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Will *Jam v. IFC* Increase Multilateral Development Banks' US Legal Exposure?

No longer entitled to near absolute immunity, MDBs may be prompted to modify their charters, lending practices, and accountability mechanisms.

Key Points:

- The Supreme Court reversed the D.C. Circuit's ruling, holding that international organizations are entitled to the same limited immunity as granted to foreign governments under the Foreign Sovereign Immunities Act (FSIA), enacted in 1976.
- A Multilateral Development Bank's (MDB's) exposure to suits in the US depends on the immunity provisions within the MDB's charter, application of the FSIA's "commercial activity" exception, and the availability of a *forum non conveniens* defense.
- *Jam* may lead MDBs to amend their charters to include stronger immunity provisions, strengthen environmental and social covenants in negotiated loans and more strictly enforce such covenants, issue fewer loans in high-risk industries and regions, or bolster their independent accountability mechanisms.

On February 27, 2019, the US Supreme Court delivered a 7-1 opinion in *Jam v. International Finance Corporation* holding that the immunity granted to international organizations under the International Organizations Immunity Act (IOIA) is not nearly absolute, but rather evolves with the immunity available to foreign governments.

Legal Implications: Exposure to US Suits for Organizations Involved in International Financial Investment Projects

The Court Did Not Reach the Question of Whether IFC's Articles of Agreement Conferred Immunity

While the Supreme Court acknowledged that the "immunities accorded by the IOIA are only default rules," and that "the organization's charter can always specify a different level of immunity,"[1] the Court did not address whether the International Financial Corporation's (IFC) Articles of Agreement confer or waive immunity for the claims at issue.

The D.C. Circuit, however, did address IFC's jurisdictional provision: "Actions may be brought against the Corporation only in a court of competent jurisdiction[.]"[2] Despite acknowledging that this provision, "read literally, would seem to include a categorical waiver" of IFC's immunity, the court applied a more narrow waiver based on its holding in *Mendaro v. World Bank*, which interpreted similar language in the International Bank for Reconstruction and Development's Articles of Agreement.[3] The *Mendaro* test asks two questions:

- Whether the suit "would benefit the organization over the long term" based on whether parties would enter into negotiations with the organization absent waiver
- Whether the suit implicates the "core operations" of an organization, such that it "would threaten the policy discretion of the organization."[4]

Applying *Mendaro*, the D.C. Circuit held that IFC had not waived its immunity in its Articles of Agreement because such an interpretation would subject IFC to a flood of litigation and threaten its policy discretion.

Because the Supreme Court declined to grant review of the *Mendaro* test, the test remains good law in the D.C. Circuit. Substantial doubts remain, however, as even the D.C. Circuit acknowledged that "it is a bit strange" for the judiciary to determine what types of lawsuits "benefit" an international organization.[5] If the D.C. Circuit revisits the doctrine, it may well hold that IFC's Articles of Agreement includes a "categorical waiver" of its immunity. The D.C. Circuit may also choose to apply the *Mendaro* test only to cases in which the Court is deciding whether an organization's charter waives the immunity provided under the IOIA and not apply the test in deciding whether an organization's charter confers immunity if the IOIA does not already provide it. Such a holding would have serious implications for IFC, as well as for other international organizations whose charters include similar language.

An international organization seeking to assess its liability for international financial projects following *Jam* must first assess its charter's jurisdictional and immunity provisions. For example, the Inter-American Development Bank's Charter, like that of IFC, has no explicit organizational immunity provision, but contains a similar jurisdictional provision.[6] The African Development Bank[7] and the Asian Development Bank,[8] on the other hand, have explicit, albeit limited, immunity provisions. Lastly, the UN Charter (as interpreted by the Second Circuit) provides absolute immunity.[9] Given the D.C. Circuit's reservations about the *Mendaro* test, MDBs with less expansive provisions may consider amending their charters to strengthen their immunities. That said, amendment may not be politically feasible. For instance, amendment of IFC's Articles of Agreement requires a vote of three-fifths of member countries (as represented by their respective Governors) exercising 85% of the total voting power of the Corporation.

The Court Did Not Reach the Question of Whether the FSIA's "Commercial Activity" Exception Applies to IFC

No court has yet decided whether the FSIA's "commercial activity" exception applies to IFC. The Supreme Court cast doubt on the D.C. Circuit's finding that under this exception, IFC "would *never* retain immunity since its operations are *solely* 'commercial,'"[10] stating that "it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA."[11]

First, "[t]o be considered 'commercial,' an activity must be 'the *type*' of activity 'by which a private party engages in' trade or commerce." Thus, "the lending activity of at least some development banks, such as those that make conditional loans to governments, may not qualify as 'commercial' under the FSIA," because such conduct is not the type of conduct in which private parties generally engage.[12]

Second, any commercial activity "must have a sufficient nexus to the United States," and "must be 'based upon' either the commercial activity itself or acts performed in connection with the commercial activity." Thus, if "the 'gravamen' of a lawsuit is tortious activity abroad, the suit is not 'based upon' commercial activity." At oral argument, the US government expressed serious doubts as to whether the petitioners' suit, "which largely concerns allegedly tortious conduct in India," could satisfy the "based upon" requirement.[13] Both the government's and the Court's observations suggest that even facially commercial activities, like lending, will not necessarily satisfy the "commercial activity" exception.

Thus, to address exposure under the FSIA's commercial activity exception, an international organization must assess whether its lending activity qualifies as commercial in nature and whether such activity has a "sufficient nexus" to the US. MDBs may elect to move their headquarters outside of the US to curb exposure. But if the headquarters' location is specified in the MDB's charter, as it is for the IFC, that change may not be politically feasible for the reasons described above.

The Court Did Not Reach the Question of *Forum Non Conveniens*

IFC argued before the District Court that the case should be dismissed on *forum non conveniens* grounds, but the court never reached that issue.[14] The doctrine of *forum non conveniens* allows a district court to dismiss a case where, based on public and private factors, another court provides a more convenient forum for disposition of the case.[15] A district court can deny a motion to dismiss for *forum non conveniens* if the plaintiff is immune from suit in the alternate forum. Alternatively, if a district court grants a motion to dismiss for *forum non conveniens*, it can condition that dismissal on the plaintiff's waiver of defenses from suit in the alternate forum, including a waiver of any potential immunities from suit in that forum. Thus, while an international organization may be successful in having a suit dismissed from US courts on *forum non conveniens* grounds, it should be aware of the attendant risk of litigating the case in the alternative forum without any potential immunities.

Practical Implications for Organizations Involved In International Financial Investment Projects

Practical Effects on MDB Loans

Jam may have practical effects on MDBs' existing loans and future lending priorities. First, it may cause MDBs to be stricter in the negotiation of environmental and social covenants and reporting requirements for new loans, re-financings of existing loans, and amendments or waivers for existing loans. MDBs also may be inclined to more strictly enforce such provisions, finding borrowers in default for failure to comply. Second, MDBs may steer away from issuing loans in perceived high-risk industries (or regions).[16] An MDB with a greater perceived risk of litigation stemming from *Jam* might elect to deprioritize funding in countries that arguably experience the greatest economic development impact from these projects.

Practical Effects on MDB Accountability Mechanisms

Additionally, *Jam* may prompt MDBs to strengthen their respective independent accountability mechanisms. In the early 1990s, the World Bank Group created its Inspection Panel, the first such grievance mechanism adopted by an MDB. Then in 1999, the Office of the Compliance Advisor (CAO) was created to serve as the independent accountability mechanism for World Bank's private sector arms, including IFC and MIGA, by facilitating dispute resolution between affected parties and project owners and investigating IFC and MIGA for failure to adhere to their own environmental and social policies or guidelines. The CAO's decisions, however, are non-binding on IFC and MIGA, and the CAO has no authority to stop a project, no matter the gravity of the environmental, social or other harms it may pose

(or has posed). Thus, *Jam* may prompt MDBs to strengthen the ability of their independent accountability mechanisms to stop and remedy harms caused by a development project.

Conclusion

Many issues remain open in the wake of *Jam*, including the degree to which MDB charters confer or waive immunity, how the FSIA's "commercial activity" exception will be applied to MDBs, and the implications of the *forum non conveniens* defense. In the meantime, *Jam* may cause MDBs to expend resources defending against claims in US courts, shift how they structure loans, enforce corresponding covenants, and strengthen their independent accountability mechanisms.

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Endnotes

[1] *Jam v. Int'l Fin. Corp.*, No. 17-1011, at 14 (U.S. 2019).

[2] IFC Articles of Agreement, Sec. 3.

[3] *Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 706 (D.C. Cir. 2017) (citing *Mendaro v. World Bank,* 717 F.2d 610, 617 (D.C. Cir. 1983)).

[4] *Jam*, 860 F.3d at 706-08 (citing *Mendaro*, 717 F.2d at 615-18; *Osseiran v. IFC*, 552 F.3d 836, 840 (D.C. Cir. 2009)).

[5] *Jam*, 860 F.3d at 707.

[6] Article XI, Sec. 3 ("Actions may be brought against the Bank only in a court of competent jurisdiction[.]"). The International Bank for Reconstruction and Development and the International Development Association also have virtually identical jurisdictional provisions. IBRD, Art. VII, Sec. 3; IDA, Art. VIII, Sec. 3.

[7] Article 52(1) ("The Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers[.]").

[8] Article 50(1) ("The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities[.]").

[9] U.N. Charter art. 105, para. 1 ("The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes[.]"); *Van Aggelen v. United Nations*, 311 F. App'x 407, 409 (2d Cir. 2009) (holding that the "United Nations enjoys absolute immunity under the U.N. Charter" and under the IOIA).

[10] *Jam*, 860 F.3d at 707.

[11] *Jam v. Int'l Fin. Corp.*, No. 17-1011, at 14 (U.S. 2019).

[12] *Id.*

[13] *Id.*

[14] *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 108 (D.D.C. 2016).

[15] The public factors include (1) the ease of access to evidence, (2) the connections of the parties to the forums, (3) the burden on the defendant of litigating in the plaintiff's chosen forum, (4) the ease of obtaining witnesses, and (5) the enforceability of any potential judgment. The public factors include (1) the potential for confusing a jury with multiple sets of laws, (2) the potential of having jurors connected to the case, (3) the forums' interests in having local cases heard at home, and (4) the benefit of hearing the case in the forum where local law applies. A district court will not dismiss a case for *forum non conveniens* if there is no alternate forum in which the dispute can be litigated.

[16] The risk may be more than just perceived, in the case of IFC. Over the period 2001-2016, infrastructure (including energy) and extractives projects comprised just 23% of IFC's total portfolio (measured by commitments in USD). Charles Kenney, et al., Inside the Portfolio of the International Finance Corporation: Does IFC Do Enough in Low-Income Countries?, January 2018, available at https://www.cgdev.org/sites/default/files/inside-portfolio-international-finance-corporation-does-ifc-do-enough-low-income.pdf. However, a recent study found that approximately 80% of all claims brought before the CAO involved projects in the oil/gas/mining/chemicals and infrastructure sectors. International Human Rights Law Clinic, University of California, Berkeley, School of Law, Accountability & International Financial Institutions: Community Perspectives on the World Bank's Office of the Compliance Advisor Ombudsman, March 2017, available at https://www.law.berkeley.edu/wp-content/uploads/2015/04/Accountability-International-Financial-Institutions.pdf, at 23.