

US Supreme Court Construes Scope of Immunities in *Jam*

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Boris Bershteyn

Partner / New York
212.735.3834
boris.bershteyn@skadden.com

Maura Barry Grinalds

Partner / New York
212.735.7808
maurabarry.grinalds@skadden.com

Timothy G. Nelson

Partner / New York
212.735.2193
timothy.g.nelson@skadden.com

Colm P. McInerney

Associate / New York
212.735.2498
colm.mcinerney@skadden.com

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Four Times Square
New York, NY 10036
212.735.3000

In the global economy, companies increasingly interact with “international organizations,” or institutions created by treaty or other intergovernmental agreement. These include organizations that engage in economic and banking activity (such as the International Monetary Fund (IMF), the World Bank and the International Finance Corporation (IFC)), regional economic bodies (such as the Inter-American Development Bank and the Organization of American States) and bodies that provide services (like the World Health Organization and UNESCO).

In U.S. courts, international organizations enjoy extensive immunities from civil suit and other protections pursuant to the International Organizations Immunities Act (the IOIA or Act). On February 27, 2019, the U.S. Supreme Court issued its first major decision construing the scope of immunities afforded by the IOIA. The decision, *Jam v. International Finance Corp.* (U.S. Feb. 27, 2019), holds that the IOIA did not confer upon international organizations any greater immunity than that available to foreign governments under the doctrine of foreign sovereign immunity, as now codified in the Foreign Sovereign Immunities Act (FSIA). The Court’s decision may significantly narrow the degree of immunity previously understood to be available to international organizations in U.S. courts.

Background

Enacted in 1945, the IOIA provides that “international organizations” designated by the U.S. president (or the statute itself) “*shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.*”¹ “The IOIA [also] authorizes the President to withhold, withdraw, condition, or limit the privileges and immunities it grants in light of the functions performed by any given international organization.”²

When the IOIA was enacted, U.S. courts tended to defer to the U.S. Department of State on questions of immunity. As a consequence of that approach, governments were granted “virtually absolute” immunity as a matter of grace and comity.³ In 1952, however, the State Department adopted a new “restrictive” theory of foreign sovereign immunity, whereby foreign governments were entitled to immunity only with respect to their sovereign acts and not with respect to “a foreign state’s strictly commercial acts.”⁴ This approach was later codified in the FSIA, which was enacted in 1976. Under the FSIA, foreign governments are presumptively immune from suit but may be subject to suit under various statutory exceptions — notably, suits in connection with a foreign sovereign’s commercial activity that has a sufficient nexus with the United States.⁵

¹ 22 U.S.C. § 288a(b) (emphasis added).

² *Jam v. International Finance Corp.*, No. 17-1011, 2019 WL 938524, at *3 (Feb. 27, 2019), citing 22 U.S.C. § 288.

³ See *Jam v. International Finance Corp.*, 2019 WL 938524, at *3.

⁴ See *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998), citing letter from Acting Legal Advisor, Dep’t of State Jack B. Tate to Attorney General Philip B. Perlman; *Jam v. International Finance Corp.*, 2019 WL 938524, at *3.

⁵ See 28 U.S.C. §§ 1604, 1605(a)(2).

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Case Law on International Organizations Prior to Supreme Court Decision

As the “restrictive” theory of foreign sovereign immunity gained acceptance, a debate emerged over whether international organizations’ immunity under the IOIA should also be “restrictive,” or whether it should be “absolute,” in that it would bar all lawsuits except in the case of an explicit or implied waiver of immunity (consistent with the philosophy at the time the statute was enacted). In 1980, the U.S. Court of Appeals for the District of Columbia Circuit, in *Broadbent v. Organization of American States*, 628 F.2d 27 (D.C. Cir. 1980), noted this issue but did not definitively adjudicate it.

In 1998, a three-judge panel of the D.C. Circuit ruled unequivocally in *Atkinson v. Inter-American Dev. Bank* that IOIA immunity was absolute and not subject to the FSIA exceptions.⁶ In reaching this conclusion, the D.C. Circuit noted that the IOIA was enacted at a time when sovereign immunity was considered absolute and granted the president the power to reduce the extent of IOIA statutory immunity by presidential order (a power that had not been exercised).⁷

By contrast, in its 2010 decision in *OSS Nokalva, Inc. v. European Space Agency*, the U.S. Court of Appeals for the Third Circuit adopted a significantly narrower interpretation of IOIA immunity.⁸ The Third Circuit expressly declined to follow *Atkinson* and instead held that the IOIA was a “reference statute” by which “Congress was legislating in shorthand, referring to another body of law — the law governing foreign organizations — to define the scope of the new immunity for international organizations.”⁹ Accordingly, the immunity of international organizations was “link[ed]” to that of foreign governments, and thus if U.S. law narrowed the extent of immunity available to a foreign government (as occurred through the FSIA), then immunity under the IOIA would likewise be narrowed.¹⁰

The Underlying Dispute in *Jam*

The dispute in *Jam* arose out of a loan by the IFC for the development of a power plant in India.¹¹ In 2008, the IFC loaned \$450

million to Coastal Gujarat Power Limited (Coastal Gujarat), a company located in India, to assist with financing the construction of a coal-fired power plant in the state of Gujarat. Pursuant to the loan agreement, the IFC could revoke financial support if Coastal Gujarat did not comply with an environmental and social action plan designed to protect areas around the plant from damage.¹²

The IFC’s subsequent audit report concluded that Coastal Gujarat did not comply with the plan and criticized the IFC for inadequately supervising the project.¹³ In 2015, a group of farmers and fishermen who lived near the plant, together with a local village, sued the IFC in the U.S. District Court for the District of Columbia. They claimed that pollution from the plant had contaminated or destroyed much of the surrounding area and, relying on the IFC’s audit report, asserted several causes of action against the IFC including negligence, nuisance and breach of contract. In response, the IFC moved to dismiss for lack of subject matter jurisdiction, asserting that it was absolutely immune from suit under the IOIA.¹⁴

The district court, applying the D.C. Circuit’s decision in *Atkinson*, granted the IFC’s motion to dismiss because the IFC enjoyed “virtually absolute” immunity from suit. The D.C. Circuit, also following *Atkinson*, affirmed, although one member of the panel noted (in a concurring opinion) that she would have decided the question differently, were she not bound by existing D.C. Circuit precedent.¹⁵

Supreme Court Decision Establishes ‘Restrictive’ Immunity for International Organizations

The Supreme Court granted *certiorari* and on February 27, 2019, reversed and remanded the D.C. Circuit’s decision, holding that the IOIA grants international organizations such as the IFC the “same immunity” from suit that foreign governments enjoy today under the FSIA.

Writing for the Court, Chief Justice John G. Roberts, Jr. found that, by granting international organizations the “same immunity” from suit “as is enjoyed by foreign governments,” the IOIA “seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing

⁶ *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998).

⁷ *See id.* at 1341.

⁸ *See OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010).

⁹ *Id.* at 761-62, quoting *Atkinson*, 156 F.3d at 1340.

¹⁰ *See id.* at 762-63.

¹¹ The IFC is an international development bank headquartered in Washington, D.C., and a designated international organization under the IOIA. It “is charged with furthering economic development ‘by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas, thus supplementing the activities of’ the World Bank.” *Jam v. International Finance Corp.*, 2019 WL 938524, at *4, quoting Articles of Agreement of the International Finance Corporation, Art. I, Dec. 5, 1955, 7 U.S.T. 2193, T. I. A. S. No. 3620.

¹² *See id.*

¹³ *See id.* In its brief before the Supreme Court, the IFC stated that “Petitioners, a group of Indian nationals, filed a complaint with IFC’s Compliance Advisor Ombudsman (CAO), alleging that the power plant had caused environmental harms” and that “[t]he CAO issued findings and suggestions addressing how IFC might better ensure compliance with its self-imposed internal standards.” Brief for Respondent at 11, *Jam v. International Finance Corp.*, 2019 WL 938524 (Feb. 27, 2019) (No. 17-1011).

¹⁴ *See Jam v. International Finance Corp.*, 2019 WL 938524, at *4.

¹⁵ *See id.* at *5.

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parity between the two.”¹⁶ Were this otherwise, the statute “could ... have simply stated that international organizations ‘shall enjoy absolute immunity from suit,’ or specified some other fixed level of immunity.”¹⁷ The Court drew support for this view “in other statutes that use similar or identical language to place two groups on equal footing,” for example civil rights legislation guaranteeing equality of treatment between certain groups of persons, with the standard of equality understood to be “continuous” in nature “with respect to the rights in question.”¹⁸

The Court added 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.”¹⁹ Thus, the IOIA’s “reference to an external body of potentially evolving law — the law of foreign sovereign immunity,” was a “general” rather than “specific” reference to “a specific provision of another statute,” and “[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.”²⁰

The Court also rejected claims that a high standard of immunity was necessary to achieve a distinct goal from foreign sovereign immunity applicable to international organizations, namely, to “allow [international] organizations to freely pursue the collective goals of member countries without undue interference from the courts of any one member country.”²¹ The Court reasoned that this argument “gets the inquiry backward” and a court ordinarily assumes that “the legislative purpose is expressed by the ordinary meaning of the words used.”²² Here, the language was intended “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.”²³ The Court also rejected the argument that providing less than absolute immunity under the IOIA would have undesirable policy consequences (for example, that the threat of money damages would jeopardize the work of international development banks),²⁴ observing that this could be addressed on a case-by-case basis.²⁵ The Court also noted that its holding might not be as broad as the IFC’s counsel had suggested in argument, since “the privileges and immunities accorded by

the IOIA are only default rules” and the founding agreement establishing an organization can “always specify a different level of immunity.”²⁶

The Court added that restrictive immunity would not necessarily expose international development banks to suit because it was not clear “that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA.”²⁷ That would require a showing that this form of lending is “the *type*’ of activity ‘by which a private party engages in’ trade or commerce.”²⁸ And even if the activity did qualify as commercial, the FSIA’s other requirements had to be met, including that the commercial activity have a sufficient nexus to the United States and the lawsuit be “based upon” either the commercial activity itself or acts performed in connection with the commercial activity.²⁹

The Court further noted that, during oral argument in the case, the solicitor general had suggested 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” and “it has ‘serious doubts’ whether petitioners’ suit, which largely concerns allegedly tortious conduct in India, would satisfy the ‘based upon’ requirement [of the FSIA].”³⁰

Justice Breyer’s Dissent

In a lengthy dissent, Justice Stephen G. Breyer argued that the IOIA granted international organizations the same immunity that foreign sovereigns enjoyed when the statute was enacted in 1945. In reaching his conclusion, he remarked that he had “rest[ed] more heavily than does the majority upon the statute’s history, its context, its purposes, and its consequences.”³¹

Examining the history of the international organizations that the United States joined during and after World War II, such as the UN and the IMF, Justice Breyer concluded that “[t]his history makes clear that Congress enacted the [IOIA] as part of an effort to encourage international organizations to locate their headquarters and carry on their missions in the United States,” and “Congress intended to enact ‘basic legislation’ that would fulfil its broad immunity-based commitments” to what were then

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*, citing 42 U.S.C. §§ 1981(a), 1982; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427-30, 88 S. Ct. 2186, 20 L.Ed.2d 1189 (1968).

¹⁹ *Id.* at *6.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*, quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S. Ct. 1534, 71 L.Ed.2d 748 (1982) (alterations omitted).

²³ *Id.* at *5.

²⁴ *Id.* at *8.

²⁵ *Id.* at *9.

²⁶ *Id.* at *8. The Court cited, among other things, the 1946 Convention on the Privileges and Immunities of the United Nations, 13 Feb 1946, 21 UST 1418. Article II (2) of that convention confers on the U.N. “immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.”

²⁷ *Id.* at *9.

²⁸ *Id.*, quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L.Ed.2d 394 (1992).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

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“nascent” international organizations.³² Further, the fact that Congress granted such broad immunity to these organizations under the IOIA in the first place “strongly suggests that Congress would not have wanted the statute to reduce significantly the scope of immunity that international organizations enjoyed.”³³

Justice Breyer also considered “the consequences” of the majority’s interpretation of the IOIA.³⁴ He remarked that because the “commercial activity” exception under the FSIA was broad, “today’s holding will at the very least create uncertainty for organizations involved in finance, such as the World Bank, the Inter-American Development Bank, and the Multilateral Investment Guarantee Agency.”³⁵ Further, he posited that the application of restrictive immunity to international organizations would “‘open[] the door to divided decisions of the courts of different member states,’ including U.S. courts, ‘passing judgment on the rules, regulations, and decisions of the international bodies,’” thus “interfer[ing] with an international organization’s public interest tasks.”³⁶

* * *

Jam represents a significant development in IOIA jurisprudence, by clarifying that international organizations possess the same level of restrictive immunity under that Act as foreign sovereigns have under the FSIA. It also has potentially profound consequences for international organizations that operate in the United States or engage in activities that affect U.S. citizens, as well as companies and individuals that transact business with them.

From the perspective of international organizations themselves (particularly development banks), the potentially increased exposure to U.S. lawsuits may warrant a review of how they operate in matters with a nexus to the United States. From the perspective of companies and individuals transacting business with international organizations, *Jam* may make it easier to bring U.S. lawsuits relating to such transactions. But *Jam* may also enable third parties (as in *Jam* itself) to bring litigation challenging business transactions, which might expose those transactions to risk and uncertainty.

There remain some important issues regarding the IOIA that *Jam* did not address. Although *Jam* addresses immunity of international organizations from suit in the United States, its effect on other immunities (such as immunity from attachment of assets) remains fully to be determined. The FSIA protects sovereigns against attachment of assets in the United States, with various specified exceptions.³⁷

Jam also does not address the question of whether, and to what extent, an individual officer or employee of an international organization might have immunity. Case law decided to date under the IOIA has indicated that the immunity of such individuals is confined to acts done in exercising their official functions (functional immunity) — meaning that their immunity is less than that afforded to accredited diplomats.³⁸ It remains to be seen whether *Jam* will affect the trajectory of this doctrine.

³² *Id.* at *14.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* Justice Breyer noted that the same concern would not apply to the U.N. because Congress had ratified a comprehensive immunity provision for the U.N. in 1970. See *id.* at *13, citing Convention on the Privileges and Immunities of the United Nations, Art. II, § 2, Feb. 13, 1946, 21 U.S.T. 1422, T. I. A. S. No. 6900 (entered into force Apr. 29, 1970); see also App. to S. Exec. Rep. No. 9117, p. 14 (1970).

³⁶ *Id.* at *15, quoting *Broadbent v. Organization of Am. States*, 628 F.2d 27, 35 (D.C. Cir. 1980).

³⁷ See 28 U.S.C. §§ 1609-11.

³⁸ See *Diallo v. Strauss-Kahn*, No. 307065/11, slip op. at 7-8 (N.Y. Sup. Ct., Bronx County, May 1, 2012) (declining to construe the IOIA as conferring “absolute” immunity from civil suit on former head of IMF).