Banking and Human Rights: World Bank Group immunities after Jam et al v International Finance Corp

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Abstract

In a landmark decision in February 2019, the US Supreme Court delivered judgment in Jam et al v International Finance Corp (IFC), ruling that this international financial institution, a member of the World Bank Group, did not enjoy absolute immunity as argued by the World Bank. The implications of this ruling go beyond the issue of immunity or the existence (or lack thereof) of a procedural bar in claims against the IFC before US courts. It arguably marks a critical moment in the manner in which financial institutions may be dealing with complaints alledging environmental and human rights abuses. The present analysis discusses the ruling and its possible implications.

On 27 February 2019, the US Supreme Court (US Supreme Court or US Court) delivered judgment against the International Finance Corporation (IFC) in *Jam et al v IFC*.[1] The case relates to a group of farmers and fishermen from India who took the IFC to court over the environmental impact of a power station partly funded by the IFC.

The IFC is an international financial institution that offers investment, advisory and asset-management services to encourage private-sector development in developing countries. The IFC is a member of the World Bank Group and is headquartered in Washington, DC. Whereas the World Bank primarily provides loans and grants to developing countries for public sector projects, the IFC finances private-sector development projects.

This article discusses the ruling in a nutshell and its implications for the IFC and other international organisations in the banking sector.

The case before the US Supreme Court

The case, originally brought before the US District Court for the District of Columbia, alleged that the IFC had exercised inadequate supervision of the environmental and social action plan over its USD 450 million loan to construct a coal-fired power plant in the state of Gurajat (Tata Mundra project),[2] resulting in pollution from the plant (such as coal, dust, ash and water from the plant's cooling system) harming "the surrounding air, land, and water".

As pointed out by EarthRights International, which supported the plaintiffs' case, before committing to financing, the IFC had additional requirements it had to meet, such as ensuring there is "broad community support" for a project, along with a number of other environmental and social safeguards incorporated as binding conditions in the IFC's loan agreement for the Tata Mundra project. From the outset, the IFC would have acknowledged that the Tata Mundra project "was a 'high risk' project that would cause significant harm to surrounding communities, particularly if the project was not well-managed and the risks were inadequately mitigated".[3] The plaintiffs argued that the critical USD 450 million loan had been provided "without taking steps to ensure sufficient safeguards were put in place to prevent the very harms [the IFC] predicted".[4]

The US Supreme Court decision centrally dealt with the IFC defence, namely that it enjoyed immunity. It looked at whether the IFC enjoyed "virtually absolute immunity" as foreign governments did when the US International Organizations Immunities Act 1945 (IOIA) was enacted, or the more limited immunity they enjoy today.

The ruling

The IOIA grants international organisations the "same immunity from suit … as is enjoyed by Sovereign governments".[5]

At the time that the US Congress passed the IOIA, governments were entitled to virtually absolute immunity. The question for the Supreme Court was whether "the same as" formulation was best understood as making international organisation immunity and foreign sovereign immunity continuously equivalent.

The Supreme Court held that the IOIA's reference to the immunity enjoyed by foreign governments is to an external body of "potentially evolving law" and not a specific reference to a common law concept "with a fixed meaning".

This external body of potentially evolving law now follows the doctrine of restrictive immunity as reflected in the US Foreign Sovereign Immunity Act 1976 (FSIA).

[1] *Jam et al v IFC* 586 US 2019.
[2] IFC, "Frequently Asked Questions: Coastal Gujarat Power Limited, Mundra" available at: *https://www.ifc.org/wps/wcm/connect/region__ext_content/ifc_external_corporate_site/south+asia/countries/frequently+asked+questions* [Accessed 7 August 2019].
[3] EarthRights International, "In wake of EarthRights' Supreme Court victory, World Bank Group expresses new commitment to 'accountability'" (2019) available at: *https://earthrights.org/in-wake-of-earthrights-supreme-court-victory-world-bank-group-expresses-new-commitment-to-accountability/* [Accessed 7 August 2019].
[4] EarthRights International, "In wake of EarthRights' Supreme Court victory, World Bank Group expresses new commitment to 'accountability'" (2019).
[5] 22 U.S.C. s.288a(b).

Under the FSIA, foreign governments are presumptively immune from suit but there are statutory exceptions to this immunity, inter alia, a foreign government may be subject to suit in connection with its commercial activity that has a sufficient nexus with the US.

As reminded by the US Court, this turning point started in the US in 1952, with the Tate letter, which shifted the position in the US on state immunity. The rationale was that "widespread and increasing practice on the part of governments of engaging in commercial activities" made it "necessary" to "enable persons doing business with them to have their rights determined by courts".[6] Under this position, foreign governments were to be entitled to immunity only with regard to their sovereign acts, not with regard to commercial acts.

Ultimate purpose of immunity not relevant to the interpretation of the provision

The IFC argued that the purpose of international organisations immunity is entirely distinct from the purpose of foreign sovereign immunity. The US Supreme Court, however, held that

> "whatever the ultimate purpose of international organization immunity may be—the IOIA does not address that question—the immediate purpose of the immunity provision is expressed in language that Congress typically uses to make one thing continuously equivalent to another".[7]

No specific reference—no fixed meaning—not a term of art with substantive content

The court noted that Federal courts have often relied on the "reference cannon" (a US doctrine of statutory interpretation) explicitly or implicitly to harmonise a statute with an external body of law that the statute refers to generally (in this case state immunity). It held that the IOIA's reference to the immunity enjoyed by foreign governments is a general rather than specific reference and 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".[8]

The court also observed that the State Department had expressed the position, shortly after the FSIA was enacted, that the immunity rules of the IOIA and the FSIA were now "linked". It noted that the Department had reaffirmed that view during subsequent administrations, and it has reaffirmed it again in the context of the case. The court cited, inter alia, the letter from Roberts B. Owen, legal advisers in Leroy D. Clark Gen. Counsel, EEOC (24 June 1980) in Nash's "Contemporary Practice of the United States Relating to International Law"[9]:

> "By virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character".

The US Supreme Court decision rejected the defence of absolute immunity invoked by the IFC.

A notable and important caveat in the above is the following. The IFC also contended that interpretation of the IOIA immunity provision to grant only restrictive immunity would defeat the purpose of granting immunity in the first place, by subjecting international organisations to suit under the commercial activity exception of the FSIA for most or all of their core activities. The IFC argued that this would be particularly true with regard to international development banks, which use the tools of commerce to achieve their objectives.

The Supreme Court held that those concerns were "inflated" for three reasons:

- the IOIA provides only default rules. An international organisation charter can always specify a different level of immunity;
- it is not clear that the lending activity of all development banks qualifies as "commercial activity" within the meaning of the FSIA; and
- but even if it does qualify as commercial that does not mean the organisation is automatically subject to suit since other FSIA requirements must also be met.

The court concluded that "restrictive immunity hardly means unlimited exposure to suit for international organizations".[10]

Its implications for the IFC and other international organisations

Implications for the IFC

The most direct implication of the US Supreme Court decision for the IFC is that the case now is going to trial. As matters currently stand, no absolute immunity applies to the activities of the IFC. Its immunity is a qualified immunity.

Applying a restrictive immunity test, however, does not mean that such restrictive immunity does not sufficiently cover the IFC in the *Jam et al v IFC* case. The FSIA includes other requirements, inter alia, that a

[6] *Jam et al v IFC* 586 US 2019 at p.4.
[7] *Jam et al v IFC* 586 US 2019 at p.9.
[8] *Jam et al v IFC* 586 US 2019.
[9] Marian L. Nash, "Contemporary Practice of the United States Relating to International Law" (1980) 74 Am. J Int'l L. 917, 918.
[10] *Jam et al v IFC* 586 US 2019 at p.10.

lawsuit must be "based upon" either the commercial activity itself or acts performed in connection with the commercial activity. It is arguable whether the petitioner's suit, which largely concerns allegedly tortious conduct in India, would satisfy the "based upon" requirement but this a matter now to be decided at trial.

Indeed, if the lending activity were to be considered commercial, this would not mean that the IFC would be automatically subject to suit since other FSIA requirements must also be met. These include: (1) the commercial activity must have "a sufficient nexus to the United States"; and (2) a lawsuit must be based upon either the commercial activity itself or acts performed in connection with the commercial activity.

As the court held,

> to be considered "commercial" an activity must be "the type" of activity "by which a private party engages in trade or commerce"...[t]*he 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 (emphasis added).[11]

Further, claims based on tortious activity would be not falling within the notion of "commercial activity". As the court held:

> "Thus, 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."[12]

If the IFC were to believe that its activities would be impaired by restrictive immunity, the organisation's charter can potentially always specify a different level of immunity, i.e. by following an amendment. In assessing this, it could at the same time, review whether the current mechanism for addressing compliance claims, the Compliance Advisor Ombudsman (CAO) may need adjustments as a dispute settlement procedure to provide an alternative option to judicial processes.

It can also be noted that as in the case of other international organisations, even if the level of immunity were to be almost absolute, such a level of immunity can be subject to the organisation's right to expressly waive its immunity on a case-by-case basis.

An important lesson from the case, however, is the fact that international organisations like the IFC do not operate in a vacuum. Seen from an international perspective, they operate within the general framework of international law which includes international environmental law.

The outcome in *Jam et al v IFC* is directly relevant to the trial of cases against the IFC in the US which includes *Juana Doe et al v IFC*,[13] another pending claim brought by Honduran farmers against the IFC in the District of Delaware.

Implications for other international organisations

There is a list of designated organisations under the IOIA. It is beyond the scope of this analysis to examine the position of each one of these organisations. The general impact can, however, be assessed as follows.

The IOIA grants immunity to international organisations such as the IFC, the World Bank and the World Health Organization, only on a default basis. The charters of many international organisations have broader immunity than that which is reflected in the IOIA.

The United Nations (UN) is one of those organisations. Its immunity provision states:

> "The United Nations … shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity".[14]

The Headquarters Agreement of the Organization of American States (OAS) is another example. It affords the OAS full immunity from judicial process, thus going beyond the usual US practice of affording restrictive immunity.

Some international organisations have adopted the immunity standards applicable to the UN Specialised Agencies whilst keeping their own privileges and immunities under their own constitutive charters. The constitutive charter of the International Monetary Fund (IMF), "Articles of Agreement", sets forth the privileges and immunities which members have agreed to grant to the organisation and to which all members have agreed to give effect under their respective domestic laws. The IMF has currently about 188 member countries. In November 1947, the IMF entered into an agreement with the UN which sets out the terms of the relationship between the IMF and the United Nations. Under this agreement while the IMF is a specialised agency within the meaning of art.57 of the UN Charter, their relationship is one of mutual association between independent entities and not one of principal and agent. In 1949, the IMF Executive Board saw merit in having the Specialised Agencies Convention applied to it as it was thought that this would facilitate and harmonise the administration of immunities in member countries that are parties. As noted by commentators,

[11] *Jam et al v IFC* 586 US 2019 at P.14.
[12] *Jam et al v IFC* 586 US 2019 at P.15.
[13] *Juana Doe et al v IFC-AMC*, Complaint October 2017, in the United States District Court for the District of Delaware (ongoing).
[14] Convention on the Privileges and immunities of the United Nations 1946 art.II s.2.

> "in doing so the Fund also considered that the Convention in some specific areas provides *for an expansion of privileges and immunities*, and it was deemed that this would be in the interest of the Fund" (emphasis added).[15]

Article III s.4 of the Convention states:

> "The specialized agencies, their property and assets, wherever located and by whomsoever held, *shall enjoy immunity from every form of legal process* except in so far as in any particular case they have expressly waived their immunity" (emphasis added).[16]

The International Bank for Reconstruction and Development (IBRD) (also known as the World Bank) is also a Specialised Agency and enjoys the same immunity as above.[17]

The decision of the US Supreme Court has no bearing on such specific provisions enshrined in the constitutive charters of such international organisations.

For those international organisations which do not have such a level of immunity, and which may feel that restrictive immunity may affect the functioning of the organisation, the organisation's charter can always specify a different level of immunity, i.e. by introducing an amendment in accordance with its governing rules.

It should be pointed out that possible changes in the charter of international organisations operate against the background of general rules of international law. A trend to recognise as a general principle of the law of nations that international organisations are liable for their own unlawful act, just as states are, especially towards private persons, is to be noted.

The International Law Association stated in 1998:

> "There is no reason at all … why [international organisations] could or should not be held accountable for disadvantages and repercussions resulting from their acts or omissions and normally based upon the authority and power granted to them."[18]

However, the issue of accountability (which entails consent and correct *fora*) is distinct from the topic of immunities (which is a procedural bar in specific *fora*).

The UN itself, for example, has acknowledged as an element of international legal principles, liability for damage attributably caused through unlawful action by UN peace-keeping troops. A dispute resolution body, the Local Claims Review Board, was created specifically for this.[19] The possibility of establishing dispute resolution organs or considering waiver on a case-by-case basis addresses the issue of responsibility.

As a whole this trend towards accountability shows the extent to which international banking institutions are not exempted from acting responsibly in the area of business and human rights.

Conclusion

In the aftermath of *Jam et al v IFC*, media reports pointed out that

> "the decision could make it possible for millions of people around the world to seek compensation for environmental and human rights abuses associated with internationally financed development projects".[20]

This, however, has some caveats. In delivering its decision the US Supreme Court emphasised that the IOIA in the US, provides only default rules. It noted that an international organisation charter can always specify a different level of immunity (i.e. amend its charter). Indeed, some international organisations have adopted a hybrid approach becoming specialised agencies of the UN. Further, it is not clear that the lending activity of all development banks qualifies as "commercial activity" within the meaning of the FSIA. It is to be noted, further, that tort claims are excluded from the "commercial activity" requirement. Finally, even if it does qualify as commercial, that does not mean the organisation is automatically subject to suit since other FSIA requirements must also be met.

However, the *Jam et al v IFC* case is potentially emblematic of a fundamental turning point in the manner in which complaints on environmental and human rights potential harm are to be dealt with by financing institutions in the future. This may not only include ensuring that *effective* grievance mechanisms are put into place but, more importantly, ensuring compliance with safeguards identified in their own risk assessments in relation to the environmental and human rights impact of their projects.

[15] Jennifer Lester and Pheabe Morris, "Immunities and Privileges, XIV Annexes of the Specialized Agencies Convention, Annex V—International Monetary Fund (IMF)" in August Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (Oxford: Oxford University Press, 2016), Ch.IV.

[16] IMF, "Selected Decisions and Selected Documents of the IMF, Thirty-Ninth Issue—B. United Nations Convention on the Privileges and Immunities of the Specialized Agencies and Annex V" available at: *https://www.imf.org/external/SelectedDecisions/Description.aspx?decision=DN15-38* [Accessed 7 August 2019].

[17] See Edward Chukwuemenke Okeke, "Immunities and Privileges, XIV Annexes of the Specialized Agencies Convention, Annex VI—International Bank for Reconstruction and Development (IBRD)" in August Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (Oxford: Oxford University Press, 2016), Ch.IV.

[18] ILA Committee on the Accountability of International Organizations, First report, in ILA (1998), Report of the 68th Conference, Taipei, London.

[19] Bertrand Malmendler, *The liability of international development banks in procurement proceedings: the example of the International Bank for Reconstruction and Development (IBRD), the European Bank for Reconstruction and Development (EBRD) and the Inter-American Development Bank (IADB)* (London: Thomson Reuters, 2019).

[20] Tim McDonell, "Supreme Court rules that World Bank can be sued" (7 March 2019), *NPR* available at: *https://www.npr.org/sections/goatsandsoda/2019/03/07/699437482/supreme-court-rules-that-world-bank-can-be-sued?t=1564338237406* [Accessed 7 August 2019].