Immunities of international organisations after the surprise decision in *Jam v IFC*: a look ahead

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In the wake of the US Supreme Court's surprise ruling in *Jam* v *IFC*,[1] the corridors of the World Bank echo with metaphors of alarm. Chief Justice Roberts, joined by six Associate Justices (with Justice Stephen Breyer in lonely dissent), have opened Pandora's Box, tipping out cats onto pigeons and sending an applecart rolling to an untidy fate. The decision opens the door to litigation in the US against international organisations ("IOs") as long as the claim relates to "commercial" activities. In the long term, IOs **may** be able to use their constituent instruments to override the result in *Jam*, or even persuade the US Courts to narrow the "commercial" gateway in immunities law. For now, in the changed landscape, IOs with connections to the US and their stakeholders need to consider: what are the consequences of *Jam*, and how are IOs with headquarters elsewhere – e.g. in the UK – faring on similar issues? We deal with these questions below.

THE RULING IN *JAM* V *IFC*

In *Jam* v *IFC*, a group of local farmers from Gujarat, India, seek to sue the International Finance Corporation ("IFC") – one of the five bodies which make up the World Bank family of IOs – for environmental harms suffered when the IFC financed the development of a coal-fired power plant. Internal investigations within the World Bank group have criticised the project for failing to apply the Bank's own environmental and social safeguards.[2]

The IFC invoked the immunity from legal process conferred by s2(b) of the US International Organizations Immunities Act ("IOIA"), and under its own articles of agreement (often referred to as its "charter"; the articles are an international treaty). The US government has listed the World Bank family as IOs protected by IOIA, but with the proviso that the IOIA does not create any

[1] Jam v IFC, 586 U.S. ___ (2019). Page references below are to the pages of the Slip Opinion.

[2] Jam (n. 1 above), p. 5.

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additional immunity beyond what the IOs' charters require. As a result, the World Bank's immunity from suit can depend **both** on the interpretation of the IOIA **and** on the interpretation of the charter wording – which judges have disparaged as "*hardly a model of clarity*"[3] and "*clumsy and inartfully drafted*".[4]

Earlier US cases, such as *Lutcher*[5] and *Mendaro*,[6] had focused on the charter wording as creating a "charter-based waiver," whose scope was debatable. On its face, the World Bank's charter would appear to remove all immunity except in respect of claims by member states and pre-judgment attachment of assets. Article VII.3 of its charter provides that it may be sued "*only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities,*" that "[n]*o actions shall ... be brought by members* [i.e. states]" and that the Bank's property is immune from seizure "*before the delivery of final judgment against the Bank*". Article VI.3 of the IFC's charter is identically worded. Despite this facially broad waiver of immunity, however, the US Court of Appeals for the District of Columbia Circuit ("DC Circuit") in *Mendaro* held that the World Bank's charter only intended to waive immunity insofar as waiver would promote the World Bank's objectives.[7] On that basis, the DC Circuit has found immunity waived for claims by creditors and borrowers,[8] but not for 'internal' disputes such as workplace claims by employees.[9]

But the focus on "charter-based waiver" appears to have been somewhat misjudged. As the DC Circuit had overlooked in *Mendaro*,[10] but awoke to in *Atkinson* v. *Inter-American Development Bank*,[11] logically, the meaning of the IOIA is the first hurdle that an

[3] Lutcher S.A. Celulose e Papel and F. Lutcher Brown v. Inter-American Development Bank, 382 F.2d 454 (CADC, 1967); this case concerned the wording of the charter of the Inter-American Development Bank, Art. XI s. 3, but the wording is substantially identical to Art. VII s. 3 of the World Bank's charter.

[4] Mendaro v. World Bank, 1717 F.2d 610 (CADC, 1983).

[5] N. 3 above.

[6] N. 4 above.

[7] *Id* ("A nonspecific waiver such as that contained in Article VII section 3 should be more broadly construed when the waiver would arguably enable the organization to pursue more effectively its institutional goals. However, when the benefits accruing to the organization as a result of the waiver would be substantially outweighed by the burdens caused by judicial scrutiny of the organization's discretion to select and administer its programs, it is logically less probable that the organization actually intended to waive its immunity. Thus, limitations on immunity that subject the organization to suits which could significantly hamper the organization's functions are inherently less likely to have been intended, and a court's interpretation of the provision in dispute should start with that in mind.")

[8] See *Lutcher*, n. 3 above, for an example of the latter, in relation to the Inter-American Development Bank.

[9] Atkinson v. Inter-American Development Bank, 156 F.3d 1335 (CADC, 1998).

[10] N. 4 above.

[11] N. 9 above.

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IO must overcome: if the immunity which the IOIA confers does not cover the facts in question, the issue of whether such immunity has been waived falls away.

The *Jam* case raised this issue in an acute form. In the light of *Mendaro*'s narrowing of the facially broad wording of Article VI.3 of the IFC charter, the "charter-based waiver" might well be construed as **not** waiving immunity over an environmental tort case (although there is no close precedent either way). Hence, the Indian plaintiffs' ability to bring their claim rested on the true scope of immunity under the IOIA.

Here, the conundrums of interpreting the IOIA begin. Section 2(b) of the IOIA provides that IOs "*shall enjoy the same immunity from suit . . . as is enjoyed by foreign governments*" 22 U.S.C. § 288a(b). When the US Congress passed the IOIA in 1945, foreign states enjoyed virtually absolute immunity under prevailing international law and US practice. But, in 1952, the US State Department adopted a "restrictive theory" of state immunity, whereby foreign sovereigns did not enjoy immunity in disputes arising from "commercial" activities. The US Foreign Sovereign Immunities Act 1976 ("FSIA") then codified the "restrictive" doctrine for state immunity (28 U.S.C. §§1604-05), but left IOs and their immunities untouched. So, should "*the same immunity*" in the IOIA be read as a reference to the immunity that foreign governments enjoyed in 1945, or to the body of potentially evolving law on state immunity?

The DC Circuit held in *Atkinson*[12] that "*the same immunity*" for IOs meant absolute immunity, and it reaffirmed that view in *Jam*. Absolute immunity remained the orthodox view in US legal circles. That said, in *Jam* both the US federal government and a group of eight distinguished international law professors filed *amicus* briefs arguing for the 'evolving' interpretation.

The Supreme Court majority of seven Justices adopted the 'evolving' interpretation in *Jam*. Its reasoning is light, verging on "*nouvelle cuisine*". The Court refrained from any searching engagement with the history, context, or purpose of the IOIA or the consequences of its holding. Instead, it based itself on the ordinary meaning of the words used, supported by a canon of US statutory construction, according to which "*when a*

[12] N. 9 above.

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statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises." By contrast, a reference in one statute to a specific statute "*cuts and pastes the referenced statute as it existed when the referring statute was enacted*".[13] The IOIA referred to foreign state immunity as a general subject, since there was no statute enacted on state immunity in 1945.

The Supreme Court's holding means that, since IOIA now applies the "restrictive theory" with no immunity for "commercial activity", the lower courts will have to determine whether the suit in *Jam* v *IFC* arises from commercial activity. This augurs a hard-fought battle at the next stage. For international organisations such as multilateral development banks whose core business consists of lending, borrowing, and evaluating and financing projects, most of their activities are – at least arguably – 'commercial' in nature, and hence now non-immune. Breyer J. regarded this as a reason to be cautious about departing from absolute immunity,[14] while the majority expressed scepticism that the facts of Jam would have a "sufficient nexus" to commercial activity.[15]

US Law at Odds with International Law

The IOIA's linking of IO immunity to US law on state immunity, now construed in *Jam* as making IOs subject to the commercial activity exception, puts the US out of step with many other jurisdictions, including the UK, and with international law generally.[16]

In brief, customary international law treats IOs as enjoying immunity by reference to a principle of **functional necessity**.[17] Immunities are granted to ensure that an IO can fulfil its functions as an actor on the international plane, and that purpose informs the interpretation of how far an IO's immunity extends. International law does not equate IO immunity with state immunity, nor embrace any "commercial" exception for IOs. To determine the question whether jurisdictional immunity is applicable to an activity of an IO the question should be: was

[13] *Jam*, above, at II.B.

[14] *Jam* (above), Breyer J., dissenting, at II.A.

[15] *Jam* (above), at II.D.

[16] Apart from the US, the other jurisdiction that links IO and state immunities is Italy. Chanaka Wickremasinghe, International Organizations or Institutions, Immunities before National Courts (2009), MPEPIL, paras. 17-19.

[17] Wickremasinghe, n. 16 above, paras. 1, 22.

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the activity necessary for the effective functioning of the organization?[18] The question is not: is this activity non-immune because it is one by which a private party engages in trade or commerce?[19]

Strikingly, the Supreme Court in *Jam* did not even discuss how IO immunities are understood in international law. As Rishi Gulati has observed, after *Jam*, "*there now exists a schism in the international and national law in this respect*".[20]

The UK approach: functional necessity, legislative control

UK law on IO immunities has some commonalities with the US, but also key differences. UK legislation – like the US IOIA – empowers the executive to designate, by way of secondary legislation, a level of immunity appropriate to each IO of which the UK is a member.[21] Unlike the US, the UK has not linked the immunities of IOs with the concept of state immunity, nor does it require a "sufficient nexus" to the UK beyond membership of the IO.[22] Instead, for a half-century, the touchstone of UK law on IO immunity has been the concept of functional necessity.

The 1969 *General Policy of Her Majesty's Government on Privileges and Immunities of International Organizations* provides that privileges and immunities "*should be granted primarily on a basis of functional need. The principle of the independence of the organizations and the equality of its Member States, in particular, that the host State should not derive undue fiscal advantage from the presence on its soil of the organization, are also important considerations*".[23] It sets out criteria to be taken into account, namely the IO's field of activity, geographical scope, extent of the IO's power to bind member states, role and purpose, financial arrangements, membership composition and size.[24] This approach is always subject to any specific terms on immunity which the UK has committed to in

[18] FOX AND WEBB, THE LAW OF STATE IMMUNITY (3rd rev ed, OUP 2015), 582.

[19] Cf. *Jam*, p 18.

[20] http://opiniojuris.org/2019/03/01/the-immunities-of-international-organisations-the-end-of-impunity/

[21] International Organisations Act of 1968; Wickremasinghe, n.16 above, para. 6.

[22] Cf FSIA §1605(a)(2). The UK Act, s 4, addresses IOs of which the UK is not a member and simply contains a power to provide by Order in Council for such an IO to have legal capacity and to be granted exemption from certain taxes, but only where the IO maintains or proposes to maintain an office in the UK and has entered into an agreement with the UK to do so.

[23] Quoted in Chanaka Wickremasinghe, "The Immunity of International Organizations in the United Kingdom" (2013) International Organizations Law Review 434, fn 1.

[24] *Id* p 436, referring to applying the principles elaborated in Council of Europe Committee of Ministers, Privileges and Immunities of International Organizations (Resolution (69) 29, 26 September 1969) and Explanatory Report.

the constituent instrument of the IO and in any Headquarters Agreement for an IO headquartered in the UK.

For the IFC, the UK legislation setting the immunity level simply copies Article VI.3 of the IFC's charter (quoted above).[25] This is interesting, because Article VI.3 *on its face* appears to envisage a broad liability to suit, with immunity preserved in exceptional situations. UK courts have not yet had the opportunity to interpret this "charter-based waiver", but it is likely that their approach would follow the principle of functional necessity as set out in the 1969 policy.

For the European Bank for Reconstruction and Development ("EBRD"), a multilateral development bank founded in 1991 and with its headquarters in London, immunity is governed by a headquarters agreement and implementing legislation.[26] In contrast to the World Bank family, the EBRD's charter and implementing legislation expressly provide for general immunity subject to listed exceptions, which include cases "*arising out of the exercise of* [the EBRD's] *powers to borrow money, to guarantee obligations and to buy or sell or underwrite the sale of any securities*", road traffic accidents, and a rather broadly worded territorial tort exception, i.e. "*a civil action relating to death or personal injury caused by an act or omission in the United Kingdom*". A case with facts similar to *Jam* might therefore be capable of overcoming the immunities hurdle in the UK, if the relevant "*act or omission*" were characterised as negligence in, for example, failing to ensure that appropriate environmental or social safeguards were followed by the headquarters staff in making policy and lending decisions.

The view from Canada: doubts over functionalism, more emphasis on constituent instruments

In 2016, Canada's Supreme Court expressed doubt about the utility of the functional necessity test. In *World Bank Group* v. *Wallace*,[27] the defendants in a trial over alleged corruption in connection with World Bank loans sought to compel the World Bank's internal anti-corruption arm to produce internal documents relating to the investigation which had triggered the case. The Supreme Court upheld the archival

[25] As for immunity of IFC officials, section 8 provides "*All Governors, Directors, Alternates, officers and employees of the Corporation: (i)shall be immune from legal process with respect to acts performed by them in their official* capacity …".

[26] See especially the European Bank for Reconstruction and Development (Immunities and Privileges) Order 1991, SI 1991/757, art. 5.

[27] 2016 SCC 15, [2016] 1 S.C.R. 207.

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immunity Bank's documents and the immunity from legal process of its personnel. Observing that "*what is 'functional' is essentially a matter of perspective*",[28] the Court emphasised instead the immunities conferred by the Articles of Agreement implemented in Canadian law by Orders in Council.[29] Although the Court acknowledged that such IO charters confer immunities in order to enable IOs to "*fulfil the functions with which they are entrusted*",[30] it observed that this did not "*impose a condition of functional necessity that must be satisfied whenever any immunity is asserted*", but rather informed a purposive approach to the interpretation of the Articles.[31]

The Way Ahead

Whatever the ultimate outcome of the *Jam* case, IOs with links to the US like the World Bank face the daunting prospect of litigation in the US Courts exploring the extent and limits of what is "commercial". In state immunity law, this exception has been broadly defined, essentially as comprising the type of activity in which private actors can engage (in contradistinction to the exercise of public power),[32] and its outer boundaries remain unmarked. It will not be easy for US Courts to adopt a narrow interpretation of 'commercial activity' just for the purposes of the IOIA, since that legislation requires Courts to decide what the law on **state** immunity is and apply that law to the IO, without allowing any 'tailoring' to suit the special needs of IOs. Courts will likely be reluctant to cabin the commercial exception to state immunity too narrowly, for fear of working injustice against private parties on their transactions with sovereign states.

Amending the charters?

The Canadian reliance on the IO constituent instruments (see above) may be the clearest – but not the fastest – path forward when it comes to determining IO immunities. As the US Supreme Court observed, an IO's charter "*can always specify a different level of immunity [to domestic legislation] and many do*".[33] The IFC's own charter does not currently state that it is absolutely immune from suit.[34] An amendment to the IFC charter requires the agreement of three-fifths of the Governors

[28] Para 62.

[29] Para 46.

[30] Para. 53.

[31] Para. 64.

[32] E.g. Republic of Argentina v. Weltover, 504 U.S. 607 (1992).

[33] *Jam*, p. 14.

[34] *Jam*, p. 14.

exercising 85% of the total voting power of the IFC.[35] In the US, the amended charter, as a treaty, would need be approved by the Senate (although certain changes have been made solely by executive agreement or action). Even the amended charter would not necessarily be a "self-executing" treaty.[36] Thus, it is likely that US implementing legislation would be needed for the amended charter to take effect domestically. That said, an amendment to the immunity provisions of the IFC charter could potentially be an 'aid to interpretation' for US courts, even without implementing legislation.[37]

Executive action to tailor IO immunities?

Another possibility is that functionalism may yet creep back into US law because the President of the United States can withhold, withdraw, condition, or limit the privileges and immunities granted to an IO in light of the IO's functions (§288, IOIA). Such a move could align the US with the prevalent international approach. It is not clear that it would necessarily provide greater protection for plaintiffs.[38]

Other forms of accountability

Suing the World Bank or IFC in US courts is not the only option available to people who consider that a World Bank project has unjustly interfered with their rights or livelihood. The Inspection Panel, created in 1993, is empowered to look into grievances arising from projects of the World Bank ("IBRD") and International Development Association ("IDA").[39] The IFC has a different mechanism, a Compliance Advisor Ombudsman.[40] While these bodies lack the

[35] Article VII(a), IFC Articles of Agreement.

[36] See p. 8 of Justice Breyer's dissent in *Jam*. *But see* Brzak v. United Nations, 597 F.3d 107 (CA2, 2010) (holding that the Convention on the Privileges and Immunities of the United Nations was a self-executing treaty).

[37] Under the *Charming Betsy* canon of US statutory interpretation. *See, e.g.*, Ingrid Wuerth https://www.lawfareblog.com/how-supreme-court-should-decide-jam-v-international-finance-corp, (explaining that the that the IOIA should not be interpreted to put the US in violation of international law, unless there is clear Congressional intent). But the status of the *Charming Betsy* canon is itself controversial and has been said to be confined to 'ambiguous' statutes.

[38] Diane Desierto has argued that in *Jam* the Supreme Court "*raise*[d] *a possible functionalist defense on subject matter jurisdiction*": https://www.ejiltalk.org/scotus-decision-in-jam-et-al-v-international-finance-corporation-ifc-denies-absolute-immunity-to-ifc-with-caveats/. That said, it would seem from the Supreme Court majority's judgment in *Jam* that the Court's primary focus remained firmly on §288 of the IOIA, the equation with state immunity and the "commercial activity" plus "sufficient nexus" exception. It was in that context, rather than in discussing the Executive's freedom to adjust immunities, that the Court made observations on the width of the "*commercial*" gateway under the FSIA, and outlined possible reasons why the gateway might not be wide enough for the plaintiffs in *Jam* (or other potential litigants in a similar position) to succeed, e.g. because of the lack of a "*sufficient nexus*" to the United States. Subject to the possibility of tailoring by the President (see above), the position under IOIA remains based on state immunity, and without a foothold for the functional necessity considerations that are paramount under international law.

[39] https://www.inspectionpanel.org/about-us/about-inspection-panel

[40] Id.

power to issue legally binding decisions, nor can they cancel or alter a project, they can and do shine light on the extent to which the financial institution has followed its own standards and procedures. Since the World Bank has adopted quite extensive social and environmental safeguard policies,[41] a review on the basis of those standards should be meaningful. A number of other multilateral development banks have established accountability mechanisms of their own, e.g. the Inter-American Development Bank created an Independent Consultation and Investigation Mechanism ("MICI").

These alternative procedures do not constitute a waiver of immunity, and in the US the Second Circuit Court of Appeals has held that even alleged deficiencies in an IO's alternative dispute resolution process did not operate to waive the organisation's immunity.[42]

Where a project financed by a multilateral development bank has adversely affected local communities, the Supreme Court's ruling in *Jam* means that those affected now have an additional option: they are not limited to invoking internal, non-legally-binding accountability mechanisms. That said, in many cases, such mechanisms may well offer a speedier, less expensive and more practical remedy than would be available by suing IOs in US courts.[43] Less formal accountability mechanisms offer greater flexibility in presenting information to the investigators, e.g. through site visits and interviews, and the investigating body is able to provide forward looking recommendations, e.g. suggesting steps to ameliorate the effects of the project, rather than just awarding money damages. In the wake of *Jam*, aggrieved communities may perhaps find that the possibility of a lawsuit gives them additional leverage that encourages the IO to resolve the dispute. If the Inspection Panel and Ombudsman procedures can be made accessible, speedy and responsive, Chief Justice Roberts may yet be proved right in dismissing the IFC's prediction of "*a flood of foreign plaintiff litigation into U.S. courts*" as "*inflated*".[44]

[41] *See* http://www.worldbank.org/en/projects-operations/environmental-and-social-framework.

[42] *Brzak*, n. 36 above. *Brzak* involved an internal complaints process at the United Nations, but the same logic would apply to a process designed for external stakeholders.

[43] The Inspection Panel has, however, been criticized for its closeness to management so while it is a useful consultative mechanism, it is not the equivalent of an independent court.

[44] *Jam*, n. 1 above, at pp.13-14.