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”
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

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...
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” it’s 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.

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**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.

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