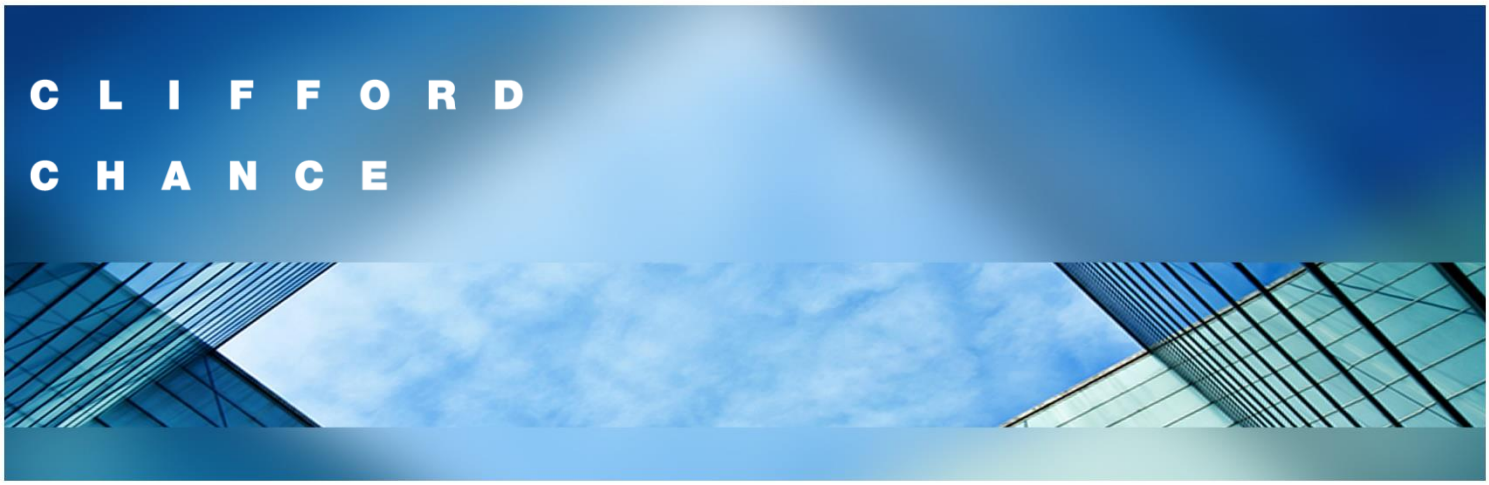

SUPREME COURT HEARS ORAL ARGUMENT IN CASE CHALLENGING INTERNATIONAL ORGANIZATIONS' IMMUNITY FROM SUIT

The U.S. Supreme Court heard oral argument on October 31, 2018 in *Budha Ismail Jam v. International Finance Corporation* (No. 17-1011), which addresses the scope of international organizations' immunity from suit. The issue in *Jam* is whether international organizations enjoy virtually absolute immunity from civil suit in the United States, or whether they should have the same restrictive immunity as foreign sovereigns enjoy under the Foreign Sovereign Immunities Act ("FSIA"). Under the FSIA, notwithstanding their general immunity from suit, foreign sovereigns can be sued for conduct constituting "commercial activity." Allowing suit against international organizations, especially those involved in economic development activities, could dramatically increase those organizations' litigation and liability risk in the United States.

Jam marks the first time the Supreme Court has addressed this issue, and it poses significant implications for international organizations. A decision is expected in the first half of 2019.

BACKGROUND

International Finance Corporation ("IFC") is a Washington, D.C.-based international organization comprised of over 180 member countries, including the United States. IFC provides loans for projects in the developing world that cannot get reasonable access to private capital.

Jam involves IFC's $450 million loan to support the development of a power plant in Gujarat, India. Plaintiffs include local farmers and fishermen who claim that the project created disastrous environmental and social harm including contaminated drinking water, degraded air quality, and displaced persons. They argue that IFC

should be liable because it failed to enforce its own environmental standards in connection with the project.

The U.S. District Court for the District of Columbia dismissed plaintiffs' suit, finding that IFC was absolutely immune from suit. The U.S. Court of Appeals for the D.C. Circuit affirmed. *See Jam v. IFC*, 860 F.3d 703 (D.C. Cir. 2017). In 2018, the Supreme Court agreed to hear the case.

QUESTION BEFORE THE COURT

The International Organizations Immunities Act ("IOIA") provides that international organizations "shall enjoy the same immunity from suit . . . as is enjoyed by foreign governments[.]" 22 U.S.C. § 288a(b). In 1945, when the IOIA was passed, foreign governments enjoyed virtually absolute immunity from suit in the United States. In 1976, however, Congress passed the Foreign Sovereign Immunities Act ("FSIA"), which, among other things, imposes various limits on foreign governments' immunity. Most notably, the FSIA provides that foreign sovereigns are not immune from suit arising out of commercial activity having some nexus to the U.S.

The primary question in *Jam* is whether the IOIA provides international organizations with the "same immunity" from suit as foreign governments had in 1945 (*i.e.*, absolute), or the immunity foreign governments have today (*i.e.*, restrictive). Most of the arguments in the case thus are highly technical ones of statutory interpretation regarding the meaning of "same immunity from suit."

The parties also dispute the factual question of how the U.S. government has historically approached immunity for international organizations, as well as what effects a restrictive immunity regime would have. For example, IFC argued that a restrictive immunity regime may impact its calculus of whether and to what extent to engage in inherently risky economic development activity under the cloud of increased potential liability.

Not surprisingly, these issues—and their important policy implications—have generated a great deal of interest from third parties. The U.S. Solicitor General submitted an amicus brief in support of the plaintiffs arguing that IFC's immunity should be the same as that of foreign sovereigns today. Various other parties, including international organizations, former government officials and international law scholars, have submitted amicus briefs on one side or the other. Clifford Chance filed an amicus brief in support of IFC on behalf of a bipartisan group of former Secretaries of the U.S. Departments of State and the Treasury making the policy case for absolute immunity—specifically, that international organizations are differently situated from individual sovereigns, and should not be subject to the individual influence posed by the scrutiny of domestic courts in any individual member state.

ORAL ARGUMENT

An eight-Justice panel[1] heard oral argument today from lawyers for Jam and the IFC as well as on behalf of the United States government.

Questions from the Justices during oral argument are not always an adequate predictor of outcome. However, Justices from across the spectrum focused on the language of the statute—in particular, on whether the use of "same immunity"

[1] Justice Kavanaugh was recused, likely because of participation in some aspect of the case in his previous position as a judge on the U.S. Court of Appeals for the DC Circuit.

meant that the immunity of international organizations should track the immunity of foreign sovereigns, however that immunity might evolve over time. In addition, the Justices appeared particularly concerned with the point that elsewhere in the IOIA, Congress expressly granted "absolute immunity" to international organization officials, suggesting that if Congress wanted to use such clear language for international organizations it would have. In addition, Justice Ginsburg pressed counsel for the IFC on whether an established meaning of sovereign immunity even existed at the time of the IOIA's passage in 1945, as the IFC argues it did, or whether the status of immunity was more in flux. The implication of the status of immunity being in flux would be to weaken the case that Congress intended to incorporate a contemporaneous concept of "absolute immunity" into the statute.

Based on their questions, no Justice appeared to be leaning in favor of the IFC. With respect to the question whether "foreign organizations would get treated the same as foreign states" under the statute, for example, Justice Kagan (traditionally associated with the more liberal wing of the Court) stated: "I mean, that's exactly what the language of the thing says."

In an apparent effort to reduce concern about the implications of a decision in favor of Jam, both lawyers for Jam and the Solicitor General argued that even if international organizations like the IFC are subject to restrictive immunity, many of these suits will not be successful because there is not a strong enough nexus to activity in the United States to overcome a claim of immunity.

The Supreme Court will issue its decision during this Term, which ends in June 2019. Given that the case presents a single question of statutory interpretation the Court likely will issue its opinion well before June. We note that if the Court evenly divides in a 4-4 vote, the decision of the D.C. Circuit providing for absolute immunity will stand.

IMPLICATIONS

If the Court rules in favor of plaintiffs, IFC and other international organizations engaged in economic development activity might become subject to suit for performing their core functions. Whether they ultimately would face suit, and potential liability, for such activity would turn on whether their development functions are "commercial activity" with an adequate nexus to the United States. If plaintiffs can cross that threshold, and thus overcome a claim of immunity, they would proceed to the merits of their lawsuits.

Without clear and absolute immunity from suit in the U.S., international organizations potentially would face significant costs to litigate the issue of immunity and the merits, which will affect the risk calculus of both the international organizations and the member states that support them including whether and how to sponsor projects.

Accordingly, in anticipation of a ruling in the coming months, international organizations may consider taking steps with respect to projects under review to mitigate the risk of litigation and liability, such as terms in the project documents relating to indemnification, risk-shifting, third-party beneficiaries, and the nature of aspirational internal documents such as environmental and sustainability policies.

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