

Ending “absolute immunity” for the International Finance Corporation: The legacy of *Jam v. IFC*

At Issue

Michelle Harrison & Lindsay Bailey,
EarthRights International



July 2022

This article examines the issues in *Jam v. IFC* – a case brought by Gujarati fishing and farming communities harmed by the IFC-funded Tata Mundra power plant. It looks at how it has helped to shift the landscape of accountability for international financial institutions by successfully challenging their claim to “absolute immunity” in US courts, potentially opening the IFC up to further legal challenges in future.

As the World Bank Group’s private investment arm, the International Finance Corporation (IFC) shares its [goals](#) of “ending extreme poverty and boosting shared prosperity.” Yet when the projects it funds harm the very people they are meant to help, the IFC has consistently sought to avoid responsibility rather than to do right by those it has injured.

The experience of communities in Gujarat, India, who sued the IFC over its role in the Tata Mundra coal-fired power plant (see *Observer Spring 2016*, *Summer 2015*), serves as an illustrative example and a warning to other communities who are negatively affected by IFC-financed

projects. Over the course of more than a decade of advocacy by the communities living in the destructive plant’s shadow, the IFC has failed to do the right thing at every turn. It repeatedly ignored [recommendations](#) for remedial action from the Compliance Advisor Ombudsman (CAO), its independent accountability mechanism. And when the communities turned to the courts, the IFC insisted that it was above the law (see *Observer Autumn 2020*).

This article examines the case of *Jam v. IFC*, looking at how it has helped to shift the landscape of accountability for international financial institutions (IFIs) by ending their claim to “absolute immunity”



Michelle Harrison focuses on legal strategies to enhance corporate accountability and support communities in defense of their human rights and their environment. She serves as counsel on ERI’s transnational cases such as *Jam v. International Finance Corporation* and *Doe v. Chiquita*. **Lindsay Bailey** graduated from Harvard Law School in May of 2019, where she focused on human rights, international law, and social justice. She worked at the Center for Justice and Accountability, where she investigated and litigated human rights cases as a Legal Fellow. Michele and Lindsay are both part of the team of lawyers representing the Plaintiffs in *Jam v. International Finance Corporation*.

in US courts, as well as the ongoing need for the IFC to provide a remedy in legacy cases like this one.

The IFC-funded Tata Mundra mega-coal plant

The Tata Mundra plant is a paradigmatic example of a development project that harmed the communities it was supposed to help. From the outset, the IFC knew that the project posed significant risks to people and the environment. It [classified](#) the project as environmental and social “category A”, meaning that it could have “significant,” “irreversible or unprecedented” impacts.

Despite this, in April of 2008, the IFC’s board [approved](#) a \$450 million loan to build the plant. The IFC’s financing was essential; without it, the project would not have gone forward. Yet the IFC failed to ensure sufficient measures were taken to prevent the damage to local communities and the environment it had specifically identified as likely to occur.

For generations, the Kutch coastline in Gujarat has supported communities that depend on its natural resources. Far from reducing poverty, IFC’s actions with respect to the Tata Mundra project left these communities worse off.


The plant has fundamentally [altered](#) the local landscape, destroying the livelihoods and threatening the health of local residents. The plant’s construction caused saltwater intrusion, which destroyed vital freshwater sources, and the plant releases enormous quantities of thermal pollution that have depleted fish stocks and other marine resources on which fishing families depend. The plant also pollutes the air in violation of Indian air quality standards and the conditions of its IFC funding; respiratory problems, especially among children, are on the [rise](#).

Making the harms all the more regrettable, the project has continually operated at a loss, and in 2017, Tata Power tried to unload most of its shares in the project for one rupee. In 2020, Tata Power absorbed the Tata Mundra subsidiary to mitigate its staggering debt.

In 2011, community members filed a complaint with the CAO (see *Observer* [Summer 2014](#)). The CAO found [shortcomings](#) at every stage of the project and harshly criticised the IFC for

failing to ensure the project met its environmental and social standards and the conditions of the loan. The IFC [responded](#) by largely [rejecting](#) the findings.

Ending “absolute immunity” for international organisations



Never before had a community tried to hold an IFI accountable for its conduct in a US court, and IFIs seem to have assumed it could never happen.

With no other options, the communities, represented by EarthRights International, sued the IFC in 2015 in Washington DC, where the IFC is headquartered. The IFC argued that it is entitled to “absolute immunity” from suit: that no matter how harmful or illegal its actions may be, it is not, under any circumstances, subject to the authority of US courts.

The trial court and the US Court of Appeals for the DC Circuit sided with the IFC, based on a prior DC Circuit decision. Plaintiffs appealed to the US Supreme Court, arguing the DC Circuit’s caselaw had been wrongly decided (see *Observer* [Autumn 2017](#)). In 2018, the United States Supreme Court agreed to hear the case (see *Observer* [Summer 2018](#)).

The question before the Supreme Court concerned how to interpret a 1945 US statute, the [International Organizations Immunities Act](#) (IOIA), which grants international organisations (IOs) like the IFC the “same immunity from suit... as is enjoyed by foreign governments.” The IFC argued this affords IOs the same immunity today that foreign governments had in 1945, when the IOIA was enacted. The plaintiffs, however, argued that the IOIA, which is written in the present tense, means that the “same” immunity rules that apply to foreign governments today likewise apply to IOs. If the statute intended to lock in the immunity states had in 1945 for IOs, it would have simply said so. Instead, Congress chose to

tie immunity to that of foreign governments, acknowledging it would continue to evolve.

In 1952, the State Department adopted the “restrictive theory” of foreign sovereign immunity, and the 1976 Foreign Sovereign Immunities Act (FSIA) codified that approach. Under the restrictive theory, sovereigns are not immune for their commercial conduct. The plaintiffs argued that under the IOIA’s “same immunity” provision, this exception applies to IOs. The plaintiffs also noted that it would make little sense to immunise IOs, which are groups of states acting together, for conduct the state could be sued for if acting alone.

On 27 February 2019, in a

historic 7-1 decision, the US Supreme Court [held](#) that IOs are not “absolutely immune” – they can be sued in US courts under the same FSIA exceptions as foreign governments (see *Observer Spring 2019*). The decision was a defining moment for the IFC and many other IOs. After decades of operating as if they were above the law, pursuing reckless lending projects that inflicted serious harms on local communities, the *Jam* case held that IOs could be subject to legal scrutiny.

IFC’s immunity under the FSIA

Despite this key victory, when the case returned to the trial court, the IFC sought to dismiss it again, arguing that



A fisherman walks past rows of drying fish and while the Tatra Munda and Adani power plant projects . Taken on February 14, 2014. Photo by: Joe Athialy

the FSIA’s commercial activity exception was not satisfied. That exception provides that foreign states (and now international organisations) can be sued for claims “based upon” their commercial activity in the US. The rationale is that while foreign states should have immunity for uniquely sovereign conduct, when they act in the marketplace in the same way as a private actor, it would be unfair to give them special treatment. Just as a state providing financing to a private corporation at market rates can be sued for claims arising out of that transaction, so too should the IFC when it engages in the same conduct.

But the IFC advanced a novel argument to evade the exception to immunity: Even though it had acted from its headquarters in Washington DC and had previously admitted its lending activities were commercial, it argued that it was nonetheless immune because the claims were really “based upon” the actions of IFC’s partner, Coastal Gujarat (CGPL), a Tata subsidiary, in India. Essentially, despite the fact that the claim challenged the IFC’s conduct, and despite the IFC’s extensive role in approval and oversight of the construction, the IFC argued it should be immune from suit because the borrower had more directly injured the plaintiffs.

There is no question that CGPL shares responsibility for the harm to the plaintiffs, but that has never been a legal basis for immunising those who cause harm by acting together.

Despite initially acknowledging that the IFC’s position would make no sense – it would “effectively immunize” IFIs “from a large swath of causes of action,” including all claims for funding third-party activity – the district court dismissed the case (see *Observer Autumn 2020*). According to the court, because CGPL “actually injured” the communities by building the plant, the claims were “based upon” its actions, and the IFC was immune. In 2021, the DC Circuit Court of Appeals affirmed the decision, and this year, the United States Supreme Court declined to hear the case, leaving that decision intact. The *Jam* communities are currently evaluating their options for further legal action.

The legacy of the *Jam* case and the road ahead

The court’s decision in *Jam* raises more questions regarding the FSIA’s “commercial activity” exception, and therefore IFI immunity, than it answers; but it certainly does not foreclose future cases. Other cases with different facts may be handled differently in the future. Indeed, in *Rodriguez v. Pan American*

Health Organization (PAHO), the DC Circuit recently rejected the same immunity argument the IFC advanced in *Jam*. There, claims against PAHO for facilitating a programme that allegedly trafficked Cuban physicians to Brazil were allowed to proceed under the commercial activity exception, even though another party had more directly injured the plaintiffs. Rodriguez shows future cases against IOs may fare differently than *Jam*. Moreover, at least one case is currently pending against the IFC, brought by communities in Honduras, in federal court in Delaware.

While questions remain about the state of the law in the US, the US experience says little about how other jurisdictions may handle claims of immunity under their own laws, which have different legal frameworks for immunity. Should the US – where many IOs are headquartered – prove inhospitable to such cases, IOs may increasingly find themselves subject to suits in the countries where they finance projects.

The experience of the *Jam* communities was hardly unique – communities affected by World Bank Group projects in countries from India, to Kenya, to Mongolia, to Ukraine, have demanded reparations for

grave environmental harms and human rights abuses. The *Jam* case has fundamentally changed the landscape of accountability for these harms. Never before had a community tried to hold an IFI accountable for its conduct in a US court, and IFIs seem to have assumed it could never happen. The *Jam* plaintiffs proved this was untrue, and that such entities cannot evade scrutiny. People and institutions who believe that they could be held responsible for their actions are more likely to think twice about the consequences of their actions. This was evident as soon as the Supreme Court agreed to hear the case (and before it ruled the IFC was not absolutely immune), as the IFC [announced](#) a series of reforms to the way it conducts environmental and social due diligence.

Recognising that it will remain vulnerable to lawsuits if it refuses to provide an adequate internal grievance mechanism, the IFC also [launched](#) an external review of the CAO, which resulted in some

meaningful changes to the way it evaluates complaints. But the CAO review also emphasised the need for remedy for communities harmed by IFC projects, which the CAO has no authority to require and the IFC has refused to provide. The IFC has [promised](#) to release a draft remedial framework this summer. It is [imperative](#) that any framework addresses “legacy” cases such as this one, including by establishing a fund to compensate communities. Any approach that fails to do so would lack legitimacy. It remains to be seen whether the IFC will take its responsibility to provide remedy seriously (see [Observer Summer 2022](#)).

An acute need for remedy

The need for remedy remains as acute as ever. The IFC still has an obligation to do right by the *Jam* communities who suffer from the harms this project inflicted – harms the IFC never denied causing during the lawsuit. There is still an outstanding CAO report emphasising the need for remedial action. The IFC’s failure to take any meaningful

action serves as a warning to communities that may face IFC projects in the future; The IFC has shown its environmental and social commitments are meaningless and communities will be forced to seek recourse from the courts when they are broken. Until the IFC provides a remedy to the *Jam* communities, this case will remain a stain on IFC’s reputation as a ‘development organisation’.

Meanwhile, the struggle for accountability will continue – aided by the fact that IFIs no longer enjoy absolute immunity in US courts. The IFC remains vulnerable to cases challenging its commercial lending activity in the US – and could soon see similar cases in other countries should remedies remain elusive. The *Jam* communities have been in this fight for a long time, and they don’t intend to give up now. They don’t have the luxury of doing so.

July 2022



Bretton Woods Project
33-39 Bowling Green Lane
London EC1R 0BJ
United Kingdom
Tel: +44 (0)20 3122 0561
info@brettonwoodsproject.org

The Bretton Woods Project is an Action-Aid-hosted project, UK registered charity no. 274467, England and Wales charity no. 274467, Scottish charity no. SC045476. This publication is supported by a network of UK NGOs, the C.S. Mott Foundation, the William and Flora Hewlett Foundation, the Wellspring Philanthropic Fund, and the Forge Foundation.

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