Jammed from Justice: How International Organization Immunity Enshrines Impunity

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INTRODUCTION

In a tiny fishing village along the Kutch coastline of India, families wake up to ash falling from the sky.[1] Foul smells loom in dark clouds over the settlements,[2] while chemicals and excess salts taint local sources of drinking water.[3] Abscesses and boils paint the bodies of children and respiratory illnesses like asthma afflict the majority of residents.[4]

It was not always like this in Mundra, a port city within India's Gujarat state. Wild animals used to run free among the forests and grazing lands.[5] The water was clean, the air was pure, and the marine life was abundant.[6] For centuries, thousands of Wagher families, a Muslim minority in India, would migrate yearly from the inland villages to the sandy Kutch gulf to begin eight months of *Pagadiya*—a 200-year-old practice of catching and harvesting fish at low tide.[7] But all this changed in 2008 when the International Finance

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1. Lakshmi Sarah, *Coal-Ravaged Indian Fishers Take to the Supreme Court*, SIERRA MAG. (Sept. 20, 2021), https://www.sierraclub.org/sierra/2019-3-may-june/feature/coal-ravaged-indian-fishers-take-international-finance-corporation-tata-mundra-to-supreme-court [https://perma.cc/GTN3-FQK6]; PRASAD CHACKO, THE CGPL POWER PLANT "TATA MUNDRA": AN EXPLORATIVE STUDY OF THE IMPACT ON CHILDREN 6, BANK INFO. CTR., https://consultations.worldbank.org/sites/default/files/consultation-template/review-and-update-world-bank-safeguard-policies/submissions/tata_mundra_case_study.pdf [https://perma.cc/XC7Y-P4NG].
2. CHACKO, *supra* note 1, at 10.
3. *Id.* at 6–7.
4. *Id.* at 8–9.
5. Sarah, *supra* note 1.
6. CHACKO, *supra* note 1, at 5–9.
7. Barry Yeoman & Michael Hudson, *The World Bank Group's Uncounted*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (May 1, 2015), https://www.icij.org/investigations/world-bank/world-bank-groups-uncounted/ [https://perma.cc/NFC5-JP47]; David Pegg, *Why the Mundra Power Plant Has Given Tata a Mega Headache*, GUARDIAN (Apr. 16, 2015), https://www.theguardian.com/global-

Corporation ("IFC")—the World Bank Group's private lending arm—approved a $450 million loan to Coastal Gujarat Power Limited ("CGPL") for the construction and operation of the Tata Mundra coal-fired power plant in the Kutch District of Gujarat.[8]

Headquartered in Washington D.C., the IFC is the world's largest development-oriented international organization with over 184 member countries.[9] The IFC's mission is to "advance[] economic development and improve[] the lives of people by encouraging the growth of the private sector in developing countries."[10] To achieve this, the IFC provides loans, equity investments, debt securities, and guarantees to projects located in developing countries.[11] Typically, international investors do not consider these projects "bankable" because these projects often lack financial backing and business promise.[12] Thus, the IFC "interven[es]," creating the conditions necessary to allow these projects to flourish.[13]

In the case of the Tata Mundra plant, though, the IFC not only failed to advance economic development, but its efforts devastated existing local economies.[14] Since its construction, the Tata Mundra plant has caused environmental degradation;[15] loss of livelihoods;[16] negative health impacts, including respiratory diseases, malnutrition, cardiac diseases, and skin

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development/2015/apr/16/why-the-mundra-power-plant-has-given-tata-a-mega-headache [https://perma.cc/658J-YU7L].

8. Pegg, *supra* note 7; Press Release, Int'l Fin. Corp., IFC Invests in India's Coastal Gujarat Power, Expanding Access to Electricity (Apr. 8, 2008), https://pressroom.ifc.org/all/pages/PressDetail.aspx?ID=21942 [https://perma.cc/D4VS-Q7NX].

9. INT'L FIN. CORP., IFC THE FIRST SIX DECADES 9 (Rob Wright et al. eds., 2d ed.), https://www.ifc.org/wps/wcm/connect/5e70149f-6cad-407a-944e-69d392079b47/IFC-History-Book-Second-Edition.pdf?MOD=AJPERES&CVID=lIwwdJi [https://perma.cc/YV26-WVZG].

10. *About IFC*, INT'L FIN. CORP., https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new [https://perma.cc/8AD8-62L2].

11. *Id.*

12. *Id.*

13. *Id.*

14. S N BHARGAVA ET AL., THE REAL COST OF POWER: REPORT OF THE INDEPENDENT FACT-FINDING TEAM ON THE SOCIAL, ENVIRONMENTAL, AND ECONOMIC IMPACTS OF TATA MUNDRA ULTRA MEGA POWER PROJECT, KUTCH, GUJARAT (2012), https://bankinformationcenter.cdn.prismic.io/bankinformationcenter%2Ffdc529c1-69fb-4fb1-aaa7-1797d62cfa4d_real%2Bcost%2Bof%2Bpower.pdf [https://perma.cc/8V79-ZLYG].

15. *Id.*; CHACKO, *supra* note 1, at 5; Pegg, *supra* note 7.

16. CHACKO, *supra* note 1, at 5–6.

ailments;[17] a decrease in access to education;[18] an increase in poverty;[19] and an increase in the prevalence of child labor.[20]

As a result, local Kutch communities filed a class-action lawsuit against the IFC in 2015 in the U.S. District Court for the District of Columbia.[21] The plaintiffs alleged that the IFC negligently financed the Tata Mundra power plant despite knowing of the plant's acute environmental and social risks, and failed to take sufficient steps to prevent and mitigate the power plant's harms.[22] Throughout years of protracted litigation, the case—*Jam v. International Finance Corporation*—made its way from the district court to the U.S. Supreme Court and then back down to the district court once more. In July of 2021, the most recent stage of litigation, the U.S. Court of Appeals for the D.C. Circuit dismissed the plaintiffs' case, holding that the IFC is immune from suit under the International Organizations Immunities Act ("IOIA").[23]

Affording international organizations ("IOs") immunity from suit is a long-standing practice within international law. The rationale behind immunity rests in the "functional necessity" theory. Functional necessity argues that IOs require immunity in order to function effectively; if a nation-state could subject an IO to a lawsuit, the state could interfere with and jeopardize the IO's activities.[24] The problem, however, is that when IOs are immune from lawsuit, victims of harmful IO activities cannot seek redress for their injuries in court. This tension between IO immunity and victims' ability to seek redress is particularly evident in cases of environmentally-destructive international development projects. *Jam* illustrates this point. By enforcing the IFC's jurisdictional immunity, the court in *Jam* precluded the victims from seeking redress for the Tata Mundra's environmental harms. In effect, IO immunity protects the IFC from liability and reinforces a pre-existing culture of environmental impunity in the field of international development.[25]

This Comment will argue that to reconcile the tension between IO immunity and victims' ability to seek redress, states should abandon the

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17. *Id.* at 8.
18. *Id.* at 12–13.
19. *Id.* at 4.
20. *Id.* at 15.
21. Complaint at 2, Jam v. Int'l Fin. Corp., 172 F. Supp. 3d 104, 108 (D.D.C. 2016) (No. 1:15-CV-00612).
22. *Id.*
23. Jam v. Int'l Fin. Corp., 3 F.4th 405, 411 (D.C. Cir. 2021).
24. *See infra* Section I.A.
25. *See infra* Part II.

functional necessity framework for IO immunity and instead adopt a right-to-an-effective-remedy approach. Under this approach, states would suspend an IO's jurisdictional immunity if the IO failed to provide victims with effective alternative means outside of court to seek a remedy for harms. Part I of this Comment will discuss the history and evolution of IO immunity within international law. Part II will examine how IO immunity implicates environmental justice in the context of international development, using *Jam v. IFC* to illustrate the adverse environmental justice consequences of IO immunity. Part III will then propose a right-to-an-effective-remedy approach, which reconciles the tension between IO immunity and individuals' ability to seek redress for environmental harms.

I. BACKGROUND: IO IMMUNITY

Since the end of World War II, the number of IOs in the world has exploded.[26] Today, more than 40,000 active IOs exist.[27] These organizations engage in a myriad of activities, from policy-making to intervening in conflict settings to helping countries manage sovereign debt crises.[28] While IOs are integral to advancing public welfare, they also are increasingly mired in controversy, from allegations of corruption to sexual exploitation to malfeasance.[29] These allegations raise questions regarding IO accountability and whether or not individuals may sue IOs for harms that an IO or its employees cause.

This Part will first examine the history of IOs, their defining qualities, and why international law customarily affords IOs jurisdictional immunity. Specifically, this Part will discuss the theory of "functional necessity," the predominant paradigm within international law that justifies granting IOs jurisdictional immunity. Next, this Part will examine how courts have applied functional necessity as a framework for IO immunity. Last, it will address a recent shift among national and international courts in how they address IO immunity.

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26. *See* Daniel D. Bradlow, *Using a Shield as a Sword: Are International Organizations Abusing Their Immunity?*, 31 TEMP. INT'L & COMP. L.J. 45, 50 (2017).

27. *The Yearbook of International Associations*, UNION OF INT'L ASS'N, https://uia.org/yearbook [https://perma.cc/88MN-9J4N].

28. *See* Bradlow, *supra* note 26, at 53–56.

29. Kristen E. Boon & Frédéric Mégret, *New Approaches to the Accountability of International Organizations*, 16 INT'L ORGS. L. REV. 1, 1–4 (2019).

A. The Origins of IOs and the Rise of Functional Necessity Immunity

The rise of modern IOs started in 1919 with the League of Nations.[30] In his famous "Fourteen Points" speech, U.S. President Woodrow Wilson called for "[a] general association of nations" to be formed "for the purpose of affording mutual guarantees of political independence and territorial integrity."[31] The League would, at least in theory, organize cooperation between states in areas of "low politics," such as transportation and communication, and would guarantee peace through a system of collective security.[32] Although the League's existence was ultimately brief, its conceptual underpinning—international cooperation for the global good—lived on, catalyzing a new world order that would take root in the second half of the twentieth century.[33]

On the heels of World War II, states once again felt the impetus to organize and coordinate state action.[34] However this time around, the global community succeeded in creating long-lasting international organizations.[35] In the post-war era, IOs like the United Nations, the Organization for European Economic Co-operation (later subsumed by the European Union), the North Atlantic Treaty Organization, and the International Bank for Reconstruction and Development (later called the World Bank) emerged as vehicles for interstate cooperation.[36]

Although modern IOs vary in size and specialty, scholars agree that all IOs share three essential features: membership, structure, and aim.[37] First, an IO's membership should draw from two or more sovereign states, though membership is not necessarily limited to states.[38] Members can also include state representatives, intergovernmental organizations, non-government organizations, or civil society groups.[39] Second, an IO's structure should be formalized, continuous, and established through an agreement, such as a treaty or constituent document.[40] No singular member should have complete

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30. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 19 (2002).
31. Woodrow Wilson, Former U.S. President, Fourteen Points, Address to Congress (Jan. 8, 1918).
32. KLABBERS, *supra* note 30, 19–20.
33. *Id.* at 21.
34. *Id.*
35. *Id.*
36. *Id.* at 21–23, 28.
37. CLIVE ARCHER, INTERNATIONAL ORGANIZATIONS 33 (Routledge 3d ed. 2001); *see also* KLABBERS, *supra* note 30, at 10–13.
38. ARCHER, *supra* note 37, at 33.
39. *See id.*
40. *Id.*

and continuous control over the IO.[41] Third, and perhaps most importantly, an IO's aim should be to further its members' common interests.[42] An IO cannot expressly serve one single member's interest; rather, an IO is to serve the common welfare of its members.[43]

States use this last feature—that IOs function to advance a common interest—to justify granting IOs jurisdictional immunity.[44] This theory of immunity is known as "functional necessity."[45] The rationale of functional necessity proceeds as follows: IOs are purpose driven entities.[46] States and actors create IOs not only to carry out specified functions that advance its members' common interests, but also to serve as general "good-doers" within international relations.[47] Consequently, for an IO to carry out its objectives and to advance the good of the collective whole, the IO requires autonomy; an IO must be able to act independently without a state interfering in the IO's activities.[48] In turn, to enable IOs to effectively carry out their tasks and aims, IOs must possess immunity from lawsuit.[49] If a state could subject an IO to its national courts, the state could unduly interfere with an IO's activity, thereby jeopardizing the IO's ability to pursue its objectives.[50] Thus, the functional necessity theory dictates that an IO should enjoy as much immunity as is necessary for the IO to carry outs its functions effectively and independently.[51]

IO charters and national statutes have expressly manifested support for the functional necessity thesis. For example, Article 105 of the UN Charter stipulates that the UN shall enjoy "privileges and immunities as are necessary for the fulfillment of its purposes."[52] In the United States, Congress adopted a functional necessity framework for IO immunity when it enacted the International Organizations Immunities Act ("IOIA") in 1945.[53] In passing

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41. *Id.*
42. *Id.*
43. *Id.*
44. *See* Stephan Hollenberg, *Immunity of the UN in the Case of Haitian Cholera Victims*, 19 J. INT'L PEACEKEEPING 118, 123 (2015).
45. *See id.*
46. *Id.*
47. *Id.*; *see also* Niels Blokker, *International Organizations: The Untouchables?*, 10 INT'L ORGS. L. REV. 259, 261 (2013).
48. Hollenberg, *supra* note 44, at 123.
49. *Id.*
50. Greta L. Rios & Edward P. Flaherty, *International Organization Reform or Impunity? Immunity Is the Problem*, 16 ILSA J. INT'L & COMPAR. L. 433, 437 (2010).
51. KLABBERS, *supra* note 30, at 148.
52. U.N. Charter art. 105, ¶ 1.
53. Lawrence Preuss, *The International Organizations Immunities Act*, 40 AM. J. INT'L L. 332, 332 (1946).

the IOIA, Congress sought to "protect the official character of public international organizations" and to "strengthen the position of international organizations of which the United States is a member when they are located or carry on their activities in other countries."[54] Although the rationale behind functional immunity is clear, applying it in practice is not as simple.

B. Functional Necessity Immunity in Practice

In theory, functional necessity immunity should extend only to conduct that is necessary for the IO to achieve its purpose.[55] As a result, any conduct or activity that falls outside the ambit of an IO's designated purpose should be susceptible to suit.[56] In practice, however, delineating the line between conduct that is necessary for an IO's functions and conduct that is merely collateral is a difficult and subjective task, leading to unpredictable outcomes.[57]

Take, for instance, *Boimah v. United Nations General Assembly*.[58] There, a plaintiff alleged that the UN General Assembly engaged in employment discrimination on the account of his race and African nationality.[59] A U.S. district court dismissed the plaintiff's case, holding that the UN General Assembly was immune from suit.[60] The court reasoned that an IO's employment practices are activities essential to the IO's "fulfillment of its purposes" and, therefore, an area to which immunity extends.[61] Similarly, in *Bertolucci v. European Bank for Reconstruction & Development*, a former employee sued the Bank for sexual discrimination.[62] The employee argued that the bank's "[o]fficial activities could not include such matters as bullying and intimidation on grounds of sex, degrading and detrimental comments, or refusal to speak to an employee or to acknowledge her presence."[63] An English appeal tribunal rejected the employee's argument, holding that staff management—including the discriminatory acts performed by managers—falls within the official activities of the Bank.[64]

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54. S. REP. NO. 79-861, at 2 (1945).
55. Hollenberg, *supra* note 44, at 123.
56. *Id.*
57. *See, e.g.*, *id.*; KLABBERS, *supra* note 30, at 149–51.
58. 664 F. Supp. 69 (E.D.N.Y. 1987).
59. *Id.* at 70.
60. *Id.* at 72.
61. *Id.* at 71.
62. [1997] EAT 276 at 1 (Eng.).
63. *Id.* at 9.
64. *Id.* at 7–12.

Contrast these cases to *Iran-United States Claims Tribunal v. AS*, which involved a labor dispute between the claimant, Mr. S, and the Claims Tribunal.[65] Unlike the courts in *Boimah* and *Bertolucci*, the Local Court of the Hague concluded that an IO's immunity did not extend employment-related disputes because such disputes concern *acta jure gestionis*, commercial acts.[66] On appeal, however, the District Court of The Hague and the Dutch Supreme Court found otherwise, holding that the Tribunal is immune from suit because Mr. S's employment dispute "belong[s] to the category of disputes which are immediately connected with the performance of [the Tribunal's] tasks."[67] Thus, even within a single case, judges can radically diverge in determining which activities are, and are not, essential to an IO's function.[68]

These cases illustrate—and scholars agree—that functional immunity is effectively in the eye of the beholder.[69] The functional necessity framework lacks clear guidelines dictating what activities fall outside the scope of functional necessity;[70] in practice, judges and courts have wide discretion in interpreting the reach and limits of functional immunity.[71] As a result, courts have generally erred on the side of broadly interpreting functional necessity, predominantly finding in favor of the IOs and granting jurisdictional immunity.[72] In turn, functional necessity has allowed IOs to enjoy absolute, rather than restricted or limited, immunity from suit.[73]

C. A Shifting Trajectory for IO Immunity in International and European Courts

Recently, national and international courts have signaled a shift away from broad functional immunity toward a more restrictive reading of IO

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65. 94 I.L.R. 321, 321 (Loc. Ct. Hague 1983).

66. *Id*. at 324–26.

67. 94 I.L.R. 326 (Dist. Ct. Hague 1984) (Neth.); 94 I.L.R. 327–30 (Hoge Raad der Nederlanden 1985).

68. *See* KLABBERS, *supra* note 30, at 151.

69. *See id.* at 149–52; AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 206 (Cambridge 2000); *see also* Hollenberg, *supra* note 44, at 125–26.

70. August Reinisch & Ulf Andreas Weber, *In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement*, 1 INT'L ORGS. L. REV. 59, 59 (2004).

71. *See* KLABBERS, *supra* note 30, at 149, 152.

72. *Id.*; *see also* Rios & Flaherty, *supra* note 50, at 437.

73. Reinisch & Weber, *supra* note 70, at 63–64.

immunity.[74] Specifically, courts have increasingly started to incorporate a *right-to-a-remedy* framework,[75] holding a grant of jurisdictional immunity contingent on whether the IO provides reasonable alternative means outside of court for an individual to see a remedy.[76] This Section begins with a discussion of the landmark decision in *Waite and Kennedy v. Germany*, in which the European Court of Human Rights ("ECtHR") suggested for the first time that enforcing jurisdictional immunity could violate an individual's right to seek a remedy if no reasonable alternative remedy is provided.[77] This Section then turns to examine the lingering ambiguity surrounding how to define a "reasonable alternative remedy."

1. Waite and Kennedy v. Germany

In 1990, two British nationals, Richard Waite and Terry Kennedy, sued the European Space Agency ("ESA") in German court over a labor dispute.[78] German courts deemed Waite and Kennedy's lawsuits inadmissible, relying on the UN treaty that both established the ESA as an international organization and afforded the ESA immunity from jurisdiction.[79] As a result, Waite and Kennedy lodged a complaint against Germany in the ECtHR, claiming that Germany violated their human right of "access to a court for a determination of their dispute with the ESA" under the European Convention of Human Rights ("Convention").[80] Article 6 section 1 of the Convention provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[81] Waite and Kennedy argued that Germany violated this section of the Convention by denying them a "fair hearing by a tribunal" regarding their labor disputes.[82] Thus, the question before the ECtHR was whether Germany

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74. *Id.* at 72, 93.

75. Within human rights scholarship, the "right to a remedy" framework is also referred to by a number of analogous terms, including "access to justice" and "a right to access courts." *See, e.g.*, *id.*; Marcello Di Filippo, *Immunity from Suit of International Organisations Versus Individual Right of Access to Justice: An Overview of Recent Domestic and International Case Law*, *in* DERECHO INTERNATIONAL DE LOS DERECHOS HUMANOS: MANIFESTACTIONES, VIOLACIONES Y RESPUESTAS ACTUALES 203 (2014).

76. Reinisch & Weber, *supra* note 70, at 93.

77. Waite & Kennedy v. Germany, App. No. 26083/94, Eur. Ct. H.R. 15 (1999).

78. *Id.* at 4–5.

79. *Id.* at 5–7.

80. *Id.* at 10.

81. *Id.* at 11.

82. *Id.*

violated Waite and Kennedy's right to seek a remedy through the courts by granting the ESA immunity from jurisdiction.[83]

In answering this question, the ECtHR first noted that Article 6 of the Convention "embodies the 'right to a court'" because it "secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal."[84] The court then turned to the tension that emerges between the individual's right to a court and state-endowed IO immunity.[85] The court noted that although a state may grant an IO jurisdictional immunity, a state is not "absolved" from its responsibilities under the Convention.[86] The court emphasized that "the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective."[87] Ensuring that rights are practical and effective is particularly important in the context of the right to access courts, especially given the vital role that fair trials play within democratic societies.[88] The ECtHR's focus on the right to access courts is significant because it departed from the jurisprudential norm that assumed IO functional immunity necessarily superseded an individual's right to seek a remedy.[89] The ECtHR's suggestion is that IO immunity only goes so far as human rights allow.[90] In other words, the IO right to immunity cannot quash the individual right to seek a remedy.

The linchpin in the court's analysis, however, came with the following test: "[A] material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them *reasonable alternative means* to protect effectively their rights under the Convention."[91] Applying this test to the case at hand, the ECtHR found that the ESA "expressly provide[d] for various modes of settlement of private-law disputes, in staff matters as well as in other litigation," such as legal recourse through the ESA appeals board.[92] Consequently, because the ESA sufficiently provided "alternative means of

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83. *Id.*
84. *Id.*
85. *Id.* at 15.
86. *Id.*
87. *Id.*
88. *Id.*
89. *See* Luca Pasquet, *Litigating the Immunities of International Organizations in Europe: The 'Alternative-Remedy' Approach and Its 'Humanizing' Function*, 36 UTRECHT J. INT'L & EUR. L. 192, 196 (2021).
90. *See id.*
91. Waite and Kennedy, 1999-I Eur. Ct. H.R. at 15.
92. *Id.*

legal process," Germany did not violate Waite and Kennedy's rights to seek redress through a court.[93]

2. Defining "Reasonable Alternative Means"

Notably, the ECtHR's decision in *Waite and Kennedy* did not define what constitutes reasonable alternative means for an individual to seek a remedy. In its analysis, the ECtHR examined the ESA's provision of multiple dispute-settlement mechanisms.[94] The court did not, however, consider the efficacy of these dispute-settlement mechanisms in delivering remedies, despite the court's own observation that Waite and Kennedy may lack the requisite standing to pursue a remedy with the ESA's appeal's board.[95] Thus, notwithstanding the court's pronouncement that alternative means to a court need be *reasonable*, the ECtHR exclusively relied on the existence of an alternative remedy in granting the ESA immunity. This suggests that under the ECtHR's application of its reasonable alternative means test, the mere *existence* of an alternative remedy—rather than the existence an *effective* one—is sufficient for IO immunity to apply.

Subsequent decisions by the ECtHR support this inference. In *Klausecker v. Germany*, the court held that the European Patent Office's ("EPO") offer to arbitrate the dispute constituted a reasonable alternative to proceedings before a court, despite the confidential nature of the arbitration hearing and despite the fact the arbitral tribunal only applied internal EPO law.[96] In *Gasparini v. Italy and Belgium*, the court upheld NATO's immunity, affording little weight to the claims that NATO's Appeals Board was "manifestly deficient" as an alternative remedy because of the lack of public proceedings and bias on the part of the Appeals Board's members.[97]

Indeed, although the ECtHR's decision in *Waite and Kennedy* was instrumental in introducing a right-to-a-remedy exception to IO immunity, the ECtHR itself has been hesitant to strictly apply the *effective* alternative remedy requirement.[98] The ECtHR has steered on away from examining the efficacy of an IO's alternative remedies and, instead, has exclusively

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93. *Id.* at 16.

94. *Id.* at 15–16.

95. *Id.*

96. Klausecker v. Germany, App. No. 415/07, ¶¶ 71, 74 (Jan. 6, 2015), https://hudoc.echr.coe.int/eng?i=001-151029 [https://perma.cc/4BQP-QMXT].

97. *Information Note on the Court's Case-Law No. 119,* Gasparini v. Italy and Belgium, Eur. Ct. H.R. (May 2009), https://hudoc.echr.coe.int/eng?i=002-1517 [https://perma.cc/KME6-PHN3]; *see also* Pasquet, *supra* note 89, at 198.

98. *See* Pasquet, *supra* note 89, at 197.

considered the mere existence of this alternative remedy.[99] In contrast, some domestic courts in Europe have not only applied the *right-to-a-remedy* exception to IO immunity, they have also assessed the reasonableness and the effectiveness of the IO's alternative remedies.[100]

For example, in *Siedler v. Western European Union*, a Belgian labor court upheld a lower court's decision denying immunity.[101] In so holding, the Belgian court assessed the effectiveness of the Western European Union's ("WEU") *Commission des recours*—the IO's designated dispute settlement mechanism.[102] The Belgian court noted that the applicable WEU law lacked any provisions on the enforcement of judgments, public access to the hearings, and the publication of decisions.[103] Furthermore, the Belgian court raised doubts regarding the independence of the commission since an intergovernmental committee appointed members to the commission hearing the complaint and the complainant had no right to recuse a member of the commission.[104] The court concluded that the WEU's provision of an alternative remedy was inadequate because it failed to provide the same due process guarantees that a fair trial in court would typically afford.[105]

Like the approach in *Siedler*, courts in France, Switzerland, and Italy have increasingly declined to enforce immunity when an IO fails to provide an effective alternative remedy.[106] In determining the efficacy of alternative remedies, these courts examined, among other things, the procedural and substantive protections afforded to complainants, such as the impartiality and independence of dispute-settlement mechanisms and public access to hearings.[107] Despite these developments, domestic and international courts remain fragmented, with no singular definition for what constitutes reasonable—or effective—alternative means for an individual to seek a remedy.[108] In the context of environmentally-destructive international development schemes, this ambiguity raises questions regarding when victims may sue IOs for causing and perpetuating environmental harms.

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99. *See id.*
100. *Id.* at 198.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 198–99.
105. *Id.* at 199.
106. *Id.*
107. *See id.*
108. *See id.*

II. IO IMMUNITY AT THE INTERSECTION OF INTERNATIONAL DEVELOPMENT AND ENVIRONMENTAL JUSTICE

The world is facing an unprecedented ecological and climate crisis.[109] Global temperatures are rising.[110] Air and water quality grows poorer.[111] Pollutants are increasingly contaminating land and freshwater sources, while biodiversity worsens.[112] The planet's conditions have reached "a code red for humanity"—the threats to existence are alarming, undeniable, and continually growing.[113] Unfortunately, IOs have played a critical role in facilitating this emerging climate crisis, prioritizing economic development over environmental protection.[114] This begs the question: can IO immunity, based on the theory of functional necessity, accommodate the need to redress and deter environmental harms within international development?

To answer this question, this Part will first provide a brief history of the role that IOs have played within the contemporary environmental crisis. Then it will turn to examine environmental corrective justice, an analytical tool that this Comment will use to evaluate how IO immunity exacerbates the environmental crisis. To illustrate this point, this Part will next examine the events surrounding the construction and operation of Tata Mundra power plant in India. Specifically, it will detail the IFC's financing of the power plant, the subsequent harms of the plant, victims' efforts to seek redress for their harms, and the culminating class action suit of *Jam v. IFC*, in which U.S. federal courts applied IO functional immunity and ultimately dismissed

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109. *See* WALTER V. REID ET AL., UNITED NATIONS MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: SYNTHESIS 1 (2005), https://www.millenniumassessment.org/documents/document.356.aspx.pdf [https://perma.cc/CRU6-7U3B].

110. Rebecca Lindsey & Luann Dahlman, *Climate Change: Global Temperature*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 18, 2023), https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature#:~:text=Earth's%20temperature%20has%20risen%20by,0.18%C2%B0%20C)%20per%20decade [https://perma.cc/Q3ZB-P8PN].

111. Brian Palmer, *Air Quality Is Worsening for Half of the World's Population*, NAT'L RES. DEF. COUNCIL (July 2, 2020), https://www.nrdc.org/stories/air-quality-worsening-half-worlds-people [https://perma.cc/Q3ZB-P8PN]; *The Water Crisis Is Worsening. Researchers Must Tackle It Together*, 613 NATURE 611, 611 (2023).

112. David Tickner et al., *Bending the Curve of Global Freshwater Biodiversity Loss: An Emergency Recovery Plan*, 70 BIOSCIENCE 330, 330 (2020).

113. Marcus Kauffman, *IPCC Report: 'Code Red' for Human Driven Global Heating, Warns UN Chief*, UN NEWS (Aug. 9, 2021), https://news.un.org/en/story/2021/08/1097362/ [https://perma.cc/2V8X-UY96].

114. *See infra* Section II.A. *See generally* Carmen G. Gonzalez, *Bridging the North-South Divide: International Environmental Law in the Anthropocene*, 32 PACE ENV'T L. REV. 407, 408 (2015).

the victims' case. This Part will conclude with a brief discussion of how the events and U.S. court case surrounding the Tata Mundra plant illustrate the incompatibility of IO functional immunity and environmental corrective justice.

A. International Development and Environmental Injustice

The effects of the current environmental crisis are spatially and socially concentrated, disproportionately harming low-income communities within the Global South.[115] Not only are communities within the Global South disproportionately exposed to environmental harms, like pollution and rising sea levels,[116] but they also are the least able to cope with such harms, lacking access to the financial, technological, and social capital that is necessary for response and adaptation.[117] To make matters worse, environmental degradation has exacerbated existing vulnerabilities, including financial instability, food insecurity, disease, conflict and displacement, and inequality.[118] Poverty and climate change compound one another, thereby trapping communities of the Global South within a vicious cycle of harm.[119]

IO-imposed international development schemes have been at the helm of this crisis, catalyzing and fueling the contemporary North-South

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115. *See, e.g.*, Carmen G. Gonzalez & Sumudu Atapattu, *International Environmental Law, Environmental Justice, and the Global South*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 229, 233–34 (2017); *see also* Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 157 (2015). I use Global South throughout this paper as a descriptive conceptualization of the peoples and regions of the world negatively subjected to the burdens of globalization. This conceptualization encompasses the geographical regions of the South, including South America, South Asia, and sub-Saharan Africa; but this conceptualization also acknowledges that "Souths" can and do exist within the North. *See* Marlea Clarke, *Global South: What Does It Mean and Why Use the Term?*, UNIV. OF VICTORIA: GLOB. S. POL. COMMENTS. (Aug. 8, 2018), https://onlineacademiccommunity.uvic.ca/globalsouthpolitics/2018/08/08/global-south-what-does-it-mean-and-why-use-the-term/ [https://perma.cc/VG4B-F24R].

116. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2020: THE NEXT FRONTIER: HUMAN DEVELOPMENT AND THE ANTHROPOCENE 60–68 (2020), https://hdr.undp.org/system/files/documents/hdr2020pdf.pdf [https://perma.cc/H89M-TRDJ].

117. *See* Barry Smit et al., *Adaptation to Climate Change in the Context of Sustainable Development and Equity*, *in* CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY 897–98 (James J. McCarthy et al. eds., 2001).

118. *Id.*; *see also* Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, *in* ROUTLEDGE HANDBOOK OF INT'L ENV'T L. 77, 77 (Shawkat Alam et al. eds., 2013).

119. Gonzalez & Atapattu, *supra* note 115, at 154–55.

environmental divide.[120] As background: in the 1980s, IOs—like the World Bank, the World Trade Organization, and International Monterey Fund—began imposing development-oriented economic reforms on countries within the Global South as a way to secure debt payment.[121] Using a one-size-fits-all approach to economic development, these international financial institutions required countries in the Global South to adopt policies aimed at accelerating natural resource production and expanding national export capacity.[122] These policies also included imposing austerity measures, deregulating industries, and liberalizing trade.[123]

Consequently, these reforms not only depleted natural resources within the Global South but also destroyed developing economies.[124] The emphasis on natural resource production caused the global supply to increase, in turn driving down prices.[125] This left the Global South selling its exports at economically disadvantageous prices.[126] Concurrently, the South relied on North's supply of food and manufactured goods, both of which were not subject to the same price decreases as Southern exports.[127] Without the ability to enact protectionist measures, Southern industries were left vulnerable to competition from the more technologically advanced industries of the North.[128] The result: the South's costs for food and goods dwarfed its incoming revenue;[129] nascent industries failed to compete with Northern competitors; poverty increased; and inequality grew.[130] Meanwhile, the North flourished, capitalizing on the South's cheaply priced resources to facilitate its own industrialization.[131]

The North's appropriation of Southern resources has produced a significant ecological footprint and has devastated the planet's ecosystems.[132] Despite only accounting for 18% of the world's population, the North's consumption activities constitute 74% of global economic activity.[133] Apart from outpacing South's footprint, the North's consumption-driven lifestyle is

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120. *Id.*
121. *Id.* at 161.
122. *Id.* at 162.
123. *Id.*
124. *Id.* at 160.
125. *Id.*
126. *Id.*
127. *Id.*
128. Gonzalez, *supra* note 114, at 415.
129. *Id.*; Gonzalez, *supra* note 115, at 160.
130. Gonzalez, *supra* note 114, at 415.
131. Gonzalez, *supra* note 115, at 161–62.
132. *Id.* at 162.
133. Gonzalez & Atapattu, *supra* note 115, at 230.

also unsustainable, dramatically exceeding the planet's ecological capacity.[134] Yet, despite this history and the evidenced harms of development, IOs—like the IFC—continue to prioritize unlimited economic growth through investment in private large-scale industrial development projects.[135]

Aside from contributing to an unfurling environmental crisis, industrial development projects also often bring with them immediate and devastating consequences for poor, marginalized, and Indigenous communities.[136] These consequences include: forced resettlement; loss of livelihoods and economic displacement; human rights violations, such as rape and torture; water, air, and land pollution; and disease and illness.[137] One estimate places the number of people that have been physically or economically displaced by development projects since 2004 at 3.4 million.[138] The IFC, in particular, has an extensive track-record of financing development projects that cause a myriad of social, economic, and environmental injuries.[139] With more than $321 billion channeled into private-sector investment,[140] the IFC has been embroiled in serious controversies involving land-grabs and forced displacement, military violence, repression, and even murder.[141] The Tata

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134. Gonzalez, *supra* note 115, at 163.

135. Gonzalez, *supra* note 114, at 417.

136. *See, e.g.*, Sasha Chavkin et al., *Evicted & Abandoned: How the World Bank Broke Its Promise To Protect the Poor*, HUFFINGTON POST (Apr. 15, 2015, 8:01 PM), https://projects.huffingtonpost.com/worldbank-evicted-abandoned [https://perma.cc/S8TB-6L6K].

137. *Id.*; *see also* Ben Hallman & Roxana Olivera, *Gold Rush: How the World Bank Is Financing Environmental Destruction*, HUFFINGTON POST (Apr. 15, 2015, 8:01 PM), https://projects.huffingtonpost.com/projects/worldbank-evicted-abandoned/how-worldbank-finances-environmental-destruction-peru [https://perma.cc/V7U3-BN8G].

138. Chavkin et al., *supra* note 136.

139. DAVID FAIRMAN ET AL., EXTERNAL REVIEW OF IFC/MIGA E&S ACCOUNTABILITY, INCLUDING CAO'S ROLE AND EFFECTIVENESS REPORT AND RECOMMENDATIONS 32 (2020), https://thedocs.worldbank.org/en/doc/578881597160949764-0330022020/original/ExternalReviewofIFCMIGAESAccountabilitydisclosure.pdf [https://perma.cc/W59Y-J3GN] (finding that 231 complaints regarding IFC funded projects have been filed over a ten-year period).

140. INT'L FIN. CORP., https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/home [https://perma.cc/J5UY-WDAP].

141. OXFAM, THE SUFFERING OF OTHERS 18–19 (2015), https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/file_attachments/ib-suffering-of-others-international-finance-corporation-020415-en.pdf [https://perma.cc/WG2W-LBWJ]; *see also* Lauren Carasik, *Investing in Murder: Honduran Farmers Sue World Bank's Lending Arm for Fueling Land Conflict*, 34 WORLD POL'Y J. 24, 27–28 (2017).

Mundra plant—discussed below—is just one of among a litany of recent IFC development projects gone-wrong.[142]

Enter: IO immunity. International development's troubling reality is made worse by the fact that states afford IOs—the same entities engaging in harmful conduct—immunity from suit. To fully appreciate and to dissect the concerning intersection of IO immunity and international development, this Comment uses environmental corrective justice as a guiding framework.

Environmental justice ("EJ") is an analytical paradigm that takes the current environmental crisis and evaluates it using a lens attuned to social, political, and economic inequity.[143] The premise underlying the EJ paradigm is that although the contemporary environmental crisis adversely affects all peoples, historically marginalized communities fare the worst.[144] The world's most vulnerable groups—poor communities, racial and ethnic minorities, women, and Indigenous peoples—are most the harmed and the least protected from this deteriorating predicament.[145] While scholars traditionally use a four-part taxonomic approach when categorizing EJ issues—examining EJ as distributive justice, procedural justice, social justice, and corrective justice—this Comment will specifically focus on the last category, corrective justice.[146] Environmental corrective justice examines the fairness in the rectification of harms, including punishment of the wrong-doer and restoration of the victim.[147] Corrective justice asks (1) whether one has done a wrong and the other has suffered a damage, and (2) whether the one who has suffered the damage is restored to the condition he or she was in before the unjust activity.[148]

IO immunity specifically implicates environmental corrective justice because of its limiting effect on victims' ability to seek redress and repairs for their environmental harms. When states preclude victims of international development schemes from suing IOs in court for international development schemes, states perpetuate environmental corrective injustice—victims, who typically comprise poor and marginalized communities in the Global South, are unable to either: (1) attempt to prove in a court of law that an IO has engaged in a wrong and they as victims have suffered a harm, or (2) receive

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142. *See infra* Section II.B.

143. Gonzalez & Atapattu, *supra* note 115, at 233–34.

144. *See id.*

145. Gonzalez, *supra* note 115, at 154–55.

146. *See generally* Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. 10681 (2000).

147. *Id.* at 10693.

148. *See id.*

an appropriate and relevant remedy for their harm. This Comment will now turn to IFC's Tata Mundra power plant to illustrate this point.

B. The IFC's Tata Mundra Power Plant

This Section first sets the scene, detailing the environmental, demographic, and cultural landscape of the Kutch District in India, the proposal to fund and develop a coal-fired power plant, and the subsequent harms of the construction and operation of the plant to local communities. Next, this Section addresses victims' attempts to seek non-judicial remedies for their harms through the IFC's internal accountability mechanism. Last, this Section turns to the case of *Jam v. International Finance Corporation*, examining how federal courts in the United States addressed the IFC's immunity from suit.

1. Background: The Region, the Proposal, and the Results

Until recently, Mundra—a coastal administrative block within India's Kutch District—had a rich marine life, abundant "sweet" groundwater, and expansive drylands.[149] Since the seventeenth century, Indigenous communities have lived off Mundra's land and waters.[150] Mundra's wide tidal zone allowed fishing communities to practice *pagadiya*, a form of fishing on foot,[151] while its drylands allowed pastoral communities to graze cattle and livestock.[152] Unfortunately, this region, once abundant in its natural resources, is now replete with the hallmarks of industrialization.

In 2001, the Indian government started granting tax incentives to encourage private sector development in the Kutch district.[153] These tax breaks rapidly transformed the region from a flourishing rural coastline into an industrial hub. Now, more than seventy large-scale and almost thirty medium-scale manufacturing industries exist in Kutch.[154] Among these industries is Coastal Gujarat Power Limited ("CGPL"), a wholly owned

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149. Kanchi Kohli & Manju Menon, *The Tactics of Persuasion: Environmental Negotiations Over a Corporation Coal Project in Coastal India*, 99 ENERGY POL'Y 270, 271 (2016).

150. *Id.*

151. *Id.*

152. *Id.*

153. Avery Letkemann et al., *Holding International Finance Institutions Accountable for Environmental Injustice: A Case Study of the Tata Mundra Power Plant in Gujarat*, *in* ADVANCING ENVIRONMENTAL JUSTICE FOR MARGINALIZED COMMUNITIES IN INDIA 155 (Alan P. Diduck et al. eds., 2021).

154. *Id.*

subsidiary of Tata Power—India's first and largest private power company since 1910.[155]

In 2005, the Indian government announced its "Power to all by 2011" plan, which aimed to increase electrical production capacity in the country by 100,000 megawatts.[156] In response, CGPL developed the Mundra Ultra Mega Power Project ("Tata Mundra power plant"), "a supercritical coal-fired power plant with a total capacity of 4,000 megawatts."[157] CGPL proposed that the Tata Mundra plant sit within an inlet of the Kutch coastline, near Mundra and surrounded by three traditional fishing settlements: Modhava, Tragadi, and Kotdi.[158] To produce electricity, the plant would burn twelve million tons of coal, imported from Indonesia, each year.[159] CGPL would transport the imported coal to the power plant using a nine-mile-long conveyor belt located along the coastline.[160] CGPL expected the plant to produce 1.8 million metric tons of ash per year, eighty percent of which would be fly ash.[161] Furthermore, the plant's cooling system would require four billion gallons of seawater to be pumped in each day; the spent cooling water would then be discharged back into the sea.[162] CGPL estimated the total cost for the plant's construction and operation at $4.2 billion.[163]

In 2008, the IFC approved a $450 million loan to CGPL for the Tata Mundra plant.[164] Prior to approving the loan, the IFC conducted an environmental and social review of the proposed project.[165] In doing so, the IFC designated the proposed plan as a Category A loan, defined as

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155. Kohli & Menon, *supra* note 149, at 272.

156. *Id.*; *see* COASTAL GUJARAT POWER LTD., ENVIRONMENTAL ASSESSMENT REPORT: INDIA, MUNDRA ULTRA MEGA POWER PROJECT 1 (2007), https://web.archive.org/web/20220203134312/https://www.adb.org/sites/default/files/project-document/65648/41946-ind-seia.pdf [https://perma.cc/93P4-SWKW].

157. COASTAL GUJARAT POWER LTD., *supra* note 156, at 1.

158. *Id.* at 2; Kohli & Menon, *supra* note 149, at 272.

159. COASTAL GUJARAT POWER LTD., *supra* note 156, at 5; Letkemann et al., *supra* note 153, at 156.

160. Letkemann et al., *supra* note 153, at 156.

161. COASTAL GUJARAT POWER LTD., *supra* note 156, at 6.

162. *See id.* (reporting the plant would require approximately 15.12 million cubic meters of seawater per day, which equals nearly four billion gallons of water).

163. Letkemann et al., *supra* note 153, at 156.

164. Lesley Wroughton, *World Bank Approves Funds for Indian Coal-Fired Plant*, REUTERS (Apr. 8, 2008, 8:49 PM), https://www.reuters.com/article/idinindia-32931720080409 [https://perma.cc/5G2F-3D2Y].

165. INT'L FIN. CORP., ENVIRONMENTAL AND SOCIAL REVIEW PROCEDURES MANUAL: ENVIRONMENT, SOCIAL AND GOVERNANCE DEPARTMENT 2.1 (2013), https://www.ifc.org/wps/wcm/connect/6f3c3893-c196-43b4-aa16-f0b4c82c326e/ESRP_Oct2016.pdf?MOD=AJPERES&CVID=lRwoQFr [https://perma.cc/K9LK-4PM8].

"[b]usiness activities with potential significant adverse environmental or social risks and/or impacts that are diverse, irreversible, or unprecedented."[166] The IFC considers Category A loans to be investments with the highest potential for negative environmental and social consequences.[167] Despite this risk, the IFC proceeded with its financing agreement, disbursing the entirety of its $450 million loan to CGPL.[168]

The results have been devastating. Thermal pollution from the power plant has fundamentally altered the marine ecosystem and killed off most of the fish catch that local populations rely on for their livelihoods.[169] The plant's construction has physically and economically displaced Indigenous Wagher communities.[170] Saltwater discharge from the power plant pollutes local sources of drinking and irrigation water.[171] The plant releases large amounts of coal dust, which then coats property, agriculture, and fish laid out to dry.[172] The dust has significantly reduced local air quality, leading to severe respiratory illness, particularly among children and the elderly.[173] Suffice it to say, the IFC's plan for development brought with it devastation and disaster for the Indigenous communities across the Kutch district.

2. Seeking Redress Through CAO, the IFC's Internal Accountability Mechanism

In 2011, on behalf of the Wagher communities, a local trade union, Machimar Adhikar Sangharsh Sangathan ("MASS"), lodged a complaint with the IFC's independent accountability mechanism, the Compliance Advisor Ombudsmen ("CAO"). The IFC created CAO in 1999 "to address complaints related to IFC . . . Projects and to enhance environmental and

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166. *Environmental and Social Categorization*, INT'L FIN. CORP., https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/es-categorization [https://perma.cc/S5TC-B9QQ]; *IFC Project Information & Data Portal: Tata Ultra Mega*, INT'L FIN. CORP., https://disclosures.ifc.org/project-detail/ESRS/25797/tata-ultra-mega [https://perma.cc/7BX5-XT9V].

167. *See Environmental and Social Categorization*, supra note 166.

168. *Tata Mundra Coal Power Plant*, EARTHRIGHTS INT'L, https://earthrights.org/tata-mundra-coal-power-plant/ [https://perma.cc/R4JB-B9VN].

169. *Id.*

170. *See id.*

171. *Id.*

172. *Id.*

173. *Id.*

social outcomes of these Projects."[174] As an independent accountability mechanism, CAO facilitates the resolution of complaints from project-affected people "in a manner that is fair, objective, and constructive" and investigates the IFC's environmental and social compliance.[175] When an individual or community lodges a complaint, CAO has two primary avenues through which it can process the complaint: (1) dispute resolution through its ombudsman role, or (2) compliance auditing and oversight.[176] After CAO deemed MASS's complaint eligible for assessment, CAO referred the matter to its ombudsman role.[177]

Wagher communities quickly realized, however, that CAO's dispute resolution mechanism would be ineffective at producing a substantive agreement between the relevant parties.[178] This is because of a structural flaw in CAO's design. Despite its mission to serve as an independent accountability mechanism, CAO lacks the authority to compel either the IFC or its private-sector partner, CGPL, to engage in negotiation, mitigation, or remediation.[179] Participation in the CAO's dispute resolution scheme is entirely voluntary and dependent on the IFC and its private-sector partner.[180] Consequently, CAO must convince the IFC and its private-sector partner company officials to address community concerns "case-by-case and issue-

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174. COMPLIANCE ADVISOR OMBUDSMAN, IFC/MIGA INDEPENDENT ACCOUNTABILITY MECHANISM (CAO) POLICY 1 (2021) [hereinafter 2021 CAO POLICY], https://documents1.worldbank.org/curated/en/889191625065397617/pdf/IFC-MIGA-Independent-Accountability-Mechanism-CAO-Policy.pdf [https://perma.cc/RPJ4-G9LQ] ("Once CAO determines a complaint eligible, it will conduct an assessment of the complaint to . . . determine whether the Parties seek to initiate CAO's dispute resolution or compliance function.").

175. *Id.* at 2.

176. *Id.* at 12; *see also* ROXANNA ALTHOLZ & CHRIS SULLIVAN, ACCOUNTABILITY & INTERNATIONAL FINANCIAL INSTITUTIONS: COMMUNITY PERSPECTIVES ON THE WORLD BANK'S OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN 15 (2017), https://www.law.berkeley.edu/wp-content/uploads/2015/04/Accountability-International-Financial-Institutions.pdf [https://perma.cc/MN8P-GNB8].

177. Letkemann et al., *supra* note 153, at 162.

178. *See India: Tata Ultra Mega–01/Mundra and Anjar*, COMPLIANCE ADVISOR OMBUDSMAN (Nov. 9, 2017) [hereinafter *CAO's Tata Mundra Investigation*], https://www.cao-ombudsman.org/cases/india-tata-ultra-mega-01mundra-and-anjar [https://perma.cc/AFZ9-UPRR].

179. *See* 2021 CAO POLICY, *supra* note 174, at 14 ("Engaging in a dispute resolution process is a voluntary decision and requires agreement between the Complainant and the Client and/or Sub-Client, at a minimum.").

180. *Id.*

by-issue."[181] Additionally, CAO cannot compel arbitration to adjudicate claims.[182]

In 2012, MASS requested that its complaint be transferred to CAO's compliance arm.[183] CAO's compliance process is primarily an internal accountability mechanism focused on whether the IFC itself has complied with environmental and social performance standards.[184] If CAO determines that the IFC is not in compliance, IFC management is required to submit an action plan that includes time-bound remedial actions.[185] Although CAO may make recommendations to IFC management regarding what remedial actions to take, the IFC is not required to adopt such recommendations.[186] Once the IFC submits an action plan, CAO will then monitor the IFC's implementation of its proposed actions and will only close its monitoring process once its determines that the IFC has effectively fulfilled its remedial commitments.[187]

In 2013, CAO published its compliance audit, concluding that the IFC failed to comply with its environmental and social performance standards during its relationship with the CGPL.[188] Among its findings, CAO reported the IFC failed to: (1) adequately consider the Wagher communities when it conducted its project risk assessment; (2) provide environment and social assessments commensurate with the projects risks; (3) engage in effective communication with the affected populations early on in the decision making process; and (4) ensure that the CGPL avoided physical and economic displacement and provided full compensation to the people who were forced to resettle.[189] Despite these findings, neither the IFC nor its private sector partner has taken affirmative steps to redress the plant's past harms, to mitigate its current harms, or to prevent its future harms.[190] A decade has passed since MASS first lodged its complaint and still the Wagher communities remain uncompensated and without redress.[191]

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181. ALTHOLZ & SULLIVAN, *supra* note 176, at 74.

182. *Id.* at 18; *see also* 2021 CAO POLICY, *supra* note 174, at 14 (describing CAO as a "nonjudicial, non-adversarial, neutral forum").

183. *CAO's Tata Mundra Investigation*, *supra* note 178.

184. 2021 CAO POLICY, *supra* note 174, at 17.

185. *Id.* at 23–26.

186. *Id.* at 25.

187. *Id.* at 26–27.

188. *CAO's Tata Mundra Investigation*, *supra* note 178.

189. *Id.*

190. Letkemann et al., *supra* note 153, at 164–66.

191. *Id.*; *see also* COMPLIANCE ADVISOR OMBUDSMAN, SECOND MONITORING REPORT OF IFC'S RESPONSE TO: CAO AUDIT OF IFC INVESTMENT IN COASTAL GUJARAT POWER LIMITED, INDIA 6–7 (2017), https://www.cao-

The reason that the victims continue to go unremedied is because the same structural deficits that afflict CAO's ombudsman role also afflict its compliance process. Although CAO's compliance arm can issue recommendations to the IFC and monitor IFC's compliance, it cannot compel the IFC to undertake specific affirmative actions to remedy noncompliance.[192] Once again, remediation and redress remains exclusively voluntary, dependent on the good will of the IFC and its private-sector partner.[193]

On the whole, CAO has been an inadequate mechanism for redress and accountability. CAO cannot sanction the IFC or its private-sector partners for their project-related harms; it cannot order the IFC or its private-sector partners to take mitigative steps or to halt their operations; and it cannot directly compensate the victims for their project-related harms.[194] Instead, CAO's role remains limited to identifying problems and recommending remedial measures. As a result, Tata Mundra plant victims were forced to seek redress and remedies for their harms elsewhere.

3. *Jam v. IFC*

After CAO proved ineffective at delivering redress, Wagher fishermen and farmers filed a class action against the IFC in the U.S. District Court for the District of Columbia in 2015.[195] Suing for damages and injunctive relief, the plaintiffs alleged that the IFC negligently lent funds to CGPL for the construction and operation of the Tata Mundra power plant, causing the plaintiffs' environmental, economic, and health harms.[196]

Initially, the district court and the court of appeals dismissed the case, ruling that the IFC enjoyed "absolute immunity" from suit in U.S. courts

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ombudsman.org/sites/default/files/downloads/CGPLSecondCAOMonitoringReportFebruary2017.pdf [https://perma.cc/VK7S-U664].

192. 2021 CAO POLICY, *supra* note 174, at 17 ("The purpose of the CAO compliance function is to carry out reviews of IFC . . . compliance with E&S Policies, assess related Harm, and recommend remedial actions where appropriate."); *see also* Marco Simons & MacKennan Graziano, Jam v. International Finance Corporation*: The US Supreme Court Decision and Its Aftermath*, 5 BUS. & HUM. RTS. J. 282, 282 (2020).

193. 2021 CAO POLICY, *supra* note 174, at 25–26 (discussing that IFC officials, not CAO, will determine actions to be taken in response to CAO's findings of harms).

194. Annamaria Viterbo & Andrea Spagnolo, *Of Immunity and Accountability of International Organizations: A Contextual Reading of* Jam v. IFC, 13 DIRITTI UMANI E DIRITTO INTERNAZIONALE 319, 328 (2019).

195. Class Action Complaint for Damages and Equitable Relief at 1, Jam v. Int'l Fin. Corp., 172 F. Supp. 3d 104 (D.D.C. 2016) (No. 1:15-CV-00612), 2015 WL 1967050.

196. *Id.*

under the IOIA.[197]As mentioned in Section I.A, the United States codified IO immunity in 1945 when it passed IOIA.[198] Under the IOIA:

> International organizations . . . wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.[199]

Notably, the IOIA's grant of immunity expressly constructs IO immunity to parallel "the same immunity . . . enjoyed by foreign governments." However, since the statute's enactment, this provision of the IOIA has caused confusion among federal courts.[200] Specifically, courts have split about whether the IOIA grants IOs *absolute* immunity or *restrictive* immunity.[201]

When the IOIA was enacted in 1945, foreign sovereigns enjoyed absolute immunity from suit.[202] However, in 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA"), replacing absolute sovereign immunity with restrictive sovereign immunity.[203] Under the FSIA, a foreign state is immune from the jurisdiction of the United States subject to statutory exceptions.[204] If one or more of the statutory exceptions applies, the foreign state shall not be immune from the jurisdiction of the courts.[205] For example, a foreign state is not immune from jurisdiction in any case in which: the state has waived immunity;[206] the action is based upon a commercial activity carried on in the United States;[207] or, the action is brought to enforce an agreement between the state and a private party.[208] After Congress enacted the FSIA, federal courts split on whether to apply to IOs the *absolute* foreign

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197. Jam v. Int'l Fin. Corp., 172 F. Supp. 3d 104, 112 (D.D.C. 2016); Jam v. Int'l Fin. Corp., 860 F.3d 703, 708 (D.C. Cir. 2017).

198. Preuss, *supra* note 53, at 334–38.

199. 22 U.S.C. § 288a(b). For the purposes of the IOIA, an international organization is defined as "a public international organization in which the United States participates." *Id.* § 288.

200. *See* Trillium Chang, Comment, *A Functional Framework To Balance Accountability with the Needs of International Organizations: International Organization Immunity Post*-Jam, 9 PA. ST. J.L. & INT'L AFF. 124, 144–46 (2021).

201. *Id.*

202. *See* Robert V. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 42 (1978).

203. *Id.* at 33.

204. 28 U.S.C. § 1605.

205. *Id.*

206. *Id.* § 1605(a)(1).

207. *Id.* § 1605(a)(2).

208. *Id.* § 1605(a)(6).

sovereign immunity regime that existed at the time of the IOIA's enactment in 1945 or the *restrictive* foreign sovereign immunity regime that the FSIA created in 1976.[209]

The U.S. Supreme Court resolved this issue when it granted certiorari to *Jam* in 2019.[210] In a seven-to-one decision, the Court held that the IOIA grants to IOs the same *restrictive* immunity regime afforded to foreign sovereigns under the FSIA.[211] The Court reasoned that had Congress intended to confer absolute immunity to IOs, the IOIA "could otherwise have simply stated that international organizations 'shall enjoy absolute immunity from suit'" or that "it was incorporating the law of foreign sovereign immunity as it existed on a particular date."[212] Because Congress did neither, the Court concluded that Congress intended "to make international organization immunity and foreign sovereign immunity continuously equivalent."[213] As a result, IOs are immune from the jurisdiction of U.S. courts unless one of the FSIA's statutory exceptions applies.[214]

In its decision, the Court also addressed the IFC's argument that a restrictive immunity regime would defeat the purpose of granting IOs immunity in the first place.[215] The IFC contended that exposing IOs to suit through the FSIA's immunity exceptions would cause undue interference in IOs' activities.[216] This result would be particularly acute for IOs involved in international development who use tools of commerce to achieve their objectives.[217] Thus, the IFC argued that under restrictive immunity—specifically, under the FSIA's commercial activity exception—all of an IO's development activities would be subject to suit despite economic development comprising an IO's core function.[218]

The Court disagreed, holding that a restrictive immunity regime would not defeat the original purpose of IO immunity: to protect IO activities from undue State interference.[219] First, the Court noted that the IOIA and its

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209. *Compare* Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1340–41 (D.C. Cir. 1998) (ruling that IOs enjoy absolute immunity), *with* OSS Nokalva, Inc. v. Eur. Space Agency, 617 F.3d 756, 762–64 (3d Cir. 2010) (ruling that IOs enjoy the same restrictive immunity as is dictated in the FSIA).

210. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 765, 772 (2019).

211. *Id.* at 772.

212. *Id.* at 768.

213. *Id.*

214. *Id.*

215. *Id.* at 771–72.

216. *Id.* at 771.

217. *Id.*

218. *Id.*

219. *Id.*

exceptions to immunity are "default rules."[220] The Court reasoned that if an IO's activities would in fact be impaired by a restrictive immunity scheme, then "the organization's charter can always specify a different level of immunity."[221] The Court then raised doubts that the IFC's lending activity would even qualify as commercial activity under the FSIA's immunity exceptions.[222] The Court stated, "Nor is there good reason to think that restrictive immunity would expose international development banks to excessive liability. As an initial matter, it is not clear that the lending activity of all development banks qualifies as commercial activity within the meaning of the FSIA."[223] Consequently, the Court reaffirmed that even under a restrictive immunity regime, IOs are protected from unlimited exposure to suit.[224]

Despite the Supreme Court narrowing the IOIA from an absolute to a restrictive immunity regime, the IFC ultimately remained immune from suit. On remand, the district court rejected the plaintiffs' argument that the FSIA's commercial activity exception to immunity applied.[225] The court noted that under the exception, a court must first determine whether the commercial activity at issue is "'based upon' activity 'carried on' or 'performed' in the United States" before it can consider the commercial nature of that activity.[226] In this case, the commercial activity at issue was the IFC's failure to ensure that Tata Mundra power plant complied with all environmental and social standards. Because the IFC "carried on" this conduct in India, not the U.S., the commercial activity exception did not apply.[227] Accordingly, the court held that the IFC is immune from the plaintiffs' suit.[228] The court of appeals affirmed.[229]

Following years of court filings, motions, and oral arguments, the court ultimately dismissed the plaintiffs' claims for reasons related to procedure—not merit. As of today, the victims have yet to have their day in court. Thus, IO immunity has effectively foreclosed their right to both *seek* and *receive* redress through the courts for IO-created environmental harms.

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220. *Id.*
221. *Id.*
222. *Id.* at 772.
223. *Id.*
224. *Id.*
225. Jam v. Int'l Fin. Corp., 442 F. Supp. 3d 162, 179 (D.D.C. 2020).
226. *Id.* at 171.
227. *Id.* at 177.
228. *Id.* at 179.
229. Jam v. Int'l Fin. Corp., 3 F.4th 405 (D.C. Cir. 2021).

III. ANALYSIS: CENTERING THE RIGHT TO AN EFFECTIVE REMEDY WITHIN THE IO IMMUNITY FRAMEWORK

The Tata Mundra power plant continues to operate to this day.[230] And with each passing day, local populations within the Kutch district continue to suffer economic harms, health harms, and irreversible environmental harms.[231] Yet, the IFC and the CGPL remain immune from liability.[232] Furthermore, not only have they declined to cease operation of the plant, but they also have refused to take any mitigative steps or rehabilitative measures to address the harms on local communities.[233]

These facts and the outcome in *Jam* illustrate how IO immunity and environmentally-destructive international development compound one another, breeding a culture of IO impunity and environmental injustice. In response, this Part seeks to diagnose and resolve the fundamental flaws in IO immunity that give rise to this problem. First, this Part argues that the functional necessity framework for IO immunity inherently conflicts with environmental corrective justice because it fails to consider the effect that immunity will have on individuals' right to seek redress for their harms. This Part will then propose a solution: replacing the functional necessity approach with a right-to-an-effective-remedy approach, modeled on the ECtHR's decision in *Waite and Kennedy*.

A. The Problem

The functional necessity approach to IO immunity is inherently at odds with environmental corrective justice. This is because the framework of functional necessity centers the needs of IOs over the needs of victims. As discussed above, functional necessity affords IOs jurisdictional immunity to

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230. *See* Sarita Chaganti Singh, *Indian Coal Power Plants Should Be Compensated for 2022 Forced Generation-Regulator*, REUTERS (Jan. 4, 2023, 12:32 AM), https://www.reuters.com/business/energy/indian-power-plants-should-be-compensated-importing-coal-regulator-2023-01-04/ [https://perma.cc/F8HK-ADG3] (discussing the most recent operations of the Tata Mundra power plant).

231. Lindsay Bailey, *Three Reasons Why the Supreme Court Should Hear EarthRights'* Jam v. IFC *Pollution Case*, EARTHRIGHTS INT'L (Feb. 2, 2022), https://earthrights.org/blog/three-reasons-why-the-supreme-court-should-hear-earthrights-jam-v-ifc-pollution-case/ [https://perma.cc/Q4G7-995L].

232. *See* Press Release, EarthRights Int'l, Nobel Prize-Winning Economist Joseph Stiglitz and Others Urge the Supreme Court To Review World Bank Group Immunity (Feb. 15, 2022), https://earthrights.org/media_release/nobel-prize-winning-economist-joseph-stiglitz-and-others-urge-supreme-court-to-review-world-bank-group-immunity/ [https://perma.cc/9Q3Y-7CET].

233. *See id.*

safeguard IO autonomy, ensuring that IOs may continue to pursue their objective without state interference.[234] The issue, however, is that functional necessity does not account for the impact that IO immunity has on victims. When IOs are immune from suit, states effectively preclude victims from seeking judicial remedies for the environmental, economic, and social harms of international development. IO immunity is particularly problematic for environmental corrective justice in situations where IOs fail to provide victims alternative mechanisms outside of court for seeking redress. When victims cannot seek accountability or remedies for their harms either through the courts or through alternative means, then environmental corrective injustice occurs—there is no rectification of the harm, there is no punishment of the wrong-doer, and there is no restoration of the victim.

Jam illustrates this dynamic. Congress enacted the IOIA to "protect the official character" of IOs and to strengthen their ability to carry on activities in other countries.[235] Because of the IOIA, the IFC is immune from suit. This means that the victims of the Tata Mundra plant cannot sue the IFC in federal court for financing and overseeing a power plant that caused environmental, economic, and social harms. This outcome implicates environmental corrective justice because the victims lack an effective way to seek remedies for their harms outside of court.

The IFC created CAO to serve as an independent accountability mechanism.[236] In theory, when project-affected people lodge a complaint with CAO regarding an IFC-financed project, CAO will address and facilitate the resolution of the complaint in a fair, objective, and *constructive* manner. In practice, though, CAO is futile. The facts surrounding the Tata Mundra plant illustrate why: CAO could not adjudicate the victims' complaint, nor could it compel either CGPL or the IFC to participate in mediation or arbitration. CAO lacked the authority to require that the IFC or CGPL undertake remedial and mitigative measures. And CAO could neither order nor directly provide compensation to the victims for their harms itself. Consequently, CAO proved fruitless at delivering any redress to the victims of the Tata Mundra plant. It is for this reason that the IOIA's grant of jurisdictional immunity to the IFC implicates environmental corrective justice—the IOIA foreclosed the only remaining viable avenue for victims of the Tata Mundra plant to seek redress.

Jam also demonstrates that narrowing functional immunity from an absolute to a restrictive regime is not necessarily enough to secure

234. *See supra* Section I.B.
235. S. REP. NO. 79-861, at 89 (1945).
236. *See infra* Section II.B.2.

environmental corrective justice. As discussed in Section II.B.3, the Supreme Court held that IO immunity is subject to the same statutory exceptions listed under the FSIA. The problem is that the FSIA's statutory exceptions to immunity do not include a specific provision for situations in which enforcing immunity would effectively deny victims the last available means for seeking redress.[237] Instead, exceptions to IO immunity include instances where the IO has waived its immunity[238] or where the IO carried out its commercial activity in the United States.[239] Because the victims in *Jam* could not demonstrate that an exception under the FSIA applied to their case, the court held that the IFC was immune from suit.[240] Thus, even under a narrowed functional immunity regime, the fact that the victims had no other means of redressing their harm remained irrelevant to the court's decision regarding whether immunity applied. Evidently, if exceptions to immunity do not go far enough in protecting victims' ability to seek redress for their harms, then it does not matter whether functional immunity is absolute or restrictive because the result will be the same: corrective injustice.

In sum, when states afford IOs immunity based on the theory of functional necessity, states perpetuate environmental corrective injustice by effectively obstructing victims of international development schemes from seeking redress for their harms in court. This outcome further exacerbates a culture of impunity and environmental degradation within international development.

B. The Solution

To ensure that IO immunity does not perpetuate environmental corrective injustice, states should abandon the functional necessity framework and instead adopt a modified version of *Waite and Kennedy*'s right-to-a-remedy approach.[241] As discussed in Section I.C.2, the *Waite and Kennedy*'s right-to-a-remedy approach required IOs to provide individuals "reasonable alternative means" to seek a remedy for their harms.[242] Notably, the decision did not require those alternative means to *effectively* provide a remedy.[243] As a result, states should adopt *Waite and Kennedy*'s right-to-a-remedy approach

237. *See* 28 U.S.C. § 1605.
238. *Id.* § 1605(a)(1).
239. *Id.* § 1605(a)(2).
240. *See infra* Section II.B.3.
241. *See supra* Section I.C.2.
242. *Id.*
243. *Id.*

but should also incorporate an efficacy requirement. In other words, states should adopt a *right-to-an-effective-remedy* framework.

Under the right-to-an-effective-remedy framework, states would not grant an IO jurisdictional immunity if the IO failed to provide an effective alternative means outside of court for victims to seek a remedy. This Section will first define the right to an effective remedy. Then, this Section will propose the two-step test that courts should apply under the right-to-an-effective-remedy approach. Last, this Section will apply the right-to-an-effective-remedy approach to the case of *Jam*, illustrating how this approach protects victims' ability to seek redress for IO-created environmental harms.

1. Defining the Right to an Effective Remedy

Scholars agree that the right to an effective remedy is a norm of customary international law.[244] Various human rights instruments also prescribe this right. The Universal Declaration of Human Rights ("UDHR") mandates that "[e]veryone has the right to an *effective remedy* . . . for acts violating the fundamental rights granted him by the constitution or by law."[245] The American Convention on Human Rights grants individuals "the right to simple and prompt recourse, or any other *effective recourse*, to a competent court or tribunal for protection against acts that violate his fundamental rights."[246] Likewise, the International Covenant on Civil and Political Rights ("ICCPR") guarantees that individuals whose rights have been violated "have an *effective remedy*."[247]

Human rights law also delineates some basic requirements for an effective remedy. The UDHR states that individuals are "entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations."[248] Similarly, the ICCPR affords

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244. *See* Karel Wellens, *Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap*, 25 MICH. J. INT'L L. 1159, 1162 (2004); DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 238 (3d ed. 2015).

245. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 8 (Dec. 10, 1948) (emphasis added).

246. Organization of American States, American Convention on Human Rights art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (emphasis added).

247. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 2(3)(a) (Dec. 16, 1966) (emphasis added).

248. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 10 (Dec. 10, 1948).

individuals the right to have their claims for a remedy "determined by competent judicial, administrative, or legislative authorities."[249]

Beyond these general parameters, scholars agree that the right to an effective remedy is two-fold: procedural and substantive.[250] The procedural right to a remedy must guarantee effective access to a fair hearing.[251] Individuals or groups must be able to vindicate their rights before an independent body.[252] The substantive right to a remedy is the reparation itself—this can look like an acknowledgment or recognition that an individual's right was violated, a cessation of the right violation if it is ongoing, or compensation for the resulting harm.[253]

2. The Test

In applying the right-an-effective-remedy approach, states should engage in a two-step test. First, a state should determine whether the IO in question provides alternative means outside of court—such as through an alternative dispute settlement mechanism—for individuals to seek a remedy. If an IO does not provide individuals with alternative means to seek a remedy, then the test ends here: the state should suspend the IO's jurisdictional immunity and permit individuals to sue the IO in court. If an IO does provide alternative means for individuals to seek a remedy, then the state should proceed to the second step.

In the second step, the state should determine whether the IO's alternative means provide individuals with an *effective* remedy. An effective remedy requires that: (1) individuals have access to a fair hearing where they may vindicate their rights before an independent body (procedural efficacy); and (2) individuals have access to meaningful reparations for their harms (substantive efficacy). If the IO's alternative means fail to provide one or both elements of an effective remedy, then the state should conclude that the IO's

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249. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 2(3)(b) (Dec. 16, 1966).

250. SHELTON, *supra* note 244, at 75; *see also* Wellens, *supra* note 244, at 1162; Theo Van Boven, *Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 19, 22–24 (Ferstman et al. eds., 2009).

251. Wellens, *supra* note 244, at 1162.

252. INT'L COMM'N OF JURISTS, RIGHT TO A REMEDY AND TO REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONER'S GUIDE 52 (2018), https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf [https://perma.cc/EX8D-2WN8].

253. *Id.*

alternative means fail to provide individuals with an effective remedy; therefore, the state should suspend the IO's immunity and allow individuals to sue the IO in court. In contrast, if the IO's alternative means provide individuals with both elements of an effective remedy, then the IO passes the right-to-an-effective-remedy approach, and the state may enforce the IO's jurisdictional immunity.

3. Applying the Test to *Jam v. IFC*

The IFC would pass the first step of the right-to-an-effective remedy test because it provides individuals with alternative means outside of court to seek a remedy for their project-related harms. The IFC provides these alternative means *vis-à-vis* CAO, its independent accountability mechanism. However, the IFC would not pass the second step of the test. This is because CAO neither (1) provides individuals access to a fair hearing where they may vindicate their rights before an independent body, nor (2) provides individuals access to meaningful reparations for their project-related harms.

As discussed in Section II.B.2, CAO has two primary mechanisms for resolving project-related complaints: dispute resolution and compliance auditing.[254] However, neither of these mechanisms allow individuals to adjudicate their complaints within a hearing before an independent body. From a structural level, the IFC did not design CAO to include an independent body that could hear claims; in fact, CAO's policy expressly disclaims that it can serve as a judicial or legal enforcement mechanism.[255] CAO also lacks the authority to compel either the IFC or its private sector partners to participate in mediation, arbitration, or adjudication. Thus, CAO fails to provide individuals with the procedural element of an effective remedy.

CAO also fails to provide individuals with the substantive element of an effective remedy—access to meaningful reparations for harms. CAO is unable to punish the IFC or CGPL for their project-related harms. CAO is unable to order the IFC or CGPL to either take mitigative steps or to halt the operation of the plant. And CAO cannot directly compensate the victims for their harms. Without the ability to sanction, order, or compensate, CAO fails to provide the substantive element of an effective remedy. In turn, because CAO does not provide individuals access to an effective remedy, the IFC would fail to pass the right-to-an-effective-remedy test, and its jurisdictional

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254. *See supra* Section II.B.2.
255. *See* 2021 CAO POLICY, *supra* note 174, at 2.

immunity would not apply. As a result, victims of the Tata Mundra plant would be able to sue the IFC in court to seek a remedy for their harms.

IV. CONCLUSION

The right-to-an-effective-remedy approach to IO immunity ensures that victims have, at the very minimum, a right to *seek* a remedy for their harms through the courts when no other viable avenue for redress exists. In turn, ensuring that victims who suffer environmental harms have an unequivocal opportunity to seek an effective remedy—whether through the courts or through an IO-created alternative dispute settlement mechanism—promotes environmental corrective justice. Under this approach, IO immunity would no longer foreclose victims from the opportunity to be heard before an independent body and to have their right to redress adjudicated on the merits, rather than the procedure, of their case. Moreover, this approach helps erode the existing culture of IO impunity within international development by putting IOs on notice that their conduct is vulnerable to independent scrutiny.

It should be noted, however, that this approach neither safeguards nor guarantees a right to *receive* a remedy. Whereas the right-to-an-effective-remedy framework guarantees that victims will be heard on their claim for a remedy, it does not promise that IOs will in fact deliver such a remedy. Indeed, genuine environmental corrective justice will require both the right to seek and the right to receive a remedy. However, a crucial step in achieving environmental corrective justice is first challenging the assumption that IOs require—and are entitled to—unfettered immunity from suit. And perhaps, the limited practical reach of the right-to-an-effective-remedy approach makes it a realistic reform that states can easily undertake within the near future. Regardless, it is time for a change: victims demand it, and the environment demands it.