Jam v International Finance Corporation: The US Supreme Court Decision and its Aftermath

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1. Background

For years, Budha Ismail Jam and his family have made their living by fishing in the Gulf of Kutch, in western India. They spend most of the year in a *bunder* on the coast – a seasonal fishing harbour, where they live and work with dozens of other families.

Around 2009, Jam became aware of big changes coming to his community. A massive coal-fired power plant project – larger than any coal plant in the United States – was in progress, financed by the World Bank Group. The International Finance Corporation (IFC), the Bank's private-sector finance arm, had approved a $450 million loan to make the project possible. Jam and the other fishing families on the *bunder* had never even been consulted.

The Tata Mundra power plant brought devastating impacts to these families. Coal dust and fly ash from the plant settled on their community, at times coating the fish they had set out to dry in the sun. The plant's cooling system discharges a river of hot water – about half the average volume of the Potomac river – into the Gulf of Kutch, severely damaging the local marine environment. The plant also emits high levels of pollution such as sulphur dioxide into the air, and allows salt water to contaminate fresh drinking water along the coast.[1]

In 2011, the fishing communities brought a complaint to the IFC's internal complaints office – the Compliance Advisor Ombudsman (CAO).[2] The CAO found serious violations of the IFC's own policies,[3] but it lacked the power to enforce changes to the project. Although the IFC itself had the power to compel such changes, it refused to exercise this power. Lacking any other remedy, in 2015, Jam and other families filed suit against the IFC in Washington, DC.

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1 Plaintiffs' Complaint, *Jam v International Finance Corporation*, No 15-cv-00612 (D.D.C. filed 23 April 2015).

2 Complaint from Machimar Adhikar Sangharsh Sangathan (MASS, Association for the Struggle for Fishworkers Rights) regarding Tata Ultra Mega (11 June 2011), http://www.cao-ombudsman.org/cases/document-links/documents/TataMundraCAOComplaint_June112011.pdf (accessed 10 June 2020).

3 Compliance Advisor Ombudsman, 'CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India' (22 August 2013), http://www.cao-ombudsman.org/cases/document-links/documents/CAOAuditReportC-I-R6-Y12-F160.pdf (accessed 9 April 2020).

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Four years later, Jam and the other plaintiffs found themselves at the US Supreme Court to answer the question of whether the IFC could be sued at all. Initially, lower courts had dismissed the case, concluding that the IFC enjoyed 'absolute immunity' from suit in US courts. On 27 February 2019, the Supreme Court issued a landmark ruling in *Jam v IFC*. The Supreme Court disagreed with the lower courts, finding that any immunity held by the IFC – and other international organizations – was more limited.

The aftermath of the Supreme Court's decision has been multi-faceted. Development institutions based in the US, like the IFC, are now facing a world in which they can no longer rely on their absolute immunity from suit. For the *Jam* plaintiffs, the Supreme Court decision is only the beginning of their legal case against the IFC. Whether the case can proceed under the IFC's new, more limited immunity is a question that the US courts are still deciding.

II. The IOIA and the Supreme Court's Ruling

The IFC has been granted certain privileges and immunities under the US International Organizations Immunities Act (IOIA). The IOIA, enacted in 1945 as the United Nations and other post-war institutions were being created, provides that such organizations are entitled to 'the same immunity from suit … as is enjoyed by foreign governments'.[4]

The issue before the Supreme Court was simple. Does 'the same immunity' as foreign governments mean the immunity that foreign governments enjoyed in 1945 – which depended only on whether the State Department decided that immunity was appropriate – or the sovereign immunity rules in place today, under the Foreign Sovereign Immunities Act of 1976?

The Court decided that 'the same … as is enjoyed' means what it says: that international organizations receive the same immunity that foreign states now receive.[5] This means that the US Foreign Sovereign Immunities Act (FSIA), with its exceptions to sovereign immunity for commercial activities and other acts, applies.[6]

III. The Effects and Aftermath of the Ruling

In the year since the *Jam* decision, the ruling has had noticeable impacts on several international organizations – most notably, international financial institutions headquartered in Washington, DC, like the World Bank Group.

The FSIA includes several exceptions to sovereign immunity, but the most frequently applied are exceptions for lawsuits based on commercial activity in the US, and lawsuits based on torts in the US.[7] So international organizations with extensive operations in the

[4] 22 U.S.C. § 288a(b).

[5] *Jam v International Finance Corporation*, note 1, 772.

[6] The IOIA also allows suit where international organizations have waived their immunity. The *Jam* plaintiffs also argue that the IFC's own charter includes a broad waiver of immunity that authorizes their lawsuit.

[7] 28 U.S.C. § 1605.

US – and especially those that engage in commercial activities like lending and equity investments – are most likely to be subject to these exceptions.

Eighty-five international organizations are designated under the IOIA, but only 22 of them are headquartered (or jointly headquartered) in the US. Of these, four – the United Nations, the International Monetary Fund, the Organization of American States, and the International Centre for the Settlement of Investment Disputes – have separate sources of near-absolute immunity, either in duly enacted statutes or ratified treaties. So they are not likely to be affected.

Another eleven organizations, many of them focused on subjects such as agriculture or fisheries, or cross-border cooperation with Mexico and/or Canada, are headquartered in the US but do not appear to engage in substantial commercial activities.[8] These might be subject to suit on commercial claims, such as office rentals and supply contracts, or if they are responsible for torts in the US.

However, the biggest effects will probably be seen with the international financial institutions – especially the seven that are headquartered in Washington, DC: four World Bank Group entities (the International Bank for Reconstruction and Development, the International Development Association, the IFC, and the Multilateral Investment Guarantee Agency), the Inter-American Development Bank and Inter-American Investment Corporation ('IDB Invest'), and the North American Development Bank. These entities all engage in substantial conduct that is arguably commercial activity, from a base of operations in the US, which might lead to liability.

The opportunity to obtain a remedy in a court of law is significant for communities affected by development projects. These development institutions finance huge projects that can have devastating consequences for local communities including displacement from their homes, loss of entire livelihoods, and negative health impacts. Additionally, often speaking out about the negative effects of a development project can put individuals and communities at risk of reprisals.[9]

Many development finance institutions do have accountability mechanisms that communities can approach to raise complaints about harmful projects. The IFC's accountability mechanism is the Compliance Advisor Ombudsman (CAO). However, often these accountability mechanisms are difficult for communities to access, fail to provide sufficient remedies to communities, and ultimately lack the authority to compel remedial action.[10]

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[8] These are the Commission for Labor Cooperation (a NAFTA entity), the Great Lakes Fishery Commission, the Inter-American Defense Board, the Inter-American Tropical Tuna Commission, the International Boundary & Water Commission (jointly headquartered in Mexico), the International Cotton Advisory Committee, the International Food Policy Research Institute, the International Joint Commission – United States and Canada, the International Pacific Halibut Commission, the Pan American Health Organization, and the United States–Mexico Border Health Commission.

[9] International Finance Corporation, 'IFC Position Statement on Retaliation Against Civil Society and Project Stakeholders' (October 2018), https://www.ifc.org/wps/wcm/connect/ade6a8c3-12a7-43c7-b34e-f73e5ad6a5c8/EN_IFC_Reprisals_Statement_201810.pdf?MOD=AJPERES (accessed 9 April 2020); Compliance Advisor Ombudsman, 'CAO Approach to Responding to Concerns of Threats and Incidents of Reprisals in CAO Operations', http://www.cao-ombudsman.org/newsroom/documents/documents/CAOApproachtoThreatsandIncidentsofReprisals_October2017.pdf (accessed 9 April 2020).

[10] C Daniel et al, 'Glass Half Full? The State of Accountability in Development Finance', *SOMO* (January 2016), https://www.somo.nl/wp-content/uploads/2016/03/Glass-half-full.pdf (accessed 9 April 2020).

In the case of the *Jam* plaintiffs, despite a scathing report from the CAO documenting how the IFC had violated its own internal environmental and social policies in financing the Tata Mundra project,[11] the IFC simply disagreed with many of the the CAO's findings and decided not to take meaningful steps to ensure that the project did not cause harm. The CAO has no ability to compel the IFC or its clients to make changes to the project or provide a remedy to those communities affected by IFC-financed projects.

Because the CAO has no power to compel remedial action, communities have to rely on IFC management or the owners of the Tata Mundra project to do the right thing. In the case of Tata Mundra project, that has yet to happen. Access to a court-ordered remedy for the *Jam* plaintiffs and others similarly affected by IFC-funded projects is therefore necessary to address this accountability gap.

Recently, some of these development institutions have taken steps to increase accountability and avoid harms to communities. The CEO of the IFC itself, for example, released a statement expressing his commitment to 'bolster accountability in my own organization' a month after the Supreme Court decision.[12] Community advocates cautiously welcomed a variety of reforms,[13] including hiring more staff focusing on social and environmental impacts, and creating a new Environment and Social Policy and Risk department that reports directly to the CEO.[14] Also, for the first time, the World Bank's board has asked to review complaints on a project – a job normally reserved for the President of the World Bank Group.[15] The board's oversight role may increase in the future, as reforms to the IFC's CAO and the parallel accountability office at the World Bank – the Inspection Panel – are currently under consideration.

The need for responsible investment and strong accountability systems is more urgent than ever given the World Bank Group has announced its intention to increase its investments in areas that are already 'characterized by fragility, conflict, and violence'.[16]

While international financial institutions – including, despite its name, the International Finance Corporation – are not business corporations, their actions in this area have a profound impact on the private sector, in two ways. First, they have historically led the way for private banks engaging in development finance. For example, the dominant standard for private development finance, the Equator Principles, is heavily based on the IFC's own Performance Standards. So improvements in the accountability standards of these organizations will also contribute to increased accountability for private finance.

Second, the IFC and several other international financial institutions also lend directly to private corporations, such as the developer of the Tata Mundra project. If these institutions

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[11] Compliance Advisor Ombudsman, note 4.

[12] Philippe Le Houérou, 'Opinion: At IFC, Accountability is of Utmost Importance', *Devex* (10 April 2019), https://www.devex.com/news/opinion-at-ifc-accountability-is-of-utmost-importance-94667 (accessed 9 April 2020).

[13] Sophie Edwards, 'Advocates Welcome IFC Reforms, but with Some Caveats', *Devex* (17 June 2019), https://www.devex.com/news/advocates-welcome-ifc-reforms-but-with-some-caveats-95044 (accessed 9 April 2020).

[14] Le Houérou, note 13.

[15] Sophie Edwards, 'First Test for World Bank Board's New Accountability Powers', *Devex* (6 February 2020), https://www.devex.com/news/first-test-for-world-bank-board-s-new-accountability-powers-96501 (accessed 9 April 2020).

[16] World Bank Group, 'Draft for Consultation: World Bank Group Strategy for Fragility, Conflict, and Violence (FCV) 2020–2025' (5 December 2019), https://consultations.worldbank.org/sites/default/files/consultations/1636/2019-12/DRAFT_WBG_Strategy_for_FCV-December_5_2019.pdf (accessed 9 April 2020).

know that they can be held accountable for enabling harms in their projects, they will go to great lengths to ensure that their corporate clients avoid such harms. That can only be a good thing for the communities that may be affected by these projects.

So far, however, no international financial institution has yet been held accountable in court for human rights abuses connected with any of its projects. Whether they will depends on further legal developments, currently under way.

VI. Next Steps in the Courts

The Supreme Court was not the end of the road for the *Jam* plaintiffs: only the beginning. After establishing that the IFC did not have absolute immunity, they still had to show that their lawsuit qualifies under the commercial activity exception to the Foreign Sovereign Immunities Act.

The IFC filed a new motion to dismiss after the Supreme Court remanded the case to the district court, arguing that the commercial activity exception did not apply. They argued both that their lending was not 'commercial activity' under the FSIA at all, and also that the claims in *Jam* were not 'based upon a commercial activity carried on in the United States by' the IFC.

The suggestion that IFC's lending is not a commercial activity seems to run headlong into the text of the FSIA, which states that the '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'.[17] Thus, even if the IFC is intending to promote development and other laudable goals by making loans to private corporations, the essential nature of its activity – making loans to private corporations – is what matters. That activity seems fairly obviously to be commercial. In fact, this type of lending is something that private banks already do. For example, J.P. Morgan recently announced the creation of its own institution committed to development finance.[18]

The argument about whether the case is 'based upon' activity 'carried on in the United States' by the IFC is trickier. The Supreme Court considered this question in a suit against a foreign government a few years ago, in the case *OBB Personenverkehr AG v Sachs*.[19] In *OBB*, the plaintiff was an American who had bought a ticket in the US for travel in Europe, and then suffered injuries due to allegedly negligent conditions on a state-run railway in Innsbruck, Austria.

The Supreme Court held that the 'gravamen' of the plaintiff's case was not commercial activity in the US. 'All of her claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria.'[20] Although the plaintiff argued that the Austrian government was also responsible for failing to warn her of dangerous conditions when she bought the

[17] 28 U.S.C. § 1603(d).

[18] 'J.P. Morgan Launches Development Finance Institution', *J.P. Morgan* (21 January 2020), https://www.jpmorgan.com/global/news/2020-DFI-Announcement (accessed 9 April 2020).

[19] 136 S Ct 390 (2015).

[20] Ibid at 396.

ticket in the US, the Supreme Court distinguished this, noting that 'there is nothing wrongful about the sale of the Eurail pass standing alone. Without the existence of the unsafe boarding conditions in Innsbruck, there would have been nothing to warn Sachs about when she bought the Eurail pass.'[21]

The IFC argued that, like in *OBB*, all of the wrongful conduct in the *Jam* case occurred abroad. However, the IFC took a more extreme position – that the 'gravamen' of the plaintiffs' claim was not even acts by the IFC, but acts by the company that built the power plant. Under their logic, the IFC could not have been sued even if the power plant was built in the US, because the claims would not be based on the IFC's commercial activity, but someone else's conduct.

The plaintiffs argued that the only way to apply the FSIA is to determine the 'gravamen' of the case based on the defendant's conduct, not that of third parties. This is what courts have repeatedly done with suits against foreign states – the 'gravamen' is determined by the foreign sovereign's conduct, even where third parties also committed wrongful acts. This interpretation is necessary to avoid the absurd result that the IFC's reasoning would entail: that financing a project in the US would still fail the commercial activity exception. The plaintiffs sued the IFC for its own actions, arguing that the IFC was negligent in financing the plant while knowing that harm was likely to result, and failing to take adequate measures to prevent that harm while it continued disbursing money to the project.

In a decision issued in February, the district court did not adopt either side's position: '[T]his Court will not follow IFC's approach and look *solely* at the place of injury or where the last act that actually caused the injury occurred, nor will it adopt plaintiffs' approach and look only at IFC's direct, affirmative conduct.'[22] Instead, the district adopted a 'holistic' approach, under which it determined that the 'gravamen' of the case was the IFC's 'alleged failure to ensure that the design, construction, and operation of the plant complied with all environmental and social sustainability standards laid out in the loan agreement, as well as the alleged failure to take sufficient steps to prevent and mitigate harms to the property, health, and way of life of people who live near the Tata Mundra plant.'[23]

The court then found that the plaintiffs' complaint 'does not allege that IFC's direct involvement in the design, construction, and operation of the power plant occurred in Washington, D.C.'[24] Instead, 'the record suggests such conduct likely occurred in India'.[25] Although the approval of the loan unquestionably happened in the US, the court also found that that the plaintiffs 'do not make specific allegations that approving the funding – by itself –was a negligent act'.[26]

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21 Ibid.

22 *Jam v International Finance Corporation*, No. 15-612, 2020 U.S. Dist. LEXIS 25923, at *24 (D.D.C. 14 February 2020).

23 Ibid at *25.

24 Ibid at *31.

25 Ibid at *32.

26 Ibid at *28.

The court found that the commercial activity exception did not apply, and once again found that the IFC was immune from suit – and dismissed the case.

V. Conclusion: What Next?

The district court's recent ruling will not be the last word on the IFC's immunity, in this case or others.

First, while the *Jam* plaintiffs disagree with the ruling, they believe they can meet the court's legal standard. In fact, the plaintiffs believe that all of IFC's significant conduct *did* occur in Washington, DC, and they also believe that the loan approval itself was a negligent act. So the plaintiffs have now filed a motion to amend their complaint, to add numerous facts about the IFC's conduct that have been gleaned in the years since the original complaint was filed, and to reconsider the dismissal.

Second, this decision will be subject to appeal to the US Court of Appeals for the DC Circuit. Even if the district court finds that the plaintiffs' new allegations meet the legal standard, and rules that the IFC is not immune, the IFC will be entitled to an appeal. Either way, this decision is only a prelude to the ultimate ruling by the DC Circuit.

Third, this is not the only case against the IFC. EarthRights International, counsel for the *Jam* plaintiffs, also represents plaintiffs harmed by another IFC project – a palm oil project in Honduras that led to land-grabbing and extreme violence by security forces.[27] In that case, *Doe v IFC Asset Management Co.*, the plaintiffs allege that the IFC should have known, from the outset, that financing the Dinant corporation would lead to violent abuses – in other words, that 'approving the funding – by itself – was a negligent act'.

Even if the *Jam* ruling stands, therefore, it may give the IFC and other international organizations little comfort that they remain above the law. In case like the *Doe* case, communities may argue that their claims are based on the funding decision itself – a decision made in the US – and thus based on commercial activity in the US.

In the face of this possibility of accountability, the IFC and other organizations would do well to continue on the path of improving their environmental and social performance. The best way to avoid being sued, after all – especially for an organization whose mission is to help poor communities – is to avoid doing harm, not to secure immunity from suit. These steps will, in turn, contribute to the overall advancement of accountability for both development finance institutions, including private banks, and for their corporate clients. This should be a welcome trend, not just for the human rights community but for development advocates as well, because it is hard to improve the lives of poor communities around the world without respecting their rights and avoiding harm to them.

[27] 'Juana Doe et al. v. IFC', *EarthRights International*, https://earthrights.org/case/juana-doe-et-al-v-ifc/ (accessed 9 April 2020).