



A GREAT VICTORY: FIGHT CONTINUES

STORY OF THE STRUGGLE AGAINST WORLD BANK AND TATA MUNDRA

Fisherfolk in Mundra Wins Historic Fight Against World Bank

In its historic decision on 27th Feb, 2019 the U.S. Supreme Court decided that international organizations like the World Bank Group “don’t enjoy absolute immunity”. Simply put, with this judgement, World Bank and other international financial institutions can be sued anywhere for the damages they are causing to people and environment. The Court’s decision marks a defining moment for the IFC (International Finance Corporation) – the arm of the World Bank Group that lends to the private sector. For years, the World Bank has operated as if it were “above the law,” at times pursuing reckless lending projects that inflicted serious human rights abuses on local communities, and then leaving the communities to fend for themselves. This decision will also push World Bank to be more responsible in their lending now being well aware that they can be dragged to the Court of Law.

This decision came after a long legal battle between the fishing community of Mundra and the IFC which started in April 2015. Fisherfolk adversely affected by the



Mundra power project; farmers from Navinal village who are affected by the increasing salinity of the groundwater and farmland damaged by the ash and dust from the project, Machimar Adhikar Sangharsh Sangathan (Association for the Struggle for Fisherworkers' Rights) and the Navinal Panchayat (village), a local government entity also affected by the Mundra Project represented by EarthRights International (ERI) filed suit against the International Finance Corporation in federal court in Washington, D.C. EarthRights International, a group of committed lawyers, led the legal fight.

The contention being that IFC caused loss of their livelihood, destroyed their land and water and created threats to their health by funding the Tata Mundra coal-fired power plant in Gujarat, India. The plea was rejected by the lower Court on the basis that IFC, the private lending arm of the World Bank Group, has absolute immunity and thus cannot be sued in the United States.

An appeal was filed in the court of Appeals for the District of Columbia Circuit in June 2017, a three-judge panel of, in the case *Budha Ismail Jam v. IFC*, had ruled that the International Finance Corporation (IFC), the private-lending arm of the World Bank Group, upheld the lower Court decision that they could not be sued for its role in the controversial Tata Mundra coal-fired power plant, which has devastated fishing and farming communities in Gujarat, because they enjoy immunity.

But one of the positive notes of the judgement was Justice Nina Pillard's observation. She noted that there is an inherent bias in the judgement towards IFC and the complainants should approach the higher Court to seek justice. This kept a window open for the community to appeal to the higher court.

In January 2018 an appeal was filed by petitioners to the Supreme Court of the United States challenging the

immunity to IFC. The Supreme Court admitted the case and agreed to hear it.. The Supreme Court stated that, it would decide whether the IFC enjoyed immunity under the 1945 International Organisations Immunity Act. Strengthening the arms of the people, U.S. Government urged the Supreme Court to reverse a lower court decision holding that international organizations like the World Bank Group are entitled to "absolute immunity" from lawsuits in U.S. Courts.

Disagreeing with the arguments of IFC that waving of absolute immunity will open floodgates of litigation against international organisations, could result in "money damages, which would in turn make it more difficult and expensive for them to fulfill their missions", and it could pose acute problems especially to international development banks because "those banks use the tools of commerce to achieve their objectives" the judgement written for the majority by Chief Justice John Roberts said "IFC's concerns are inflated".



Finally, the decision of the US Supreme Court came out vindicating the stand of the community that International Financial Institutions cannot enjoy absolute immunity and could be tried in the Court of Law. This decision of the US Supreme Court is not only a big decision for the fishing community of Mundra but also for the people across the globe who have been fighting the negative impacts of the projects funded by International Financial Institutions with very limited agency to hold these institutions accountable because of the immunity they operated under. This decision holds persuasive importance for communities to challenge the absolute immunity these institutions enjoy in their own countries as well. This decision will also be a push for financial institutions to be more responsible in their lending.

This decision has also come after a long history of struggle of the fishing community of Mundra against the financiers of the project Like Asian Development Bank (ADB) and IFC. The fishing community complained to the independent accountability mechanisms (IAM) of both these institutions. Though both IAMs validated the concerns of the community pointing out to the failures of their own institutions in implementing their own social and environmental policies, these reports were rejected by the Institutions themselves. The result has been a long drawn engagement with the IAMs with little difference on ground and the process still in monitoring phases.

This decision of the US Supreme Court also a relief for the community as it opens a window for holding these institutions accountable. For long these institutions have operated under the garb of accountability by pointing to their own independent accountability mechanisms which, in this particular case and many other across the globe have shown a complete failure to even recognise the findings of their own accountability bodies.



The struggle is still not over. Now that the US Supreme Court has settled the matter that the IFC can be sued and doesn't enjoy absolute immunity, the case will again go to the lower court. This time the arguments will be to establish that in this particular case IFC can be held responsible in the US Courts for the destruction of livelihood of the fishing community of Mundra by lending finance to Tata Mundra Power Project, which was marred with environmental and social destruction from the beginning.

There are five key takeaways from this case. *First*, the decision has opened up another door to the communities around the globe to hold lenders accountable. Investments in every sector without considering the negative impacts on people or environment, or mitigation plans have reached an unprecedented peak in the past years.

Second, in an era where profits alone determines success and concerns around pressing issues like climate change is just lip service, this decision will be an incentive for financial institutions to be more responsible in their lending and not carry out business as usual.

Third, as in the case of many other struggles in the past, this case and the process which led to this judgment underlines the need and effectiveness of international solidarity among likeminded people and organisations when the global financial system transcends boundaries, delve in opaque investments and questionable transactions.

Fourth, in many countries where state owned public sector was the champion of developmental activities, where the government financed the projects, rarely were questions raised about the lenders. In a changed world, where privatisation is the new norm and private capital the panacea for all ills, communities who are fighting the negative impacts of projects will have to extend their attention to the lenders of the project as well. This judgement confirms that such an attempt could be fruitful.

Fifth, this judgment unhesitantly upholds peoples' rights over the privileges of the rich and mighty. When governments around the globe are coming down heavily on civil society organisations shrinking spaces for dissent, where dissent is criminalised and intimidation, media trial and arrests of people and activists who have taken on big corporations is the new normal, this verdict is a stern warning to such forces, financed and protected by mighty institutions, and a reassurance to people.



The judgment may not overturn the institution overnight. Small victories the past have empowered people at different stages. Establishing the Inspection Panel in 1995, because of the struggle by Narmada Bachao Andolan had changed the way multilateral development banks functioned at that time. Adopting different safeguard

policies emboldened people to expose the violations of these institutions. All of them were achieved through years of struggle. This judgment is also a result of such a relentless struggle. And another victory, towards empowering people and making international financial institutions accountable.

Current Situation

It has almost been a decade when the construction on the Mundra Power Project started and has been fully operational since 2013. The one thing that has been well established time and again through investigations of independent fact-finding teams, accountability mechanisms of financial institutions is the fact that the project has irreversibly damaged the marine ecology resulting in the destruction of livelihoods of thousands of fish workers who used to fish on the harbours which are now impacted by the project. From the violation of national laws to the failure of to apply the environmental and social safeguards, Multilateral Development Banks, company and the financial institutions have shown complete indifference to the plight of the affected community. The MDBs have gone ahead and rejected the findings of their own accountability mechanisms.

This has led to a situation of complete inaction on the part of company and financiers leaving the affected community in a worse situation today. There is no accountability on the part of the financial institutions who fund such disastrous projects which are worsened by the fact they enjoy absolute immunity in countries they operate. This

absolute immunity has emboldened these institutions to undermine accountability and responsibility for the kind of projects they fund and also indifferent to the impact that these projects have on the ground.

In supporting the fishworkers of Mundra to hold the IFC accountable for the destruction they have caused by funding the Mundra power project and by challenging the

immunity enjoyed by IFC in the United States, ERI has given a hope to communities across the globe who are fighting the destructive development funded by MDBs. The fact that the historical decision of scrapping the absolute immunity of IFIs like World Bank Group has been held by the Supreme Court of United States is a testimony of community's and ERI's commitment and perseverance. The community and ERI need our support and solidarity as they prepare for the next stage of approaching the lower court again to establish the responsibility of IFC for damage caused by the project they have funded.

Overview of the Project

The Tata Mundra Ultra Mega Power Project India is part of an ambitious plan, which



saw the building of several coal-based thermal power stations to meet India's energy needs. Located on the western coast of India, in Gujarat, spanning 72 kilometres covering 10 coastal settlements, it is strategically located near the Mundra Port and within the Special Economic Zone. This coast is also home to fishing communities who have lived there for generations and who reside on the coast for almost nine months out of every year.

Coastal Gujarat Power Limited (CGPL), 100% owned by Tata Power Limited, will build, own and operate a 4,000 MW (5 units of 800 MW each) ultra-mega supercritical technology-based power plant at the port city of Mundra in the Kutch district of Gujarat, India (the –project). The plant was fully operational in 2013.

The total project cost is estimated at about US\$4.14 billion. IFC invested \$450 million of its own capital in this project, which IFC has classified as a category A project, signifying that IFC believes there are potentially significant adverse social and environmental impacts that may be diverse or irreversible.

Financiers

A consortium of Banks including multilateral agencies and Exim Banks invests in this project which costs the US \$4.14 billion. Financing comprises of the equity of INR 42.50 billion, External Commercial Borrowings (ECB) of up to USD 1.8 billion and

Rupee Loans of up to INR 55.50 billion. The ECBs include the International Finance Corporation, the Export-Import Bank of Korea, Korea Export Insurance Corporation, the Asian Development Bank and BNP Paribas. National financial institutions (FIs) involved are SBI, the India Infrastructure Finance Company Ltd., Housing and Urban Development Corporation Ltd., Oriental Bank of Commerce, Vijaya Bank, State Bank of Bikaner & Jaipur, State Bank of Hyderabad, State Bank of Travancore and State Bank of Indore.



Today, the project has been operational for over five years. Damage to the marine environment has been immense and has resulted in drastic decline in fish catch; hot water discharges into the sea from the plant's outfall channel and the destruction of mangroves which has impacted the marine environment. The project has displaced people, snatched their livelihoods and failed to carry out any genuine consultation. Making matters worse, the plant is operating at a financial loss following rises in the price of imported coal. Now the private company is looking to sell the plant and owing to the PPP set-up, the government will take most of the liability.

ENGAGEMENT WITH INDEPENDENT ACCOUNTABILITY MECHANISMS

Engagement with IFC's Compliance Advisor Ombudsman [CAO]

In 2011 a complaint was filed by Machimar Adhikar Sangharsh Sangathan (MASS – Association for the Struggle for Fishworkers' Rights) and affected community to CAO, the accountability mechanism of IFC regarding the environmental and social impacts of the Tata Mundra Project. Subsequent to the complaint, an audit was done which reinforced the serious environmental and social impacts of the project. The major findings of the CAO audit were :

- IFC failed to ensure that its client's (Tata) Environmental and Social (E&S) assessments adequately considered the risks and impacts of the project on these fisher people.
- IFC paid inadequate attention to the requirement of biodiversity conservation.
- There were serious lapses in IFC's review and supervision of the impacts of the project on the airshed and marine environment.
- IFC had not ensured that its client correctly applied the World Bank's Thermal Power: Guidelines (1998) in that the project airshed has not been defined as a degraded airshed.
- IFC's process of E&S review was not appropriate to the nature and scale of the project or commensurate to risk as required by the Sustainability Policy (of IFC).
- IFC has not assured itself that the plant's seawater cooling system will



comply with applicable IFC Environmental, Health and Safety (EHS) Guidelines.

- IFC's E&S review paid inadequate attention to ensuring that the project's risks and impacts were "analyzed in the context of [its] area of influence," as required by Performance Standard 1 (of IFC), including "areas potentially impacted by cumulative impacts...from project-related developments that are realistically defined at the time the E&S assessment is undertaken."

- IFC should have advised its client that third-party E&S risk emerging from the project's proximity and relationship with Mundra Port and Special Economic Zone needed to be better assessed, with mitigation measures developed.

IFC's (non) response

The response of the IFC management to these findings was rebutting all the findings of CAO and going out of the way to defend its client, CGPL and its parent company, Tata Power and put its own credibility and the credibility of its own accountability mechanism at risk. The action plan devised by the IFC, nowhere reflected the seriousness of the CAO audit report and was limited to bandage work. The action plan merely commissioning of studies on marine impact, ambient air quality, health status and need survey, household level socio-economic survey of 21 villages/hamlets including seasonal settlements in CGPL's influence area and undertaking the environment and social impact assessment for the expansion project. Today, seven years after the initiation of the process the action plan has yet not been properly implemented.

CAO's Second Monitoring Report

CAO published its second monitoring report of the action plan in February, 2017. CAO in its second monitoring report¹ has categorically mentioned that it remains concerned that the actions reported by IFC do not suffice to address the findings of the audit. In addition, the monitoring report that there is an outstanding need for a rapid, participatory and expressly remedial approach to assessing and addressing project impacts raised by the complainants. CAO has kept this audit open for monitoring. The next monitoring report was supposed to be out not later than January 2018 but, has not come out yet. Significantly,

On Consultations: CAO was not able to establish whether the action plan or the road map had been prepared in consultation with affected communities, whether the road map had been disclosed by CGPL, or whether the actions were being implemented impacts on fisher people seasonally resident on the bund, and to develop remedial action plans to address any impacts identified.

On Livelihood issues: CAO during previous monitoring periods had said that in the absence of reliable baseline data, a participatory approach to identifying and addressing impacts on vulnerable communities is required. CAO expected that IFC will work with its client to carry out a participatory assessment of project impacts on fisher people seasonally resident on the bund, and to develop remedial action plans to address any impacts identified.

On Air quality: CAO expressed concerns that the monitoring is undertaken is inadequate in terms of technique, quality and reporting. Further, IFC supervision has not identified these inadequacies, CAO monitoring report said.

¹ <http://www.cao-ombudsman.org/cases/document-links/documents/CGPLSecondCAOMonitoringReportFebruary2017.pdf>

On Marine impact assessment: CAO noted that the National Institute of Oceanography's thermal dispersion study does not address CAO's findings regarding gaps in IFC's review of the original marine impact assessment nor does it address the requirement for establishment of a "scientifically defined mixing zone" for the outfall water.

In its first monitoring report which was released in January 2015, CAO noted that a number of its findings suggest the need for a rapid, participatory and expressly remedial approach to assessing and addressing project impacts raised by the complainants. But, the second monitoring report clearly shows a lack of sense of urgency in the completion of the action plan. The situation after the second monitoring report is still focusing on pending studies that should have been completed before the project was even built in the first place. It is also the first time ever that the CAO is keeping the case open after five years of its first report.

Second complaint with CAO:

In April 2016, a complaint² was filed with CAO by local residents of Tragadi village and members of the Tragadi Sea Shore Development Committee raising concerns about the outfall channel connected to the Tata Mundra project. The complaint raised concerns about the impacts of the channel on the environment and local fishermen's livelihoods, including limited access to water resources, coastal erosion, and damage to fish stocks and natural habitats. The complainants also raised issues regarding the use of security forces and their interaction with local populations, as well as unfulfilled social and environmental commitments. As the project became operational

These complainants from Tragadi village was in favour of the power plant initially for they were receiving some benefits from the company. This was particularly when the CAO process was on and this village was a sample for the company to establish that everything is fine with the project and people around are happy and content with them. Post CAO, and staring at a huge financial loss, the company withdrew each and every service it extended to the village, leaving the people high and dry, making it tough for them to meet their daily needs with the meagre fish catch.

The complaint was accepted by CAO. Due to the lack of agreement between the parties on pursuing a dispute resolution process facilitated by CAO, the complaint was referred for a compliance appraisal of IFC's due diligence. CAO identified concerns regarding environmental and social outcomes that would ordinarily merit a CAO compliance investigation but decided to merge the compliance of this case with the previous complaint and consider the issues raised in this complaint as part of its on going monitoring of IFC's response to the audit findings of the previous case.

Engagement with the Asian Development Bank's Compliance Review Panel (CRP)

A complaint was filed with CRP regarding the environmental and social impacts of Tata Mundra Project in December 2013 demanding a compliance review of the project. The issues raised in the complaint were regarding failure to adequately disclose information and conduct consultations; loss of livelihood of fisherfolk; access restrictions to fishing grounds; coal dust and fly ash pollution and its impact; ambient air quality; ground water impacts; horticulture impacts and labour issues and human stress. The Compliance review report released in March 2015 confirmed the violations of ADB's environmental and social safeguards, action plan was formulated. The CRP found several noncompliance areas with ADB operational policies and procedures, which resulted in harm. The single biggest area of concern mentioned the failure to conduct adequate and comprehensive consultations with fisherfolk early in

² http://www.cao-ombudsman.org/cases/case_detail.aspx?id=245

the project design phase and to consider their views to assess project impacts. This failure had numerous consequences. Despite this report, the remedial action plan that was devised was done only in consultation with the company and as expected only focuses on conducting studies and limited consultation with affected fishworkers for a livelihood improvement plan. The second monitoring report of the remedial action plan was published it just went on to reconfirm that much had not changed on the ground.



The second monitoring report³ of the remedial action plan was just a brutal reminder of the lack of seriousness ADB has shown to the findings of CRP's compliance report. The remedial action plan has been made fait accompli on the people, and cosmetic remedial actions are being focused merely to claim that the project is compliant with ADB's operational policies. The very fact that the second report mentions that, "CRP finds that since the first monitoring report, limited progress has been made in disclosing information and conducting consultations" goes on to show the seriousness that has been associated with the process. The findings include:

On Consultations: Consultations with the affected community are a prerequisite for any social and environmental assessment of a project. The remedial action plan mentions, as part of this consultative process, the affected foot fisherfolk will be identified; information on their livelihoods will be collected, and impacts will be assessed; and measures to address livelihood impacts will be established in a Livelihood Improvement Plan, as detailed in this Action Plan. CRP's final report on compliance came out in 2015 since then, ADB has not even been able to monitor the most primary prerequisite of conducting a well informed public consultation. This situation is nothing less than a travesty of justice that despite not following the basic requisites of consultation a project was constructed, is operational now.

On Marine Impacts: Even the superficial remedial actions have still not been fully complied. The NIO (National Institute of Oceanography) study conducted on the impact on marine biology due to the project (about which CRP had expressed its reservations regarding incorrect methodology) has still not been completed. CGPL outrightly has rejected any further action on the report and considers the NIO study conclusive and showing enough evidence that there are no impacts on marine biology.

On identifying the affected and livelihood concerns: The report also, mentions that "the 24 *pagadiyas* (*on foot fishing*) have been identified as a part of the NIO study and the actually affected *pagadiyas* could be much larger than assumed in the study". To add insult to injury, it also adds that the Livelihood Improvement Plan does not

³ [https://lnadb4.adb.org/dir0035p.nsf/attachments/Final-Mundra-2ndMonitoringReport-ForWeb.pdf/\\$FILE/Final-Mundra-2ndMonitoringReport-ForWeb.pdf](https://lnadb4.adb.org/dir0035p.nsf/attachments/Final-Mundra-2ndMonitoringReport-ForWeb.pdf/$FILE/Final-Mundra-2ndMonitoringReport-ForWeb.pdf)

provide for a long-term development support activity which would enable pagadiyas to earn incomes comparable to income foregone from lower yields of *pagadiya* fishing resulting from impacts of the discharge channel. This just reflects the apathetic attitude of CGPL and ADB toward the affected people. On one hand, they have not even identified all affected people in the last 5 years and on top of that, the ones identified have also not been rehabilitated.

On Air Quality: Moreover, even on issues of ambient air quality impact studies, the CRP report states that the quality of data collected is of poor quality. It is of the view that such quantitative correlation impact assessment carried out with data where there are large data gaps, is unlikely to produce reliable results. The studies have still not been translated and shared with communities. Even with the Baseline Health Profile with Respect to Air Quality in Airshed of the CGPL Power Plant, the CRP notes that they have expressed concern about the insufficient sample size, particularly with respect to respiratory diseases of children.

Recently, the Third monitoring report⁴ was released on 8th September 2018. The report clearly states that since, the completion of the second annual monitoring report, very limited progress has been made in the implementation of the action plan. This just goes on to establish the seriousness associated to the process when people on ground continue to suffer the disastrous impacts of the project.

Legal troubles for Tata Mundra UMPP:

1. Supreme Court set aside tribunals ruling that allowed the power producer to charge compensatory tariff from consumers:

The Tata Mundra project was set to run on coal from Indonesia, but in 2010, the Indonesian government decreed that coal exports could be done only at prices linked to international rates. In spite of this, they went ahead, with the confidence that they would be able to rework the tariff under the PPA with the public distribution companies. Tata Power Company Limited and Adani Power then approached the Central Electricity Regulatory Commission (CERC) that ruled in 2013 that both companies could claim a higher tariff to compensate for an increase in coal prices⁵. The Appellate Tribunal for Electricity (APTEL) upheld CERC's decision in 2016.

Several state-owned power distribution companies then challenged the decision in the Supreme Court of India. The argument was that power producers cannot be allowed to charge higher compensatory tariffs for changes on import prices of coal, a risk inherent to the business. The two-judge bench set aside the initial rulings. The Supreme Court in April 2017, ruled that power companies couldn't raise tariffs if fuel becomes costlier due to changes in laws overseas, setting aside rulings by regulators

2. With Tata Power reporting a loss of a net loss of Rs 1,719 crore (INR 17.19 bn) in the fiscal year 2017, the company had written to the Union Government proposing to sell 51 per cent equity of the ailing asset Tata Mundra UMPP, for a nominal fee of 1 rupee. Machimar Adhikar Sangharsh Sangathan (MASS) from the very inception of this project has been stating that the project is neither socially and environmentally viable but also makes no economic sense. The project ever since it's operations began has been loss generating, due to poor planning, unrealistic projection and flouting of rules. The Supreme Court declined their plea for tariff revision. If the colossal social and environmental impacts of this project, and particularly the impacts on the livelihood loss would have been properly assessed, it would have pointed towards the unavailability of this project.

⁴ [https://lnadbg4.adb.org/dir0035p.nsf/attachments/Mundra%203rd%20Monitoring%20Report-For%20Web.pdf/\\$FILE/Mundra%203rd%20Monitoring%20Report-For%20Web.pdf](https://lnadbg4.adb.org/dir0035p.nsf/attachments/Mundra%203rd%20Monitoring%20Report-For%20Web.pdf/$FILE/Mundra%203rd%20Monitoring%20Report-For%20Web.pdf)

⁵ http://cercind.gov.in/03022007/No_18-2007.pdf

3. Recently, the Gujarat state government has formed a High Powered Committee that will offer solutions for imported coal-fired power plants that are underutilized due to viability issues. The committee is chaired by former Supreme Court judge Justice R. K. Agrawal. Apart from him, former Reserve Bank of India Deputy Governor S. S. Mundra and former Central Electricity Regulatory Commission Chairman Pramod Deo are also a part of the committee, which will be assisted by SBI Capital Markets Ltd and NTPC Ltd.

In a recent news, Tata Power Co. Ltd stated that they are working to revive its troubled 4,000 megawatts (MW) Mundra power plant and dropping previous plan to sell 51% equity of the plant it for one rupee⁶. It was stated by the CEO of Tata Power that they were taking initiatives to reduce operational costs by using a higher percentage of blended coal in the plant (mixing in coal of lower calorific value with higher quality coal). In case this is being done, there are serious concerns that arise as to whether renewed permissions and environmental clearance have been taken for this. Also, using a lower calorific value coal also raises the question on the ultra critical technology.

Resources

Complaint, audit report and monitoring reports of IFC's Compliance Advisor Ombudsman: <https://tinyurl.com/o5mncq>

Complaint, audit report and monitoring reports of ADB's Compliance Review Panel: <https://tinyurl.com/y7m7ua5a>

More about Tata Mundra: <https://tinyurl.com/yao966hj>

Documents related to the case challenging immunity of IFC: <https://tinyurl.com/y9fr48tv>

Images: <https://tinyurl.com/y8fj9oks>

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