



Statutory Canon Aimed at International Organization Immunity

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In the October 2018 term, the Supreme Court is slated to hear oral argument in *Jam v. International Finance Corp.*, a case involving an international development project gone awry in India. The petitioners—a group of Indian nationals from Gujarat—seek to hold International Finance Corp. (IFC) liable for extensive environmental damage throughout their community caused by the construction of a power plant financed and overseen by IFC. The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) dismissed their lawsuit, [holding](#), in accordance with the circuit’s [precedent](#), that the International Organizations Immunities Act (IOIA) grants absolute immunity to IFC in this case. The IOIA, in relevant part, states that:

International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

The issue before the Court is whether the “same immunity from suit ... as is enjoyed by foreign governments” means the immunity foreign states enjoyed at the time of the statute’s 1945 enactment—which the D.C. Circuit described as “[absolute](#)”—or the more restrictive form of immunity that applies today under the Foreign Sovereign Immunities Act (FSIA). Under the FSIA, foreign governments are immune from lawsuits unless a statutory exception applies, including an exception for “commercial activity” carried out by foreign states in the United States, among others. The proper measure of immunity in this case could potentially turn on the [canons of statutory interpretation](#) the Court could choose to apply to discern Congress’s intent.

The petitioners argued at the D.C. Circuit that Congress intended in enacting the IOIA that the form of immunity it granted to international organizations in 1945 would change along with developments in international law regarding the sovereign immunity of the governments that participate in those international organizations. The respondent, IFC, views Congress’s intent differently, arguing the 1945

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standard has weathered the adoption of restrictive sovereign immunity by most states, including the United States. If the IOIA does permit the petitioners' lawsuit against IFC, the IFC argues that the "floodgates" for such suits would open—potentially subjecting IFC to suit in the United States for "every loan [it] makes to fund projects in developing countries." The D.C. Circuit [agreed](#) with IFC.

Concurring on the grounds that the petitioners' lawsuit is foreclosed by circuit precedent, Circuit Judge Pillard wrote separately to suggest that such precedent was wrongly decided and should be revisited. Judge Pillard would have [applied a different rule](#) of statutory construction to the IOIA, the "reference canon," that "[w]hen a statute incorporates existing law by reference, the incorporation is generally treated as dynamic, not static: As the incorporated law develops, its role in the referring statute keeps up." She noted that circuit precedent had accepted that rule generally, but rejected its application in this circumstance because it read another part of the IOIA to negate the presumption. Specifically, the D.C. Circuit [has held](#) that [section 1](#) of the IOIA delegates to the President the authority to update the immunity standard afforded to international organizations. That provision authorizes the President to "withhold or withdraw from any such [international] organization or its officers or employees any of the privileges, exemptions, and immunities provided for" by the IOIA. Judge Pillard [would have read](#) section 1 of the IOIA instead as "merely empower[ing] the President to make organization- and function-specific exemptions from otherwise-applicable immunity rules," rather than establishing new rules applicable to all such organizations.

Among amici who have submitted briefs to the Supreme Court, there is [some support](#) for Judge Pillard's interpretation. Some Members of Congress submitted a [brief in support of the petitioners](#) to explain their view that the reference canon should control the outcome of the case. [Addressing](#) the "importance of canons of construction and the background principles of statutory interpretation against which Congress legislates," the Members [cited](#) a venerable 1904 treatise describing the canon:

The reference canon has two components: first, "[w]here one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provision adopted, . . . [s]uch adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent." But, when "the reference is, not to any particular statute or part of a statute, but to the law generally which governs a particular subject. . . [t]he reference . . . means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied." (citing *J.G. Sutherland's Statutes and Statutory Construction* (2d ed. 1904) (internal page numbers omitted)).

Under the participating Members' view (and in agreement with a [2010 opinion of the Third Circuit](#)), the reference to the "same immunity from suit...as is enjoyed by foreign governments" is a reference to a general body of law and should accordingly be interpreted dynamically. Moreover, under their [view](#), the D.C. Circuit's interpretation that Congress in the IOIA delegated to the President its authority to set the jurisdictional boundaries of federal courts with respect to international organizations raises important constitutional issues. They [argue](#) that "separation-of-powers concerns 'caution [this Court] against reading legislation, absent clear statement,' as delegating one branch's constitutionally prescribed power to another."

In its brief before the Court, however, [IFC](#), [argues](#) that the reference canon has bearing only on statutes that refer to other statutes, not on those that adopt the common (judge-made) law. Under IFC's [view](#), citing *Morissette v. United States*, where a statute adopts a common-law concept, a court should presume that Congress "adopt[ed] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken" at the time of enactment, absent clear evidence of contrary intent.

The United States Government submitted a [brief in support of reversal of the D.C. Circuit's opinion](#), [expressing](#) general agreement with Judge Pillard's concurrence. The Solicitor General [argues](#):

The text, structure, and history of the IOIA support [petitioners'] interpretation. Congress's use of the present tense phrase—"as is enjoyed"—is most naturally read to refer to the immunity afforded

to foreign sovereigns when the statute is applied, not some 70 years in the past. If Congress had intended a backward-looking inquiry, it could have stated that international organizations shall be afforded the same immunity “as was enjoyed on the Act’s effective date” or something similar. Congress’s decision not to use such language is telling, particularly in light of the background principle that statutory references to other bodies of law generally incorporate subsequent amendments to the referenced body of law.

Finally, the Supreme Court could decide the extent of international organization immunity using means other than one of the proposed constructions of the IOIA discussed above. Notably, the Court has in the past interpreted the FSIA very narrowly to [hold](#) that it covers only foreign states and their agencies and instrumentalities—not [foreign officials](#). Similarly, the FSIA does not by its [terms](#) cover international organizations. The Court could also, as [various amici](#) for respondent recommend, place emphasis on [historical practice](#) or the [foreign policy](#) ramifications of allowing the suit against IFC to proceed, for example. Whatever mode of statutory interpretation leads the Court to an answer, Congress could choose to let it stand, codify it, or legislate a different result.

The Court scheduled oral argument for October 31, 2018.