International Insight: Immunity of International Organizations: How Courts Are Applying *Jam v. International Finance Corp.*

A little over a year has passed since the Supreme Court issued its landmark decision in *Jam v. International Finance Corp.*,[1] which held that international organizations are entitled to the same immunity as foreign states under the Foreign Sovereign Immunities Act ("FSIA") and thereby reversing decades-old precedent holding that international organizations were entitled to absolute immunity under the International Organizations Immunities Act ("IOIA"). This client alert provides an overview of the *Jam* decision and reviews recent lower court decisions applying that decision.

The Supreme Court's Decision in *Jam*

In *Jam*, a group of Indian nationals sued the International Finance Corporation ("IFC"), a development bank headquartered in Washington, D.C. that has been designated as an international organization under the IOIA.[2] The plaintiffs claimed that they were harmed by pollution from a coal-fired power plant in India, which was constructed with the proceeds of a $450 million loan from the IFC. According to the complaint, the IFC failed to take any action against the borrower after it violated certain environmental covenants contained in its loan agreement with the IFC.[3]

The United States District Court for the District of Columbia dismissed the complaint, holding that the IFC was entitled to absolute immunity under the IOIA.[4] The D.C. Circuit affirmed.[5] Both courts relied on the D.C. Circuit's prior decision in *Atkinson v. Inter-American Development Bank*, which held that international organizations were entitled to absolute immunity because the IOIA grants international organizations the "same immunity from suit ... as is enjoyed by foreign governments"[6] and foreign states were entitled to absolute immunity when the IOIA was enacted in 1945.[7] The Supreme Court reversed.[8]

The Supreme Court held that immunity granted to international organizations under the IOIA was not set in stone in 1945 and was merely intended to link the immunity of

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[1] *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019).
[2] *Id.* at 766.
[3] *Id.* at 767.
[4] *Jam v. Int'l Fin. Corp.*, 172 F.Supp.3d 104, 108-109 (D.D.C. 2016).
[5] *Jam v. Int'l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017).
[6] 22 U.S.C. § 288a(b).
[7] *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998).
[8] *Jam*, 139 S. Ct. at 764-65.

international organizations with the immunity accorded to foreign states.[9] It therefore held that the FSIA governs the immunity of international organizations.[10] Thus, the Supreme Court remanded the case to the lower courts to determine whether one of the FSIA's exceptions to immunity applied.

However, in remanding the case, the Supreme Court made a couple of interesting observations regarding the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2). First, the Court suggested that the lending activities of certain development banks, such as loans made to governments, may not qualify as "commercial activity" under the FSIA. Second, the Court reiterated the "serious doubts" expressed in the U.S. government's *amicus* brief that the plaintiffs' claims would not satisfy the "based upon" requirement of the FSIA's commercial activity exception.[11]

Immunity of International Organizations in Lending Cases

The D.C. district court's decision on remand in *Jam v. International Finance Corp.*[12] as well as its decision in *Zhan v. World Bank*[13] demonstrate that courts are unlikely to abrogate an international organization's immunity in cases where the plaintiffs are essentially seeking to hold the organization liable for financing a third-party borrower that engaged in the wrongful conduct that harmed the plaintiff.

Jam v. International Finance Corp. (D.D.C.)

On remand from the Supreme Court, the plaintiffs in *Jam* asserted jurisdiction under the first clause of the FSIA's commercial activity exception, which abrogates a foreign state's immunity in actions that are "based upon ... a commercial activity carried on in the United States" by the foreign state.[14] However, the district court held that this exception did not apply and dismissed the case.[15]

The district court focused its analysis on the "based upon" requirement of the commercial activity exception. An action is "based upon" a foreign state's conduct where that conduct constitutes the "gravamen" of the complaint – *i.e.* the conduct that actually injured the plaintiff.[16] The district court found that the "gravamen" of the plaintiffs' suit was "the alleged failure to ensure that the design, construction and operation of the plant complied with all of the environmental and social sustainability

[9] *Id.* at 768.
[10] *Id.* at 772.
[11] *Id.*
[12] *Jam v. Int'l Fin. Corp.*, No. 15-cv-612 (JDB), 2020 U.S. Dist. 25923 (D.D.C. Feb. 14, 2020).
[13] *Zhan v. World Bank*, No. 19-cv-1973 (DLF), 2019 U.S. Dist. LEXIS 201172 (D.D.C. Nov. 20, 2019).
[14] 28 U.S.C. §1605(a)(2).
[15] *Jam v. Int'l Fin. Corp.*, No. 15-cv-612 (JDB), 2020 U.S. Dist. 25923 (D.D.C. Feb. 14, 2020).
[16] *Id.* at *15-16 (applying *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015)).

standards laid out in the loan agreement [and] ... to prevent and mitigate harms to the property, health and way of life of [the plaintiffs]."[17] It then concluded that such conduct was centered in India and therefore did not have the requisite "substantial contact" with the United States under the first clause of the commercial activity exception.[18]

The district court effectively confirmed the Supreme Court's "serious doubts" that the complaint satisfied the "based upon" requirement of the commercial activity exception. However, the district court explicitly declined to address the other potential jurisdictional deficiency identified by the Supreme Court – namely whether the IFC's conduct constituted ***commercial*** activity under the FSIA.[19]

Zhan v. World Bank (D.D.C.)

In *Zhan v. World Bank*, the plaintiff brought a putative class action suit against the World Bank on behalf of Chinese individuals whose villages were destroyed in connection with the Chinese government's construction of a dam, which was financed by a loan from the World Bank.[20] The complaint alleged that, as part of the project, the Chinese government was supposed to offer compensation and assistance to help the villagers relocate and that the villagers never received adequate compensation because Chinese officials allegedly embezzled the resettlement funds. According to the complaint, the World Bank was supposed to "keep a 'close watch' on the resettlement process" but failed to do so.[21]

The district court held that none of the FSIA's exceptions applied and dismissed the case. It held that the World Bank had not waived its immunity under Section 3 of Article VII of the World Bank's Articles of Agreement, which states:

> Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.[22]

Relying on the D.C. Circuit's decision in *Atkinson*, the district court stated that this provision only constituted a waiver of immunity with respect to certain claims in which

[17] *Id.* at *25.
[18] *Id.* at *31.
[19] *Id.* at *13 n.2.
[20] *Zhan v. World Bank*, No. 19-cv-1973 (DLF), 2019 U.S. Dist. LEXIS 201172 (D.D.C. Nov. 20, 2019).
[21] *Id.* at *2-3.
[22] *Id.* at *6-7 (quoting World Bank Articles of Agreement, art. VII, § 3).

a waiver "would further the Bank's objectives."[23] It found that this was not such a case, stating that exposing the World Bank "to liability for decades-old loans where the plaintiffs have been allegedly injured by the borrower – and not the actions of the World Bank – would severely interfere with and hamper the Bank's operations."[24]

The district court further concluded that the FSIA's commercial activity exception did not apply. It stated: "The 'gravamen' of this suit centers not on commercial activity but rather on the Chinese government's tortious actions in China and against Chinese citizens."[25]

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Both *Jam* and *Zhan* addressed the question of whether an international organization is subject to suit in U.S. courts with respect to claims that are based on the organization's lending activities where the borrower, and not the organization itself, engaged in the allegedly wrongful conduct. While the courts took different approaches, they arrived at the same conclusion – the international organizations were immune from suit.

Immunity of International Organizations in Employment Suits

Prior to the Supreme Court's decision in *Jam*, courts routinely dismissed employment-related lawsuits against international organizations on the grounds that the IOIA conferred absolute immunity from such suits.[26] In light of the holding in *Jam*, courts must now determine whether such claims fall within one of the FSIA's exceptions to immunity. That issue was recently addressed in *Francisco S. v. Aetna Life Ins. Co.*, which held that the FSIA's commercial activity exception applied to the plaintiff's ERISA claims against the World Bank.[27]

In *Francisco*, the plaintiff was an employee of the World Bank who received health insurance through a self-funded employer sponsored benefit plan.[28] Aetna provided third-party claims administrator services to the plan.[29] The plaintiff alleged that Aetna

[23] *Id.* at *7 (quoting *Atkinson*, 156 F.3d at 1338, *overruled on other grounds in Jam*).
[24] *Id.* at *7-8.
[25] *Id.* at *6.
[26] *See, e.g., Sampaio v. Inter-American Dev. Bank*, 468 Fed. App'x 10 (D.C. Cir. 2012); *Veiga v. World Meteorological Org.*, 368 Fed. App'x 189 (2d Cir. 2010); *Mendaro v. World Bank*, 717 F. 2d 610 (D.C. Cir. 1983); *see also Brzak v. United Nations*, 597 F. 3d 107 (2d Cir. 2010).
[27] *Francisco S. v. Aetna Life Ins. Co.*, No. 18-cv-0010-EJF, 2020 U.S. Dist. LEXIS 60469 (D. Utah Apr. 6 2020).
[28] *Id.* at *4.
[29] *Id.* at *5.

and the World Bank violated ERISA by failing to pay for his daughter's medically necessary treatment.[30]

The court held that the FSIA's waiver exception did not apply. Consistent with *Zhan*, the court held that Section 3 of Article VII of the World Bank's Articles of Agreement did not constitute a waiver of immunity with respect to the plaintiff's ERISA claims. It also found that the Bank did not waive its immunity under the terms of the health insurance plan.[31]

Nevertheless, the court held that the first clause of the FSIA's commercial activity exception did apply. It was undisputed that the plaintiff's case was "based upon" the denial of insurance coverage for the plaintiff's daughter's medical bills. Because the employee lived and worked for the World Bank in the United States, the daughter received medical care in the United States and the denial of coverage occurred in the United States, the court held that the case was based upon activity "carried on in the United States" for purposes of the FSIA's commercial activity exception.[32] The court further concluded that such activity constituted "commercial activity" under the FSIA. It explained that the World Bank' acted as a private player in the market by providing health insurance to the plaintiff and by denying coverage to the plaintiff's dependant.[33]

In support of its conclusion, the court relied on the First Circuit's decision in *Merlini v. Canada*, which held that the FSIA's commercial activity exception conferred jurisdiction over a worker's compensation claim against Canada.[34] However, the First Circuit in *Merlini* and other courts of appeals have drawn a significant distinction between claims brought by employees who perform civil service, diplomatic or other sovereign functions and employees who do not perform such functions. Courts have held that the hiring and employment of persons who perform civil service, diplomatic or other sovereign functions does not constitute a "commercial activity" under the FSIA and therefore the commercial activity exception does not apply to employment-related claims brought by such employees.[35] The *Francisco* decision does not address this distinction. Thus, it remains unclear whether all employees (or just lower-level staff) may bring employment-related claims against international organizations under the commercial activity exception.

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[30] *Id.* at *3.
[31] *Id.* at *15-16.
[32] *Id.* at *18.
[33] *Id.* at *18-19.
[34] *Id.* at *19 (citing *Merlini v. Canada*, 927 F.3d 21 (1st Cir. 2019).
[35] *See, e.g.*, *Merlini*, 927 F.3d at 31; *see also El-Hadad v. United Arab Emirates*, 496 F.3d 658, 664 (D.C. Cir. 2007); *Kato v. Ishihara*, 360 F. 3d 106, 111-12 (2d Cir. 2004).

Applying the FSIA's Procedural Provisions in Actions under the IOIA

The FSIA provides a comprehensive statutory scheme that governs all aspects of lawsuits against foreign states in U.S. courts.[36] By contrast, the IOIA does not enumerate any exceptions to the immunity accorded to international organizations and their assets. Nor does it contain any provisions concerning venue, removal, service of process, or entry of default judgments. While the Supreme Court held in *Jam* that the FSIA's substantive immunity provisions apply in actions against international organizations, it is not clear whether the FSIA's procedural provisions apply in such cases. One recent decision – *Rodriguez v. Pan Am. Health Org.* – suggests that at least some of the FSIA's procedural safeguards would apply to international organizations.[37]

In *Rodriguez*, a group of Cuban doctors were recruited to participate in a medical aid program in Brazil that was organized, in part, by the Pan American Health Organization ("PAHO"), a designated international organization under the IOIA headquartered in Washington, D.C. The doctors filed civil RICO claims and human trafficking claims against PAHO in the Southern District of Florida alleging that they were never adequately compensated for their services and that the program was equivalent to forced labor and human trafficking.[38]

The court granted PAHO's motion to transfer the case to Washington, D.C. pursuant to the FSIA's venue provision, 28 U.S.C. § 1391(f). The court concluded that the FSIA's venue provision is exclusive and must be applied in every case against a foreign state.[39] It further explained that foreign sovereign immunity under the FSIA encompasses the venue requirements of Section 1391(f) and thus prescribes both whether a foreign state may be sued and where it can be sued.[40] Because the FSIA governs the immunity analysis under *Jam*, the court held that "immunity from suit" under the IOIA incorporates the FSIA's venue provision.[41] It then concluded that Florida was not a proper venue under Section 1391(f) and transferred the case to the FSIA's default venue, Washington, D.C.[42]

Rodriguez may provide some additional protection to international organizations that are sued in remote or inconvenient venues in the United States. For example, the World Bank similarly moved to transfer the *Francisco* case from Utah to Washington, D.C., but

[36] *See Verlinden BV v. Central Bank of Nigeria*, 461 US 480 (1983).
[37] *Rodriguez v. Pan Am. Health Org.*, 18-cv-24995-GAYLES, 2020 U.S. Dist. LEXIS 58987 (S.D. Fla. Apr. 3, 2020).
[38] *Id.* at *2-3.
[39] *Id.* at *20-23.
[40] *Id.* at *11, 19-20 (citing *Mobil Cerro Negro v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 124-25 (2d Cir. 2017)).
[41] *Id.* at *19-20.
[42] *Id.* at *25-26.

it did not invoke Section 1391(f). Instead, the court applied the general transfer statute, 28 U.S.C. § 1404(a), and denied the Bank's transfer motion after concluding that the Tenth Circuit's discretionary convenience factors did not warrant a transfer. Had the World Bank asserted the FSIA's more restrictive venue provision, it is possible that the court might have granted the Bank's motion to transfer the case to Washington, D.C., which is the default venue under Section 1391(f).

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