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Forget International Law Not: IFC Loses Absolute Immunity in Jam v International Finance Corporation

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Abstract

In J*am v International Finance Corporation* (Jam case), the United States (US) Supreme Court (Supreme Court) applied a dynamic approach in interpreting the International Organizations Immunities Act (IOIA) and found that immunity of international organizations (IOs) and foreign sovereign immunity shall be continuously equivalent. Jam case interpreted US domestic law in depth but did not carry out detailed analysis of IO immunity under international law. This case note discusses sources of IO immunity under international law, which can serve as a basis for arguments in future litigations involving IOs, and observes that Jam case does not necessarily increase the litigation risks of all IOs.

Keywords

International Organization, International Finance Corporation, Judicial Immunity, Functional Immunity, Customary International Law

1. Introduction: Victory at Last or Temporary Truce?

The Jam case is determined according to the IOIA and the Foreign Sovereign Immunities Act (FSIA). Under IOIA, IOs enjoy the "same immunity from suit…as is enjoyed by foreign governments" (*Jam v International Finance Corp*, 2019). The Supreme Court, which is the highest tribunal in the US for all cases and controversies arising under the constitution or the laws of the US, interpreted this provision dynamically and decided that the "same as" formulation is best understood as making IO immunity and foreign sovereign immunity continuously equivalent. In this way, it reverses well-established circuit level precedents, which hold that the executive branch of the US has the power to withdraw

immunity of IOs where immunity is not warranted (*Jam v International Finance Corp*, 2019).

On 14 February 2020, after the Supreme Court remanded Jam case for further proceeding, the District Court ruled that the plaintiffs' lawsuit does not fall within the commercial activity exception under the FSIA because the core of the suit is not carried on or performed in the US (*Jam v International Finance Corp*, 2020). In late 2020, the plaintiffs appealed from US district court's decision to the US Court of Appeals for the DC Circuit. In July 2021, the D.C. Circuit panel issued a decision affirming the district court's dismissal of the case. In January 2022, the plaintiffs filed a petition asking the US Supreme Court to consider the case again and overturn the DC Circuit's holding. Such a petition was turned down by the US Supreme Court on 25 April 2022 (*Jam v International Finance Corp*, 2022).

Specifically, according to FSIA's commercial activity exception, immunity of IOs will be withheld when 1) "a commercial activity carried on in the United States" by an international organization; or 2) "an act performed in the United States in connection with a commercial activity" of the international organization "elsewhere" (*Jam v International Finance Corp*, 2020). The District Court pointed out that to determine whether the exception applies, it must first consider whether the action is "based upon" activity "carried on" or "performed" in the US, and then assess the commercial nature of that activity (28 USC section 1605(a)(2)). The District Court started and ended its analysis with the first question, i.e. the action at issue is not performed in the US. The District Court first decided that the "gravamen" or "core" of the suit was IFC's failure to ensure that the plant at issue complied with environmental and social sustainability standards in the loan agreement (*Jam v International Finance Corp*, 2020). The District Court then ruled that the "gravamen" of this case is not in the US, as the signing of mandate letter, initial site visits, negotiation and signing of the loan agreement, etc. are all carried out in India (*Jam v International Finance Corp*, 2020).

Looking back to the Supreme Court decision, it cannot be neglected that IFC no longer enjoys absolute judicial immunity under US domestic law (*Jam v International Finance Corp*, 2019). Nevertheless, does it necessarily mean that IOs like IFC are now exposed to greater risk of being sued in US domestic courts? In response to this shift, the sections below will 1) summarize how IO immunity has been treated in US domestic courts, especially in Second and DC Circuits; and 2) analyze Supreme Court's ruling in Jam case and its possible implications on lower US domestic courts; 3) examine the various sources of immunity of IOs under international law and possible arguments of IOs in future litigations.

2. Immunity of IO Immunity in US Domestic Courts

2.1. IO Immunity in Second and DC Circuits of the US

Generally speaking, the supremacy clause of the US Constitution provides that

"all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land". Self-executing treaties have a status equal to federal statue, superior to US state law, and inferior to the US Constitution (Garcia, 2011).

In US domestic case-law, different courts use different sources of law in deciding cases involving international organizations. Some courts tend to rely on special multilateral treaties and others tend to rely on the IOIA (Reinisch, 2013). The US Court of Appeals for the Second Circuit and the DC Circuit are of particular relevance to IOs and will be discussed below.

The Second Circuit, where the UN is headquartered, tends to deal with IO related litigations pursuant to international law, e.g. the UN Convention on Privileges and Immunities. For instance, in one of the landmark cases, *Brzak v United Nations*, the Second Circuit ruled that Section 2 of the UN Convention on Privileges and Immunities is self-executing and thus the UN is entitled to "absolute immunity" (*Brzak v United Nations*, 2010). Although the plaintiff in the Brzak case contended that the IOIA only affords international organizations "the same immunity…as is enjoyed by foreign governments", which had been vastly curtailed following the adoption of the FSIA (*Brzak v United Nations*, 2010), the Second Circuit declined to resolve this issue as whatever the scope of immunities granted by the IOIA, the UN Convention on Privileges and Immunities clearly granted that organization "absolute immunity without exception" (*Brzak v United Nations*, 2010).

The DC Circuit, on the contrary, focuses largely on IOIA when determining cases in relation to IOs, because the relevant IOs based in the District of Columbia either do not benefit from special bilateral or multilateral agreements on privileges and immunities, or did not benefit from such agreements for several decades following their establishment (Reinisch, 2013). *Atkinson v Inter-American Development Bank* (IADB) ruled by DC Circuit is particularly relevant to Jam case as it delivered a definitive opinion on whether the FSIA curtailed the availability of immunity for international organizations under the IOIA (*Atkinson v Inter-American Development Bank*, 1998). In Atkinson, the DC Circuit placed great emphasis on the fact that Congress conferred on the President the "authority to modify, condition, limit, and even revoke the otherwise absolute immunity of a designated organization" as required by "changing circumstances" (*Atkinson v Inter-American Development Bank*, 1998), which is a "built-in mechanism" for updating the IOIA. Thus, the DC Circuit rejected the view that the IOIA automatically shifted to reflect changes in the law governing foreign sovereign immunity (*Atkinson v Inter-American Development Bank*, 1998). The Jam case overturned the longstanding jurisprudence of Atkinson of DC Circuit.

2.2. IO Immunity in Jam Case

As mentioned above, the Supreme Court overturned Atkinson case with a very textualist approach (Rossi, 2019). According to IOIA, IOs have the same im-

munity from suit in US courts as foreign states enjoy. The immunity of foreign states is regulated under FSIA. When the IOIA was enacted in 1945, the US government favored absolute immunity (Yang, 2012). Such attitude changed in the 1950s and restrictive immunity for foreign states was later codified in FSIA (*Jam v International Finance Corp*, 2019). The statutory language under IOIA and change of attitude presented the Supreme Court with a choice between static and dynamic interpretations. The majority chose to adopt the dynamic interpretation, i.e. finding that the IOIA should be interpreted as affording IOs the same immunity that foreign states enjoy at the time "a suit is filed" (*Jam v International Finance Corp*, 2019). For one thing, the Supreme Court found that the language of IOIA "naturally" led itself to the dynamic reading (*Jam v International Finance Corp*, 2019). When granting IOs the "same immunity" from suit "as is enjoyed by foreign governments", the IOIA continuously links the immunity of IOs to that of foreign governments, so as to ensure ongoing parity between the two (*Jam v International Finance Corp*, 2019). Despite IFC's arguments on legislative intention of the IOIA, the Supreme Court did not consider the intention of the IOIA because the "immediate purpose of the immunity provision is expressed in language" (*Jam v International Finance Corp*, 2019). This interpretation is supported further by the "reference canon" of statutory interpretation, meaning 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" (*Jam v International Finance Corp*, 2019).

Nevertheless, as noted by Justice Breyer in his dissenting opinion, he was of the opinion that linguistics of the IOIA does not answer the temporal question, i.e. "without knowing the point in time at which the law speaks, it is impossible to tell what is past and what is present or future" (*Carr v United States*, 2010). He also casted doubt on the "reference canon" proposed by the majority opinion. Considering the opinion of Justice Breyer, one can conclude that the dynamic approach used by the majority opinion is subject to further debate. It is ambiguous under IOIA whether IFC shall enjoy absolute immunity.

Although the Supreme Court's legal logic when applying the "same as" formula in the context of domestic law does not appear to be clearly flawed, the international law aspects of Jam case were not discussed in depth, which leaves room for IOs to argue for their immunity under international law in the future (Restatement (Third) of Foreign Relations, 1987). For litigations involving IOs in the future, what are the possible arguments in support of IO immunity under international law? The following section will probe into the various international legal sources of IO immunity and assess the post-Jam case litigation risks for IOs.

3. Legal Sources of IO Immunity and Possible Arguments in Future Litigations on Immunity

In future domestic litigations in the US, IOs may tap into the following sources and argue for their immunity, i.e. treaty, functional immunity and customary

international law.

3.1. Treaties

On the international level, the immunities of IO can be found in three categories of treaties: 1) constitutive instruments; 2) other multilateral conventions, such as Convention on the Privileges and Immunities of the United Nations; and 3) bilateral agreements between a state and an individual IO, including headquarters agreements and host agreements (Rossi, 2019). There may be overlap between the three categories above and their relationship is usually governed by the principal of lex specialis, that is, priority is given to bilateral treaties while multilateral conventions play a residual and complementing role (Burci & Granziera, 2013).

On the US domestic level, when there is a case involving both domestic and international laws, the court will need to determine the relationship between these two legal regimes first. In addition to the generally rules discussed in section 2.1 (supremacy clause), Jam case specifically analyzed the issue of how the restrictive immunity granted by the IOIA interacts with international treaty obligations (Rossi, 2019), i.e. the privileges and immunities accorded by the IOIA are only default rules. […] [T]he organization's charter can always specify a different level of immunities (*Jam v International Finance Corp*, 2019). In other words, IOIA is a minimum threshold and only applies when the applicable treaties provide for an immunity that is less favorable than restrictive immunity. Thus, if an IO's constitutive instruments or bilateral agreement with the state provide a stronger immunity, immunity of such IO will not be affected by the ruling of Jam case. Examples of those IOs include UN and International Monetary Fund (IMF).

Moreover, for IOs with constitutive instruments similar to IFC Articles of Agreement (AoA), there may also be room for arguments in future US domestic cases. One may contend that IFC AoA also provides for judicial immunity, which is more favorable than the restrictive immunity under IOIA.

Admittedly, as noted by the Supreme Court, language in the IFC AoA on judicial immunity differs from that in Convention on Privileges and Immunities of the UN and Articles of Agreement of the IMF, which provides that they "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity". The judicial immunity under IFC AoA actually should be given the same effect as that provided under the fundamental documents of the UN and the IMF:

The first half of Article VI Section 3 of the IFC AoA seems to endorse judicial process against IFC, which is why it has previously been described as "presumption of absence of immunity" (Amerasinghe, 2005) and "indirect immunity clauses" (Reinisch & Wurm, 2010). However, the second half of this article provides for limitations to the so-called "presumption of absence of immunity", that is, IFC does not waive its immunity for 1) suits brought by or on behalf of

member states, and 2) pre-judgment attachments. The Jam case falls squarely into the first category. In other words, domestic courts of member states cannot hear cases filed by persons acting for or deriving claims from member states of IFC. Given that the Jam case derives from India, a member state of IFC, no action shall be brought against IFC according to the IFC AoA.

This position could also be supported by the travaux preparatoires of the IFC AoA, which suggests that the drafters only wanted to restrict immunity to suits that are unrelated to the organizations' lending activities. As IFC is established to "deal with private companies and persons", the drafters did not want immunities to prevent purchasers from buying the World Bank's securities (Reinisch & Bachmayer, 2016). Conversely, the drafters actually intended to cover lending activities under the judicial immunity, thus precluding the establishment of jurisdiction in the Jam case. The US executive branch has similarly interpreted the identical language contained in the IBRD's charter. As noted above, IFC's charter was modeled on IBRD's charter, the executive's understanding of the IBRD's Articles of Agreement is highly relevant when interpreting IFC AoA. Specifically, from the executive branch's understanding, Article VII (3) was intended as a limited waiver of immunity specifically to permit suits by private lenders against the Bank in connection with the Bank's issuance of securities (Owen, 1980). Moreover, the waiver "was not designed (and should not now be construed) to subject the Bank to the full range of our domestic jurisdiction International Bank" (Owen, 1980). In light of the above, Article VI Section 3 can be construed to support IFC's judicial immunity by looking at the text and travaux preparatoires of IFC AoA. In the future, it is possible for IOs with constitutive instruments similar to IFC AoA to make arguments based on the above two basis.

In conclusion, while the Supreme Court did not support IFC's arguments on its immunity, the ruling of Jam case will not affect IOs whose constitutive instruments clearly provide for more favorable immunity treatment than IOIA. IOIA is a minimum threshold and only applies when the applicable treaties provide for an immunity that is less favorable than restrictive immunity.

3.2. Functional Immunity

Another argument in support of IOs' immunity is functional immunity. It is widely recognized that IO immunities have a functional rationale, in the sense that they are granted in order to allow IOs to perform their functions (UN Doc. A/44/10, 1989). In Jam case, IFC's arguments relied heavily on broad understandings of the concept of functional immunity (Rossi, 2019). It contends that i) absolute immunity is required by IOs to freely pursue the collective goals of member countries without undue interference from the courts of any one member country; and ii) depriving absolute immunity from IOs will expose IOs to money damages, which would in turn make it more difficult and expensive for them to fulfill their mission (*Jam v International Finance Corp*, 2019).

1) The scope and degree of functional immunity

To understand the scope and degree of functional immunity, it is useful to compare the immunities of states and IOs. The major distinction is that states possess all the rights and responsibilities under international law, whereas IOs possess only those that are granted to them by their constituent treaty (Okeke, 2018).

Foremost, state immunity is based primarily on the principle of sovereign equality, whereas the immunity of international organizations is based on functional necessity. IOs exist and operate for the benefit of all their member states while states are political entities pursuing their own self-interest (Okeke, 2018). Reviewing the fundamental documents of most IOs, it can be seen that legal personality and power capacity of IOs are closely related to functions that can be performed by those organizations (*Mendaro v World Bank*, 1983). The functions of an IO would be limited if the immunities necessary for the performance of its functions were limited. The greater the likelihood that immunity will be constraint, the greater the impact on the performance of functions by IOs. Thus, as highlighted by Canadian Supreme Court, state immunities and immunities granted to IOs shall be treated differently (*Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013).

Further, the principles of reciprocity and comity enable states to counter acts of other states while IOs are not capable of doing so: i) states are considerably protected from undue intrusion of other states by their ability to retaliate and invoke the principle of reciprocity; IOs, not standing on a parity with states, cannot depend on reciprocity, nor are they in a position to retaliate against any violation of their integrity. For instance, when State A changes the immunity granted to State B from absolute immunity to qualified immunity, State B is capable of changing its attitude towards State A likewise. IOs are not in the position to take similar action; ii) on the basis of agreements or principles of comity embodied in international law, states can grant to or withhold immunity from each other, while IOs are not in a position to grant to or withhold immunity from states; and iii) thus, a state can choose the degree of immunity enjoyed by itself. The degree of immunity for IO, however, can only be determined by assessing its function and mission. This position is also supported by the amicus curiae brief of the UN in *Broadbent v. Organization of American States* (UN Doc. ST. LEG. SER.C.18, 1983). Justice Breyer's dissenting opinion in Jam Case also supports the above rationale. He notes that the majority's reading of the IOIA will likely produce consequences that run counter the statute's objectives and overall scheme, that is, weeding out lawsuits that interfere with an IO's public interest tasks (*Jam v International Finance Corp*, 2019).

2) Functional immunity in Jam case

In Jam Case, the Supreme Court grants the same judicial immunity to IOs and states pursuant to the IOIA by applying the "same as" formation. The use of "reference canon" and dynamic interpretation ensures that immunities granted to these two parties could evolve together (*Jam v International Finance Corp*, 2019). Admittedly, when IOIA was enacted, the U.S. Congress granted the same

level of immunity to both foreign states and IOs (*Jam v International Finance Corp*, 2019). This does not necessarily lead to a backward reasoning that immunities of foreign states and IOs are of the same nature. Such approach overlooks the fact that foreign states and IOs are in essence not the same species (see analysis above). They shall not be treated equally anyway—the change in foreign states immunity does not entail a corresponding change in IO immunity. As discussed above, when the immunity of a state changes in another state's jurisdiction, the adversely affected state can retaliate with multiple ways. It is impossible for IOs to rely on the principal of reciprocity and carry out such retaliation. Even if domestic legislators, when drafting the law, grant same level of immunities to states and IOs with the "same as" formula, it does not necessarily mean that they contemplate the subsequent changes to state immunity applies to IOs as well (*Jam v International Finance Corp*, 2020). For instance, at the beginning of a match, runners' feet and the starting line are at the same place, while during the match the runner moves ahead but the starting line remains where it used to be. As discussed above, treaties establishing the IOs reflect the collective interests of member states while a state represents the interest of its own. A runner can move his feet forward or backward at will but the location of the starting line represents the consensus of all participants.

In conclusion, since states and IOs are different, it is not reasonable to grant same level of immunities to states and IOs with the "same as" formula. Rather, level of IO immunities shall be determined based on their functions. After the Jam case, when immunity of IOs is challenged, IOs can differentiate the immunities of states and IOs, and thus argue for a more favorable immunity treatment.

3.3. Customary International Law

Another alternative argument for IOs to defend their immunity is customary international law. There are impressive number of treaties providing for the privileges and immunities of IOs, with remarkable similarities in their contents (Evans, 2014). The existence of many widely accepted and similar agreements is evidence of or even establishes a rule of immunity under customary international law (Wood, 2014). Treaties may be a reflective of pre-existing rules of customary international law; generate new rules and serve as evidence of their existence; or, through their negotiation processes, have a crystallizing effect for emerging rules of customary international law (UN Doc. A/CN.4/663, 2013). Following this rationale, some scholars contend that UN enjoys immunity under customary international law (Sands & Klein, 2009). In Jam case, the Supreme Court made no mention of customary international law on IO immunity. There is possibility for specialized agencies of UN, such as IFC, to argue for their immunity on this basis. Meanwhile, if countries consistently follow their treaties obligations and accord immunity to IOs, such general practice can contribute to the formation of customary international law for IO immunity in the long run. Also, courts of several nationalities have traditionally recognized this immunity'

of international organizations from employment claims, and the DC Circuit confirmed in *Mendaro v World Bank* that "it is now an accepted doctrine of customary international law" (*International Institute of Agriculture v Profili*, 1931; *Chemidlin v International Bureau of Weights & Measures*, 1945; *Dame Adrien & Others*, 1931).

Nevertheless, it shall be admitted that apart from treaties, there does not appear to be a great deal of practice or opinio juris on the immunity of IOs. As noted by International Law Association in its 2000 London Principles, there is no presumption that a succession of similar treaty provisions gives rise to a new customary rule with the same content. While one may argue that there is customary international law on IO immunity for UN, it is hard to justify the existence of customary international law for regional organizations, and those composed of a few or only two states (Wood, 2014). The argument on customary international law is more likely to succeed for IOs with global reach similar to UN. Admittedly, customary international law for IO immunity is controversial. More practice and opinio juris of countries are required to crystalize its existence.

4. Conclusion

In Jam case, the Supreme Court granted the same judicial immunity to IOs and states pursuant to the IOIA by applying the "same as" formation. The use of "reference canon" and dynamic interpretation ensures that immunities granted to these two parties could evolve together (*Jam v International Finance Corp*, 2019). Admittedly, when IOIA was enacted, the US Congress granted the same level of immunity to both foreign states and IOs (*Jam v International Finance Corp*, 2019). This does not necessarily lead to a backward reasoning that immunities of foreign states and IOs are of the same nature. The change in foreign states immunity does not entail a corresponding change in IO immunity. Since Jam case is determined primarily on domestic law and the Supreme Court compared the level of immunity under IFC AoA with the IOIA, it does not necessarily lead to the increased litigation risks for IOs because they can still argue for their immunity under international law.

In post-Jam case era, if immunity of IOs is challenged, there are at least three arguments in support of IO immunity, namely, the more favorable immunity treatment as provided in the constitutive instruments or bilateral agreements with the state, functional immunity and customary international law. Also, it shall be noted that granting immunities to IO does not mean that they can escape from liabilities for their wrongdoings (Harpignies, 1971). Victims of IOs' wrongdoings can still seek remedy by legal, political and fiscal means (Bradlow, 2005). For instance, IOs can waive immunity by themselves or enhance their internal supervisory departments. Multilateral dispute resolution mechanism can also be used to discipline IOs. This case note discusses the sources of IO immunity under international law with the aim to enable IOs to better perform their functions and achieve missions. Supreme Court ruled Jam case primarily ac-

cording to US domestic law, leaving room for debate on IO immunity under international law.

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The authors declare no conflicts of interest regarding the publication of this paper.

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