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CHANGING DYNAMICS OF IMMUNITY TO

INTERNATIONAL ORGANIZATIONS:

COMMENT ON JAM ET AL V. IFC

Authored by - Ritika Kanwar

Abstract

With the landmark judgement in recent years, the Supreme Court of United States (“US SC”) has strengthened the foundations of human rights and environmental standards in the international community. With a majority of 7:1, the US SC held that immunity to international organizations under the International Organizations Immunity Act, 1945 (“1945 Act”) is not absolute in nature, instead is pari passu with that granted to foreign governments from lawsuits under the Foreign Sovereign Immunities Act, 1976 (“1976 Act”).

The said judgment holds ample significance in terms of international law by lowering down the standards of absolute immunity to international organization and making it equivalent to the immunities to foreign sovereigns. The said judgment is an epitome of the fact that actions of international organizations can be scrutinized by courts at domestic level. However, the extension of scope of said restrictive immunity is a major dilemma in the light of commercial disputes and direct linkage or nexus to US territory.

The author, herein, envisages to identify such additional loopholes and criticisms along with analysing the matured scenario prior and post the said ruling. Apart from criticisms and impact, the article focuses on statutory history and procedural background of the 1945 and 1976 Acts along with examining the position of functional necessity rationale post judgement. Moreover, it discusses a prospective journey from principle of equivalence to principle of translation with respect to international organizations.

Keywords: Absolute Immunity, Foreign Sovereign Immunities Act, Functional Necessity Rationale, International human rights, International Organizations Immunity Act.

Introduction

International Finance Corporation (“IFC”), as an investment institution of the World Bank, lends large quantum of monetary aid to development projects of private counterparts in several developing countries around the world. Herein, a group of farmers and fishermen of Gujarat State brought into limelight the serious and adverse repercussions on human rights and environmental standards owing to prospective construction of Gujarat coal plant. The IFC has invested a significant amount of \$540 million in the said project which had a detrimental effect on the local surroundings.

The US SC, in the said case, ensures victory of human rights by rejecting absolute immunity to international organizations in law suits at domestic level and make the, consequently, accountable for any kind of violations with respect to human rights and environmental standards in domestic sphere. The studies undertaken by IFC were indicative of some major protocol violations such as dumping of coal ash and releasing contaminated water which in turn severely impacted marine ecosystem and agriculture, the dominant source of livelihood, in that area.

Thus, the communities approached the court alleging the lending and subsequent ignorance of the conduct by IFC as the causal event for establishment of the project and harm to the environment. The first stop in the road to the Supreme Court was Compliance Advisor Ombudsman (“CAO”) at IFC in June 2011. Being deficient of further enquiry and ineffective remedies by CAO which is not a legal enforcement mechanism, the communities seek adequate redressal by filing a class action suit in US district court at Columbia in April 2015.

The plaintiffs, i.e., local fishermen and farmers, panchayat and the trade union Machimar Adhikar Sangarsh Sanghatan, were represented by Earth Rights International, an NGO engaged in pro-bono environmental litigation in the US. After non-satisfactory settlement from District Court and Court of Appeals, the plaintiffs approached the US SC. On February 20, 2020, with an opinion 7:1, the US SC in *Jam v. International Finance Corporation* (“JAM-IFC judgement”) concluded that the international organizations are equally immune to the lawsuits at domestic level as the foreign sovereigns.

It has been interpreted by the court that there is a constant link between both such immunities, i.e., to foreign governments and international organization established by FSIA and IOIA. The decision paves way for similar cases to be decided on merits in US courts. Moreover, it exposes activities of international organizations falling under exceptions to FSIA including that of ‘commercial activities.’

Factual Matrix and Issues Involved

While granting specific immunities and privileges to international organizations, the Congress passed International Organizations Immunity Act in 1945. The 1945 Act exempts such organizations from property taxes and absolutely immune them from searches and lawsuits. Section 2 of 1945 Act extends the scope of said immunity to their property and assets, irrespective of their possession, from every form of judicial process except when the same has been expressly waived off in lieu of any binding contract. It affords international institutions the same immunity as enjoyed by foreign sovereigns. However, it allows the president to withdraw such exemptions and immunities from international organizations. Through commercial activities exception, such absolute immunities to foreign governments were significantly restricted.

IFC (Respondent) is an international organization, member of World Bank based in Washington DC (DC), which provides funding to private-sector projects in developing countries. The IFC financed for construction and operation of one such projects, namely, Tata Mundra Plant in Gujarat, India. In lieu of the same vested supervisory authority, it may rescind the agreement and revoke the financial aid in case company shows patchy adherence to environmental action plan damaging the surrounding communities.

Plaintiff, being the third-party beneficiary, i.e., farmers and fishermen living nearby, approached the federal district court in DC seeking damages and injunctive relief based on tort cause of action. They claimed against IFC's negligent compliance with own internal audit pointing towards detrimental effects on surroundings and enforce environmental action plan resulting in degraded air quality, contaminated groundwater, loss of livelihood, property damage, threats to human health and consequent displacement of local masses. IFC avowed regarding absolute immunity from lawsuits under 1945 Act.

Thus, the case revolves around the issue whether immunity from lawsuits enjoyed by international organizations under 1945 Act is equivalent to that provided to foreign governments when 1945 Act was enacted or as described in accordance with 1976 Act? The district court, while dismissing the claim of plaintiffs, found that international organizations are entitled to absolute immunity from lawsuit under 1945 Act and the IFC had not waived the same. Moreover, the action did not fulfil the condition precedent of commercial activities exception, i.e., it was not 'based on' conduct, 'carried on' or 'performed in' the US. The US Court of Appeals for DC Circuit affirmed the district court relying on its 1998 precedent titled *Atkinson v. Inter-American Development Bank* ("1998 Case") along with *Convention on Privileges and Immunities of United Nations*.

It is pertinent to note that the 1998 Case is in contrast with other such precedent by the US Court of Appeals for third circuit in 2010, namely, *OSS Nokalva Inc v. European Space Agency* (“2010 Case”) well-known for its collateral order doctrine. In 1998 Case, court took the opinion in the favour of absolute immunity to international organizations on the similar level as enjoyed by foreign sovereigns under 1945 Act. Nevertheless, in 2010 Case, the court opined international organisations to be included in commercial activities exception under 1976 Act. With the evolving dynamics in this aspect, the US SC ruled in favour of restrictive immunity to such organizations.

Majority Opinion and Dissent

The majority opinion authored by Justice John G. Roberts J.R. held that 1945 Act assign international organizations with same immunity from lawsuits as provided to foreign sovereigns under 1976 Act and not what was described under 1945 Act at the time of its enactment. In a 7:1 judgement, IFC enjoys restricted immunity, i.e., to the extent as enjoyed by foreign governments, thereby uplifting such immunity from commercial activities carried on by international organisations.

The 1945 Act is non- static in nature and parallel with the lines of 1976 Act. The Court found that this interpretation is bolstered by the “reference canon” of statutory interpretation, which provides that when a statute refers to a general subject, it adopts the law on that subject at the time a question arises, as opposed to when a statute refers to a statute by title, in which case it adopts the law as it existed at the time the statute was enacted. However, Justice Stephen Breyer emphasised on statutory history, context, aim and consequences of 1945 Act rather than on canons of statutory interpretation.

US SC, discarding the contention that restrictive immunity under 1945 Act would result in flooding of litigation claims against international organizations, stated that 1945 Act merely comprises of default rules that can be departed through introduction of specific level of immunity under charter of an international organisation. Further, it wasn’t specified whether activities of developmental banks would qualify as commercial activities, thus continued to be immune. Moreover, for courts to exercise jurisdiction the activity along with related requirements under 1976 Act must have sufficient nexus to the US.

On the other hand, the district courts’ decision was founded on the proposition that gravamen is indicated through the ‘last act’ which causes injury in the causal chain, i.e., not the act of funding the project by IFC but the prospective ignorant conduct of the IFC. Moreover, the court excluded the ‘but for’ test of causation while determining the core of the complaint. This is indicative of objective approach of the court regarding determination of essential or gravamen of the suit. Apart from ‘last act’ theory, the court took ‘point of contact’ approach wherein it found the point of contact with

plaintiff as the basis of particular conduct of suit. As the whole conduct didn't took place in US, the same would not come within the ambit of commercial activities exception.

Comparative Analysis: Prior and Post Ruling

The impact of JAM-IFC judgement is confined to the interpretation of US state practice or opinion juris with respect to certain restrictions on international organizations under customary international law. Prior to said ruling, such organizations presumably enjoyed absolute immunity from lawsuits against property damage, human rights violations and deteriorating environmental standards. Post ruling, if analysed closely, the situation is pretty much similar in the light of the fact that IFC's charter did not provide absolute immunity. The JAM-IFC judgement reflects that absolute immunity could only be denied to international organizations for commercial activities within the US territory under customary international law unless there is any provision under the treaty or charter to the contrary.

Apart from negligible effect on customary international law, it does not significantly affect treaty-based immunities to such organizations. The judgement mandate of restrictive immunity can be nullified by international organizations through introduction or modification of its rules under charter, specifying either its activities to be of non-commercial in nature or having absolute immunity from lawsuits. Furthermore, whether the commercial activities, i.e., activities by which private party engages in trade or commerce, are inclusive of international development banks' activities is still a grey area. Merely contracts like procurement contracts undertaken by international organizations can be captured by commercial activities provided it does not have sufficient nexus to the core function of organization in case the same has modified its immunity provision.

Moreover, the immunity of international organizations is founded on functional basis and not the governmental actions that are commercial in nature. Thus, applying the restrictive standard akin to state would go contrary to challenges posed by such immunity. On one hand, if functions of international organizations would be covered within the ambit of commercial activities exception, they would get prone to divided verdicts of courts of several member states vitiating their purpose of independent functioning. On the other hand, if not, access to justice concerning affected individual would go unaddressed. The absolute immunity would result in lack of reasonable alternative redressal means of dispute settlement against such organizations. This approach would be advantageous for capturing harm caused by non-commercial activities of international organizations.

Therefore, the functional necessity rationale proves to be relevant in the US post-ruling. The distinction between commercial and non-commercial would be based on functions or activities of international organization. Even though they qualify as non-commercial activity under 1976 Act,

functions of such organizations would indicate domestic courts as preferable ones for exercising jurisdiction. However, the normative relationship between access to justice and immunity of international organizations is still unaddressed and the judgement haven't proved to be a significant step towards holding international organizations legally accountable before domestic courts. A key takeaway for international organizations could be improvisation of internal settlement mechanisms for employment disputes and thirty party redressals for not encouraging domestic courts to deprive them from their immunity in the light of right to fair trial.

Conclusion

The JAM-IFC judgement proves to be a landmark one in the aspects of covering lending activities of international organizations as commercial in nature and lowering down the standards of their absolute immunity. However, specific litigation being commercial activity and having sufficient nexus with the US to be potentially liable is objective in nature and a question of fact. Moreover, the restrictive state immunity standard would dissuade international lending institutions from funding projects with grave human rights and environmental risks. This judgment would change the win-lose scenario to a healthy amicable settlement. Moreover, the same deeply impacts related cases like one against palm oil plantations in Honduras and would open avenues for third party redressal.

Additionally, the contrary decision upholding the absolute immunity would have resulted in authoritative persuasion to negligent and unaccountable conduct of the international organizations that would further have posed serious environmental and social risks. The same would have been in violation of customary international law as right to access effective remedies with the affected individuals, non-state actors, is guaranteed by the International Covenant on Civil and Political Rights ("ICCPR"). Lastly, it would reaffirm the mandatory compliance of international organizations towards not only the customary international law but also its own framework and policies on environment and human rights.

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