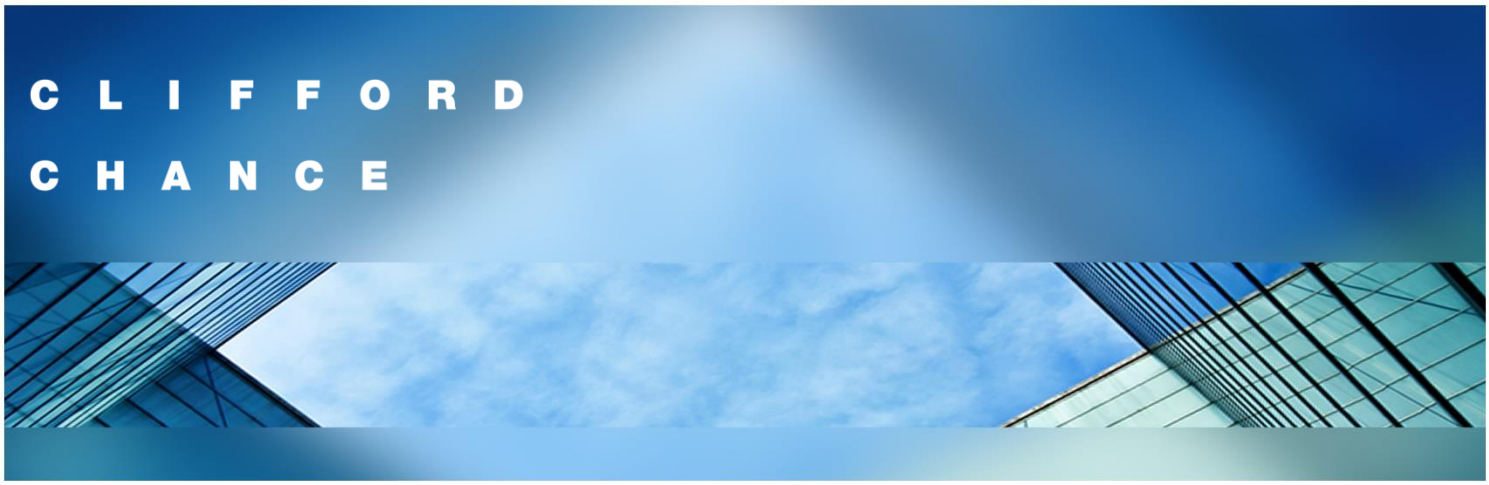

U.S. SUPREME COURT SAYS INTERNATIONAL ORGANIZATIONS ARE NOT ABSOLUTELY IMMUNE FROM SUIT—BUT AVENUES FOR DISMISSING U.S. LAWSUITS REMAIN

On February 27, the U.S. Supreme Court issued an opinion in *Budha Ismail Jam v. International Finance Corporation* (No. 17-1011) holding that the International Organizations Immunities Act ("IOIA") does not provide international organizations with absolute immunity from suit in the United States. Writing for a 7-1 majority,[1] Chief Justice John Roberts said that international organizations have the same immunity enjoyed by foreign sovereigns under the Foreign Sovereign Immunities Act ("FSIA")—meaning restrictive immunity that is subject to several statutory exceptions, including an exception for lawsuits based on commercial activity. The decision overturned longstanding precedent in the U.S. Court of Appeals for the District of Columbia Circuit.

The immediate implication is that international organizations cannot obtain early dismissal of lawsuits based on an automatic presumption of absolute immunity. But there are still potential avenues for dismissal on the basis of FSIA immunity (as well as the ordinary defenses available to any litigant)—which the Supreme Court was careful to identify, including immunity under the organization's charter, immunity because development bank lending might not be "commercial activity," and lack of a sufficient nexus between the dispute and the United States. Therefore, while the *Jam* decision marks a distinct shift in the law, international organizations retain several defenses and may employ a number of strategies to continue to protect themselves against lawsuits in U.S. courts.

Background

International Finance Corporation ("IFC")—a member of the World Bank Group—is a Washington, D.C.-based development institution with more than 180 member countries (including the United States). IFC provides loans for private-sector

[1] Justice Breyer dissented. Justice Kavanaugh did not participate.

projects in developing countries that cannot get reasonable access to private capital.

The *Jam* case involved a $450 million IFC loan to support the development of a power plant in Gujarat, India. Plaintiffs included local farmers and fishermen who claimed that the project produced environmental and social harms including contaminated drinking water, degraded air quality, and displaced persons. They argued that IFC should be liable for this harm because it allegedly did not 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 enjoyed absolute immunity. 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 granted *certiorari* to review the case. Please see our coverage of the Supreme Court oral argument here.

Question Before the Court

The 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 U.S. courts.

In 1976, Congress passed the FSIA, 28 U.S.C. § 1605, which imposes various limits on foreign governments' immunity from suit, known as "restrictive immunity." Most notably, the FSIA provides that foreign sovereigns are not immune from suit arising out of their commercial activity with a defined nexus to the United States.

The question before the Court in *Jam* was whether the IOIA confers on international organizations the "same immunity" from suit as foreign governments enjoyed in 1945 (*i.e.*, absolute), or the immunity foreign governments are afforded today (*i.e.*, restrictive, under the FSIA). The parties also disputed the U.S. government's historical approach to immunity for international organizations, as well as the potential chilling effects of a restrictive immunity regime on the willingness of international organizations to engage in certain types of activities.

The case generated tremendous interest from third parties, including numerous multilateral organizations. In a somewhat surprising move, the U.S. Solicitor General submitted a brief in support of the plaintiffs arguing for restrictive immunity. Various other parties, including international organizations, former government officials, and international law scholars, submitted amicus briefs in support of one side or the other.[2]

The Supreme Court's Decision

The near-unified Court held that, under the IOIA, international organizations have restrictive, not absolute, immunity, because "[i]n 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 parity between the two." The term "same immunity" was key to the ruling, and the Court identified the IOIA's language as what the U.S. "Congress typically uses to make

[2] Clifford Chance filed an amicus brief in support of IFC on behalf of a bipartisan group of former U.S. Secretaries of State and Secretaries of the Treasury.

one thing continuously equivalent to another." Under this interpretation, the language of the statute "make[s] international organization immunity and foreign sovereign immunity continuously equivalent," meaning that when Congress restricted the immunity of foreign governments in 1976, the immunity of IOIA organizations became restricted in parallel.

The Court stated that its reading of the IOIA was "further bolster[ed]" by the U.S. State Department's views, expressed in the Solicitor General's brief, which ordinarily receive "special attention" in this area. Although the parties had vigorously disputed the point, the Court stated that the State Department's "longstanding view" has been that IOIA immunity should be coupled with and parallel to FSIA immunity.

The Court acknowledged IFC's argument that reading the IOIA as conferring less than absolute immunity would "lead to a number of undesirable results." For example, IFC argued that exposing international development banks to arguments over whether international lending constitutes commercial activity could open the floodgates to litigation relating to their core activities. IFC also argued that the purpose of IOIA immunity was to keep individual member countries from second-guessing the decisions of multilateral institutions in their own courts, causing significant foreign relations concerns. The Court cautioned that its decision would not necessarily lead to these results, for several reasons:

First, the Court emphasized that IOIA immunity is only the "default rule" and that international organizations are free "to specify a different level of immunity" in their charters. For example, the charters of the United Nations and the International Monetary Fund provide for immunity from "every form of legal process," unless the organizations expressly waive that immunity. As Justice Breyer pointed out in dissent, however, because multilateral organizations' charters are in many cases international treaties, amending an organization's charter can be extremely difficult, and an immunity provision in an international organization's charter is effective under U.S. law only if the treaty is "self-executing" (and many treaties are not) or approved by the U.S. Congress.

Second, the Court stated that it is "not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA." The Court explained that activity is "commercial" under the FSIA only if it is "'the type'" of activity "'by which a private party engages in' trade or commerce." The Court noted as significant the Government's suggestion at oral argument 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."

Third, "even if an international development bank's activity does qualify as commercial," according to the Court "that does not mean the organization is automatically subject to suit." In particular, the Court indicated that the FSIA requires that the commercial activity at issue have a "sufficient nexus" to the United States. Moreover, a suit must be "based upon" the commercial activity itself or acts performed in connection with the commercial activity. So "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." On this point, and in a nod to IFC's potential defenses in the *Jam*

case, the Court referred to the government's concession at oral argument that it had "serious doubts" that this lawsuit involving "allegedly tortious conduct in India, would satisfy the 'based upon' requirement." If the lower courts ultimately rule in IFC's favor on this point, IFC would still be immune from suit and could have the case dismissed.

Implications

The Court's decision raises concern that international organizations engaged in economic development activity may become subject to suit in U.S. court for performing their core functions. The Supreme Court stated that "restrictive immunity hardly means unlimited exposure to suit for international organizations." But whether organizations ultimately will face the cost of litigation, and potential liability, for such activity will turn on whether their development functions are "commercial activity" with an adequate nexus to the United States under the specific definition of that term. If plaintiffs can cross that threshold, and thus overcome a claim of immunity, they would proceed to the merits of their lawsuits, which is a significant change from the status quo.

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

However, it bears emphasizing that, while the Court's decision in *Jam* removes a potential first line of defense to U.S. lawsuits under the IOIA, international organizations retain a number of defenses and strategic options that may provide an early exit from litigation:

- International organizations still enjoy immunity from suit under the IOIA and FSIA if they can show that the suit is not based on commercial activity with a sufficient U.S. nexus. The early battle will likely involve the distinction (if any) between lending to private entities and lending to states.
- International organizations may consider taking steps to mitigate the risk of litigation and liability in connection with projects under review, for example, inserting terms in project documents addressing indemnification, risk-shifting, and third-party beneficiaries (in particular, liability in tort to third parties).
- International organizations may review aspirational documents such as environmental and sustainability policies that may, as they did in *Jam*, provide plaintiffs with a basis for alleging that the organization is at fault for injury caused by a project.
- International organizations with charters that do not provide for absolute immunity may consider amending those documents to obtain immunity on that separate basis (although to be effective in the United States, approval by Congress may be required).

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