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JAM V. IFC: ONE STEP FORWARD, TWO STEPS BACK?

Nicholas Johnson*

Jurisdictional questions often arise in cross-border development lawsuits. Claims against international organizations and foreign sovereigns, however, are especially challenged by broad immunity regimes.¹ A recent case before the Supreme Court, *Jam v. International Finance Corp.*,² reignited this debate in the October 2018 term, and the February 2019 decision established a new standard for proceedings against international organizations.³ The Supreme Court decided that instead of referencing a historical and absolute immunity from suit for sovereigns based in common law, the immunities extended under the International Organization Immunities Act of 1945 (IOIA) will now mirror the more restricted statutory immunities enumerated in the Foreign Sovereign Immunities Act of 1976 (FSIA).⁴ The decision, however, took the litigation one step forward and two steps back. Although the suit is no longer barred by immunity, the ultimate outcome of the case, and future cases like it, remains far from clear because the Court did little to clarify the mixed case law surrounding sovereign commercial act exceptions.⁵

The primary question before the Court was whether the IOIA—which grants international organizations the “same immunities from suit . . . as is enjoyed by foreign governments”—should be based on the common law definition of foreign sovereign immunity as understood in 1945 or whether the immunities are linked to statutory foreign sovereign immunities and remain at parity with the modern FSIA.⁶ Notably, the FSIA was enacted after the Department of State initiated a policy shift from recognizing absolute sovereign immunity at the time of the IOIA to a form of restricted immunity in 1952.⁷ Under the new theory, foreign sovereigns were presumed to have immunity from suits related to their sovereign acts but not for their commercial acts.⁸ This theory was then codified into law with the FSIA and the judicial branch was tasked with interpreting when a foreign sovereign could be sued based on the enumerated exceptions.⁹

In the present case, the petitioners were a group of farmers and fisherman who lived in a region in India that was environmentally degraded by an energy project financed by the International Finance Corporation (IFC) and implemented by a local contractor under IFC loan agreements.¹⁰ The IFC had required that the company follow a specific environmental and social action plan to protect the surrounding area in its loan agreement; the IFC also maintained the right to revoke funding if the company did not comply.¹¹ An IFC internal audit report following the project found that the local contractor had not complied with the protections plan and also criticized the IFC for inadequately supervising the project.¹² This internal audit

report became an impetus for the petitioners to sue the IFC in the Federal District Court for the District of Columbia which followed the United States Court of Appeals for the District of Columbia’s precedent by upholding the IOIA absolute immunity standard and dismissing the suit.¹³

Now that the Supreme Court remanded and decided that the IOIA will incorporate the FSIA restricted immunity, the exceptions to immunity will have to be reinterpreted and re-litigated in the new context of international organizations.¹⁴ For the relevant commercial activity exception discussed in the present case, “a foreign government may be subject to suit in connection with its *commercial activity* that has *sufficient nexus* with the United States.”¹⁵ Courts have established further case law on this issue, but the record is unclear and the cases referenced in the opinion are filled with unsettled questions about the commercial activity and sufficient nexus elements.¹⁶

In its opinion, the Supreme Court twice referenced the U.S. Government’s oral argument and amicus brief in support of the petitioner to suggest that future cases would not succeed at trial even if the Court linked the IOIA to the FSIA; however, this seems far from certain.¹⁷ On the issue of commercial activity, the Court concluded that “[a]s the Government suggested . . . the lending activity of at least some development banks . . . *may not qualify* as ‘commercial’ under the FSIA.”¹⁸ On the issue of nexus to the United States, the Court concluded “the Government stated that it has ‘*serious doubts*’ whether petitioners’ suit . . . would satisfy the ‘based upon’ requirement.”¹⁹ Following this analysis, the Court concluded that “restrictive immunity *hardly means unlimited exposure* to suit for international organizations.”²⁰ The language used in the opinion notably avoids committing to one conclusion on whether the commercial-activity or sufficient-nexus tests will ultimately allow the IFC to maintain immunity in the present case.

Serious doubts and generalizations aside, the legal questions left unanswered in the Court’s past opinions on commercial act exceptions to the FSIA now carry over into cases against organizations subject to the IOIA. As *Jam v. International Finance Corp.* is remanded for further proceedings, it will again raise serious questions about sovereign and international organization immunity that will have broad consequences beyond the present case.²¹

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