

# U.S. Supreme Court Curtails International Organizations' Immunity from Lawsuits

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Resolving an issue that had divided U.S. courts, the Supreme Court of the United States recently decided that the statutory immunity of international organizations from suit is subject to the same exceptions as the immunity of foreign states, including the exception for commercial activity. The decision rejected the long-held position of the federal courts in Washington, D.C., the most significant U.S. jurisdiction for litigation involving international organizations, that international organizations' immunity under the International Organizations Immunities Act (IOIA) is absolute.<sup>1</sup>

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Instead, the Court concluded, that immunity is subject to the exceptions to immunity in another U.S. statute, the Foreign Sovereign Immunities Act (FSIA).<sup>2</sup>

The decision, in the case of *Budha Ismail Jam, et al. v. International Finance Corporation*,<sup>3</sup> rejected arguments that the unique functions of international organizations warrant interpreting the IOIA as granting them absolute immunity. Instead, the Court relied on the text of the IOIA to conclude that the scope of international organization immunity must coincide with the scope of foreign state immunity, even as that immunity has been narrowed since enactment of the IOIA. At the same time, the Court noted that charters of specific international organizations can and sometimes do prescribe a higher or lower level of immunity, which will prevail in the event of a conflict with the IOIA.

The Supreme Court's decision diminishes international organization immunity in significant respects. The decision is likely to lead to more frequent and more complex litigation about the scope of that immunity in the future.

**Background.** The IOIA was enacted in 1945 as numerous international organizations were established and headquartered in the United States in the aftermath of World War II. Under the IOIA, international organizations "enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." The IOIA further

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<sup>1</sup> 22 U.S.C. § 288 *et seq.*

<sup>2</sup> 28 U.S.C. §§ 1602, 1605 (1976).

<sup>3</sup> No. 17-1011 (Feb. 27, 2019).

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granted the President discretion to withhold any of the privileges and immunities granted by the IOIA from designated international organizations.

In 1945, when the IOIA was adopted, the position of the United States was that foreign governments were entitled to virtually absolute immunity from suit, with few exceptions made on a case-by-case basis by the U.S. Department of State. Starting in 1952, however, the Department of State began to follow the “restrictive” theory of sovereign immunity, which limited foreign state immunity in certain respects. In 1976, the U.S. Congress codified the “restrictive” theory into law in the FSIA, which took questions of foreign state immunity out of the hands of the Department of State and made those issues a matter for decision by the courts. The FSIA contains a list of exceptions to foreign sovereign immunity, such as for lawsuits based on the commercial activities of the foreign sovereign or its agencies and instrumentalities.

The *Jam* case raised the question of whether the adoption of the restrictive theory of state immunity enactment of the FSIA limited the immunities of international organizations under the IOIA, as well as limiting the immunities of foreign states. The dispute in *Jam* arose from environmental damage allegedly caused by a power plant project in rural India. The project was funded by a loan from the International Finance Corporation (IFC), an international development organization headquartered in Washington, D.C. Local Indian farmers and fisherman sued the IFC in a United States District Court. They argued their claims were based on commercial activities by the IFC and that the IFC lacked immunity because the IOIA incorporates by reference the FSIA’s commercial activities exception.

The District Court dismissed the suit on immunity grounds,<sup>4</sup> and the plaintiffs appealed. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal based on its prior decisions construing the IOIA as providing absolute immunity.<sup>5</sup> This decision conflicted with a recent decision of a different intermediate appellate court, the United States Court of Appeals for the Third Circuit, which had held that the FSIA exceptions applied in a suit against the European Space Agency.<sup>6</sup> The Supreme Court granted review to resolve the disagreement.

**The Supreme Court’s Decision.** In a 7-1 decision, the Supreme Court interpreted the IOIA’s reference to the “same immunity ... as is enjoyed by foreign governments” as incorporating all changes in the U.S. law of foreign sovereign immunity subsequent to the IOIA’s enactment, including the dramatic change effected by the adoption of the restrictive theory and the enactment of the FSIA. The opinion of Chief Justice John

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<sup>4</sup> *Jam v. Int’l Fin. Corp.*, 172 F. Supp. 3d 104 (D.D.C. 2016).

<sup>5</sup> *Jam v. Int’l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017).

<sup>6</sup> *See OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 763 (3d Cir. 2010).

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Roberts, writing for the majority, relied on the principle of statutory construction that whenever a statute refers to a general body of law, it should be construed as incorporating subsequent changes in the law. On that basis, the Court concluded, international organization immunity under the IOIA mirrors changes in the law of foreign state immunity. As a result of the Court's decision, all of the exceptions to immunity in the FSIA now apply to international organizations under the IOIA.

The IFC had argued that foreign state immunity and international organization immunity serve distinct purposes, as the former "is grounded in the mutual respect of sovereigns and serves the ends of international comity and reciprocity," while the latter allows international organizations "to freely pursue the collective goals of member countries without undue interference from the courts of any one member country." The Supreme Court held that this argument "gets the inquiry backward." Instead, the Court held that the "ordinary meaning of the words used" in the IOIA must hold sway, and that, "[w]hatever 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." The Court also noted that international organizations' charters can mandate a different level of immunity than the IOIA if "the work of a given international organization would be impaired by restrictive immunity."

The sole dissenter was Justice Stephen Breyer. In his dissenting opinion, Justice Breyer expressed deep concern that the multilateral mission of international organizations will be "threatened if one nation alone, through application of its own liability rules (by nonexpert judges), can shape the policy choices or actions that an international organization believes it must take or refrain from taking." Justice Breyer noted that many international organizations have agreed to limited waivers of immunity or set up alternative methods of dispute resolution that provide recourse to claimants in a way that does not interfere with the organizations' core objectives and policies. By contrast, Justice Breyer observed, the decision in *Jam* "exposes these organizations to potential liability in *all* cases arising from their commercial activities, without regard to the scope of their waivers."

**Future Litigation Risks.** The Supreme Court's decision substantially alters litigation risk in the United States for international organizations. Although the Court dismissed concerns that the application of restrictive immunity to international organizations would cause an onslaught of litigation, the immunity defenses now available to international organizations in the United States are complex and unpredictable. For example, the Court did not resolve whether IFC was in fact entitled to immunity in the *Jam* case. Rather, relying on statements in oral argument by the attorney for the U.S. Government, the Court suggested that lending by international development banks "may not qualify as 'commercial' under the FSIA" and that such disputes may not have

sufficient geographical connections to the U.S. Unlike absolute immunity, these elements require detailed litigation on a case-by-case basis. As Justice Breyer suggested in his dissenting opinion, this new legal landscape “will at the very least create uncertainty for organizations involved in finance, such as the World Bank, the Inter-American Development Bank, and the Multilateral Investment Guarantee Agency.”

In the wake of the *Jam* decision, international organizations should reevaluate their plans for addressing potential litigation in the United States and examine areas of potential risk under the FSIA exceptions to immunity. In designing projects and initiatives, international organizations should take into consideration the potential impact of the FSIA exceptions and possible ways to minimize exposure to litigation in U.S. courts.

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