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Supreme Court Rules That International Finance Corporation, Other International Organizations Do Not Have Absolute Immunity From Suit

Ramifications for Multilateral Development Banks, Other International Organizations, and Private Sector Entities

INTERNATIONAL ORGANIZATIONS SNAPSHOT

- As of the date of this update, there are 86 designated international organizations.
- All World Bank Group's member entities are designated: the (1) World Bank (International Bank for Reconstruction and Development (IBRD)); (2) International Finance Corporation (IFC)*; (3) International Development Association (IDA); (4) International Centre for the Settlement of Investment Disputes (ICSID); and, (5) Multilateral Investment Guarantee Agency (MIGA).
- Other designated multilateral development banks are the: (1) Inter-American Development Bank and its (2) Inter-American Investment Corporation; (3) African Development Bank (AfDB); (4) the European Bank for Reconstruction and Development (EBRD); and, the (5) Asian Development Bank (ADB).
- Other designated international organizations include, interestingly, the Hong Kong Economic and Trade Offices, and the African Union (which filed an amicus brief in support of the IFC's position before the Supreme Court).

*Notably, the IFC's wholly-owned subsidiary, IFC Asset Management Company, LLC (AMC), is not separately designated. AMC is a defendant in a lawsuit and claimed (prior to the Supreme Court's decision) to have immunity from suit, derivative of the IFC's immunity. It is not clear that a separate legal entity like a subsidiary, even one wholly owned by a designated international organization, derives immunity from its owner. If the AMC does have derivative immunity, its scope will be on par with that of the IFC, consistent with *Jam*. The AMC case is *Doe v. IFC Asset Mgmt. Co.*, C.A. No. 17-1494-VAC-SRF2018 (D.Del.).

Summary. The Supreme Court has ruled in the case of *Jam v. International Finance Corporation* that the International Finance Corporation and other "international organizations" designated as such under the International Organizations Immunities Act do not have absolute immunity from the jurisdiction of the federal and state courts of the United States. Rather, international organizations have limited immunity coextensive with that of foreign governments under the Foreign Sovereign Immunities Act, and are therefore subject to suit in certain cases, such as those arising from their U.S.-linked commercial activities.

The *Jam* decision sets the stage for further jurisdictional and, potentially, merits proceedings in *Jam*, now on remand to the lower courts. Moreover, the decision likely opens the door to future litigation testing the liability of multilateral development banks and other international organizations where it is alleged that their seemingly commercial activities or other acts (such as waiver of immunity) render them liable to third parties.

This legal update discusses the *Jam* case and its immediate and potentially wider ramifications for multilateral development banks, other international organizations, and private entities that finance, invest in, or otherwise participate in development and infrastructure projects, particularly those incorporating environmental, social, and governance standards (such as the Equator Principles).

Prior Proceedings: *Jam v. International Finance Corporation*

In April 2015, a group of farmers, villagers, and a small village in India, among others, sued the International Finance Corporation (**IFC**) in the federal district court for the District of Columbia for injunctive relief and damages stemming from what plaintiffs asserted were environmental and economic harms caused by the IFC-financed Tata Mundra Power Plant, a coal fired power plant in Gujarat, India.[1] The IFC, a member of the World Bank Group headquartered in the District of Columbia, is by its own description "the largest global development institution focused exclusively on the private sector in developing countries." [2] Consistent with IFC practice, the IFC's financing of and ongoing participation in the Tata plant project required compliance with the IFC's Social and Environmental Action Plan.[3] The IFC did not, according to the plaintiffs and an internal IFC audit, adequately supervise the project.[4]

As a designated International Organization ("**IO**") under the International Organizations and Immunities Act of 1945 ("**IOIA**"), the IFC moved to dismiss the action for lack of subject matter jurisdiction on the grounds that under the IOIA, it enjoyed "absolute" immunity from the jurisdiction of federal and state courts in the United States.[5] The DC District Court agreed with the IFC and dismissed the case. The plaintiffs appealed, and the U.S. Court of Appeals for the District of Columbia Circuit affirmed.

On appeal to the Supreme Court of the United States, the IFC advanced the same argument, with a different result. On February 27, 2019, the Supreme Court ruled in a 7-1 decision that the IFC does not have "absolute" immunity from suit. [6] Rather, the Court concluded, the IFC has limited immunity on par with that enjoyed by foreign sovereign states under the Foreign Sovereign Immunities Act of 1976 (**FSIA**), the controlling federal statute on the immunity of foreign sovereigns. Accordingly, the Court remanded the case to the lower courts for further proceedings consistent with its decision.

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[1] *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104 (D.D.C. 2016); *aff'd*, 860 F.3d 703 (D.C. Cir. 2017); *rev'd and remanded*, 586 U.S. ___ (2019), 17-1011, 2019 WL 938524 (U.S. Feb. 27, 2019) (page references herein to the Supreme Court's decision correspond to the slip opinion, available at https://www.supremecourt.gov/opinions/18pdf/17-1011_mkhn.pdf). The IFC loaned $450 million to Coastal Gujarat Power Limited, a subsidiary of Indian power company Tata Power. Project costs in total were estimate at $4.14 billion. *Jam*, 172 F. Supp. 3d 104 at 106.

[2] IFC, About, Overview, at https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new.

[3] The "IFC's Performance Standards on Environmental and Social Sustainability have become globally recognized good practice in dealing with environmental and social risk management. In the financial markets worldwide, the Performance Standards have been catalyzing the swift convergence of standards for cross-border project finance." The Equator Principles, adopted by over 90 banks worldwide, are based on the IFC's standards, which also serve as a "benchmark" for similarly-purposed standards of export credit agencies and other World Bank Group entities. IFC, Equator Principles Financial Institutions, at https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/company-resources/sustainable-finance/equator+principles+financial+institutions.

[4] *Jam* at 5.

[5] The IFC was designated by Presidential Executive Order on October 2, 1956. Exec. Order No. 10680, *Designating the International Finance Corporation as a Public International Organization Entitled to Enjoy Certain Privileges, Exemptions, and Immunities*.

[6] Chief Justice Roberts authored the Court's decision. Justice Breyer dissented, and Justice Kavanaugh did not participate, presumably related to his having been a judge of the D.C. Circuit Court of Appeals when that court decided the case on earlier appeal. The World Bank, MIGA and its member countries, and current and former U.S. Secretaries of State and Treasury, among others, filed amicus briefs in support of the IFC's position. More notably, the United States and a bipartisan group of Congress members filed amicus briefs in support of the plaintiffs' position. The government asked the Court to find "limited" immunity and the Congress members' urged the Court to apply the "reference" cannon of statutory construction discussed below.

The IOIA, FSIA, and the Path From "Absolute" to "Restrictive" Immunity

The dispositive issue before the Supreme Court was whether the IOIA's grant of jurisdictional immunity to International Organizations (**IOs**)[7] was "virtually absolute," consistent with U.S. practice at the time of the law's adoption in 1945, or limited, in accordance with the prevailing U.S. position on foreign sovereign immunity from 1952.[8] In assessing the merits of the parties' respective positions, the Supreme Court reviewed the language of the IOIA and interpreted its meaning with reference to the FSIA and the evolution of federal law on foreign sovereign immunity, from "absolute" to "restrictive."

The relevant language of the IOIA provides that

> International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy ***the same immunity*** from suit and every form of judicial process ***as is enjoyed by foreign governments***, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.[9]

When the IOIA was adopted and until 1952, the United States adhered to the "classical" theory of absolute foreign sovereign immunity: foreign governments were "entitled to 'virtually absolute' immunity as a matter of international grace and comity."[10] The determination of the scope of a foreign sovereign's immunity was generally determined by the State Department, which ordinarily requested that courts apply "absolute" immunity in cases involving allied foreign sovereigns, and thereby deprive themselves of subject matter jurisdiction over foreign sovereign defendants in particular cases.[11]

As those familiar with the history of the FSIA will know, the State Department in 1952 adopted the "restrictive" theory of foreign sovereign immunity, which attaches immunity only to the sovereign acts, and not the commercial acts, of foreign sovereigns, in recognition of the increased engagement by foreign governments in "commercial activities" that "made it 'necessary' to "enable persons doing business with them to have their rights determined in the courts."[12]

In 1976, the restrictive theory of foreign sovereign immunity was codified by the FSIA, which establishes presumptive foreign sovereign immunity rebuttable by showing that a statutory exception to immunity

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[7] Under the IOIA, "'international organization' means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter." 22 U.S.C.A. § 288 (West 2019). Importantly, the IOIA authorizes the President to, by executive order, "withhold or withdraw" or "condition or limit" an IO's privileges, exemptions, and immunities "in the light of the functions performed by any such international organization." *Id.*

[8] *Jam* at 1.

[9] 22 U.S.C.A. § 288a(b) (West) (emphasis added).

[10] *Id.*

[11] The Supreme Court explained that: "The immunity was 'virtually' absolute because it was subject to occasional exceptions for specific situations. In *Republic of Mexico v. Hoffman*, 324 U. S. 30 (1945), for example, the State Department declined to recommend, and the Court did not grant, immunity from suit with respect to a ship that Mexico owned but did not possess." *Id*. at 2 and n. 1. Where the State Department "did not make a recommendation" as to whether "a given foreign government should be granted immunity," the "courts decided for themselves whether to grant immunity, although they did so by reference to State Department policy." *Id.* at 3 (citing *Samantar v. Yousuf*, 560 U.S. 305, 311-12 (2010)).

[12] The restrictive theory and its adoption by the State Department was discussed in the "Tate Letter." *Id*. at 4 (noting the Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–985 (1952)).

applies, where, for example, a case arises from a foreign sovereign's "commercial activity."[13] Under the FSIA, foreign sovereign states are not immune from the jurisdiction of federal and state courts in cases

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[14]

In rejecting the IFC's interpretation of the IOIA's grant of jurisdictional immunity, the Supreme Court found, based on the language of the IOIA and applying the "reference" cannon of statutory construction,[15] that the IOIA's jurisdictional immunity provision "continuously link[s] the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two."[16] Consequently, the IFC and other IOs enjoy the same "restrictive" immunity claimable by foreign governments today, rather than the "absolute" immunity that prevailed in 1945.

Immediate Legal Consequences of *Jam*: Further Proceedings in *Jam* and Beyond

By its decision in *Jam*, the Supreme Court resolved a key jurisdictional issue, but opened the door to a range of additional jurisdictional and substantive issues that will undoubtedly follow. Most apparently, the Court's decision means generally that the IFC and similarly situated IOs, like foreign governments and pursuant to the FSIA, are not immune from suit where an exception to immunity applies, including in cases arising out of a "commercial activity" having a nexus to the United States. The IFC argued that restricting its immunity would, given the nature of its mission and activities, "expose international development banks to excessive liability." The Court downplayed the potential risk, stating that "it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA" and, even so, not all "commercial activities" would meet the U.S. nexus requirements of the FSIA.[17] Future cases will show if the IFC's concerns in this respect were well-placed or, as the Court assessed them, "inflated."[18]

On remand in the *Jam* case, the plaintiffs must still clear an immunity-based jurisdictional hurdle. To reach the merits as to any IFC liability, they must show that an exception to the IFC's immunity applies, most likely that the IFC's financing, monitoring, and other activity related to the Tata Mundra Power Plant constitute U.S.-linked "commercial activities," and/or, perhaps, that the IFC expressly or impliedly waived jurisdictional immunity (waiver is discussed below).

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[13] Foreign Sovereign Immunities Act, 28 U.S.C.A. §§ 1602-1611 (West 2019). The FSIA "transferred 'primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Jam* at 4 (citing *Republic of Austria v. Altmann*, 541 U. S. 677, 691 (2004) and 28 U. S. C. §1602).

[14] 28 U.S.C.A. §1605(a)(2) (West 2019).

[15] "According to the 'reference' canon, 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* at 9.

[16] *Jam* at 7. Explaining also that the State Department, after the FSIA's passage, "took the position that the immunity rules of the IOIA and the FSIA were" linked. The State Department affirmed that position before the Court in *Jam*. *Id.* at 12.

[17] *Jam* at 14-15 (explaining that "[t]o be considered 'commercial,' an activity must be 'the type' of activity 'by which a private party engages in' trade or commerce." (quoting *Republic of Argentina v. Weltover*, Inc., 504 U. S. 607, 614 (1992)).

[18] *Id.* at 14.

Wider Potential Ramifications for Multilateral Development Banks (MDBs), Other International Organizations, and Private Sector Entities

The ramifications of the *Jam* decision and any further proceedings on the merits in the case will very likely have implications for—and should influence—the manner in which parties that finance, invest in, or otherwise participate in infrastructure or other development projects approach their roles, partners, and third parties. Potential implications and considerations—including for entirely private (*i.e.*, non-MBD-involved projects) include the following.

- **Waiver of Immunity: Contractual Governing Law, Disputes, and Immunities Clauses**. MDBs and IOs would be well-advised to review their contractual provisions, including governing law, disputes, and immunities provisions. The FSIA carves out a general exception to immunity where a foreign sovereign has expressly or impliedly waived immunity.[19] Cases testing claims of express or implied contractual waiver are numerous, and should be reviewed. Generally, it should be noted that express or implied waiver could be premised, for example, on absent or weak contractual immunity provisions in loan or other project documentation, or on governing law or dispute resolution provisions that can be read to render immunity waived. Where third party claims are involved (as discussed immediately below), the issue of express or implied waiver as to non-contract parties might arise, and likely will in in further *Jam* proceedings on remand.

- **Third Party Rights**. Where project or standards terms expressly or impliedly relate to non-contract parties—such as terms pertaining to environmental matters and indigenous communities—terms or standards purportedly designed to protect (or not harm) non-contract parties likely will give rise to questions of whether they create third party rights or claims. For example, the IFC's financing of and participation in the Tata Mundra project required satisfaction of environmental, social, and governance (**ESG**) standards. Where such ESG standards create or implicate third party interests directly or indirectly, the failure of principal parties to adhere to or enforce such standards may, it will be argued, render the principal parties liable to third parties that have been demonstrably harmed. The lack of contractual privity between third party claimants and an entity like the IFC will not necessarily be decisive, as non-third-party beneficiary (or other contract-based theories) could be raised, such as in tort.

- **Liability Standards for MDBs, IOs, and Private Entities**. The *Jam* decision, and further proceedings on jurisdiction and the merits, if reached, will likely have bearing on future cases involving MDBs and non-bank IOs engaged in U.S.-linked commercial activities to which jurisdictional immunity does not attach. Private entities, including banks and investors, should take note, as any standards of liability for environmental and social harms that emerge from further *Jam* proceedings or similar cases would likely be relevant to any claims against such private entities. For clarity, it should be understood that once any immunity-based jurisdictional hurdle is cleared in cases involving MDBS or other IOs, particularly where the commercial activity exception to immunity applies, substantive proceedings on liability in such cases will have wider value as precedent, as substantive issues will not necessarily be unique to the "sovereign" or "international organization" of defendants. Private lenders and other parties that

[19] 28 U.S.C.A. § 1605(a)(1) (West 2019).

adhere to the Equator Principles or other standards that are based on or similar to IFC/MDB standards should, in particular, take note (even if the Equator Principles or other standards are voluntary).[20]

- **Risk Allocation, Indemnification as Between Project Parties**. While loan, inter-creditor, and other project documentation allocates risk between contract parties, the *Jam* decision should prompt reviews of contractual risk allocation provisions by MDBs, other IOs, and private entities. After *Jam*, the likelihood of similar cases (in the United States and elsewhere) most likely has risen. In light of this, parties to project contracts should want to ensure that, as between them, contractual allocations of risk for failures to observe or enforce ESG standards (or other terms) correspond to their respective roles, investment guidelines, and risk profiles (including, as relevant, considering external ratings and risk assessments). Any recalibrated risk allocation provisions should, of course, be accompanied by corresponding indemnification language (including indemnification for legal fees and costs).

- **Public Disclosure Through Litigation: Reputational Risk and Further Claims**. Entities (and individuals) tend to not sufficiently appreciate the non-legal risks of litigation, including that their otherwise non-public agreements, understandings, operations, and transaction-specific conduct will, through litigation, likely become public record (barring special limitations on, *e.g.*, public disclosure). Public disclosure through litigation is not the same as voluntary public disclosure at the discretion of or pursuant to the standing policies of an MDB, other IO, or a private entity. Litigants have much less control over the timing and extent of disclosure, as well as the narratives that surround publicly disclosed information. Reputation risk-aware parties should take note of the non-legal risks of public disclosure through litigation.

  In addition, information and documentation disclosed through litigation in one case could very well form the basis for additional related or unrelated legal claims (and could inform litigation strategies). MDBs, IOs, and private entities should understand the potential substantive and tactical legal snowball effects of litigation.

- **United States Political Climate: Immunity Generally and Multilateral Development Banks Specifically**. MDBs and IOs should note that the *Jam* decision comes at a time at which the political climate in the United States is not as favorable as it once was. As is well known, members of the Trump Administration and some in Congress view MDBs and certain IOs with skepticism, and question the value of continuing U.S. financial and other support to these organizations. Moreover, there have been increasing efforts in recent years to chip away at foreign sovereign immunity. For example, legislation pending currently seeks to amend the FSIA to deny immunity to OPEC in certain antitrust cases.[21] In 2016, a Senate bill sought to deprive state-owned enterprises of the tactical advantage of asserting sovereign immunity in U.S. courts.[22] While these bills are not the first of their kind—or the last—they speak to, and may gain steam from, the more pronounced inhospitality of some U.S. officials to

[20] Banks and other non-MDBs should be aware of the ESG-related risks already before them. *See, e.g.*, MassPoint PLLC, *Nonfinancial Risks for Banks: Incorporating Environmental, Social and Governance to Identify and Manage Banks' Legal, Commercial, and Reputation Risk Management*, April 2017, at https://masspointpllc.com/wp-content/uploads/Nonfinancial-Risk-for-Banks-ESG.Abdelhady.MassPoint.pdf.

[21] S.370, No Oil Producing and Exporting Cartels Act of 2019" or "NOPEC," at https://www.congress.gov/bill/116th-congress/senate-bill/370/text?q=%7B%22search%22%3A%5B%22sovereign+immunity%22%5D%7D&r=2&s=1.

[22] MassPoint PLLC, *Senate Bill Deprives State-Owned Enterprises of Sovereign Immunity as a Litigation Tactic in U.S. Courts*, Sept. 2016, at https://masspointpllc.com/wp-content/uploads/MassPointPLLC.STAR-Act-Update.Sovereign-Immunity.pdf.

multilateral institutions and foreign sovereign immunity. MDBs and other IOs would be well-advised to digest and respond to the *Jam* decision in context.

- **Will *Jam* Influence IO Immunity Practice Overseas?** A potential follow-on effect of *Jam* is that countries that accord absolute or more than "restrictive" immunity to IOs might follow the Supreme Court's decision in *Jam* with respect to IOs generally, IOs of certain kinds, or IOs headquartered in the United States. It is not inconceivable that questions might arise among some foreign government or political actors as to whether a U.S.-headquartered MDB or other IO should have greater immunity in a foreign country than it has in the country of its headquarters.

Key Takeaways

The legal rule of *Jam* is significant and will likely spur future litigation against MDBs and IOs that will also be relevant to private parties, such as bank and investors, that engage in project development and financing, whether involving MDBs or entirely private. All of these constituencies should take note of the *Jam* decision and further proceedings in the case and in similar cases, as they may yield substantive standards of liability for environmental and social harms attributable to projects. These constituencies should also review their investment guidelines and contractual terms, including, as discussed above, to allocate risk with reference to relevant legal developments. As to the non-legal implications of *Jam*, they too are significant and should be understood, particularly with respect to reputational risk as a result of public disclosure.■

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