Equivalence and Translation: Further thoughts on IO Immunities in Jam v. IFC

At the end of February, the Supreme Court of the United States issued a landmark judgment on the immunity of international organizations in *Jam v. International Finance Corporation*, 58 U.S. (2019). The case concerned the meaning of the 1945 International Organizations Immunities Act (***IOIA***), which affords international organizations "*the same immunity from suit* […] *as is enjoyed by foreign governments*"[1]. Writing for a 7-1 majority, Chief Justice Roberts found that the IOIA incorporates a dynamic immunities regime, equivalent to whatever immunities US law affords to foreign states. The immunities of international organizations are keyed to sovereign immunity. The former evolve to meet the latter. Thus, as the US law of sovereign immunity has shifted from an absolute to a restrictive paradigm with the enactment of the 1952 Foreign Sovereign Immunities Act (***FSIA***), so too does the IOIA today incorporate merely restrictive immunity for international organizations.

Writing in dissent, Breyer laments the majority's approach, arguing for a static interpretation of the IOIA on purposive grounds. Given his druthers, Breyer would have interpreted the

statute as affording international organizations absolute immunity from suit – which foreign sovereigns were entitled to under US law when the IOIA was enacted in 1945. In his view, a static interpretation best accords with the IOIA's purpose of freeing international organizations from interference through domestic litigation.

Between Diane Desierto's thorough recent post on EJIL: Talk!, and Ingrid Wuerth's preview of the case on lawfare last year, there is no need to rehash the facts and issues here. Suffice it to say that the case mostly plays out on the familiar turf of statutory interpretation – pitting Roberts, the textualist, against Breyer, the purposivist.

More interesting is the spirit of the split between Roberts and Breyer. Their debate plays out less as a clash between nationalism and internationalism, than as an opposition between moderate and maximalist visions of the international legal order. Roberts' majority opinion embraces a vision of international integration in which national courts play a real *but limited* role in holding international institutions to account. By contrast, Breyer, the internationalist, embraces maximally insulating international organizations from domestic suit – discarding an avenue of accountability for international organizations in the name of protecting them from interference.

Like Desierto and Wuerth, I applaud the majority's result. I share their skepticism of Breyer's policy arguments for absolute immunity, which are diminished by growing problems of organizational accountability at the international level. But Breyer is right that the majority's approach has flaws. At minimum, Roberts' opinion leaves central questions unaddressed.

Jam produces two fundamental ambiguities. The majority holds that the IOIA/FSIA restrictive immunity rule provides merely a default regime of restrictive immunity for international

organizations. But it leaves unclear: (1) how states can opt out of the default (*i.e.* its stickiness); and (2) just what, concretely, the default entails as applied to international organizations.

What kind of default is the IOIA/FSIA restrictive immunity rule?

Roberts acknowledges that states may wish to endow particular organizations with heightened immunity. He suggests that they should be free to do so, by codifying even absolute immunities in the organization's constituent instrument (as in the IMF Articles of Agreement, Art. IX) or by subsequent treaty (as in the Convention on the Privileges and Immunities of the United Nations). This sounds reasonable in the abstract: the IOIA provides statutory default rules, which states can contract around by treaty – preserving flexibility, while prioritizing state consent.

However, as Breyer notes, the Chief Justice neglects to mention some important context – namely the Court's doctrine of self-executing treaties, as consolidated by Roberts himself in *Medellín v Texas*, 552 U.S. 491 (2008). Roberts' "*default rule*" argument becomes rather less convincing when coupled with his own aversion to giving treaties or treaty provisions direct effect. Despite what the majority says in *Jam*, contracting around the restrictive immunity rule would require *both* codifying a different immunity regime into the organization's constituent instrument *and* making that treaty demonstrably self-executing – no simple matter. In other words, if IOIA/FSIA restrictive immunity is a default, it may ultimately prove a very sticky one.

Breyer's concerns here are well-placed. Still, the issue of opt-out remains undecided. The question before the Court in *Jam* concerned only the content of the statutory rule – not the conditions under which treaty opt-out would be effective. And the IFC charter does not itself force the issue[2].

Because Roberts does not explain how the majority's conception of the IOIA/FSIA default interacts with the doctrine of self-executing treaties, it remains possible for future litigants to thread the needle. Wuerth suggests that the *Charming Betsy* canon might provide a legal hook, such that "*the IOIA should not be interpreted to put the United States in violation of international law, unless Congress makes its intent to do so clear*". On this view, the IOIA/FSIA rule would yield to any organizational treaty establishing heightened immunity rules (at least where the US is a party). This is an eminently sensible approach. Still, we should query whether the Court's newfound openness to contracting around the IOIA/FSIA by treaty would really take precedence over its longstanding aversion to giving treaties direct effect, if push came to shove.

What is the content of the IOIA/FSIA default?

To my eye the case leaves unresolved the central question: what is the concrete content of the IOIA/FSIA default? The majority concludes by holding that insofar as the IOIA incorporates "*the same immunity from suit*" as enjoyed by foreign sovereigns, the FSIA "*governs the immunity of international organizations*". What, concretely, does "*govern*" mean? In his broadest statement, Roberts suggests that the IOIA issues "***an instruction to look up*** *the applicable rules of foreign sovereign immunity, wherever those rules may be found—the common law, the law of nations, or a statute*". Elsewhere, he suggests that the "*IOIA should* […] *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*". And still elsewhere: "*the immediate purpose of the immunity provision is expressed in language that Congress typically uses to make one thing continuously* ***equivalent*** *to another*" (my emphasis).

In the majority's view, all this means that international organizations are "*therefore not absolutely immune from suit*".

But it is not entirely clear exactly what kind of restrictive immunity regime they are subject to.

The question that remains unanswered is: what does it mean to for international organizations to be subject to a restrictive immunity regime *equivalent* to that applicable to foreign sovereigns? It is tempting to read into Roberts' broad language that *equivalent* immunity here means *identical* immunity. But it does not. Indeed it cannot. Equivalence, here, necessitates a measure of differential treatment.

The problem is that the FSIA approach to restrictive immunity cannot be coherently applied to international organizations without some translation. This is because, as understood by the Court, the FSIA rule is enmeshed in the notion of sovereignty – a core feature of statehood, but something international organizations lack *by definition*. Indeed, the Court has long understood the key exception removing states' immunity for "*commercial activity*" only in opposition to sovereignty[3]. Bemoaning the FSIA's lack of clarity about the scope of the commercial exception in *Weltover*, the Court defined "*commercial activities*" *against* "*the exercise of powers peculiar to sovereigns*"[4]. As the Court framed it in *Nelson*, "*a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts* (jure imperii)*, but not as to those that are private or commercial in character* (jure gestionis)"[5]. What counts as commercial, for FSIA purposes, can only be understood in light of what is sovereign. Yet, as Breyer rightly notes in *Jam*, "*international organizations are* not *sovereign entities*". They exercise no sovereignty of their own, though they surely engage in acts of public governance – acts which may be more or less commercial in nature.

Yes, the IOIA clearly indicates that the immunity of international organizations is somehow keyed to sovereign immunity. Yes it indicates that such immunities should be

equivalent. We need not follow Breyer in inferring that the essential differences between states and international organizations imply that the latter must enjoy absolute immunity. However, it also cannot be right that determining the scope of immunity for international organizations under the IOIA is *simply* a matter of copy/pasting the restrictive immunity regime for sovereigns codified in the FSIA. Equivalence requires not only treating like cases alike, but also treating unlike cases in unlike manner. In material ways, international organizations and states are not like cases. To afford equivalent immunity to these unlike entities, the FSIA approach must be translated into the IOIA.

The key question, then, is: *what is the proper principle of translation*? Both the majority and the dissent leave this matter completely unaddressed. As a result, the meaning of the IOIA/FSIA default remains fundamentally unclear – both in terms of its content and its rigidity. While evident that international organizations are entitled to only restrictive immunity, the details of the restrictions remain indeterminate. In particular, it remains unclear how to distinguish between international organizations' commercial and non-commercial acts. The analogy to *jure imperii* and *jure gestionis* only goes so far.

Toward a Functional Principle of Translation

What might a plausible principle of translation look like? Here we might take a page from international law, where the ICJ's functional principle offers a credible candidate. In *Reparations*, the ICJ famously distinguished between the subjecthood of states and international organizations. By contrast to the state, as plenary subject of international law, the ICJ held that the subjecthood of international organizations is functionally delimited. The extent to which an organization enjoys powers and privileges associated with subjecthood turns on the functions delegated to it by its member states.[6] This functional principle can be (and often

is) extended to immunities – itself a hallmark of subjecthood in international law.

The idea would be that the contours of the immunity due to a particular organization depend upon the functions delegated to it. Commercial activities, for example, would be opposed not to *sovereign acts* (as in the FSIA), but to *acts taken in furtherance of the organization's functions*. Obviously, further questions must be addressed, such as how far such acts must be *necessary* to the organization's functions. Putting such (critical) details to the side for purposes of this sketch, the benefits of a functional approach are twofold. First, it helps distinguish vertically between states and international organizations, by providing an appropriately tailored comparator for determining which organizational acts should be immune. Second, and as importantly, it helps to distinguish horizontally among international organizations. Unlike sovereigns, which for international legal purposes are all formally *equal*, international organizations are all formally *different*. The functional principle helps ensure that they will be immune when acting in their varied governance capacities, but not when they are acting as, say, ordinary commercial actors on the market.

Functionalism has the further advantage of getting around another of Breyer's concerns – that some organizations' actions are inherently commercial. On this logic, an organization whose core purposes involve engaging directly in commerce might enjoy reduced exposure to the commercial activity exception compared to organizations with different mandates. While the World Bank or IFC might enjoy immunity for contract disputes arising out of a loan agreement, the WHO might not enjoy as strong a claim for immunity with respect to a procurement contract.

As a principle of translation, functionalism would not be particularly radical. Functional immunity has a long pedigree at the international level. Several organizations' charters

adopt a functional approach[7]. Though not uncontested, scholars have long argued that functional immunity is also the proper default under general international law[8].

Of course care has to be taken with the details. As Klabbers rightly cautions, an uncritical functionalism can devolve into absolute immunity and unaccountability[9]. All the same, he concludes that a "*modest functionalism*" remains a justified principle of translation – even one "*to be cherished*"[10].

I am suggesting that a moderate functional principle is the best way to translate the FSIA into the IOIA as the default position under US law. But whether or not this view wins the day, the issue remains live. One way or another, the Court will have to determine criteria for translating the restrictive immunity of states to the context of international organizations.

[**Editorial note:** This post first appeared on EJIL Talk! on 11 March 2019]

[1] 22 U.S.C. § 288a(b).

[2] IFC Articles of Agreement, Art. VI(1) & (3) (enumerating relatively limited immunities).

[3] 28 U.S.C. §1605(a)(2).

[4] *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992).

[5] *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-360 (1993).

[6] Reparations For Injury Suffered in the Service of the United Nations, [1949] ICJ Rep. 174.

[7] *See* UN Charter, Art. 105 ("*The Organization shall enjoy* […] *such privileges and immunities as are necessary for the fulfillment of its purposes*"); OAS Charter, Art. 133; and even the IFC Articles of Agreement, Art. VI(1) (enumerating limited

immunities "[t]*o enable the Corporation to fulfill its functions*").

[8] Rosalyn Higgins, Problems & Process: International Law and How We Use It 91-94 (1994); *but see* Fernando Lusa Bordin, The Analogy Between States and International Organizations (2018) (on the limits of functionalism with respect to third parties).

[9] Jan Klabbers, *The EJIL Forward: The Transformation of International Organizations Law*, 26 EJIL 9 (2015).

[10] *Id.*, at 82.
