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Legal risk and accountability in development finance: Lessons from *Jam v. International Finance Corporation*

Michelle Harrison¹ and Shannon Marcoux²

I. Introduction

In a landmark decision in 2019, the U.S. Supreme Court ruled in *Jam v. International Finance Corporation* that international organizations like the International Finance Corporation (IFC), the private lending arm of the World Bank Group, can be sued in U.S. courts, ending the “absolute immunity” from suit that they had long claimed. The *Jam* lawsuit arose out of IFC’s gross mishandling of the Tata Mundra coal-fired power plant project in Gujarat, India, which has destroyed the livelihoods, environment, and way of life of local communities living in its shadow. The lawsuit, and especially the clash between IFC’s sweeping assertions of jurisdictional immunity on the one hand, and its role in harming communities and the need for remedy to the communities on the other, brought substantial international attention and public scrutiny to the broader accountability crisis at IFC. In particular, the suit revealed that too often IFC-funded projects result in harm to the poorest and most vulnerable – the very people IFC is meant to help – and when this happens, neither IFC nor its borrowers take meaningful action to remedy that harm.

Following the 2019 *Jam* decision, the Boards of IFC and the Multilateral Investment Guarantee Agency (MIGA) requested an “External Review of IFC’s/MIGA’s Environmental and Social Accountability including the CAO’s Effectiveness,” and in 2020 the Review Team issued its report with numerous important recommendations for IFC and MIGA to address their accountability problem, including to create and implement a framework for remedial action.³ Despite this crucial opportunity to learn from past mistakes and course-correct, IFC management has responded by doubling down on its position that it owes nothing to the communities that host its projects and has justified its inaction in the name of minimizing litigation risk and legal exposure. This is most evident in its Draft Approach to Remedial Action (“Draft Approach”), released earlier this year.⁴

Organizations that believe they are above the law, and that they will not be held accountable, act like it. Jurisdictional immunity and the limited mandate of IFC’s internal accountability mechanism, the Compliance Advisor Ombudsman (CAO), have contributed to an institutional culture of unaccountability at IFC, which in turn has led to a failure to meaningfully scrutinize borrower conduct and to unremedied harm to host communities that substantially undermines development outcomes. Despite this critical opportunity to chart a new course, IFC’s Draft

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³ External Review of IFC’s/MIGA’s Environmental and Social Accountability including the CAO’s Effectiveness Review Report (2020), <https://thedocs.worldbank.org/en/doc/578881597160949764-0330022020/original/ExternalReviewofIFCMIGAESAaccountabilitydisclosure.pdf> [hereinafter “External Review”]. For purposes of this article, we focus only on IFC.

⁴ IFC/MIGA Approach to Remedial Action (Oct. 2022) available at <https://www.ifc.org/content/dam/ifc/doc/2023/ifc-miga-proposed-approach-remedial-action-en.pdf> [hereinafter “Draft Approach”]

Approach reveals that IFC management fundamentally misunderstands legal risk and has learned precisely the wrong lessons from the *Jam* litigation.

In the case of the Tata Mundra project, IFC had numerous opportunities to prevent, mitigate, and remedy harm, which would have eliminated any reason for it to be sued. The lesson IFC *should* have learned from the *Jam* case is that robust, meaningful, and effective mechanisms to prevent and mitigate harm, and promptly remedy any harm that results, along with trusted, legitimate mechanisms to access remedy – from both the borrower and IFC – are the best ways to both prevent future litigation and to enhance positive development outcomes. By failing to address the root causes of why IFC was sued, the position embodied in the Draft Approach would further entrench the institutional culture of unaccountability and guarantee that IFC will face future lawsuits.

II. The Tata Mundra Project and the failure to prevent, mitigate, and remedy harm

The Tata Mundra power plant is a paradigmatic example of a development project that harmed the communities it was supposed to help. From the outset, IFC knew that the project posed significant risks to people and the environment – classifying the project as environmental and social “category A”, meaning that it could have “significant,” “irreversible or unprecedented” impacts. Despite this, IFC’s board approved the critical financing to build the plant; without it, the project would not have gone forward. The specific issues IFC flagged at the outset were precisely those that then devastated the lives and livelihoods of local communities and their health. The harms were not only foreseeable, but they were also accurately predicted by IFC.

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 itself releases enormous quantities of thermal pollution that have depleted fish stocks and other marine resources on which fishing families depend.⁵ The plant also pollutes the air in violation of Indian air quality standards and the conditions of IFC funding; respiratory problems, especially among children, have already risen.

Among other things, the project is a stark example of how a failure to effectively consult with and account for host communities from the beginning – and an unwillingness to course-correct – led to cascading failures to identify, prevent, and mitigate impacts.⁶ IFC had numerous legal and other tools available to compel compliance with the environmental and social (E&S) conditions of the loan agreement and to protect local people, to prevent and mitigate further harm, and to remedy

⁵ For more information on the Tata Mundra project and the harm it caused neighboring communities, see EarthRights International, Budha Ismail Jam, et al v. IFC, <https://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/>.

⁶ These early failures compounded later shortcomings in the project, particularly with respect to supervision and monitoring. IFC continued to maintain that the communities were not being harmed, because they were not identified by the borrower in initial studies as project-affected – even when the design of the project changed, without additional studies – and because it lacked baseline information against which to compare the mounting impacts on the local community. This in turn was made worse by its ignoring these communities when they repeatedly sounded the alarm.

harm that had occurred.⁷ Despite worsening conditions, IFC continued to make disbursements without enforcing the E&S conditions and without steps to prevent further harm.

In 2011, the communities filed a complaint with the CAO, before the plant even began operating, raising in detail the impacts they already faced, and concerns about future injuries. In 2013, after a failed dispute resolution process, the CAO issued its Audit Report finding shortcomings at every stage of the project, including but not limited to, failing to adequately assess risk and weaknesses in review of impacts, and it harshly criticized IFC for failing to address environmental and social compliance during project supervision.⁸ The CAO called for IFC to take rapid remedial action; IFC responded by largely rejecting the findings. The CAO has reiterated the call for remedy in monitoring reports, which IFC has likewise ignored. The project remains out of compliance and the harms unremedied.

III. *Jam v. IFC and the end of “absolute immunity” in U.S. Courts*

Left with no other avenue for recourse, the communities sued IFC in 2015 in Washington, D.C., where IFC is headquartered. IFC responded that it was 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 U.S. courts.

Both the trial court and Court of Appeals for the D.C. Circuit sided with IFC, concluding they were bound by prior D.C. Circuit precedent that international organizations had absolute immunity.⁹ Judge Pillard of the D.C. Circuit, however, wrote in a separate opinion that although that precedent “remains binding law,” those “cases were wrongly decided” and should be “revisit[ed].”¹⁰ In 2018, the U.S. Supreme Court agreed to hear the case.

The question before the Supreme Court concerned how to interpret a 1945 U.S. statute, the International Organizations Immunities Act (IOIA), which grants international organizations like IFC the “same immunity from suit... as is enjoyed by foreign governments.”¹¹ IFC argued that this provision should be read to mean it enjoys the same immunity today that foreign governments enjoyed in 1945, when the IOIA was enacted, ignoring the ways sovereign immunity has since

⁷ The loan agreement gave IFC substantial power and authority over the project and its construction and operation at every stage. This included substantial control over design and construction, the power to withhold disbursements based on noncompliance with environmental and social conditions, the power to audit environmental and social compliance, and the power to compel the borrower to remedy harm, among others. These obligations survive repayment of the loan. See EarthRights International, Submission of EarthRights International on the Draft IFC/MIGA Approach to Remedial Action, §§ V.C.2, 3 (Apr. 2023), available at <https://earthrights.org/wp-content/uploads/2023/04/ERI-Submission-on-IFC-MIGA-Remedial-Approach-4.20.23.pdf> (analyzing the Tata Mundra loan agreement in detail).

⁸ CAO, CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India (Aug. 22, 2013).

⁹ See, e.g. *Jam v. Int’l Fin. Corp.*, 172 F. Supp. 3d 104, 112 (D.D.C. 2016) (holding that “this Court cannot overturn” the D.C. Circuit’s decision in *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998), which held international organizations were entitled to “absolute immunity”); *Jam v. Int’l Fin. Corp.*, 860 F.3d 703, 705-06 (D.C. Cir. 2017) (“we conclude our precedent stands as an impassable barrier”).

¹⁰ *Jam v. Int’l Fin. Corp.*, 860 F.3d 703, 708 (D.C. Cir. 2017) (Pillard, J., concurring).

¹¹ 22 U.S.C. § 288a(b).

evolved and changed. 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 organizations like IFC. If the statute intended to lock in the immunity states had in 1945, it would have simply said so. Instead, Congress chose to tie international organizations’ immunity to that of foreign governments, acknowledging that such immunity would continue to evolve.

In 2019, in a historic 7-1 decision, the U.S. Supreme Court overturned the D.C. Circuit and held that international organizations are not “absolutely immune” – rather, they enjoy only the same “restrictive” immunity that applies to foreign governments.¹² This means that the same exceptions to immunity set forth in the U.S. Foreign Sovereign Immunities Act (FSIA) that permit suits against foreign governments also apply to organizations like IFC.¹³ After decades of operating as if they were above the law, pursuing reckless projects that inflicted serious harms on local communities, the *Jam* case held that international organizations could be subject to legal scrutiny if the case fell within one of the FSIA exceptions to immunity.

IV. *The FSIA exceptions to Immunity in U.S. courts*

Most relevant to the *Jam* case was the FSIA’s “commercial activity exception” to immunity which permits suits against states (and now international organizations) based on conduct in the United States that is “commercial” as opposed to uniquely governmental, like loaning money to private businesses.¹⁴ 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 IFC when it engages in the same conduct. After the Supreme Court’s ruling, the case returned to the trial court to assess whether the commercial activity exception to immunity was satisfied.

The FSIA’s statutory requirement that a suit be “based upon” the defendant’s commercial activity in the United States requires courts to determine the “gravamen” of the plaintiff’s claims.¹⁵ The “gravamen” of a case refers to “those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.”¹⁶ Because sovereign immunity is conduct based, this test has always focused on the conduct of the defendant that was sued.¹⁷ After all, a plaintiff’s entitlement to relief rests on *the defendant’s* conduct, not the conduct of any third party.

¹² *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759 (2019).

¹³ *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759 (2019). See 28 U.S.C. § 1605.

¹⁴ 28 U.S.C. § 1605(a)(2); *Republic of Arg. V. Weltover, Inc.*, 504 U.S. 607, 614 (1992).

¹⁵ *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015); *Saudi Arabia v. Nelson*, 507 U.S. 349, 356, 357 (1993).

¹⁶ *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993).

¹⁷ See, e.g. *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 174 (2d Cir. 2010) (looking to “the act of the foreign sovereign that serves as the basis for the plaintiff’s claim” in assessing immunity); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) (“immunity depends on the nature of those acts of the defendant that form the basis of the suit”); *Global Technology, Inc. v. Yubei (XinXiang) Power Steering System Co.*, 807 F.3d 806, 814 (6th Cir. 2015) (holding that the proper analysis required first determining which acts were attributable to the sovereign, as only this could be the gravamen); *Southway Constr. Co. v. Cent. Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999)

But in a later stage of the *Jam* case, IFC advanced a novel argument for why the exception should be applied differently to IFC, including that IFC’s own immunity should turn on the actions of an entirely different party – the borrower and operator of the power plant. Surprisingly, the U.S. Court of Appeals for the D.C. Circuit went against its own consistent line of case law and agreed, holding that the *Jam* plaintiffs’ claims were “based upon” third party conduct that happened in India, and not the actions for which IFC was sued – IFC’s *own* actions, which occurred in the United States.¹⁸

Whatever the merits of that decision, it is indisputably an outlier, not the rule. The *Jam* decision marked a significant deviation from prior precedent. And new precedent provides good reason to believe that a case similar to *Jam* would be viewed differently if it came before the D.C. Circuit today. After handing down the *Jam* decision, the D.C. Circuit subsequently reached a very different holding in another case against an international organization, *Rodriguez v. Pan American Health Organization*.¹⁹ In *Rodriguez*, the Pan American Health Organization facilitated the third-party conduct (Cuba and Brazil’s forced labor) that “actually injured” the plaintiffs. Contrary to the *Jam* holding that the claims’ gravamen was the third party’s acts because those acts “actually injured” plaintiffs,²⁰ *Rodriguez* held the gravamen was the defendant organization’s conduct and that the organization’s conduct need not be the conduct that “actually injured” plaintiffs in order to hold the organization liable.²¹ The *Rodriguez* decision indicates that a court may impose liability on a party, like IFC, who contributes to injury indirectly – such as through financing – even if another party more directly caused the plaintiffs’ injuries. Subsequent FSIA cases have reiterated that it is the conduct of the defendant – not a third party – that is determinative when it comes to assessing immunity.²² Had the D.C. Circuit applied this rationale in *Jam*, it likely would not have upheld the dismissal of the *Jam* case. At the very least, IFC faces significant uncertainty about the scope of its immunity in any future suits against it in the United States.

V. Immunity law outside the United States

The *Jam* decisions finding IFC immune from this specific suit in the U.S. turned on how U.S. courts interpreted U.S. statutes; this says nothing about how other jurisdictions would evaluate immunity under their laws or any relevant treaty. Other countries have different approaches to international organization immunity; some assess immunity under the terms of a generally applicable statute, while others incorporate the Articles of Agreement, the founding charter document, of institutions like IFC into their laws (either as self-executing treaties, or via statute

(holding the sovereign defendants were not immune from suit where those with a direct contractual relationship with the plaintiff more directly caused its injuries).

¹⁸ *Jam v. Int’l Fin. Corp.*, 3 F.4th 405, 409 (D.C. Cir. 2021).

¹⁹ *Rodriguez v. Pan Am. Health Org.*, 29 F.4th 706 (D.C. Cir. 2022).

²⁰ *Jam*, 3 F.4th at 409.

²¹ *Rodriguez*, 29 F.4th at 715.

²² See, e.g. *Rosenkrantz v. Inter-American Dev. Bank*, 35 F.4th 854, 863 (D.C. Cir. 2022) (courts must “zero in on the wrongful conduct on the part of the defendant”)(emphasis added); *Africa Growth Corp. v. Republic of Angola*, No. 21-11136, 2023 U.S. App. LEXIS 12594 at *7 (11th Cir. May 23, 2023) (“we focus on the core of the suit—the [defendant] foreign state’s acts”) (quoting *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 33 (2015)) (emphasis added).

with verbatim language). While a comprehensive overview of immunity law outside the U.S. is beyond the scope of this article, we briefly discuss below the way other courts are likely to approach the question of IFC's immunity.

A. IFC Articles: Immunity from suits by member states

In many legal systems, the immunity of international organizations is determined based on the provisions of the founding treaty establishing the organization (or the identical provisions, as incorporated verbatim into domestic law), by the terms of a Headquarters Agreement, or by another treaty, such as the United Nations Convention on Privileges and Immunities of the Specialized Agencies.

The founding treaties and headquarters agreements of many international organizations provide for seemingly unqualified immunity, or broad immunity with only narrowly defined exceptions, using language such as the organization “shall enjoy immunity from all forms of judicial process, except to the extent that it expressly waives its immunity.”²³ IFC, however, is notably not one of them; it has no such provision in its Articles of Agreement and no headquarters agreements.²⁴ To the contrary, Article VI, Section 3 of IFC's Articles states that:

Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members.

This provision clearly envisions IFC can and will be subject to suit of various kinds in different jurisdictions and contains only one exception: suits may not be brought by member states.²⁵

IFC may thus be found to only have immunity from suits by member states in many places.²⁶ Indeed, IFC itself made this very point in the *Jam* litigation, asserting that the plain language of its

²³ See, e.g. International Monetary Fund Articles of Agreement, art. IX § 3, Dec. 27, 1945, 60 Stat. 1401 (“The Fund . . . shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity.”); Convention on the Privileges and Immunities of the United Nations art. II, § 2, Feb. 13, 1946, 21.2 U.S.T. 1418, 1 U.N.T.S. 15.

²⁴ Nor does the Convention on Privileges and Immunities of the Specialized Agencies help IFC, because IFC explicitly exempted itself from the Convention's broad immunity, providing that the language in Section 3 of IFC's Articles of Agreement “shall be substituted” for the Convention's broader immunity provision. See Convention on the Privileges and Immunities of the Specialized Agencies Annex XIII §1, Nov. 21, 1947, 33 U.N.T.S. 261.

²⁵ See, e.g. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 771-72 (2019) (noting that “the charters of many international organizations” reserve immunity beyond what the IOIA provides, but “IFC's own charter does not”); International Law Commission, Fourth report on relations between States and international organizations (Second Part of the Topic), A/CN.4/424 and Corr.1 ¶ 71 (1989) https://legal.un.org/ilc/documentation/english/a_cn4_424.pdf (“IBRD, IDA and IFC do not enjoy general immunity from suit. Their immunity is limited to actions brought by member States or persons acting for or deriving claims from such States.”).

²⁶ That this language did not help the plaintiffs in *Jam* is based on particularities in the D.C. Circuit that have not been adopted elsewhere. The D.C. Circuit has treated this language as a “waiver” of immunity that the organization would otherwise have enjoyed under the IOIA. But it created a test to narrow the plain language of the waiver to apply only

Articles would render the IFC “subject to suit” in courts outside the United States.²⁷ This will no doubt prove useful to future litigants in non-U.S. cases.

B. *The Requirement of an Alternative Avenue for Redress*

Even where a court finds that the relevant treaty, headquarters agreement, or a statute would otherwise provide immunity from judicial process (which is unlikely for IFC), courts outside the United States are increasingly requiring the existence of a fair, impartial alternative avenue for meaningful remedy as a precondition to recognizing the immunity of international organizations from suit. More than twenty years ago, for example, the European Court of Human Rights held that a “material factor” in determining whether to grant an international organization immunity from jurisdiction is whether the claimant had “available to them reasonable alternative means to protect effectively their rights” of access to courts.²⁸ While many national courts in Europe have applied this precedent directly, others have found an independent basis in national law for the same principle.²⁹

where the court finds that there would be a “corresponding benefit” to the organization of allowing the particular suit. *Mendaro v. World Bank*, 230 U.S. App. D.C. 333, 717 F.2d 610, 617 (1983); *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1338 (1998) *rev'd other grounds* *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019). This test lacks any basis in the language of the provision or policy and it has been roundly criticized by numerous judges on the D.C. Circuit and many legal scholars. *See, e.g. Jam*, 860 F.3d at 708, 710, 713 (Pillard J. concurring) (stating that *Mendaro* was “wrongly decided,” and the waiver doctrine “lacks a sound legal foundation,” “is awkward to apply,” and has contributed to a “doctrinal tangle” and should be “revisit[ed].”); *Vila v. Inter-Am. Inv. Corp.*, 583 F.3d 869, 870-71 (2009) (Williams, J., statement) (noting the test should be re-visited). *See also, e.g. Steve Herz, International Organizations In U.S. Courts: Reconsidering The Anachronism Of Absolute Immunity*, 31 SUFFOLK TRANSNAT'L L. REV. 471, 518 (2008) (“The D.C. Circuit's treatment of the waiver issue... is not persuasive.”); Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 84 (1995) (“It would be hard for the court to have confused ... waiver more thoroughly.”). Accordingly, even in jurisdictions that afford international organizations some baseline immunity through a generally applicable statute or treaty, courts are likely to give this provision the broad meaning its words clearly provide – waiving IFC’s immunity for all suits, except those brought by member states – without applying the D.C. Circuit’s judicially-created test to unduly narrow waiver. And for those jurisdictions that only look to the Articles, there is of course no immunity to waive and IFC could be subject to suit.

²⁷ *See* Defendant IFC Reply in Support of Motion to Dismiss at 16, *Jam v. Int'l Fin. Corp.*, 172 F.Supp. 3d 104 (D.D.C. 2016) (No. 1:15-cv-00612), available at <https://earthrights.org/wp-content/uploads/Doc.-23-IFC-MTD-Reply-Memo-of-Law.pdf>; *see also* Plaintiffs’ Response To New Arguments The Defendant Impermissibly Raised For The First Time On Reply at 5-6 (Nov. 13, 2015), available at <https://earthrights.org/wp-content/uploads/Plfs-Surreply-DDC.pdf> (explaining this means IFC has conceded it waived immunity).

²⁸ *Waite and Kennedy v. Germany*, Application No. 26083/94, ¶ 68. (ECtHR 1999); *Beer & Regan v. Germany*, Application No. 28934/95 (ECtHR 1999).

²⁹ *See, e.g. Paola Pistelli v. European University Institute*, Italian Court of Cassation, all civil sections, 28 October 2005, no. 20995, Guida al diritto 40 (3/2006), ILDC 297 (IT 2005) (evaluating whether immunity would violate the Italian constitution and finding it did not where organization had established an adequate alternative judicial remedy); *Hetzel v. EUROCONTROL*, Germany, Federal Constitutional Court, 2 BvR 1058/79, BVerfG 59, 63 (1982) (evaluating whether organization’s dispute tribunal was sufficient such that immunity did not violate the German Constitution); *Banque africaine de développement v. Degboe*, Cour de Cassation, Chambre sociale, 25 janvier 2005, 04-41012, 132 Journal du droit international (2005) 1142 (immunity absent alternative recourse would be contrary to “public international order.”).

Where no alternative tribunal exists, domestic courts have frequently refused to recognize the immunity of international organizations.³⁰ Moreover, mere existence of an alternative is not generally not enough. Courts regularly scrutinize the fairness of the procedures, qualifications and impartiality of the arbiters and judges, and the actual possibility of obtaining a remedy, among other considerations,³¹ and they have regularly refused to recognize immunity where the existing alternative mechanism lacked sufficient indications of impartiality and fairness, including the inability to issue binding decisions and execute judgments.³²

This line of cases leaves IFC particularly vulnerable as the IFC has no mechanism available to communities with the kind of impartiality, independence, and remedial authority required under

³⁰ See, e.g. *Banque africaine de développement v. M.A. Degboe*, Cour de Cassation [Cass.] soc., Jan. 25, 2005, Bull. civ. V, No. 04-41.012 (rejecting African Development Bank’s immunity where there was no tribunal established that could issue binding decisions if the plaintiff was denied access to court); Neumann and Peters, “Switzerland” at 252 in *The Privileges and Immunities of International Organizations in Domestic Courts* (August Reinisch, ed. 2013) (“the Swiss Federal Supreme Court has repeatedly linked the dispensation of international organizations from domestic jurisprudence to the establishment and operation of an alternative means of dispute settlement.”); Rosanne von Alebeek and Andre Nollkaemper, “The Netherlands” at 197 in *The Privileges and Immunities of International Organizations in Domestic Courts* (August Reinisch, ed. 2013) (observing that Dutch courts proceed from the “assumption that international organizations’ immunity will not be applied when no alternative remedy is available.”). Although this trend is most prominent in European courts, courts in other jurisdictions have likewise found an alternative avenue to access remedy critical to recognizing immunity. See, e.g. Raúl E. Vinuesa, “Argentina.” *The Privileges and Immunities of International Organizations in Domestic Courts* (August Reinisch, ed. 2013) at 19-22 (discussing *Cabrera, Washington J. E. c. Comisión Técnica Mixta de Salto Grande*, Fallos 305:2150, de 5/12/1983) (explaining that the supreme court found that immunity would be incompatible with the right to have access to a court if there was not an alternative avenue to entertain claims against the organization, citing both the National Constitution and arguing that the right of access to court is now a norm of jus cogens under international law); Raposo with UNESCO *Sentencia Ilustrísima Corte de Apelaciones de Santiago. Causa ROL 90-2009* (finding constitutional protections outweighed immunity of UNESCO); *SN Ryabov v Eurasian Development Bank*, Russian Federation, Supreme Court, judgment of 9 July 2010, N 5-B10-49, ILDC 1559 (RU 2010) (holding that the Eurasian Development Bank could not claim immunity in the absence of an alternative means of redress).

³¹ See, e.g. *X v Organisation for Economic Co-operation and Development*, France, Court of Cassation, Appeal judgment of 29 September 2010, no 09-41030, ILDC 1749 (FR 2010), paras. 4-5 (upholding the OECD’s immunity after reviewing its Administrative Tribunal’s makeup, competence, independence, and impartiality, as well as various procedural aspects, such as whether its hearings were public). See also, e.g. Riccardo Pavoni, “Italy,” at 160-61, in *The Privileges and Immunities of International Organizations in Domestic Courts* (August Reinisch, ed. 2013) (discussing *FAO v Colagrossi* (1992) 75 RDI 407, 101 ILR 386 (Court of Cassation, 18 May 1992 No 5942) and *Carretti v FAO* (2004) Archivio civile 1328 (Court of Cassation, 23 January 2004 No 1237)); Thore Neumann and Anne Peters, “Switzerland” at 256-57 (discussing the Swiss Federal Supreme Court’s decision in *ZM v Arab League* and noting the court took effort to “verify both the adequacy of the alternative mechanism and effective access to it.”).

³² See *Siedler v. Western European Union*, Brussels Labour Court of Appeal (4th chamber), J. TRIBUNAUX 617 (2004), ILDC 53 (BE 2003) (denying immunity to the Western European Union and finding that the commission des recours was an inadequate alternative based on its lack of provisions providing for execution of decisions, for public hearings, or publication of judgments, and insufficient independence of commissioners, among other things). See also *Western European Union v. Siedler*, Belgium, Court of Cassation, 21 December 2009, Cass No S 04 0129 F, ILDC 1625 (BE 2009) (upholding prior decision denying immunity); *Lutchmaya v. ACP Secretariat*, Cour d’Appel [CA] Bruxelles, Mar. 4, 2003, J.T. 2003, 684, ILDC 1363 (BE 2003) (upholding denial of organization’s immunity from suit to execute judgment of Belgian Labor Court that had ruled for plaintiff where organization had refused to pay, as there was no alternative mechanism to compel the organization to execute the decision); *Drago v. International Plant Genetic Resources Institute (IPGRI)*, Cass., 19 febbraio 2007, No. 3718, ILDC 827 (It.) (refusing to recognize an international organization’s immunity where the alternative dispute mechanism was insufficiently independent and impartial).

this inquiry. In *Jam*, IFC argued that under U.S. case law, “the presence of such a mechanism” was all that mattered, but how “effective (or ineffective) those mechanisms were,” or that they were “fundamentally flawed,” was “not relevant” to IFC’s immunity.³³ Indeed, IFC’s accountability mechanism, the CAO, was intentionally set up in ways to avoid many of the qualities found necessary in such cases.³⁴ It is entirely internal to IFC; has no judges or arbiters of any kind, let alone with the kind of impartiality and independence that have been required; and lacks any power to issue a binding decision or compel any remedial action.³⁵ Moreover, as discussed below IFC is continuing to oppose efforts to provide a meaningful remedy framework that could in theory strengthen the CAO in ways that would likely reduce the chances a court would strip IFC of its immunity.

VI. *IFC’s Draft Approach to Remedial Action: Learning the Wrong Lessons*

Throughout the *Jam* litigation and in its Draft Approach to Remedial Action released in 2023, IFC has argued that addressing the harms caused by its projects will drastically increase its litigation risk.³⁶ However, attempting to minimize legal risk by taking the position that it will never directly provide remedy, shows that IFC has learned precisely the wrong lessons from the *Jam* litigation. It was IFC’s refusal to take any remedial action that got IFC sued in the past, and its continuing refusal to remedy harm will guarantee IFC gets sued again in the future.

In reality, the very actions that IFC presumes will give rise to legal risk – exercising IFC’s oversight and enforcement authority over a borrower and making a strong institutional commitment to provide remedy – are two of IFC’s best avenues for preventing future litigation. The *Jam* lawsuit, for example, would not have been filed if IFC had taken remedial action – as the CAO repeatedly recommended – to address the harm to the project’s neighbors. Nor would litigation have been necessary if IFC used its extensive contractual authority to compel the borrower to prevent, mitigate, or remedy the harm. Yet, IFC’s Draft Approach rejects IFC’s contribution to any remedy and makes no commitments regarding the enforcement of future loan conditions.

Having disclaimed any responsibility to provide or ensure a remedy where its projects have caused harm, IFC makes clear in the Draft Approach that impacted communities’ *only* option to engage with IFC remains the CAO, a mechanism IFC can freely disregard without consequence, while

³³ Defendant IFC Reply in Support of Motion to Dismiss at 10-11, *Jam v. Int’l Fin. Corp.*, 172 F.Supp. 3d 104 (D.D.C. 2016) (No. 1:15-cv-00612).

³⁴ For further discussion of CAO’s limited authority, see EarthRights International, Submission of EarthRights International on the Draft, § V.B.1. (Apr. 2023), available at <https://earthrights.org/wp-content/uploads/2023/04/ERI-Submission-on-IFC-MIGA-Remedial-Approach-4.20.23.pdf>.

³⁵ This stands in stark contrast to the mechanism IFC has for hearing employment disputes that is made up of independent judges with fixed terms who are not (and cannot later be) employed by the World Bank Group, and have the power to issue final binding decisions with which the IFC must comply, including payment of compensation and restitution. Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation, Art. IV, Art. XII (1980).

³⁶ See IFC Draft Approach

simultaneously emphasizing that IFC will never consider itself required to contribute to remedy directly – even if CAO finds noncompliance and harm and recommends remedy.³⁷ IFC’s categorical stance against remedial action and failure to establish an alternative mechanism to provide or otherwise ensure remedy will leave other desperate communities without redress and all but guarantee IFC will be sued again.

The most effective way for IFC to mitigate legal risk is to strengthen its ability to promptly and meaningfully address project-related harm, to take meaningful action to alter its organizational culture to actually incentivize both IFC staff and borrowers to address project-related harm, and to ensure management, staff, and borrowers are held to account for the failure to do so. As the 2020 *External Review* of IFC’s accountability system correctly noted, a key “way to mitigate litigation risk is to be able to demonstrate the integrity and efficacy of its governance and accountability mechanisms with respect to E&S principles and sustainability outcomes.”³⁸ This includes strengthening the ability of CAO to make findings of fault and compel remedies and enhancing its independence.³⁹

But IFC management appears to be doing the opposite. Indeed, IFC appears to have actively sought to interfere with CAO’s processes in ways that have done significant further damage to public trust in both CAO and IFC and the World Bank Group more broadly. The CAO recently revealed that during the course of an ongoing investigation into child sexual abuse claims at IFC-funded Bridge International Academy schools, “IFC and the client entered into a wide-ranging confidential agreement that purports to cover CAO’s work.”⁴⁰ The agreement, “reached without CAO’s agreement or participation ... includes commitments from IFC that CAO will not disclose information that the client asserts to be confidential.”⁴¹ And in October 2023, media reports revealed damning evidence that IFC and World Bank Group management attempted to cover up the abuse, including by retaliating against a CAO employee involved in the investigation.⁴² IFC is simultaneously telling communities that their only path to recourse is through the CAO while actively attempting to undermine CAO’s effectiveness and independence.

³⁷ See generally EarthRights International, Submission of EarthRights International on the Draft, § V.B.1 (Apr. 2023), available at <https://earthrights.org/wp-content/uploads/2023/04/ERI-Submission-on-IFC-MIGA-Remedial-Approach-4.20.23.pdf>.

³⁸ External Review, *supra* note 3, at ¶ 143; see also *id.* ¶ 138 (“The *Jam* case (and others) have altered litigation risk for IFC (and other international financial institutions) and placed a sharper focus on the substantive effectiveness and procedural legitimacy of IFC’s commitment to its Sustainability Framework, including the manner in which CAO administers (and IFC engages in) its complaint resolution processes.”).

³⁹ See generally EarthRights International, Submission of EarthRights International on the Draft, §§ IV.C, V.B.1 (Apr. 2023), available at <https://earthrights.org/wp-content/uploads/2023/04/ERI-Submission-on-IFC-MIGA-Remedial-Approach-4.20.23.pdf>.

⁴⁰ CAO, Compliance Appraisal: Summary of Results: Bridge International Academies-04, at 7 (Dec. 23, 2020).

⁴¹ *Id.* at 7-8.

⁴² Ryan Grim, Neha Wadekar, “Neutralize Adler”: Whistleblower: The World Bank Helped Cover UP Child Sex Abuse at a Chain of For-Profit Schools it Funded, *The Intercept*, Oct. 17, 2023 <https://theintercept.com/2023/10/17/world-bank-whistleblower-bridge-international/>; Ryan Grim, *World Bank Whistleblower Exposes Cover Up of Child Sex Abuse at For-Profit School Chain*, *The Intercept*, Oct. 19, 2023, <https://theintercept.com/2023/10/19/world-bank-whistleblower-bridge-child-sex-abuse/>

While wrongfully disclaiming IFC's responsibility to provide remedy itself, IFC's Draft Approach also claims that it lacks sufficient leverage to ensure that a borrower provides a remedy. This is a common refrain heard in specific cases as well, especially where a loan has been repaid: IFC claims to no longer have any leverage or ability to compel the borrower to do anything. IFC's highly problematic approach to transparency has historically made such claims difficult to evaluate as IFC never discloses its loan agreements – just expecting stakeholders to trust IFC as to what is and is not possible under the confidential terms. Indeed, in the Draft Approach, much discussion is dedicated to how IFC will “explore ways to build influence” in its contracts, but without any discussion of the extent to which its contracts already contain terms providing influence and whether IFC ever utilizes such terms in practice.⁴³

But these assertions – and IFC's suggestion that examining contractual terms is somehow a meaningful step towards remedy - are plainly not credible after *Jam*. During the course of the litigation, IFC turned over the Tata Mundra Loan Agreement and it reveals that, far from IFC lacking leverage to compel the borrower to take remedial action, the terms afford IFC substantial control over the project at every stage and provide IFC with significant leverage over the borrower – much of which continues long after repayment.⁴⁴ For example, the agreement conditioned each loan disbursement on compliance with the Environmental and Social Action Plan (ESAP), IFC's Performance Standards, environmental laws and regulations, Environmental and Social Management Plans, and numerous other environmental and social measures specified in the agreement. Even after all the funds were disbursed and the loan was repaid, IFC retained significant leverage to compel the borrower to take remedial action the CAO had repeatedly called for. It also could take such action itself and recover the full costs from the borrower thanks to the indemnification provisions that survive repayment.⁴⁵ The problem is not IFC's lack of power and contractual leverage, it is IFC's unwillingness to use it.

The failure by IFC management to exercise their leverage is not unique to the Tata Mundra case. Analysis by the CAO has found that IFC/MIGA made use of the contractual leverage provided by contract provisions conditioning disbursements on compliance with Environmental and Social Action Plans (ESAPs), in only 23 percent of cases where it “considered a client's E&S actions inadequate.”⁴⁶ In 54 percent of cases, it allowed disbursement to go ahead despite unfulfilled

⁴³ Draft Approach ¶ 17c, 17a

⁴⁴ For a more in-depth discussion of the Tata Mundra Loan Agreement and IFC's broader failure to utilize its leverage over borrowers, see EarthRights International, Submission of EarthRights International on the Draft IFC/MIGA Approach to Remedial Action, §§ V.C.3-4 (Apr. 2023), available at <https://earthrights.org/wp-content/uploads/2023/04/ERI-Submission-on-IFC-MIGA-Remedial-Approach-4.20.23.pdf>.

⁴⁵ According to the Tata Mundra Loan Agreement, the Borrower “shall pay to the Senior Lender or as the Senior Lender may direct, all costs and expenses (including Consultants' fees and expenses) arising out of or in connection with ... any failure by the Project or the Borrower to comply with any Environmental and Social Requirements.” The borrower also must pay IFC for consultants that IFC appoints. And the Borrower also indemnifies IFC for any loss, claim, damage, or liability to which IFC itself may become subject in connection with or arising from their activities. Each of these indemnification provisions expressly survived repayment of the loan. See EarthRights International, Submission of EarthRights International on the Draft IFC/MIGA Approach to Remedial Action, § V.C.3 (Apr. 2023) (quoting the Tata Mundra Loan Agreement).

⁴⁶ CAO, Advisory Note: Insights on Remedy, The Remedy Gap: Lessons from CAO Compliance and Beyond at 16-17 (Apr. 2023).

commitments, either through waiver, or amending or extending the E&S compliance deadlines, and in no case did IFC/MIGA analyze the impacts that waiver and disbursement had on E&S performance.⁴⁷ Far from using their leverage, IFC/MIGA freely give it up for nothing in return.

IFC's failure to speak honestly about existing contractual terms, leverage, and actual practice in the Remedy Framework process substantially undermines IFC's credibility and destroys trust, particularly given its track record of failing to use any such leverage and/or waiving environmental and social requirements. Any suggestion by IFC that review of existing terms and consideration of new contractual terms will be a meaningful part of its Remedy Framework cannot be taken seriously without, at a minimum, a commitment to full contract transparency going forward. How can communities and other stakeholders trust IFC as to what terms and conditions govern its loans, and what actions IFC can take, if IFC continues to hide behind long outdated arguments for contract secrecy?

Providing remedy – in particular, compensation – where its actions result in or contribute to harm is essential; it is not only morally right, it would also substantially decrease the possibility that those injured would resort to litigation.⁴⁸ And making an institutional commitment to compensate communities that suffer harm at the hands of IFC-funded projects will also lead to better due diligence policies and practices, investment approval decisions, project supervision, and enforcement of IFC standards – all of which will further decrease the likelihood of harm resulting in future projects, thus reducing IFC's legal risk.

VII. Recent IFC settlement further signals remedy requires litigation.

In December 2023, IFC agreed to settle a lawsuit filed against it by farmers alleging that IFC is liable for financing a notorious palm oil company's violent land-grabbing campaign in the Bajo Aguán Valley of Honduras. The case, *Juana Doe v. International Finance Corporation*, was brought in U.S. federal court in 2017 by family members of seven murdered *campesino* farmers, and two classes consisting of thousands of community members who were harmed. The suit alleges that the plaintiffs or their family members were victimized by armed agents of Corporación Dinant, which terrorized local communities to expand its profitable palm oil operations, and that IFC, which financed Dinant's expansion, knew or should have known that its money was abetting murder and other serious abuses. In this case, as in *Jam*, the CAO found that IFC violated its own rules. The CAO issued a scathing report in December 2013, noting that at least 40 killings targeting the Bajo Aguan Valley *campesino* movement had been linked to Dinant during 2010-2013. The settlement is pending court approval.⁴⁹

The only lesson other communities IFC has harmed can take from the *Jam* and *Juana Doe* cases is that the only path to remedy requires suing IFC—and even that is a difficult path. As we have

⁴⁷ *Id.*

⁴⁸ *See Id.* ¶ 143 (“such leadership” by IFC “should mitigate a variety of risks, including the proliferation of ‘home country’ litigation.”).

⁴⁹ EarthRights International represents the plaintiffs in this case.

explained, in the Draft Approach IFC disclaims any responsibility to provide remedy itself and merely directs aggrieved communities to the CAO, which remains powerless to provide a remedy. But IFC still has a chance to course-correct and create a real remedy framework that will provide communities another option to obtain meaningful remedies, and afford them confidence that IFC projects will not risk the future of their families and their communities. Whether it will choose to create such a framework, or instead force communities to sue, remains to be seen.

Conclusion

The first time IFC was sued by a community in need of remedy, after nearly four years of litigation and millions of dollars in legal fees, the U.S. Supreme Court rejected the sweeping absolute immunity IFC had for decades assumed it enjoyed.⁵⁰ The *Jam* litigation and subsequent U.S. IOIA and FSIA litigation, the evolving legal landscape globally with respect to jurisdictional immunity, as well as the increasing scrutiny of financial institutions more broadly,⁵¹ should all make IFC wary of future litigation in both the United States and in other countries. IFC can limit the number of cases pursuing liability in the future if it develops and implements an approach to remedy that creates concrete paths to obtain meaningful remedies. More generally, strong enforcement of environmental and social safeguards, an empowered accountability mechanism, and a commitment to taking proactive remedial action will most effectively reduce IFC's legal risk while better enabling it to carry out its development mandate.

⁵⁰ *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019).

⁵¹ *See, e.g.* External Review Report, *supra* note 3, at ¶ 145 (noting the increasing “exposure” of lenders and investors “with respect to negative social externalities and their recognition of the materiality of E&S factors to the sustainability of their business models and those of their borrowers/investee”; *id.* 146-150 (noting the growing body of legal precedent imposing duties on lenders in various contexts). Global legislative and judicial developments show a clear trend of increased scrutiny of financial institutions’ role in causing and contributing to harm to third parties. *See* EarthRights International, Submission of EarthRights International on the Draft, §§ III.C.2. (Apr. 2023), available at <https://earthrights.org/wp-content/uploads/2023/04/ERI-Submission-on-IFC-MIGA-Remedial-Approach-4.20.23.pdf>.