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Jam Exposes International Orgs To New Litigation Risks

By **James Berger** (March 11, 2019, 2:36 PM EDT)

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On Feb. 27, 2019, the U.S. Supreme Court issued its decision in Jam v. International Finance Corp.,[1] a case in which it was asked to rule on the extent of sovereign immunity enjoyed by international organizations before U.S. courts. Jam resolved a split among the federal courts of appeals that had persisted for several years, and the high court's 7-1 ruling addressed a perceived incongruity in which international organizations enjoyed a more comprehensive form of immunity under U.S. law than did foreign states.

The court's ruling establishes that international organizations and foreign states now each enjoy the "restrictive" immunity that has applied to states since 1952, and which immunizes foreign states from suit for their government acts, but allows them to be sued, subject to certain additional protections, for their commercial and nongovernmental actions.

Background: Sovereign Immunity and the IOIA

Most practitioners are familiar with the concept of sovereign immunity, the ancient doctrine that protects governments from being haled before courts in connection with their actions. In the U.S., the federal government and the states each enjoy a set of immunities that effectively allow those governments to operate efficiently and without having every decision they make be scrutinized in litigation.

Foreign governments likewise enjoy limited immunity from suit before U.S. courts; this immunity, which is governed in the United States by the Foreign Sovereign Immunities Act, or FSIA,[2] is grounded in comity and the prevailing view worldwide that disputes involving foreign countries should be resolved primarily through diplomatic means, rather than through litigation.[3]

While the FSIA was only adopted in 1976, the U.S. had recognized a common law doctrine of foreign sovereign immunity since the first days of the republic, beginning with the Supreme Court's decision in The Schooner Exchange v. M'Faddon.[4]

The 20th century saw the creation of a multitude of international organizations, such as the United Nations, the International Monetary Fund, the World Bank and many others. While these organizations were created by governments to carry out important public functions, they were not organs of any state, and thus were not entitled to sovereign immunity under U.S. or customary international law.

Accordingly, Congress adopted the International Organizations Immunity Act, or IOIA, in 1945.[5] When the IOIA was adopted, it provided that international organizations enjoyed the "same immunity from suit" as "is enjoyed by foreign governments."[6]

As noted above, the immunity enjoyed by foreign governments before U.S. courts is governed by the FSIA, which codifies the doctrine of restrictive sovereign immunity. At the time the IOIA was enacted in 1945, however, the FSIA had not been adopted; sovereign immunity was a common law doctrine. Importantly, the doctrine provided for absolute immunity.

In practice, when a lawsuit was filed against a foreign state, the court would solicit the view of the U.S. Department of State; if the foreign state defendant was one with whom the United States maintained normal relations, the State Department would file a suggestion of immunity, and the court would dismiss the case on sovereign immunity grounds.[7]

In 1952, the State Department — in a document known as the "Tate Letter" — announced a change in its policy concerning sovereign immunity. Consistent with changing norms around the world, the Tate Letter embraced the doctrine of restrictive immunity, whereby governments would be immune for their government acts, but amenable to suit for their commercial actions and ordinary torts.[8]

Perceived inconsistency by the State Department in making immunity determinations led eventually to Congress's adoption of the FSIA in 1976, which codified the restrictive immunity doctrine.[9] Neither the Tate Letter nor the FSIA amended or otherwise addressed the IOIA, and a result, there was a lack of clarity concerning whether the "same immunity" conferred by the IOIA referred to the immunity enjoyed by foreign sovereigns at the time IOIA was enacted in 1945 (i.e., absolute immunity), or the restrictive immunity enshrined in the Tate Letter and, ultimately, in the FSIA.

The federal circuits split on the issue, with the District of Columbia Circuit, in Atkinson v. Inter-American Development Bank,[10] holding that the IOIA codified the immunity in effect in 1945 (absolute immunity), while the Third Circuit, in OSS Nokalva Inc. v. European Space Agency,[11] found the IOIA's immunity to be governed by current law (restrictive immunity).

Jam

Jam arose out of litigation brought in the U.S. District Court for the District of Columbia by residents of India against the International Financial Corporation, which had financed a power plant that the residents claimed had caused pollution. The IFC claimed absolute immunity from suit. The district court, applying Atkinson, dismissed the action, and the D.C. Circuit affirmed.[12]

The Supreme Court reversed. In an opinion by Chief Justice John Roberts, the Supreme Court acknowledged that, when Congress passed IOIA in 1945, foreign governments had "virtually absolute" immunity from lawsuits in U.S. courts. But the most natural way to read the IOIA, the court explained, is that it makes immunity for international organizations "continuously equivalent" with immunity for foreign governments.

Put more simply, the IOIA was designed to "tether" immunity for international organizations to foreign sovereign immunity. Applying canons of statutory construction, the court explained that, if 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." In this case, the court observed, the IOIA refers to the immunity "enjoyed by foreign governments," which "is an instruction to look up the applicable rules of foreign sovereign immunity, wherever those rules may be found."[13]

The court rejected as "inflated" the IFC's arguments that limiting its immunity to that embodied in the FSIA would "bring a flood of foreign-plaintiff litigation into U.S. courts," which could impact U.S. foreign relations, and that affording international organizations only limited immunity "would defeat the purpose of granting them immunity in the first place."

The court noted that the IOIA's immunity rules constitute only default rules, and that international organizations may, in the charter, "specify a different level of immunity"; the court noted as examples the charter-based immunity of the United Nations and the International Monetary Fund, each of which contain grants of immunity from "all forms of legal process."[14]

The court also discounted the IFC's concern about a flood of litigation in connection with its lending activities, noting that even under the FSIA, the waiver of immunity for commercial activities requires a nexus to the United States that would not likely be present in many or most cases.[15]

What Does It Mean?

Jam effects a sea change in the legal posture of international organizations before U.S. courts. While the majority opinion seeks to discount the significance of this change by noting the existence of charter-based immunity, and by stressing the difficulty of overcoming ever the restrictive immunity provided by the FSIA, the changes wrought by Jam will be tangible.

International organizations — particularly international development banks — are involved in large, expensive and controversial projects that can spur litigation, and they are likely to be viewed as attractive litigation targets. Before Jam, potential plaintiffs would recognize that such cases would have no chance of even getting past a pleading stage. After Jam, plaintiffs may see a different calculus.

The absolute immunity recognized by the Atkinson court prior to Jam was a complete bar not only to liability, but to jurisdiction: A case brought against a defendant who enjoys complete immunity would be dismissed almost immediately at the pleading stage, since there would generally not be any set of facts that the plaintiff could allege (with the potential exception of a waiver) to overcome it.

Restrictive immunity, on the other hand, is conditional and fact-driven, and a well-pleaded complaint can state facts sufficient on a prima facie basis to overcome it. This, of course, is a common feature of litigation under the FSIA, where a foreign government's invocation of sovereign immunity typically leads to contested motion practice, often replete with evidentiary proffers and expert testimony, concerning whether the immunity claim is satisfactory as a matter of fact and law.[16]

Under the FSIA's restrictive immunity regime, international organizations who are sued will be required to litigate threshold questions related to the existence of immunity, such as whether the activity underlying the lawsuit is "commercial" and whether that commercial activity has any nexus to the United States. Even if the international organization is successful in winning dismissal on immunity grounds, it will likely have had to engage in difficult litigation that would have been unnecessary under the absolute immunity regime.

Further, while the Supreme Court relied on the existence of charter-based immunities to protect certain international organizations from suit, Justice Stephen Breyer's dissent demonstrates that those immunities may not be so clear, and may themselves become the subject of contested litigation.

Specifically, Breyer notes that charter- and treaty-based immunities of the kind relied upon by the majority opinion may not be self-executing, and may require implementing legislation under U.S. treaty law.[17] Breyer noted further that previous Congresses had not found it necessary to enact implementing legislation for the charters and treaties providing immunity to international organizations because of a view that the IOIA sufficed in doing so.[18]

Finally, eliminating the immunity of international organizations may result in their becoming entangled in disputes between other parties. While cloaked with absolute immunity, international organizations were completely immune from judicial process; this immunity prevented not only plenary lawsuits brought against them, but also left them immune from attachment writs, subpoenas and other types of special proceedings that can arise in litigation involving their state clients.

Parties holding judgments against foreign states are likely to consider whether, in circumstances where FSIA immunity can be overcome, it will be beneficial to seek discovery from international organizations, or to seek to interfere with the process of disbursing loan proceeds to critical projects. While it is not immediately clear whether or under what circumstances the jurisdictional requirements for such actions would be capable of being satisfied, Jam's elimination of the categorical bar on litigation against international organizations unquestionably gives rise to the possibility that they will become embroiled in legal disputes between states and their foreign investors.

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[1] Jam v. Internationall Finance Corp., 586 U.S. ___, No. 17-1011 (Feb. 27, 2019).

[2] Pub. L. 94-583, 90 Stat. 2892 (1976), codified at 28 U.S.C. § 1602 et. seq.

[3] See, e.g., Verlinden BV v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983).

[4] The Schooner Exchange v. M'Faddon, 11 U.S. 116 (1812).

[5] P.L. 79-291, 59 Stat. 669 (1945).

[6] Id. § 288a(b). The IOIA defines an "international organization" as “a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided in this subchapter or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this subchapter.” 22 U.S.C. § 288.

[7] See, e.g., Kata v. Ishihara, 360 F.3d 106, 107 (2d Cir. 2003).

[8] See, e.g., Guevara v. Rep. of Peru, 468 F.3d 1289, 1296-97 (11th Cir. 2006) (quoting letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), as reprinted in 26 Dept. of State Bull. 984-85).

[9] See 28 U.S.C. § 1605(a) (listing exceptions to sovereign immunity).

[10] Atkinson v. Inter-American Development Bank, 156 F. 3d 1335 (D.C. Cir. 1998).

[11] OSS Nokalva Inc. v. European Space Agency, 617 F. 3d 756 (3d Cir. 2010).

[12] Jam v. Int'l Finance Corp., 172 F. Supp.3d 104, 108-09 (D.D.C. 2016), aff'd, 860 F.3d 703 (D.C. Cir. 2017).

[13] Jam, slip. op. at 11.

[14] The court noted that the IFC's charter does not contain a broad grant of immunity. Jam, slip op. at 14.

[15] Id. at 15.

[16] See, e.g., Kilburn v. Soc. People's Libyan Arab Jamahiraya, 376 F.3d 1123, 1132 (D.C. Cir. 2004) (noting the FSIA's jurisdictional burden shifting analysis).

[17] Jam, slip. op. at 8 (Breyer, J., dissenting).

[18] Id.