ZOOM IN

The question:

Immunities of organizations under international law: Reflections in light of *Jam v International Finance Corporation*

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In its decision of February 27, 2019 in *Jam v International Finance Corporation*, the US Supreme Court ruled on the highly debated issue of immunity of international organizations. This case originated from a claim for damages brought by local farmers and fishermen and a small village of Gujarat, India, against International Finance Corporation (IFC). IFC, whose mission consists of financing private-sector development projects in developing countries, entered into a loan agreement with Coastal Gujarat Power Limited, a company based in India, to finance the construction of a coal-fired power plant in Gujarat. The petitioners claimed that pollution from the plant harmed the surrounding air, land, and water, and claimed IFC's liability for not having adequately supervised the environmental and social action plan for the project. The defendant invoked its absolute immunity from jurisdiction in accordance with the 1945 US International Organizations Immunities Act (IOIA).

IOIA provides that organizations are afforded the 'same immunity from suit […] as is enjoyed by foreign States'. However, the US law of foreign State immunity evolved since 1945, when IOIA was enacted. While at that time foreign governments were granted absolute immunity from legal process in the US, since 1952 their immunity was restricted to suits concerning sovereign acts, as opposed to acts of a private or commercial character, a solution which culminated in the codification of the 'commercial activities exception' by the 1976 Foreign Sovereign Immunities Act (FSIA).

In *Jam v IFC*, the main question was whether the IOIA should be interpreted in a 'static' way, ie by referring to the law existing in 1945, at the time when the IOIA was enacted, or in an 'evolving' way, ie by referring to the law in force at the time of the suit. While the former interpretation would have accorded IFC absolute immunity, the latter would have limited this immunity to 'sovereign' acts.

The Supreme Court, by seven votes to one, followed the latter interpretation and reversed the Circuit Court's decision that had followed the opposite solution. The Supreme Court held that: 'IOIA's reference to the immunity enjoyed by foreign governments is a general rather than specific reference [...] [t]he reference is to an external body of potentially evolving law – the law of foreign sovereign immunity – not to a specific provision of another statute. The IOIA 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.' In addition, the Court noted that: 'the IFC's own charter does not state that the IFC is absolutely immune from suit'. Consequently, the Supreme Court remanded the case to the District Court for the District of Columbia for further proceedings.

On February 14, 2020, the District Court granted IFC's motion to dismiss for lack of subject matter jurisdiction. It held that 'plaintiffs' lawsuit does not fall within the FSIA's commercial activity exception because the suit is not, at its core, based upon activity – commercial or otherwise – carried on or performed in the United States'.

Although the Supreme Court's decision is essentially focused on the interpretation of US statutory law, it offers significant points for reflection on the nature and scope of IO immunities under international law. Five broad key-issues are worth examining.

A first critical issue is whether IOs enjoy immunities under international customary law. This question, which is still waiting for investigation at the ILC, is not purely theoretical: although immunities from civil jurisdiction are often provided in international agreements (either constitutive instruments of IOs, or multilateral and bilateral conventions), they are frequently invoked before courts of States that are not bound by these conventional rules. Moreover, some constitutive treaties (as in the present case) do not grant IOs with absolute immunity from private suits.

A second important issue regards the relationship between different sources regulating IO immunities (customary international law, treaty law and domestic law). To what extent can the silence of a treaty be integrated by any existent rule of customary international law or domestic law on IO immunities? Can the interpretation of a domestic statute on IO immunities supersede the applicable rules of international law governing this issue? And what impact, if any, does the interpretation of a domestic statutory norm have on the development of the international law of IO immunities?

A third and related point is the use of analogy for the purpose of assessing the content of IO immunities. While State immunities are based on the principle of sovereign equality, the rationale of IO immunities is most frequently identified in the doctrine of functional necessity. If the above is correct, to what extent can the rules on States immunities be applied also to determine the scope of IO immunities?

Fourthly, even if one considers it possible to apply the 'commercial activities exception' to IOs, the practical application of this standard still needs clarification. The Supreme Court judges themselves acknowledged that 'it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the [FSIA exception]'. As noted by J. Breyer in his dissenting opinion, '[u]nlike foreign governments, international organizations are not sovereign entities engaged in a host of different activities'. Such difference between States and IOs could make it difficult to identify the precise boundaries of the IO's immunities based on the distinction between sovereign and commercial acts, especially when the main function of the relevant IO necessarily implies entering into private transactions.

A last point, which did not specifically arise in *Jam v IFC*, concerns the relationship between IO immunities and human rights law. To which extent are IO immunities conditional upon the existence of alternative remedies available to the victims of human rights violations?

QIL asked two authors to discuss the Supreme Court decision in *Jam v IFC* in light of the above-mentioned issues. Fernando Lusa Bordin explores the foundations and scope of IO immunity under general international law, arguing a potential analogy between State immunity and IO immunity. Yohei Okada addresses the impact of the 'tandem' approach between State and IO immunity adopted by the Supreme Court on the relevance of the functional necessity doctrine in the interpretation and application of the IOIA.