 171, 79th Congress).

[12] *Ibid.*, para. 772.
[13] *Ibid.*

Similarly, Executive Order 10680 by President Eisenhower stated:

> The designation of the International Finance Corporation made by this order is not intended to abridge in any respect privileges, exemptions, and immunities which such corporation may have acquired or may acquire by treaty or Congressional action; nor shall such designation be construed to affect in any way the applicability of the provisions of section 3, Article VI, of the Articles of Agreement of the Corporation deposited in the archives of the International Bank for Reconstruction and Development.

The import of these Executive Orders is that the IOIA was not intended to abridge or alter the scope of immunity of these international organizations under the treaties establishing them.

Although the IFC was the defendant in the case, the decision should have no bearing on the determination of the immunity from suit for the IFC and other international organizations that derive their immunity principally from the constituent instruments where the United States is a party to those treaties. IFC lost the case but it did not lose its immunity. IFC never had absolute immunity under the IOIA (as is evident in Executive Order No. 10680) nor under its Articles of Agreement: «Notably, the IFC's own charter does not state that IFC is absolutely immune from suit»[14].

The Supreme Court did not decide that the doctrine of restrictive sovereign immunity under the FSIA would have to be applied to the activities of the IFC. The discussion of the commercial activity exception in the opinion is a bit of a red-herring. Considering that the primary source of the immunity of the IFC is its Articles of Agreement, which is implemented into United States law by the International Finance Corporation Act, the FSIA would not apply to the determination of the immunity of the IFC in the United States[15]. The key to the applicability of the constituent instrument of an international organization is whether it is a self-executing treaty or has been incorporated into United States law by an enabling legislation: «[U]nless the treaty provision granting immunity is 'self-executing,' *i.e.*, automatically applicable, the immunity will not be effective in U.S. courts until Congress enacts additional legislation to implement it»[16]. Thus, if the constituent instrument of an international organization is binding on the United States, as a self-executing treaty or through an implementing legislation, then the scope of immunity from legal process for that organization is determined by the relevant provision in the constituent instrument. In other words, the scope of immunity depends on the source of the immunity for the respective international organization.

Moreover, even though the Supreme Court has decided that the IOIA must be interpreted and applied consistent with the doctrine of restrictive sovereign

[14] *Ibid.*, para. 772.

[15] See United States, *International Finance Corporation Act*, 22 U.S.C para. 282 et seq. (1955).

[16] Supreme Court of the United States of America, *Jam v. Int'l Fin. Corp.*, cit., para. 776, Justice Breyer's Dissent.

immunity under the FSIA, it should not be the end of the analysis. Congress enacted the IOIA in 1945, ratified the IFC Articles in 1956, and enacted the FSIA in 1976. The FSIA has the treaty exception or exclusion under para. 1604 (Immunity of a foreign state from jurisdiction) of the FSIA: «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»[17]. The treaty exception applies if there is «conflict with the FSIA immunity provisions, whether toward more or less immunity»[18]. The treaty exception under the FSIA would or should lead to a determination of the scope of immunity of the international organization, such as the IFC, under the constituent instrument of that organization if the United States is a party to that treaty.

The Supreme Court did not decide that international organizations can now be sued for allegations of environmental damage and human rights violations associated with international development projects financed by them. The Supreme Court did not pronounce on the euphonious banal phrase that immunity is not impunity. Most important, it did not decide that the immunity of international organizations in the United States is contingent on the availability of accountability mechanisms.

7. Key Takeaways from the Decision

The decision has changed the legal landscape for some, but not all, international organizations in the United States. Although IFC was the respondent in the *Jam* case, the Supreme Court decision does not alter IFC's legal position regarding its immunity from legal process under its constituent instrument. IFC lost the *Jam* case but it did not lose its immunity because its immunity was never absolute and it cannot, therefore, lose what it never had.

Undoubtedly the decision will lead to increased litigation as lower courts struggle to apply the statutory framework of the FSIA to international organizations, considering the stated purpose of the FSIA:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign

[17] See 28 U.S.C. para. 1604; *Moore v. United Kingdom*, 384 F.3d 1079 (9th Cir. 2004) (applying the FSIA treaty exception to the NATO Status of Forces Agreement).

[18] *Ibid*., para. 1084 citing *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 109 S. Ct. 683 (1989).

> states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter[19].

Evidently, Congress did not intend that the FSIA will apply to international organizations. At any rate, Congress can always amend the IOIA to effectively overrule the Supreme Court decision, but such congressional action is highly unlikely in the prevailing political climate in the United States.

Territoriality is key under the FSIA. The decision may open the way for suits over allegations of far-flung environmental damage and human rights abuse but the nexus requirement for exceptions under the FSIA may prove or provide a rampart against a litigation explosion. It is, therefore, not clear what impact, if any, the decision will have on holding international organizations accountable through the national courts.

Even though the Supreme Court did not discuss the nature and purpose of the immunity of international organizations, compared to those of States, the decision is consistent with international law. The Supreme Court did not decide that national law trumps international law. In fact, it decided that treaty law is the primary source of the immunity of international organizations. Even though the decision is lacking in a comprehensive analysis of the relationship between national law and international law, it is nevertheless consistent with the *Charming Betsy* canon of statutory interpretation from the eponymous case of *Alexander Murray v. Schooner Charming Betsy*, in which the Supreme Court had implored courts to construe federal statutes, wherever possible, as not to violate international law[20]. In sum, the IOIA, through the FSIA, has no extraterritorial application that violates international law.

ABSTRACT. Unpacking the *Jam v. IFC* Decision

This contribution analyses the 27 February 2019 decision of the US Supreme Court in *Jam et al. v. International Finance Corporation* concerning jurisdictional immunities of international organisations under the International Organizations Immunities Act of 1945. After providing an overview on the US legal landscape prior to the decision, the author discusses the decision and its ramifications on the jurisdictional immunity of international organizations in the United States. He foresees increased litigation as courts struggle to apply the statutory framework of Foreign Sovereign Immunities Act and its jurisprudence to cases involving international organizations that derive their jurisdictional immunity in the United States from the International Organizations Immunities Act.

Keywords: immunities; international organizations; jurisdiction; US Supreme Court; International Finance Corporation; International Organizations Immunities Act.

[19] United States, *Foreign Sovereign Immunities Act*, 28 U.S.C para 1602, «Findings and declaration of purpose».

[20] Supreme Court of the United States of America, *Murray v. The Charming Betsey*, 4 U.S. 64 (1804), Decision of 1st January 1804.