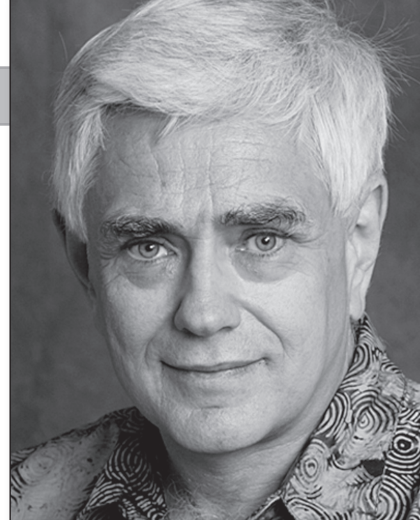
Court Says World Bank Can Be Sued. But More Remedies Needed



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In February, the Supreme Court ruled that the World Bank's International Finance Corporation as well as other international organizations are not totally immune from lawsuits in the United States. The complaint, *Jam v. International Finance Corporation,* was filed in the D.C. District Court in 2015. It alleged that the 4150 megawatt Tata Mundra coal power plant in India, financed with a $450 million loan by the IFC in 2008, contaminated drinking and irrigation water of local farm communities, severely harmed fisheries and fisherfolk, and adversely affected through air pollution public health, inducing involuntary economic and physical displacement.

Though the IFC's compliance advisor/ombudsman confirmed these allegations in 2013 and again in 2015, management did not act to remedy the problems. Earth Rights International and the Stanford Law Supreme Court Clinic, representing the affected communities, challenged the IFC's claims to almost complete legal immunity, based on the International Organizations Immunity Act. That 1945 law grants international organizations the same immunity from lawsuits as sovereign states, an immunity that then was almost total. Both the trial court and the appeals court for the D.C. Circuit supported the IFC's arguments, decisions that the Supreme Court reversed with a 7 to 1 majority.

How a coal plant went from a value of billions of dollars to less than one rupee

The main issue was a narrow one: whether the language in the 1945 statute granting the "same" immunity to international organizations as to sovereign states should be interpreted in a "static" or a "dynamic" fashion. In other words, whether the near total immunity that sovereign states enjoyed in U.S. law in 1945 would be frozen in time for international organizations, although the 1976 Foreign Sovereign Immunities Act created broader exceptions for lawsuits against sovereign states.

Chief Justice Roberts ruled that since the FSIA changed the legal parameters for immunity of sovereign states, then the "same" immunity for international organizations also changed. He cited the "reference canon" of statutory interpretation, namely that when a general subject (rather than a specific law) is referred to in a statute, the legal conditions concerning that subject change when relevant future legislation changes.

Roberts wrote that the 1976 FSIA provided that sovereign states (and thus the IFC and other international organizations) could be sued for their "commercial activities," giving an opening for the plaintiffs to pursue relief. But, he emphasized, "as the government suggested at oral argument, the lending activity of least some development banks, such as those that make conditional loans to governments, may not qualify as 'commercial' under the FSIA."

And even if all multilateral development bank lending activity were to qualify as commercial, it would also have to be shown that there is a "sufficient nexus" to the United States and that the lawsuit is "based upon" the commercial activity or acts performed in connection with the commercial activity. Remanding the case to the appeals court for further deliberation based on the Supreme Court's ruling, Roberts noted the government argument that "it had serious doubts whether petitioner's suit, which largely concerns allegedly tortious conduct in India, would satisfy the 'based upon' requirement."

After four years, the litigation could continue substantially longer. For poor farmers and fisherfolk in India, delayed justice is denied justice more than for most plaintiffs. Litigation in U.S. courts seeking redress for the over half million victims of the 1984 Union Carbide Bhopal chemical disaster continued until 2012. Political pressure by major donor governments on the IFC to assume responsibility for its negligence would provide quicker and more effective redress.

The negligence extends beyond the needless harm inflicted on local poor people. Tata Mundra is also one of the 50 biggest point sources of greenhouse gas emissions on Earth. And the inexpensive electricity rates that Tata and the IFC touted to justify the project depended on import of highly subsidized Indonesian coal. Indonesia halted the subsidies, and in 2011 Tata Power asked the Indian government — in vain — to allow it to double the rate it charged customers, since the plant was losing $250 million annually.

In 2012, Tata Power's executive director announced that henceforth the company would only invest in wind and solar, both domestically and abroad. "Why would anyone want to invest at this stage in a coal project?" he said. Then Standard and Poor's and Moody's downgraded the company's debt. In 2017 Tata offered to sell 51 percent of its equity in the multi-billion-dollar coal plant to several Indian states for one rupee. There were no takers.