ALERT MEMORANDUM

The Scope of Immunity for International Organizations Comes Under Scrutiny Again, Two Years After the U.S. Supreme Court's Decision in *Jam v. International Finance Corporation*

March 1, 2021

Two years ago, the U.S. Supreme Court held in *Jam v. International Finance Corporation* that international organizations ("IOs") are not entitled to the virtually absolute immunity enjoyed by foreign states in 1945, when the International Organizations Immunities Act ("IOIA") was enacted. Rather, the Court held that IO immunity was "the limited or 'restrictive' immunity that foreign governments currently enjoy" under the Foreign Sovereign Immunities Act ("FSIA"),[1] which is subject to several exceptions.

The scope of immunity for IOs is now under scrutiny again in two separate appeals, both before the D.C. Circuit. The first is in *Jam* itself, which is back before the appeals court following the district court's decision on remand that the plaintiffs' claims do not trigger the FSIA's commercial activity exception and thus the IOIA immunity of the International Finance Corporation ("IFC") remains intact.[2] In the second case, *Rodriguez v. Pan American Health Organization*, the district court reached a different result, holding in connection with one of the plaintiffs' claims that the Pan American Health Organization ("PAHO") is not entitled to immunity under the IOIA—or, for that matter, the U.N. Charter or WHO Constitution.[3]

This alert memorandum summarizes the Supreme Court's decision in *Jam* and highlights the key issues now pending in the D.C. Circuit Court.

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[1] *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 765 (2019).
[2] *Jam v. Int'l Fin. Corp.*, 442 F. Supp. 3d 162 (D.D.C. 2020); *see also Jam v. Int'l Fin. Corp.*, 481 F. Supp. 3d 1 (D.D.C. 2020) (denying plaintiffs' motion to amend their complaint).
[3] *Rodriguez v. Pan Am. Health Org.*, No. 20-928, 2020 WL 6561448 (D.D.C. Nov. 9, 2020).

1. The Supreme Court's Decision in *Jam v. International Finance Corporation*

Under the IOIA, designated IOs "enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments."[4] Interpreting this provision, a 7-1 majority of the Supreme Court held that Congress had intended 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 thus the FSIA's restrictive immunity governs IOs today.[5] Accordingly, the Court rejected D.C. Circuit precedent that the IFC enjoyed absolute immunity from suit—the standard enjoyed by foreign states at the time of the IOIA's 1945 enactment—and remanded the case to the district court to address whether plaintiffs' claims in relation to the IFC's loan to develop a power plant in India trigger the FSIA's so-called "commercial activity" exception. In reaching this result, the majority downplayed concerns that anything less than absolute immunity under the IOIA would lead to a flood of litigation against IOs in the U.S.

First, the majority confirmed that the "privileges and immunities accorded by the IOIA are only default rules," and suggested that "[i]f the work of a given international organization would be impaired by restrictive immunity, the organization's charter can always specify a different level of immunity."[6] The majority noted that "[t]he charters of many international organizations do just that," and observed that "the IFC's own charter does not state that the IFC is absolutely immune from suit."[7]

Second, the majority suggested that the lending activities of IOs like the IFC may not fall within commercial activity exception.[8] The majority also indicated that even if the activity at issue is deemed to be commercial under the FSIA, there may not be a sufficient nexus or link between the activity and the U.S., or the case may not be based upon that activity but rather non-commercial conduct.[9]

Justice Breyer was less optimistic, pointing out in dissent that the constituent documents of many IOs do not have the force of law in the U.S., and thus these organizations "continue to rely upon [the IOIA] to secure immunity," rather than their charters or articles of agreement.[10] Justice Breyer also explained that the definition of "commercial activity" under the FSIA is broad, and this will "at the very least create uncertainty for organizations involved in finance," given that the core functions of these organizations "are at least arguably 'commercial' in nature."[11]

2. The District Court's Decision in *Jam* on Remand

On remand, the district court focused on whether the claims were based upon activity, commercial or otherwise, carried on in or performed in the U.S., and concluded that they were not.[12]

Undertaking a holistic assessment of plaintiffs' claims, the district court found that the main focus, or "gravamen," of the complaint was the IFC's alleged failure to ensure that the design, construction, and operation of the power plant complied with relevant environmental and social sustainability standards, and that this occurred in India, not the U.S.[13] Notably, the mere fact that the IFC approved the financing of the power plant in the U.S., at the IFC's headquarters there, and also disbursed funds from the U.S., was not sufficient to satisfy the U.S. nexus requirement, because the misconduct alleged occurred primarily in India, where the plant is located and the harm occurred.[14] The district court accordingly concluded that the

[4] 22 U.S.C. § 288a(b). The IOIA extends statutory immunity only to IOs "which shall have been designated by the President through appropriate Executive order as being entitled to enjoy" it. *Id.* § 288 (defining "international organization" for purposes of the statute).
[5] *Jam*, 139 S. Ct. at 769, 772.
[6] *Id.* at 771.
[7] *Id.*
[8] *Id.* at 772 ("[I]t is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA.").
[9] *Id.*
[10] *Id.* at 778 (Breyer, J., dissenting).
[11] *Id.* (Breyer, J., dissenting).
[12] *Jam*, 442 F. Supp. 3d at 171.
[13] *See generally id.* at 175-77.
[14] *Id.* at 177-79.

IFC's immunity "remains intact," and dismissed plaintiffs' claims.[15]

The district court subsequently denied plaintiffs' request that they be allowed to amend their complaint to include additional allegations related to the IFC's loan approval process.[16] In denying leave to amend, the district court focused once again on the gravamen issue, explaining that the parties had advanced competing bright line rules. Plaintiffs argued for a narrow approach, focused on the IFC's "affirmative lending activity," which occurred mainly in the U.S. By contrast, the IFC "advocated for an equally narrow approach focused exclusively on the last act that 'actually injured' plaintiffs," which occurred in India and was directed by the power plant company, not the IFC.[17] The district court rejected plaintiffs' proposed rule, concluding that while the IFC was incorrect that the conduct that actually injured plaintiffs is *always* the gravamen, courts should usually "look to the conduct that 'actually injured' plaintiffs," even "where it is clear from the face of a plaintiff's complaint that the conduct that actually injured [the plaintiff] was in large part that of a third party," not a named defendant.[18]

3. Applying *Jam* in *Rodriguez v. Pan American Health Organization*

In *Rodriguez v. Pan American Health Organization*, a more recent decision applying *Jam*, a different judge in the D.C. district held that PAHO, a specialized international health agency for the Americas, was not immune from suit under the IOIA given the FSIA's commercial activity exception.[19]

The *Rodriguez* plaintiffs are Cuban doctors who allege that they were coerced by the Cuban government into participating in a medical mission in Brazil and that the Cuban government withheld most of their wages while they were abroad. According to the complaint, PAHO facilitated this misconduct, including by arranging payment for the work performed by the plaintiffs, most of which PAHO remitted to Cuba and some of which it kept.

The district court concluded that the gravamen of one of the plaintiffs' claims—that PAHO knowingly profited from forced labor—was based on the allegation that PAHO "mov[ed] […] money, for a fee, between Cuba and Brazil," and that this qualified as commercial activity under the FSIA "and thus the IOIA."[20] The district court held there was a sufficient nexus between PAHO's commercial activity and the U.S., given that the Director-General approved the agreements committing PAHO to its role as a financial intermediary at PAHO's headquarters in Washington, D.C., and the money passed through PAHO's bank account there.[21]

The district court next considered PAHO's argument that it was otherwise entitled to immunity under the U.N. Charter and the WHO Constitution, both of which contain so called "functional" immunity provisions.[22] But an IO's charter or other constituent documents, like its articles of agreement, may only have binding legal effect in the U.S. if they are part of or referenced in a treaty of which the U.S. is a member, *and* the relevant treaty provisions are either self-executing or have been enacted into law by Congress. Focusing on the text and drafting history of the immunity provisions contained in the U.N. Charter and the WHO Constitution, the district court concluded that they are not self-executing, and thus do not have domestic legal effect in the U.S.[23] As a result, it held that neither immunity provision renders PAHO immune from suit.[24]

Justice Breyer's dissent in *Jam*, in expressing concern about the majority's immunity-reducing

[15] *Id.* at 179.
[16] *Jam*, 481 F. Supp. 3d at 4.
[17] *Id.* at 6.
[18] *Id.* at 9.
[19] *Rodriguez*, 2020 WL 6561448, at *9. The *Rodriguez* decision was issued by Judge Boasberg. The *Jam* decisions were issued by Judge Bates.
[20] *Id.* at *7.
[21] *Id.* The *Rodriguez* plaintiffs asserted two other claims against PAHO; the district court concluded that these claims did not trigger the commercial activity exception.
[22] IO immunity is based on operational necessity, and thus is often described as "functional" immunity. This is epitomized by Article 105 of the U.N. Charter, which states that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." The WHO Constitution contains similar language.
[23] *Rodriguez*, 2020 WL 6561448, at **16-18.
[24] *Id.* at *18.

reading of the IOIA, presaged the failure of IO charters to confer immunity as a matter of U.S. law, noting that in many cases "the United States has never ratified treaties nor enacted statutes that might extend the necessary immunity."[25]

4. *Jam* and *Rodriguez*: Key Issues on Appeal

The *Jam* plaintiffs have appealed the district court decisions granting the IFC's motion to dismiss the claims and denying the motion to amend.[26] PAHO has appealed the district court decision denying in part its motion to dismiss plaintiffs' claims.[27] Both appeals are pending in the D.C. Circuit.[28] Certain of the key issues on appeal are discussed below.

a. The Gravamen Analysis

One key issue on appeal will be the standard for determining whether the gravamen of the claim against the IO is properly characterized as commercial in nature with a sufficient connection to the U.S., thereby implicating the FSIA's commercial activity exception to immunity.

In *Jam*, the IFC argued that the conduct that actually injured the plaintiffs, and thus the gravamen of the plaintiffs' claims, was not the loan it had authorized in the U.S., but mismanagement of the power plant in India by the Indian power company that had undertaken the project. The district court did not fully endorse this argument—it was wary of creating a bright line rule that the gravamen of a claim will always be the conduct that actually injured the plaintiffs—but, as noted above, it did conclude that this will usually be the case, even where the conduct that actually injured the plaintiffs was committed by a third party, rather than the sovereign (or here, IO) defendant.

PAHO made a similar argument in *Rodriguez*: that the core of plaintiffs' financial intermediary claim was not any injury traceable to its financial activities, but the alleged forced labor itself, which was directed by the Cuban government and occurred outside the U.S. The *Rodriguez* district court was less receptive to this argument than the court in *Jam*. It concluded that the gravamen of the claim was not Cuba's "separate malfeasance," but rather PAHO's alleged role as a "knowing money middleman," because this activity was not "minor or ancillary" and, if proven, would itself violate an anti-trafficking statute.[29]

Both *Jam* and *Rodriguez* acknowledge that plaintiffs should not be able to invoke the FSIA's commercial activity exception through artful pleading. But the *Jam* district court's embrace of the principle that courts should usually look to the conduct that actually injured the plaintiffs, even where that conduct was by a third party, and the *Rodriguez* district court's evident skepticism of that view, suggests that guidance from the D.C. Circuit on this issue is needed.

b. Applying the FSIA Definition of "Commercial Activity" to IOs

Another issue on appeal will be what constitutes "commercial activity" for IOs, as compared to foreign states. The FSIA definition of "commercial activity" dictates that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[30] The case law also makes clear that a foreign state engages in commercial activity "where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns."[31]

Although the district court in *Jam* did not consider whether the conduct at issue was commercial in nature, focusing instead on the FSIA's U.S. nexus requirement,[32] the *Rodriguez* district court squarely addressed this issue. In doing so, the district court acknowledged that applying the FSIA definition to

[25] *Jam*, 139 S. Ct. at 778 (Breyer, J., dissenting).
[26] *See Jam v. Int'l Fin. Corp.*, No. 20-7092 (D.C. Cir. filed Sept. 30, 2020); *Jam v. Int'l Fin. Corp.*, No. 20-7097 (D.C. Cir. filed Oct. 9, 2020).
[27] *See Rodriguez v. Pan Am. Health Org.*, No. 20-7114 (D.C. Cir. filed Dec. 9, 2020).
[28] As of the date of this alert memorandum, oral argument in the *Jam* appeal is scheduled for April 26, 2021. PAHO is due to submit its appellant brief in *Rodriguez* on April 16, 2021.
[29] *Rodriguez*, 2020 WL 6561448, at **7-9.
[30] 22 U.S.C. § 1603(d).
[31] *Rodriguez*, 2020 WL 6561448, at *5 (quotations omitted).
[32] *Jam*, 481 F. Supp. 3d at 7.

IOs is "fraught with difficulty," including because IOs are not sovereigns and do not have the same powers, and therefore may act more like private parties.[33] But it declined to adopt PAHO's argument that conduct that falls within an IO's altruistic mission is always non-commercial, reasoning that an approach linking the definition of "commercial activity" to an IO's mission would conflict with the statutory rule that the nature of the activity at issue is what matters, not its purpose.[34]

It remains to be seen whether the D.C. Circuit, addressing *Rodriguez* on appeal, will affirm this view or take a more flexible approach to determining what constitutes "commercial activity" for IOs.

c. Assessing the Legal Effect of the Immunity Provisions of the U.N. Charter and WHO Constitution

Acknowledging the mandatory language contained in the immunity provisions of the U.N. Charter and the WHO Constitution—which both state that the respective organizations "shall enjoy" certain privileges and immunities—the *Rodriguez* district court concluded that the language was not "self-executing," and therefore did not have domestic legal effect.[35]

The district court noted that the drafters of both the U.N. Charter and WHO Constitution included another sub-paragraph contemplating a diplomatic mechanism for fleshing out the details of the immunity to which the organizations would be entitled.[36] For the U.N., this took the form of the Convention on the Privileges and Immunities of the U.N., enacted in 1946 and ratified by the U.S. in 1970, and a "separate convention covering the broader universe of U.N.-affiliated agencies like PAHO," which the U.S. has yet to ratify.[37] The district court determined that the anticipation of future action to implement or honor the immunity-related provisions in the U.N. Charter and WHO Constitution was "a hallmark of a non-self-executing provision."[38]

PAHO is likely to challenge this ruling in the D.C. Circuit, having argued before the district court that both the U.N. Charter and WHO Constitution are self-executing treaties. PAHO's parent organization, the WHO, will likely be paying close attention to how the D.C. Circuit addresses this issue, as it has argued in a separate case pending in the U.S. District Court for the Southern District of New York that it is entitled to immunity from suit for certain COVID-19-related claims on the basis of its constitution, as well as the IOIA.[39]

5. Conclusion

In *Jam*, the Supreme Court settled a fundamental question regarding the scope of immunity for IOs—answering in the negative whether they are entitled to absolute immunity under the IOIA. Lower courts are now grappling with how to apply FSIA immunity concepts to IOs and to determine the level of immunity to which an IO may be entitled under its charter or other constituent documents, which the Supreme Court clarified "can always specify a different level of immunity" than the statute,[40] but which may not be binding in U.S. courts. The pending appeals in *Jam* and *Rodriguez* implicate these issues, and two years after the Supreme Court's decision in *Jam*, the D.C. Circuit is in a position to provide greater clarity regarding the framework for analyzing IO immunity and its scope.

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[33] *Rodriguez*, 2020 WL 6561448, at *5 (citing *Jam*, 481 F. Supp. 3d at 14).
[34] *Id.* at **5-6.
[35] *Id.* at *15.
[36] As noted, the first paragraph of Article 105 of the U.N. Charter provides that the U.N. shall enjoy what amounts to functional immunity (*i.e.*, the immunity "necessary for the fulfillment of its purposes"). Article 105's third paragraph provides that the General Assembly "may make recommendations with a view to determining the details of the application" of the functional immunity provision. The WHO Constitution contains similar language.
[37] *Rodriguez*, 2020 WL 6561448, at *17.
[38] *Id.* at **16, 18.
[39] *See* Memorandum of Law in Support of the World Health Organization's Motion to Dismiss, *Kling v. World Health Organization*, No. 7:20-cv-03124 (S.D.N.Y. Nov. 2, 2020), ECF No. 33.
[40] *Jam*, 139 S. Ct. at 771.